

Studio Nilima: Collaborative Network for Research and Capacity Building

Report on Amicus Curiae/Legal Aid Counsel Interaction Program

Organised by Studio Nilima: Collaborative Network for Research and Capacity Building in collaboration with Assam State Legal Services Authority and Gauhati High Court Legal Services Committee

25.05.2019

Resource Persons:

1. Hon'ble Mr. Justice (Retd.) B.P. Katakey, Former Judge, Gauhati High Court
2. Hon'ble Mr. Justice (Retd.) C.R. Sharma, Former Judge, Gauhati High Court and Upa-Lokayukta, Assam
3. Mr. Nilay Dutta, President, Studio Nilima and Senior Advocate, Gauhati High Court
4. Mr. Ziaul Kamar, Senior Advocate, Gauhati High Court

Name of Advocates:

- 1) Mr. Anowar Hussain Laskar
- 2) Mr. Jogesh Ch. Roy Choudhury
- 3) Mr. Sunil Agarwal
- 4) Mr. Debabrata Banerjee
- 5) Mr. Nayan Moni Dutta
- 6) Ms. Pratima Saha
- 7) Mr. Rupam Jyoti Sarma
- 8) Ms. Anna KP
- 9) Ms. Nilakshi Barman
- 10) Ms. Hira Baruah Barman
- 11) Ms. Lovely Devi
- 12) Mr. Manas Pratim Sarma
- 13) Ms. Afrina Begum



COLLABORATIVE NETWORK FOR RESEARCH AND CAPACITY BUILDING

- 14) Ms. Minakshi Das
- 15) Mr. Rana Phukan
- 16) Mr. Alakesh Baruah
- 17) Mr. Sushanta Sarma Barooah

Mr. Nilay Dutta introduced the concept of Studio Nilima and the idea behind starting the Amicus Curiae/ Legal Aid Counsel Training Session. He said the Constitutional vision envisages Free Legal Aid for the indigent people. For that it is essential that the providers have the capacity for the same. So, on discussing the matter with the Hon'ble Gauhati High Court, it was agreed that it is necessary to start a capacity building programme, for which this programme has been started. Then he introduced the resource persons to the participants. He also stated that the discussion only includes Criminal matters but in the near future arrangements will be made to include Civil matters.

The discussion began with the participants being invited to speak on preparation of defence in the instant Paper Book. The participants were encouraged to initiate the discussion by giving a brief overview of the facts and issues of the case and the defence they would take. It was emphasized that the entire purpose of the day's session was to understand how to prepare a defence in a Criminal Appeal in the High Court where the accused is already convicted.

One of the participants discussed the facts and the chain of circumstances upon which the conviction was based. Another participant put light on the discrepancies in the investigation of the case like, the time of seizure of the rope was not mentioned. There was a lag in the time of seizing the murder, which increases the possibilities of implanting those in the Place of Occurrence after the incident. Further, another participant pointed out the improvements in the deposition of PW1, and another pointed out the contradictions in the depositions of PW1 and PW2. And also the discrepancies in the medical report that could have given a benefit of doubt to the accused were pointed out.

This was followed by the resource persons inviting one of the participants to enlighten the other participants by telling them how trial court proceedings take place. The participant explained the process starting from the arrest till the commencement of the trial. Then Mr. Dutta pointed out that the charges framed in this instant case was that of Dowry Death u/s 304 (B) of the Indian Penal Code, 1860 and subsequently Sec. 302 was added. This was followed by a

discussion of the essentials of Dowry Death. In the instant case, the lower court acquitted two accused persons charged u/s 304 (B) of IPC, 1860 and convicted one accused person charged u/s 302 of IPC, 1860. So, at first the charges must be looked upon to frame the defence for appeal because the first question that arises on appeal is what the charge is. He then explained the process of a Criminal trial proceeding, step by step. After the verdict, if the accused is convicted then the person can appeal to a higher court either by appointing a private lawyer or through a Jail Appeal, as the case may be. The people who can afford to spend on the trials can take their cases forward but the poor people who are unable to afford the costs of a trial and appeal are given the right of representation from the Court. This is the moment when the Amicus Curiae/ Legal Aid Counsel step in.

