GAHC010097332020

**IN THE GAUHATI HIGH COURT**
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)**

# Crl.App.(J)/48/2020

1. Baba @ Khumtai Borah
S/O. Lt. Bolin Bora, Vill. No.1 Baruati,
P.S. Silapathar, Dist. Dhemaji, Assam

**Appellant**

***-Versus-***

1. The State of Assam
Represented through the Public Prosecutor,
Assam

**Respondent**

For Appellant : Mr. M. Dutta, Amicus Curiae

For Respondent : Ms. S. Jahan, Additional Public Prosecutor

Date of judgment : 06.05.2024

**BEFORE**
**HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA**
**JUDGMENT**

**1.** Heard Mr. M. Dutta, learned Amicus Curiae for the appellant. Also heard Ms. S. Jahan, learned Additional Public Prosecutor for the State.

**2.** This Criminal Appeal has been registered on receipt of an appeal petition by the appellant Shri Baba @ Khumtai Borah through the Superintendent, District Jail, Dhemaji impugning the judgment dated 29.08.2019 passed by the Court of learned Sessions Judge, Dhemaji in Sessions Case No. 108(DH)/2014, whereby the present appellant has been convicted under Section 304 Part-II of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for 7 years and to pay a fine of Rs. 2,000/- and in default of payment of fine to undergo further rigorous imprisonment for two months.

**3.** The facts relevant for consideration of the instant Criminal Appeal, in brief, are as follows : -

**(i)** That on 30.03.2009, one Smt. Junmoni Borah lodged an FIR before Officer-In-Charge of Silapathar Police Station, *inter-alia,* alleging that on 29.03.2009, at about 8.00 PM, her brother, Khumtai Borah (present appellant) had a quarrel with her father, Bolin Borah at their house. It was also alleged that during the quarrel the present appellant had inflicted blow to his father with the blunt side of an "axe" causing grievous injury on his person. The father of the informant was immediately taken to the hospital.

**(ii)** On receipt of the said FIR, Silapathar P. S. Case No. 85/2009 was registered under Section 325/307 of

the Indian Penal Code and investigation was initiated. During the course of investigation, the father of the informant succumbed to his injuries on 30.03.2009 and Section 302 of the Indian Penal Code was added to the case.

**(iii)** Ultimately, on completion of the investigation, charge-sheet was laid against the present appellant under Section 302 of the Indian Penal Code.

**(iv)** The case being exclusively triable by the Court of Session, it was committed to the Court of learned Sessions Judge, Dhemaji by the Committal Court, i.e., the Court of learned Judicial Magistrate 1st Class, Dhemaji. The appellant faced the trial remaining on bail.

**(v)** On 05.01.2015, charges under Section 307/302 of the Indian Penal Code were framed against the present appellant. Same on being read over and explained to him, he pleaded not guilty and claimed to be tried.

**(vi)** During the trial, the prosecution side examined six (06) witnesses to bring home the charges against the present appellant. The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973, during which he denied the truthfulness of the testimony of the prosecution witnesses and pleaded

his innocence. He led no evidence in his defence. However, by the judgment which has been impugned in this appeal, the appellant was convicted and sentenced in the manner, as already described in Paragraph No. 2 hereinabove.

**4.** The point to be determined in this appeal is that as to whether the Trial Court was right in convicting and sentencing the appellant, namely, Shri Baba Borah @ Kumtai Borah under Section 304 Part-II of the Indian Penal Code.

**5.** Before considering the submissions made by the learned counsel for both sides, let us go through the evidence which is available on record.

**6.** PW-1, Shri Bulu Saikia, who is not an eye witness, has deposed that he went to the house of the appellant after coming to know about the fact that someone has killed the father of the appellant. In the house of the appellant, police asked him to put his signature on a piece of paper, which is exhibited at Exhibit-1, however he is not aware about as to what was written on the said paper. The cross-examination of this witness has been declined by the defence side.

