

Heramba Brahma and Another

Vs

State of Assam

Criminal Appeal No. 558 of 1982

(R. B. Misra, D. A. Desai JJ)

04.11.1982

### JUDGMENT

1. Special leave granted. Printing dispensed with. Copies of paper-book used by the High Court while hearing the appeal against appellants have been furnished to us. With the consent of parties, we proceeded to hear the appeal on merits.
2. In Sessions Case No. 75(D) of 1974, 17 accused including accused 2 Heramba Brahma and accused 3 Amar Singh Brahma (appellants herein) were tried for having committed offences under Section 120-B and Section 302 read with Section 34 of the Indian Penal Code. The learned Sessions Judge convicted accused 1, 2, 3, 4, 6, 7, 10 and 11 for having committed offences under Section 120-B and Section 304 read with Section 34, IPC and sentenced each of them to suffer rigorous imprisonment for five years and to pay a fine of Rs 500, in default to suffer further RI for six months for the offence under Section 302 read with Section 34 of the Indian Penal Code. No separate sentence was awarded for the offence under Section 120-B of the IPC. The accused 5, 8, 9, 12, 13, 14, 15, 16 and 17 were held not guilty of the offences with which they were charged and were acquitted. The accused who were convicted, preferred Criminal Appeal No. 114 of 1975 in the Gauhati High Court. The High Court allowed the appeal of accused 1, 4, 6, 7, 10 and 11 and acquitted them of all the offences for which they were convicted and set aside the sentence imposed upon them. The High Court upheld the conviction of accused 2 Heramba Brahma and accused 3 Amar Singh Brahma for the offence under Section 304 read with Section 34 of the IPC and confirmed the sentence imposed upon them. Hence, this appeal by special leave.
3. Briefly stated the prosecution case is that the deceased Santosh Kumar Brahma, former student of Sapatgram Amalgamated Academy accompanied by PW 5 Dilip Kumar Brahma visited Sapatgram on June 3, 1972 to meet his friend Dharmeswar who was staying in the hostel. On an invitation by Dharmeswar, all of them visited a theatre at the time of second show and returned to the room of Dharmeswar in the hostel at night. Santosh Kumar and Dilip Kumar slept on the bed of Dharmeswar who shifted to another one for accommodating his friends. Some time during the night led by accused 3 Amar Singh Brahma, several boys came to the room where deceased Santosh Kumar was sleeping, opened the door, called out Santosh Kumar and accused 3 Amar Singh Brahma told him why he had assaulted them previously and that Santosh Kumar would be beaten. All the boys in the room assaulted Santosh Kumar. PW 5 Dilip Kumar, companion of Santosh Kumar tried to intervene, but on being threatened, he moved away. Santosh Kumar attempted to escape by running towards the house of the Head Master Shri Panchanan Medhi crying out for help. Shri Panchanan Medhi, Head Master of the Academy woke up from his sleep and emerging from his house, he saw two persons running away towards the boarding and Santosh Kumar lying injured. He rushed to the dispensary to bring medical help and simultaneously told Shri Sujit Kumar Bose, Assistant Head

Master of the school to summon the police. In the meantime, Santosh Kumar succumbed to his injuries. PW 8 Sujit Kumar Bose, the Assistant Head Master gave information at the police station and an offence was registered. Autopsy was performed on the dead body of Santosh Kumar by PW 1 Dr. D.N. Sharma. He did not find any external injury, but on internal examination, he found fracture of nasal bone, a linear fracture of frontal bone and internal haemorrhage. In the course of investigation, 17 accused persons including the two appellants were arrested and ultimately sent for trial, with the result as set out herein above.

4. In this appeal, we are concerned with the case against only original accused 2 and 3; because other 15 accused have been acquitted during the journey of proceedings to this Court.

5. A brief reference to the evidence led in the case would be advantageous. We would, however, like to administer a caution that this Court in appeal under Article 136 does not reappreciate or reevaluate evidence. But, where the High Court overlooked a well laid principle of appreciation of evidence to be presently mentioned, reluctance to reevaluate evidence would result in miscarriage of justice.