Then the discussion turned towards the preparation of defence by the Amicus Curiae. At first the documents furnished with the Chargesheet must be verified. The statements of the Prosecution Witnesses u/s 161 of CrPC must be read thoroughly from the records to find out the improvements and contradictions in the statements. And then it must be seen if the Witness was considered hostile by the Lower Court and if it was done through due process or not. Then statement u/s 164 of CrPC must be studied, if there is any confession made by the accused. A question was raised that the statements u/s 161 of CrPC are not mentioned in the Paper Book provided by the High Court. The resource persons replied that the statements are not mentioned in the Paper Book , but can be obtained from the records of the Lower Courts available with the High Court. They also explained the process of obtaining the records. In the Gauhati High Court rules there is a chapter on 'Record Inspection' which mandates an application to the concerned Superintendent. A time will be allotted when inspection can be done in the presence of a Court Officer. They further emphasized that it is the responsibility of the Amicus Curiae to gather the records and frame proper defence for the client, to ensure that free legal aid is both 'free' and 'effective'. Records are also available with the Hon'ble Court at the time of hearing.

Coming back to the instant case in the Paper Book , the resource persons pointed out the issues that were raised. Firstly, the discrepancies in establishing the Circumstantial evidences and secondly, the difference between the Ocular and the Medical evidence.

Mr. Ziaul Kamar started by pointing out the issues. First issue was that of the Ocular v. Medical. The inquest report stated that there was one mark on the neck of the deceased and the Post Mortem report stated that there were two ligature marks. Second issue was that of the circumstances, that is only husband and wife were present in the house and they slept separately. Whereas in common parlance, husband and wife sleeps together and as there was no other person except their 1.5 years old son so the doubt completely shifts towards the husband. One participant pointed out that the issue of 'Ghor Jowai' does not seem to be valid as the deceased had four brothers. Mr. Kamar questioned the participants when there is a conflict of the ocular and the medical, then which one prevails?

In the meantime, Justice (Retd.) Brojendra Katakey, addressed the gathering. He said that the issue of record verification is very important, because the quality of the Paper Book is questionable as mostly it is translated from the vernacular language. The translations may be illegible and there maybe mistakes. So, proper verification of records is mandatory. Further he emphasized that in Amicus defence it is essential to change the mindset. The Amici Curiae can do their best with an altruistic mindset for compliance of provisions of Constitution and CrPC. He also shared some anecdotes that how the previous generation of lawyers used to gather knowledge from their seniors. At present as there is a paucity of chambers so the blooming advocates must try to gather knowledge from their seniors.

Returning to the question of Mr. Ziaul Kamar whether ocular evidence will prevail over medical evidence, the following was discussed. Medical jurisprudence says that doctor being the expert should be relied upon.

Mr. Nilay Dutta said that what we intend is to identify how a lawyer prepares himself for court. In this case, there is a clear difference between ocular and medical evidence. We must identify the client's gain in settling the matter. Whether we want ocular evidence to be relied on? If Post Mortem is relied on, it will mean that two ligature marks will prevail, but what would that mean in the case. So at first it should be discussed which is beneficial. If there are two marks what will that mean? Find case law to that effect. That is how it is prepared.

Further he said that, in case the judge is inclined to rely on medical evidence, what is the Amicus Curiae's responsibility? How to tackle that? Would there be supporting evidence even if there are two ligature marks? Does that necessarily indicate strangulation. So that would

necessarily entail consulting authorities like J.B Mukherjee and Modi. He also clarified that two ligature marks does not necessarily indicate homicidal strangulation.

This was followed by a discussion on various types of hanging? Partial hanging and complete hanging. Two ligature marks will not indicate necessary strangulation. It can also be due to slipping of the rope. Most judgments rely upon 'facts of the case'. So in such a case it would be more effective to find opinions in line with judge's thinking. In this case, this would create a doubt sufficient to not discharge the burden of proof. The resource persons suggested two books 'Forensic Medicine and Toxicology by J.B. Mukherjee' and 'A Textbook of Medical Jurisprudence and Toxicology by Modi'. Further they said that library reading is essential.

The main difference in ocular evidence and medical evidence is essential. You will find two possibilities for two ligature marks. One must exploit that. It is not important what the lawyer thinks, but it is important to understand the psychology of the judge.

In parlance to the matter, Justice (R) Chitta Ranjan Sharma said that in both prosecution and defence, the law and facts must fit together. In the present case, 304B and 302 are invoked. So one must know the substantive law for both the provisions. See provision and its mandates. Understand simulations in the present case. For example, will violence by husband in isolation of demand for dowry qualify as S.304 (B) of IPC. It is essential to check the ingredients. Then focus on the facts. For example, are allegations of domestic violence soon before death?

