



GAHC010278062019



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

Criminal Appeal (J) No. 98/2019

1. Anil Basumatary,
Sonitpur, Tezpur, Assam.
2. Lakhimaya Basumatary,
Sonitpur, Tezpur, Assam.

Appellants

-Versus-

1. The State of Assam

Respondent

For Appellant(s) : Ms. B. Sarma, 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 Ms. B. Sarma, learned Amicus Curiae for the appellants.
Also heard Ms. S.Jahan, learned Additional Public Prosecutor
for the State of Assam.



- 2.** This jail appeal has been registered on receipt of an appeal petition filed by the appellants, namely, Sri Anil Basumatary and Smt. Lakhimaya Basumatary, through the Superintendent, Central Jail, Tezpur, impugning the judgment and order dated 07.05.2019, passed by the learned Sessions Judge, Sonitpur, Tezpur in Sessions Case No. 96/2018.
- 3.** By the impugned judgment, the appellants are convicted under Section 304 Part I/34 of the Indian Penal Code and have been sentenced to undergo rigorous imprisonment for 7(seven) years each, with a fine of Rs. 5,000/- each and in default of payment of fine to undergo simple imprisonment for 2(two) months each. Both the appellants are presently detained in the Central Jail, Tezpur, Sonitpur.
- 4.** The facts relevant for consideration of the present appeal, in brief, are as follows:-

 - i.** That on 18.02.2018, at about 8:23 PM, one Smt. Junu Musahary had lodged an FIR before the Officer-In-Charge of Missamari Police Station, *inter-alia*, alleging that on 17.02.2018, at about 10:00 PM, the present appellants engaged in an altercation with the father of the first informant, namely, Keshram Musahary and they also assaulted him causing grievous injuries on his person. As a



result the father of the first informant sustained injuries and he died on 18.02.2018. At the time of his death, the deceased was 70 years of age.

- ii.** On receipt of the said FIR, the Officer-In-Charge of Missamari Police Station registered Missamari P.S. Case No. 29/2018 under Section 302 of the Indian Penal Code and initiated the investigation.
- iii.** During investigation, the Investigating Officer recorded the statements of witnesses under Section 161 of the Code of Criminal Procedure, 1973. He visited the place of occurrence and drew a sketch map of the place of occurrence. He collected the post-mortem examination report and arrested both the appellants, and ultimately, on completion of the investigation a charge-sheet was laid under Section 302 of the Indian Penal Code against both the above named appellants.
- iv.** Both the above named appellants faced the trial while remaining on bail granted by the Trial Court on 31.05.2018. After considering the materials on record and hearing both the sides, the Trial Court framed charges under Section 302/34 of the Indian Penal Code against both the above named

appellants. When the said charge was read over and explained to them, they pleaded not guilty and claimed to be tried.

- v. The prosecution side examined 10(ten) prosecution witnesses to bring home charge against the appellants. The appellants were examined under Section 313 of the Code of Criminal Procedure, 1973, during which they denied the truthfulness of the testimony of prosecution witnesses and pleaded their innocence. However, they declined to adduce any evidence in their defence.
 - vi. Ultimately, by the judgment which has been impugned in this appeal, the above named appellants were convicted and sentenced by the Trial Court in the manner as already described in Paragraph No. 2 hereinabove.
5. The point for determination before the learned Sessions Judge, Sonitpur, Tezpur in Sessions Case No. 96/2018 was as follows:-

"Whether the accused Anil Basumatary and Lakhimaya Basumatary, in furtherance of the common intention, on 17-02-2018, at about 10 p.m. at No.1 Bherbheri under Missamari PS, assaulted

Kesharam Mushahary as a result of which he succumbed to the injuries on the next day i.e. on 18-02-2018 and thereby committed an offence punishable u/s 302/34 of the IPC?"