**7.** PW-2, Shri Prabhat Saikia, has deposed that some children told him about the fact that the appellant had killed his father with an "axe". When he went to the house of the appellant, police had seized the axe and prepared one seizure list, which has

been exhibited by PW-2 as Exhibit-1, wherein his signature is exhibited as Exhibit-1 (2). During cross-examination, he denied the defence suggestion that nobody had told him about killing of Bolin Borah by the appellant with an "axe".

**8.** PW-3, Shri Krishan Kant Saikia has deposed that Smti Junmoni Borah (PW-4) had informed him that there was a quarrel between the appellant and his father, wherein the father of the appellant, namely, Bolin Borah, sustained injuries. PW-3 has also deposed that he was requested to take the father of the appellant to the Dhemaji Civil Hospital, accordingly, he took Bolin Borah to Dhemaji Civil Hospital. He has also deposed that on the next day, he came to know that the injured Bolin Borah had died in the hospital. During cross-examination, PW-3 has deposed that he had not seen the incident himself and he did not asked anything to the injured Bolin Borah.

**9.** PW-4, Smt. Junmoni Borah, who is the first informant in this case, has deposed that the appellant is her elder brother and the deceased Bolin Borah was her father. She has also deposed that the incident took place about six (06) years prior to her deposing before the Trial Court. She has deposed that on the date of incident, she came out of her house, after hearing cries of her father and saw her father in injured condition who told her that the appellant had inflicted injuries on him. She has further deposed that they took her father to the Dhemaji Civil

Hospital, where he succumbed to his injuries. Later on, she filed the FIR, which is exhibited as Exhibit-2 and her signature is exhibited as Exhibit-2 (1). She has also deposed that the police had seized the "axe" by which the appellant had assaulted his father. She exhibited the seizure list as Exhibit-1 and her signature thereon as Exhibit-1 (3). She has also exhibited the seized "axe" as Material Exhibit-1. During cross-examination, she had answered in negative to the suggestive questions put to her by the learned defence counsel.

**10.** PW-5, Shri Indreshwar Hazarika, who is the Investigating Officer of the case, has deposed that on 30.03.2009, he was posted as ASI of Police at Silapathar Police Station and on that day, Smt. Junmoni Borah had lodged an FIR, *inter-alia,* alleging that the appellant had assaulted her father and had caused grievous injuries on his person. PW-5 has also deposed that after receipt of the FIR, he was entrusted by the Officer-In-Charge of the Silapathar Police Station to conduct the preliminary investigation. He has also deposed that he visited the place of occurrence, drew the sketch map and recorded the statement of witnesses. He also recorded the statement of the present appellant, wherein he confessed to his guilt. During the course of the investigation, the injured Bolin Borah succumbed to his injuries in the hospital and Section 302 of the Indian Penal Code was added to the case. PW-5 has also deposed that

SI Durgeshwer Gogoi held the inquest over the dead body and thereafter, postmortem examination of the deceased was conducted. PW-5 has also deposed that on his transfer, he handed over the case diary to the Officer-In-Charge of Silapathar Police Station. He has also deposed that on completion of the investigation, charge-sheet was laid under Section 302 of the Indian Penal Code against the present appellant. He had exhibited the sketch map as Exhibit-3 and Exhibit-3(1) as signature. He also exhibited the seized "axe" as Material Exhibit-1. He had also exhibited charge-sheet as Exhibit-4 and signatures of SI Kuladhar Konwar as Exhibit-4 (1).

**11.** During cross-examination, PW-5 has deposed that he went to the place of occurrence on 30.03.2009 at about 11.00AM. He has also deposed that he did not record the statement of neighbours, at the place of occurrence, as mentioned in the sketch map. He has also deposed that he had not visited the hospital where the deceased succumbed to his injuries. He took the statement of PW-4 before the death of the deceased, however, he did not again record the statement of the complainant after the death of her father. He also denied the suggestion that the weapon of offence was not seized on being produced by the present appellant. He has also deposed that he had not sent the weapon of offence to Forensic Science

Laboratory (FSL) for examination. He has denied the suggestion that the confession of the appellant was obtained under duress.