The judgment is based on both facts and law. In assailing the judgment, we must focus on both facts and law. In this case, DW3 came from several kilometers away and saw hanging. This is difficult to understand. The judge must have discussed this event. One must also be aware of when the burden shifts. Arguments are exact like hammering a nail into the wall. Law and facts must be comprehended properly.

Factual evidence and expert evidence must be analyzed. The rules for analyzing expert evidence must be examined properly. Look at the medical evidence in the case, the cross shows throttling, hanging etc which are inconsistent. One must look at the age of the accused. Negating the prosecution evidence will be based on the expert interpretation of medical evidence.

Then shifting to the issue of Circumstantial evidence, Mr. Dutta said that circumstantial evidence has not been proved in this case. Look at the four circumstances cited in the case. Suicide has not been provided in this case. Judge should have checked whether the sleeping after meal was together. In the first statement (or FIR which does not disclose cognizable offence); it

must be shown that there is a possibility that they might not have slept together. Breaking the circumstance is one thing and creating a doubt is another.

Alternate defence may also be taken. While some judges do not like it, some do entertain such defences. Medical evidence throttling, strangling, hanging led to bringing of 302 IPC. The second doctor was crossed. Charge was on strangulation; not anything else. One must show how all these are different. The defence must be able to create doubts. In cases where alibi was taken but could not be proved, defence has taken burden upon oneself. S. 110 of the Indian Evidence Act, 1872 vests burden upon defence for proving special facts.

Mr. Ziaul Kamar raised the question under what law is the doctor's evidence taken into account? S.45 of Indian Evidence Act, 1872 deals with expert opinion. Now it is upto the Amicus Curiae as a defence lawyer to dislodge the doctor's opinion. In order to cross-examine the expert, one must also be an expert. First medical jurisprudence needs to be consulted, here we see that doctor's cross is beneficial as it shows different phenomena: throttling/hanging. In throttling, there are finger marks. But prosecution will show that throttling does not always show finger marks. All of this evidence comes through S.45 of Indian Evidence Act, 1872. But this can be discarded by Court too when it sees enough evidence to the contrary.

Then the question arose whether the first FIR was valid? No, because there is no cognizable offence disclosed in this case. The second is the actual FIR. U.D Case No. 18 was later merged into the actual case. The cross in relation to dowry is good in this case.

In this case, Post Mortem cross is a very good example for crossing an expert effectively. One must learn from this. Only expert opinion is not enough, it needs to be followed by valid reasons. Because in this case, the doctor's opinion in Post Mortem report is only 2-3 lines. Reference was made to page no. 141 of the Paper Book (The Post Mortem report). Sketch map also becomes important in several cases.

Then some terms specific to criminal trials in Assam were; difference between *nal* and *taar*; which are common types of measurement. 1 taar equals to 12 foot, 1 haat equals to 18 inches, Ulabari means small bamboo with two sharp edges.

One must exploit local connections like shopkeepers with a rural background to understand traditional weapons. It is essential to observe material exhibits. Often, *malkhanas* send wrong exhibits and if PP is not conversant, may not be able to examine. Mr. Ziaul Kamar

gave an example of case where a bottle which had been manufactured after the date of incident was exhibited by the malkhana. (MR No. in the seizure list must also be compared).

Justice (Retd.) C. R. Sharma emphasized that the advocates must be analytical, scientific approach and out of the box thinking. Further he said that, it is important to understand what kind of weapons cause what kind of wounds? For example, dao can cause both blunt impact injury and incised injury.

The session concluded with some advises from the resource persons. One must reflect whether the points which were expressed by the experts had occurred to oneself. That would be the room for improvement. They emphasized the importance of appreciating new sources of legal information. But the judgments should always be in entirety. When placing case laws, overruled judgments should never be put. One should never mislead the courts.

The resource persons shared the citations of some cases, which are as follows:

For the law on circumstantial evidence : *Sharad Birdichand Sarda v. State of Maharashtra* AIR 1984 SC 1622 (Panchsheel) and *Antulay* cases. Originally in 1952 422 para 10.

Discrepancy between Post Mortem and Inquest Report: *Prodip Das v. State of Assam* 2012 (5) GLT 390, *Brahm Swaroop and Anr. v. State of Uttar Pradesh* AIR 2011 SC 280.

Strangulation in suicide: *Anil Paul v. State of Tripura*, 1998 (1) GLT 190;

Last seen together theory: *Gungun Sahu v. State of Assam*, 2006 (2) GLT 196

Finally, Mr. Nilay Dutta thanked everyone and the session concluded.