6. Before considering the rival submissions of the learned Amicus Curiae as well as the learned Additional Public Prosecutor, Assam, let us go through the evidence available on record.
7. PW-1, Nirmal Swargiary, the son-in-law of the deceased, deposed that on 17.02.2018, the deceased Kesharam Mushahary, along with his wife Jogeswari Mushahary, went to *Shamshan* (Cremation ground) to offer *Puja* (prayers) at around 11:00 PM and after returning from *Puja*, an altercation took place in the house of Subhash Boro between the deceased and the appellants. Thereafter, the deceased along with his wife returned home, and on the same night, the appellants came to the house of the deceased and picked up a quarrel again. He deposed that both the appellants had assaulted the deceased with a bamboo *lathi*. On hearing commotion (*hulla*) in the house of the deceased, he rushed there and found the deceased in a bending position. He also saw both the accused standing near the deceased, and a *lathi* was lying at the place of occurrence. On the next day, at around 2:00 PM, the deceased died. PW-1 has further deposed

that he saw injury on the left side of the chest of the deceased. PW-1 has cited that on the next day, wife of the deceased also informed him about the incident. He exhibited the inquest report as Exhibit-1 and his signature thereon as Exhibit-1(1).

- 8.** During cross-examination, PW-1 has stated that he had not seen as to who assaulted the deceased and how the incident took place. He had also deposed that he does not know the contents of the inquest report as Exhibit-1. PW-1 has also deposed that his father Kesharam Masahary used to drink liquor and on the day of incident, he had consumed liquor. He has also deposed that police did not seized the bamboo lathi from the place of occurrence. He was asked certain suggestive questions by the learned defence counsel which were answered in negative by him. He has also deposed that he made statement before police that as the injuries was not so serious so they did not feel to take his father to the hospital.
- 9.** PW-2, Smt. Anima Swarglary, the daughter of the deceased as well as the wife of PW-1, has deposed that on 17.02.2018, at night after having dinner when they went to bed to sleep, they heard commotion (*hulla*) in the campus of Someswar Boro, the son-in-law of the appellants. She has also deposed that on the same night, Siba Boro came to their house and woke them up,



and informed them about the incident. They immediately rushed to the place of occurrence, and Someswar and Siba Boro brought her father to his house. She has also deposed that on regaining his sense, her father told that the appellants Lakhi and Anil had assaulted him. She asked the appellants to take the injured to the doctor, but on the next day her father died. PW-2 has also deposed that due to the assault by the appellants, her father sustained fracture on the chest bone.

- 10.** During cross-examination, PW-2 has deposed that she along with her husband resided in the same campus with her parents. On hearing the incident, she and her husband rushed to the place of occurrence. She has also deposed that he deceased father told her that the appellants came to his house and took him from the bed to the boundary of Someswar, where they assaulted him. She has also deposed that as initially they did not notice any injury on their father and as they had no money, they could not take their father to hospital immediately. She further stated that her deceased father used to consume liquor and on the relevant day also her father consumed liquor on the day of incident in the *Puja*. She has answered in negative to a suggestive question put to her that she have not stated to police that when her father

regained his sense, he told that the appellants Anil and Lakshmi had assaulted him.

- 11.** PW-3 Dr. Achinta Kr. Baruah, the Medical Officer has deposed that on 19.02.2018, he conducted post-mortem examination on the dead body of Kesharam Mushahary and found the following:

External appearance:

An elderly male in fresh condition with presence of rigor mortis. Ecchymosis on the left side of the chest, back and flank.

Thorax: Walls, ribs and cartilages. Fracture of ribs: 9th, 10th and 11th

Pleurae - haemothorax, left lung-congested.

Abdomen:Spleen: ruptured.

All other organs are healthy. The injuries are ante-mortem caused by blunt weapon.

The doctor opined that the cause of death was due to shock and haemorrhage as a result of the injuries sustained and the injuries are sufficient to cause the death of a person.

The doctor proved the Post-mortem report as Exhibit-2.