**12.** PW-6, Dr. Anup Dutta, who conducted the post-mortem examination of deceased, has deposed that on 31.03.2009, he was posted as Medical and Health Officer-1 at Dhemaji Civil Hospital. He has deposed that on that day, he received a police requisition in connection with Silapathar Police Station Case No. 85/2009 under Section 325/307 of the Indian Penal Code to perform the postmortem examination on the dead body of Bolin Borah, Male, aged about, 50 year. The dead body was identified by one Muniram Dowarah. Accordingly, PW-6 had conducted the postmortem examination of the said dead body. During examination, he found following:

> *"External appearance: there is a lacerated wound over both parietal bone, size about 3 inch x 2 inch.*
> *Cranium and spinal canal-after opening of scalpe - there is a hematoma under the wound area about 4 inch x 2 inch. There is a depressed fracture in right parietal bone. Under this parietal bone a hematoma of 4 inch x 3 inch size found in right parietal brain matter.*
> *Spinal cannal, thorax, abdomen and other organs are normal.*

The PW-6 had opined that the cause of the death was due to neurogenic shock. He had exhibited Exhibit-5 and post mortem examination report and Exhibit-5(1) as his signature. During cross-examination he has stated that he did not mention the time of death of the deceased in the post mortem examination report.

**13.** During his examination under Section 313 of the Code of Criminal Procedure, 1973, the appellant had denied the truthfulness of the testimony of the prosecution witnesses and has pleaded his innocence. However, he has not adduced any evidence in his defence.

**14.** Mr. M. Dutta, learned Amicus Curiae has submitted that there is no eye witness to the incident of assault on the deceased. He has also submitted that apart from the testimony of the Investigating Officer (PW-5), no witness has deposed that the weapon of offence was seized from the possession of the present appellant. He has also submitted that though the seizure list, which was exhibited as Exhibit-1 mentions that the seized "axe" was produced by the present appellant, however, all the three seizure witnesses, namely, PW-1, PW-2 and PW-4 have not stated anything in their deposition as to from where the seized "axe" was recovered. He has submitted that none of the witness has deposed that the appellant was present in his house at the time of seizure of the "axe". Further, he has also

submitted that the seized "axe" was not even sent for forensic examination by the Investigating Officer and therefore, he has submitted that there is no sufficient evidence on record to show that the seized "axe" was used for inflicting injuries on the deceased.

**15.** Further, he has also submitted that apart from the testimony of the PW-4, where she has deposed that her father told her in injured state that the appellant had caused injury to him, there is no other material on record to implicate the present appellant. He has also submitted that the PW-4 had never stated before the Investigating Officer, during the course of investigation, that her father told her that the appellant had caused injury to him. He has fairly submitted that this omission was not proved by putting questions to that effect, to the Investigating Officer, during his cross-examination, by the defence side. However, he submits that prudence requires that the extra judicial dying declaration made by the deceased before his daughter should be corroborated before it can be relied upon. He submits that in the instant case, no such corroboration is there regarding the extra judicial dying declaration made by the deceased before his daughter.

**16.** Learned Amicus Curiae has also submitted that in the impugned judgment, the Trial Court had made some observation merely on the basis of conjectures and surmises. He has submitted

that the Trial Court has arrived at a finding that the appellant was in his home on the relevant date and time, however, there is no evidence on record to that effect. He has also submitted that the Trial Court has also observed that there was quarrel between the appellant and his father, however, in this regard, also there is no evidence on record. He has also submitted that even if the appellant has not taken any specific defence in this case, it was incumbent on the prosecution side to prove the guilt of the appellant, beyond all reasonable doubt by adducing admissible evidence, which it has failed to do. It is submitted by learned Amicus Curiae that in absence of credible evidence on record against the appellant, he is entitled to get benefit of doubt and an order of acquittal in this appeal.