- 12.** PW-4 Sri Siba Boro, has deposed that on 17.02.2018, at around 10:30 PM, hearing commotion (*hulla*), he rushed to the place of occurrence and saw Kesharam Mushahary in the

boundary of Someswar Boro. He also saw the appellants standing near Kesharam Mushahary. Then he along with Someswar Boro brought the injured to the room. At that time, the deceased told him that he was assaulted but, as they did not notice any injury on the victim, so they did not take the injured to the hospital and on the next day, he died.

- 13.** During cross-examination, PW-4 has deposed that when he reached the place of occurrence, he had seen only the appellants. He heard the sound of "*dhapdhup*" at the place of occurrence. He had not seen the incident. He further stated that on the day, there was a *Puja* in their village where the deceased acted as a priest and in the *Puja* liquor was offered. He has answered in negative to a suggestion put to him that he had not stated before police that "*I saw Keshram Musahary in the boundary of Someswar Bora. I saw accused persons standing near Kesharam Musahary. During that time Kesharam told me that he has been assaulted.*"
- 14.** PW-5, Smt Junu Mushahary, the daughter of the deceased, has deposed that on the day of the incident she was in Tezpur. She has further deposed that on the next day of the occurrence, her elder sister Anima Swargiary called her, informing her that Laxmi and Anil had assaulted their father and he was in serious condition. She has deposed that she



met her father in injured condition and he told her that Laxmi and Anil assaulted him in the boundary of Someswar Boro. She has also deposed that her father also told her that he sustained pain in his chest, head and stomach. She had also deposed that they asked the accused persons to take the injured to the hospital but they did not do so. In the mean time, her father died. She has deposed that then she went to the police station and lodged the FIR. She has exhibited the FIR as Exhibit-3 and her signature thereon as Exhibit-3(1).

- 15.** During cross examination she has deposed that she received information from her elder sister at about 9:00 AM. She has also deposed that her father used to consume liquor. She has answered in negative to certain suggestive questions put to her by learned defence counsel. She has denied the suggestion put to her by the defence counsel that she has not stated before the police that her father told her that the appellants have assaulted him.
- 16.** PW-6, Smt. Jogeswari Mushahary, who is the wife of the deceased, has deposed that on the day of the incident, after having dinner she and her husband were sleeping. She has also deposed that her husband used to sleep in the front side room of their house. At night at around 3:00 AM her husband asked her for a glass of water and told her that both the



appellants had assaulted him with a *batam* (a piece of wood). She has also deposed that on the next day at about 10:00 AM her husband died.

- 17.** During cross examination, she has deposed that after the death of her husband at about 10:00 AM, she informed the matter to her nephew Numal Swargiary about the incident and he informed the matter to police. PW-6 has also deposed that her husband came to the house after attending the *Puja* and after consuming liquor, went to sleep. She has also deposed that she had seen injuries on the waist, chest and back of her husband.
- 18.** PW-7, Sri Subhash Boro, has deposed that the incident took place in the month of March at night, on that day, Puja was performed in the house. He has also deposed that the deceased Kesharam also attended the Puja and went back to his house. He has deposed that at about 9.30 PM, a commotion (*hulla*) took place in the house of the deceased, Kesharam, and then he rushed there, he saw both of the appellant quarrelling with the deceased. He has deposed that on the next day, Kesharam died in his house. PW-7 was declared as hostile and during his cross examination by the prosecution side, he denied that he had stated before the

police that the appellants assaulted Kesharam due to which he sustained injuries and thereafter, died.

- 19.** During cross examination by the defence side, PW-7 has deposed that there are house of Nana Basumatary, Pranav Basumatary and Jiten Tanti near the house of the appellants and the deceased. He has deposed that deceased performed puja as a priest and he left the house of PW-7 at about 9.30 PM after consuming liquor. He has also deposed that he had not seen any altercation taking place in the house of the deceased. He was asked certain suggestive questions by learned defence counsel to which he has answered in negative.
- 20.** PW-8, Someswar Boro, has deposed that on the night, on which the incident occurred, while he was sleeping, he woke up to attend nature's call. At that time he heard commotion (*hulla*) near the house of the deceased. He has deposed that he rushed there and saw the Kesharam in a kneel down position, he was bending towards the bamboo fencing near the side of the road. PW-8 has deposed that he heard from the public that appellant Lakhimaya had assaulted the deceased with a stick (*Lathi*), as a result of which Kesharam sustained injuries. He has also deposed that the injured was

not brought to the hospital immediately, and at around 3:00 PM Kesharam died.