**17.** On the other hand, Ms. S. Jahan, learned Additional Public Prosecutor has submitted that the only reliable evidence against the present appellant, in this case, is the extra judicial dying declaration made by the deceased before his daughter, i.e., PW-4, wherein, he had stated that the present appellant had caused injuries to him. However, she fairly submits that in the case of "***Heikrujam Chaoba Singh Vs. State of Manipur"*** reported in ***(1999) 8 SCC 458,*** the Apex Court has observed that though an oral dying declaration can form the basis of the conviction, however, rule of prudence requires corroboration of the same, before it can be acted upon. She has also submitted that

though, the PW-4 heard hue and cry, however, she has not stated anything regarding witnessing the appellant at the crime scene. She has also submitted that if this Court finds the testimony of the PW-4 regarding extra judicial dying declaration made by the deceased before her as reliable, the impugned judgment may not be interfered with and the conviction of the appellant may be upheld.

**18.** I have considered the submission made by the learned counsel for both the sides and have perused the materials available on record very carefully.

**19.** Though, there are several statues which operates in the sphere of criminal law applicable in this country, however, one basic underlying principle of criminal jurisprudence has found place invariably in all such statues, i.e., before an accused person can be convicted of a crime, his guilt must be proved beyond all reasonable doubt. Even if, there is no eyewitness to an incident of commission of offence by the accused, if there are circumstantial evidence, which unmistakably points towards the guilt of the accused, he may also be convicted. However, such circumstances should be fully established, before convicting an accused on the basis of the same. Let us examine, whether such circumstantial evidence are there or not, in this case, which unmistakably points towards the guilt of the present

appellant only and whether the impugned judgment may be sustained or not.

**20.** In the case of "***Sharad Birdhichand Sarda Vs. State of Maharashtra"*,** reported in **(1984) 4 SCC 116,** the Supreme Court of India has observed as follows:

> ***"153.*** *A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*
>
> *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
>
> *It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]*
>
> *"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."*
>
> *(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
>
> *(3) the circumstances should be of a conclusive nature and tendency,*

> *(4) they should exclude every possible hypothesis except the one to be proved, and*
> *(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

**21.** Thus, from the above mentioned ruling of the Apex Court, it is clear that the circumstances from which the conclusion of guilt is to be drawn should be fully established and the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis, except that the accused is guilty.

**22.** In the instant case, in Paragraph No. 15 of the impugned judgment, the learned Sessions Judge, Dhemaji has enumerated following circumstances, brought on record by the prosecution side:

(i) That the accused and the deceased were son and father, respectively, were at their home on the relevant date and time.

(ii) There was a quarrel between the two at the relevant time.

(iii) Police seized an axe from the possession of the accused.

(iv) Deceased sustained fracture injuries on parietal bone as per medical report which supports oral testimony of PWs.

(v) Medical evidence shows that the deceased died as a result of the injuries sustained.

As regards, the circumstance No. (i) enumerated by the Trial Court that the accused and the deceased were at their home on relevant date and time, it appears that there is no record to show that the present appellant was there at the crime scene. This circumstance has not been established by any of the evidence of prosecution witnesses. As regards, circumstance No. (ii) that there was a quarrel between the appellant and his father at the relevant time, there is no evidence to this effect on record except the testimony of PW-3 wherein he has stated that PW-4 had informed him that there was a quarrel between the appellant and his father, however, the PW-4 has not made any such statement before the Trial Court. She has only stated in her testimony that she heard cries of her father from outside. She has not stated anything about either hearing the voice of the appellant or seeing him at the crime scene. Without there being any credible evidence on record, regarding any quarrel between the appellant and his deceased father at the crime scene on the date of alleged offence, the circumstance No. (ii) enumerated at Paragraph No. 15 of the impugned judgment cannot be regarded as fully established.

**23.** Very surprisingly, the Trial Court has not enumerated the extra judicial dying declaration, made by the deceased before the

PW-4, as one of the incriminating circumstances against the present appellant in Paragraph No. 15 of the impugned judgment. However, let us examine the said evidence regarding extra judicial dying declaration.