- 21.** During cross examination, PW-8 has stated that he had not seen any incident personally. He has also deposed that it was after 10:00 PM when he saw the deceased kneel down and bending his head towards the bamboo fencing. He has also deposed that at that time, the deceased was in a drunken state. He has also deposed that after his arrival, when Siba Boro reached there, he along with Siba Boro brought the deceased to the home. He has also deposed that during that time, the deceased did not say anything to them. He has also deposed that he had not seen any injury on the body of Kesharam and he does not know as to how Kesharam died.
- 22.** PW-9 Shyam Terang, the Investigating Officer, has deposed that before filing the FIR, informant Junu Mushahary appeared at the police station and informed about the incident. On the basis of the said information, he made Missamari PS GDE No. 391/2018 dated 18.02.2018, at around 3:20 PM. The said GD Entry has been exhibited as Exhibit-4. He has further deposed that thereafter, on receipt of the FIR which is exhibited as Exhibit-3, he registered the same and himself took up the investigation of the case. He visited the place of occurrence, recorded the statements of witnesses, conducted an inquest



on the dead body, sent the dead body for post mortem examination, prepared a sketch map of the place of occurrence, which is exhibited as Exhibit-5, apprehended the accused persons, collected the post mortem report and on completion of the investigation laid the charge-sheet against the accused persons under Section 302 of the Indian Penal Code, which is exhibited as Exhibit-6. He has also deposed that Subhas Boro (PW-7) has stated before him under Section 161 of Code of Criminal Procedure, 1973 that "altercation all started, then about some boundary dispute between Kesharam Bora and Someshwar Bora, son of Anil and Laxmimaya Basumatary, later on, the same night, they had altercation, Anil and his wife assaulted the Kesharam to which the he sustained injuries and died today." He exhibited the case diary as Exhibit-7 and the statement of Subhash Boro as Exhibit-7(1).

- 23.** During cross examination, he stated that on the basis of GDE, he had first visited the place of occurrence, prepared the sketch map, conducted an inquest, recorded the statements of witnesses and as it was night, so on the next morning, he sent the dead body for post mortem examination. He has further stated that he took all these steps on the basis of GD Entry and he received the FIR (Ejahaar) on 6.15 PM on 18.02.2013.



PW-9 has deposed that the Exhibit-3, i.e., the FIR and the Exhibit-4, i.e., the GD Entry No. 319/2018 of Missamary P.S. are silent regarding the dying declaration made before the informant Junu Swargiary, Anima Swargiary, or any other witness. PW-9 has also deposed that Nirmal Swargiary (PW-1) did not stay before him that *"after returning from puja an altercation took place in the house of Subhash Boro in between the deceased and the accused persons. Thereafter, the deceased came to his house along with his wife. On the said night both the accused persons came to the house of the deceased and again took quarrel. On hearing hulla, I went to the house of the deceased and saw deceased was found bending and near the deceased both the accused were standing. I have also seen one lathi lying at the place of occurrence."*

- 24.** PW-9 has also deposed that he has not seized any weapon in connection with this case. He has also deposed that Anima Swargiary did not state before him that *"My deceased father told us that the accused persons came to the house of the deceased and took him from the bed to the boundary of Someswar where my father was assaulted by the accused persons. As my father told about the incident before us so we came to know about the incident. We kept our father at home*

as because we have not seen any injury at first. We do not have any money so in spite of our willingness we did not take our father to the hospital for treatment immediately." PW-9 has also deposed that Anima Swargiary has stated that "my father told us that accused Anil Basumatary and his wife Laxmi assaulted me."

- 25.** PW-9 has also deposed that PW 4 Siba Bora did not state before him that *"I saw Kesharam Muchahary in the boundary of Someswar Boro. I saw accused persons standing near Kesharam Muchahary. During that time Kesharam told me that he has been assaulted."*
- 26.** PW-9 has also deposed that Junu Muchahary (PW-5) did not state before him that *"On the next day of the incident my elder sister Anima Swargiary called me to my parental house at Bherbheri stating that Laxmi and Anil assaulted our father and so he was in serious condition. I met my father in injured condition and my father told me that Laxmi and Anil assaulted him in the boundary of Someswar Boro. My father also told me that he sustained pain in his chest, head and stomach. Then, we asked accused persons to our house to see my father and to take him to hospital but they did not come. Then I went to the police station to inform the matter. In the meantime my father was died. Then I lodged the ejahar."* PW-9 has also

deposed that Junu Muchahary (PW-5) stated before him that
"I came to know about the Incident as informed from home."

- 27.** PW-9 has also deposed that Jugeswari Muchahary (PW-6) in her statement made before him did not state that *"after having dinner, I along with my husband were sleeping. My husband used to sleep in the front side room of our house. At night at about 3 p.m. my husband asked a glass of water to drink. During that time he told me that the accused persons Laxmi and Anil assaulted him by means of a "batam" after calling him out. Next day of the incident at about 10 a.m. my husband died."* He has denied the suggestion given to him by the learned defence counsel that he recorded the statements of the witnesses in the police station. He has answered in negative to some other suggestive questions put to him by the learned defence counsel.
- 28.** PW-10, Sri Lakhya Jyoti Das, has deposed that on 18.02.2018, he was posted as Executive Magistrate-cum-Circle Officer at Thelamara and on that day in reference to GD Entry No. 391 dated 18.02.2018 of Misamari Police Station, he conducted the inquest upon the dead body of Keshram Musahary and found following:

Description of the dead body- male age 70 years, approximate date of death 18.12.2018. Dead body was found at bedroom of the deceased house at No.1 Bherberi Village, as reported. Dead body was old. position of dead body- lying on the bed in upper face.

Description of injury mark-swollen face, blackish spot on back. Swollen in the right side of the chest. Opinion of witnesses and police about the cause of death and weapon/instrument use-as per the statement of witnesses, death occurred due to assault on his body due to physical fight. He exhibited the inquest report as Exhibit-1 and his signatures and Exhibit 1(1).

- 29.** During cross examination, PW-10 has deposed that Junu Mushahary was not cited as a witness. He has also deposed that since the inquest was conducted by him, so he did not take the signature of the Investigating Officer. He has also stated that there is no mention in the Exhibit-1 that it was written by the Investigating Officer on his dictation. He has denied a suggestion that in fact he saw no injuries as mentioned in the Exhibit-1.
- 30.** During their examination under Section 313 of the Code of Criminal Procedure, 1973, both the appellants have denied the truthfulness of testimony of prosecution witnesses. Both of



them have stated that they have not assaulted Keshram Musahary and have pleaded their innocence.

- 31.** Ms. B. Sharma, learned Amicus Curiae has submitted that in the instant case there is no eye witness to the incident of assault and the entire case is based only on circumstantial evidence. She has also submitted that the circumstances culled out by the Trial Court in Paragraph No. 35 of the impugned judgement do not lead to the inference only of guilt of the present appellant. She has also submitted that the circumstances on which the Trial Court has relied for arriving at the decision of the guilt of the present appellant have not been fully established. She has also submitted that though the testimony of prosecution witnesses were contradicted by the Investigating Officer with reference to their previous statement made by the witnesses before him, however, the Trial Court has not taken into consideration the contradictions in the testimony of the witnesses and have relied on the evidence which ought not to have been relied upon. She has submitted that the entire prosecution case is based on the oral dying declaration given by the deceased to the PW-2, however, the Trial Court has failed to take into consideration the fact that the deceased was in an inebriated condition as admittedly, he was in a habit of drinking liquor and even on



the date of the incident he consumed liquor before the incident and, therefore, it is submitted by learned Amicus Curiae that Trial Court has erred in relying on uncorroborated oral dying declaration of the deceased which was made to his daughter, i.e., PW-2. She has also submitted that in the FIR the first informant has not mentioned anything about the oral dying declaration. She has also submitted that the Trial Court also failed to take into consideration that all the witnesses who had implicated the present appellants were relative and were interested witnesses.