**24.** The evidence of all the witnesses, except that of PW-4, appears to be hearsay evidence. Though, the PW-4 had stated in her deposition that at around 8.00 PM, upon hearing the cries of her father, she came outside and saw her father in an injured state, and on being asked, her father said that the appellant had caused injury to him. Though, an oral dying declaration may be made a basis for conviction, however, it may not be safe to rely solely on an uncorroborated extra judicial dying declaration for convicting the appellant. In this regard, the observations made by the Apex Court in the case of "***Heikrujam Chaoba Singh Vs. State of Manipur" (Supra),*** appears to be relevant in the instant case. Hence, same is quoted herein below:

> *3. An oral dying declaration no doubt can form the basis of conviction, though the courts seek for corroboration as a rule of prudence. But before the said declaration can be acted upon, the court must be satisfied about the truthfulness of the same and that the said declaration was made by the deceased while he was in a fit condition to make the statement. The dying declaration has to be taken as a whole and the witness who deposes about such oral declaration to him must pass the scrutiny of reliability……."*

In the instant case, it appears that the PW-4 has mentioned about the extra judicial dying declaration for the first time, only while deposing as PW-4 before the Trial Court. She has not mentioned anything about the extra judicial dying declaration in the FIR, which was lodged by her and has been exhibited as Exhibit-2. The PW-5, who is the Investigating Officer, has also not stated that the PW-4 told him anything regarding the dying declaration made by her father at the crime scene. Moreover, none of the other prosecution witnesses has stated anything regarding the dying declaration, made by the deceased before the PW-4. Under such circumstances, the veracity of the testimony of PW-4 as regards the dying declaration made by her father to her becomes doubtful and under such circumstances, this Court is of considered opinion that it would not be safe to rely on such a dying declaration alleged to have been made by the deceased before the PW-4 at the place of occurrence of the offence.

**25.** Moreover, there is no independent witness in this case to show that the appellant was present at the crime scene when the alleged offence was committed or when the "axe" which is stated to have been used for commission of offence was seized. Apart from the Investigating Officer, no other witness has deposed that the "axe" was seized from the present appellant or that it was produced by the present appellant. The "axe" was

also not sent for forensic examination, therefore, there is no forensic evidence on record to connect the seized "axe" with the injuries sustained by the deceased. Under such circumstances, this Court is unable to find any credible evidence on record to come to the conclusion that the seized "axe" was the weapon of offence, in this case, which was used to cause injuries on the deceased.

**26.** In view of the discussions made in foregoing paragraphs, this Court is of the considered opinion that the prosecution side has miserably failed to fulfil any of the five condition enumerated by the Supreme Court of India in Paragraph No. 153 of the judgment in the case of "***Sharad Birdhichand Sarda Vs. State of Maharashtra"*, *(Supra)*.** Hence, the case against the appellant cannot be said to be fully established.

**27.** As the prosecution side has failed to fully establish the circumstances from which the conclusion of guilt was drawn by the Trial Court in the impugned judgment, the appellant is entitled to get benefit of doubt and the impugned judgment is liable to be set aside.

**28.** For the reasons mentioned hereinabove, the conviction and sentence imposed on the present appellant by the impugned judgment is hereby set aside.

**29.** The appellant is set at liberty forthwith, unless he is required to be detained in connection with some other case.

**30.** Let the case record of Sessions Case No. 108(DH)/2014 along with connected files as well as a copy of the judgment be sent to the Court of learned Sessions Judge, Dhemaji.

**31.** Let a copy of this judgment be also sent to the Superintendent, District Jail, Dhemaji, where the present appellant is detained.

**32.** The learned Amicus Curiae shall be entitled to the honorarium as per the prevailing rules.

**33.** This Criminal Appeal is accordingly, allowed and disposed of.

**JUDGE**

**Comparing Assistant**