- 32.** Learned Amicus Curiae has also deposed that PW-6, who is the wife of the deceased and who was with the deceased on the date of the incident has not stated anything about the incident and she has deposed that she came to know about the incident, only at around 3.00 AM., when her husband told her that he was assaulted by the appellants. However, learned Amicus Curiae has submitted that it is very unnatural that PW-6 did not know about the incident before she was told about it by the deceased. Learned Amicus Curiae has submitted that if there was a hue and cry and the people gathered there, the PW 6, who is the wife of the deceased, would have known about the incident had such incident of assault had actually happened.



- 33.** On the other hand, Ms. S. Jahan, learned Additional Public Prosecutor, has fairly submitted that the testimony of most of the prosecution witnesses have been contradicted, and this fact was not taken into consideration by the learned Session Judge, Sonitpur, while coming to the finding of the guilt of the present appellants. She has submitted that only the testimony of PW-2 to the effect that the deceased told her that the accused Anil Basumatari and his wife Lakshmi assaulted him remain uncontroverted. She has also submitted that though, there is no bar in convicting an accused solely on the basis of oral dying declaration, however, prudence demand that such oral dying declaration should be corroborated by some other independent evidence before it is relied upon.
- 34.** I have considered the submissions made by learned counsel for both the sides and have perused the materials available on record very carefully.
- 35.** It appears from the record that in the instant case, there is no eye witness to the incident of assault on the deceased Kesharam Musahari, and the prosecution case is based on the circumstantial evidences only.

36. It appears that the Trial Court has based its finding of guilt of the present appellants on the circumstances, which are culled out in Paragraph No. 35 of the impugned judgment. For the sake of convenience, the circumstances culled out by the Trial Court in Paragraph No. 35 of the impugned judgment are quoted herein below:

"(i) On the day of incident, at around 9.30 p.m., the deceased after attending Puja in the house of PW 7 Subhash Boro while returning home, altercation took place between the accused persons and the deceased.

(ii) The deceased used to consume liquor and on the fateful night also he consumed liquor in the house of PW 7 where he acted as priest in the Puja performed in his house.

(iii) Hearing hulla PW 1 came out and saw the deceased in bending position and near him both the accused were standing and also saw one lathi lying at the place of occurrence.

(iv) PW 4 hearing hulla, when came to the place of occurrence, saw the deceased in the boundary of PW 8 and saw the accused persons standing near the deceased.

(v) After being assaulted when the deceased was brought home, on regaining sense he told before his daughter PW 2 that accused Anil Basumatary and Laxmi Basumatary taking him from bed to the boundary of PW 8, had assaulted him.

(vi) Since the time of oral information, the witnesses pointed both the accused persons as perpetrator of the crime.

(vii) As per post mortem report the deceased sustained fracture of ribs of the left side chest and spleen was ruptured."

37. From the testimony of the prosecution witnesses, more specifically the cross examination of the PW-9 Shri Shyam Terang, who was the Investigating Officer of the case, it appears that the testimony of PW-1, PW-2, PW-4, PW-5 and PW-6, where they have stated that the deceased told them about the assault by the present appellant was contradicted as the said fact was not stated before the Investigating Officer by the aforesaid witnesses when they were examined under Section 161 of the Code of Criminal Procedure, 1973. Hence, their testimony, while deposing as prosecution witnesses before the Court during the trial to the effect that the deceased told them that the appellants had assaulted them may not be safe to be relied upon, as it was for the first time that they have stated so before the Trial Court. Therefore, there is no reliable evidence, on record, to come to the finding that altercation took place between the appellants and the deceased at around 9.30 PM. The circumstances enumerated by the Trial Court in Paragraph No. 35 of the impugned

judgment, therefore, have not been fully established except the circumstance No. (v), wherein the deceased has told his daughter, i.e., PW-2 that the appellants Anil Basumatari and Lakshmi Basumatari had assaulted him. In this case, if we look at the testimony of PW-2 also, it appears that she was not told by the deceased as to how the appellants had assaulted him. No weapon of offence was seized by the investigating officer in this case. Moreover, there is no reliable evidence on record to corroborated testimony of PW-2.

- 38.** 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. In the instant case, it appears that the only uncontroverted evidence which is available on record is the testimony of PW-2 to the effect that her father informed her that the appellants had assaulted him. However, there is no other evidence to corroborate the said evidence as the testimony of other witnesses were contradicted and in the considered opinion of this Court, it is not safe to be relied upon.

39. 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 Cri 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."*

40. Thus, from the above mentioned ruling of the Apex Court, it is clear that the circumstances from which the conclusion of guilt of the appellant 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, those circumstances should not be explainable on any other hypothesis, except that the accused is guilty.

41. However, in the instant case as discussed in the foregoing paragraphs, it appears that the only uncontroverted evidence on record is the extrajudicial dying declaration of the deceased given before the PW-2. It is also important for the Court that it must be satisfied about the truthfulness of such extrajudicial dying declaration and that the same was made by the deceased while he was in fit condition to make such a statement.



- 42.** In the instant case, almost all the witnesses have deposed that the deceased was in habit of drinking and on the date of incident also he had consumed liquor even before going to bed. So, it cannot be stated that even if it is believed that he made a statement implicating the present appellants before his daughter, i.e., PW2, he was in a fit state of mind and that he was not in an inebriated condition. Moreover, the testimony of PW-2 that her father had made such a statement to her implicating the appellants has not been corroborated by the testimony of other witnesses. As already discussed herein above, the testimonies of other witnesses have been contradicted by their previous statement as well as testimony of the Investigating Officer and, therefore, same are not safe to be relied upon.
- 43.** This court is therefore of the considered opinion that the circumstances enumerated by the Trial Court in Paragraph No. 35 of the impugned judgment cannot be held to be fully established.
- 44.** This Court also of the considered opinion that the prosecution side has miserably failed to fulfill the conditions 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, this Court is of the considered



opinion that the Trial Court had failed to take into consideration that the deceased was in an inebriated condition on the day of incident as well as when he made statement before PW-2 incriminating the present appellants. Moreover, the Trial Court also failed to take into consideration, before arriving at the conclusion of guilt of the present appellants, that the testimonies of other witnesses have been contradicted and therefore, it was not safe to rely upon such testimonies. The testimony of PW-2 thus, remained uncorroborated and in the considered opinion of this Court it is not safe to rely on such an uncorroborated testimony under the facts and circumstances of this case and, therefore, the trial court had erred in arriving at the conclusion of guilt of the present appellants mainly on the basis of oral lying declaration of the deceased given before PW-2. So, this Court is of considered opinion that under the facts and circumstances of this case, the appellants are entitled to get benefit of doubt and the impugned judgment is liable to be set aside.

- 45.** For the reasons mentioned herein above, the conviction and sentence imposed on the present appellants by the impugned judgment are hereby set aside.
- 46.** The appellants are set at liberty forthwith unless they are required to be detained in connection with some other case.



47. Let the case record of Sessions Case No. 96/2018 along with the connected files as well as a copy of this judgment be sent to the Court of learned Sessions Judge, Sonitpur, Tezpur.
48. Let a copy of this judgment be also sent to the Superintendent Central Jail, Tezpur.
49. The learned Amicus Curiae shall be entitled to the honorarium as per the prevailing rules.
50. This Criminal Appeal is accordingly, allowed.

JUDGE

Comparing Assistant