6. PW 1 Dr. D.N. Sharma, the Medical Officer carried out the autopsy. Two points are worth noticing in his evidence. He stated that he did not find any external injury. Two internal injuries were : fracture of nasal bone and linear fracture of frontal bone accompanied by internal haemorrhage. In the cross-examination, he stated that both the injuries were possible by fall, but not by one single fall looking to the seat of injuries. The seat of injuries resulting in fracture of nasal bone is on the front side and the one which resulted in linear fracture of the frontal bone was, according to him, on the lateral side. He was of the opinion that depending upon how the victim fell, both the injuries may be caused by two separate falls.

7. PW 3 Onkarmal Maheshwari and PW 4 M.L. Adhikari were at the relevant time holding the post of the Magistrate and they were examined to prove confessional statement made by accused 9 and accused 4 respectively both of whom are acquitted and, therefore, the evidence of these two witnesses is not of any use against the present appellants.

8. Next witness PW 5 Dilip Kumar Brahma was the witness to the occurrence. After referring to the visit to Sapatgram in company of deceased Santosh Kumar and meeting Dharmeswar, he spoke about the occurrence. He deposed that accused 3 Amar Singh after entering the room where he and deceased Santosh Kumar were sleeping asked Santosh Kumar, "Why did you assault us like cows earlier ? So, you will be killed today." He then went to describe the assault on the deceased as under :

They began to assault Santosh. I approached them and asked them not to assault Santosh. But they gave me threatening. When they began to assault Santosh, Santosh began to run towards the house of the Head Master and others also followed him. After a while, I came out and met Dharmeswar outside. I and Dharmeswar went towards the house of the Head Master. We saw Santosh lying in front of the house of the Head Master.

9. This is all the description of the occurrence as given by the only and the most important witness to the occurrence. He merely said that they began to assault Santosh. There were seventeen accused sent up for trial. It is impossible to make out what role was played by the present appellants and 15 other acquitted accused. The only information of a reliable nature this witness gave was that he had identified accused 2 and 3 in the group of students who entered the room and accused 3 Amar Singh

spoke to Santosh. He further said that he identified the accused by the light of a torch which was in the hand of accused 3 Amar Singh. The question is how far the identification is reliable. In the cross-examination, the witness was asked to identify accused 2 and 3 who, according to him, were recognised by him at the time of occurrence. He correctly identified accused 2 Heramba, but when he was asked to identify accused 3 Amar Singh (appellant 2) he identified accused 14 (since acquitted) as accused 3. And let it be recalled that it was accused 3 who according to prosecution, was at the head of the crowd and addressed deceased Santosh Kumar. Witness Dilip Kumar stated that he knew accused 3 since about three years prior to the occurrence and had identified him at the time of occurrence. He failed to identify him in the court. The difficulty posed by this error on his part is how far the identification of accused 2 could be trustworthy. Surprisingly in cross-examination, the confusion becomes worse confounded. He said that the Head Master first caught hold of Dharmeswar and asked him if he had killed Santosh. The Head Master Shri Medhi did not enquire from this witness anything about the occurrence. Here it may be pointed out that the offence was registered on a written report Ex. 6 given by the Head Master, Panchanan Medhi. Curiously Shri Medhi is not examined by the prosecution without assigning adequate reasons for dropping him. Add to this the fact that in report Ex. 6, names of any of the accused are not set out. In this background, it is difficult to place any reliance on the evidence of witness Dilip Kumar about the identification of appellants among the crowd of boys who allegedly assaulted deceased Santosh Kumar.

10. The next witness is PW 6 Amiya Kumar Brahma, the father of the deceased. Only part of the evidence relied upon is that when PW 5 Dilip Kumar met him he gave him the information that among the crowd of boys who assaulted Santosh, he identified accused 2 and 3, but this would hardly be of any assistance in view of the error committed by Dilip Kumar in identifying appellant 2 in the court.

11. The next witness is PW 8 Sujit Kumar Bose, Assistant Head Master. His evidence does not advance the prosecution case against the present appellants.

12. The next witness PW 9 Jogendra Mishra is the peon attached to Sapatgram Academy. There is nothing in his evidence which is of assistance to prosecution.

13. PW 10 Prabhat Chandra Das is the Officer who registered the offence at the police station.

14. The next witness is Mohan Mangal Chandra Brahma. But he was declared hostile to the prosecution and Mr Nandi, learned counsel for the State did not invite us to examine his evidence.

15. The next witness is PW 12 Javed Ali, Investigating Officer. His evidence is of a formal nature.

16. The examination of the evidence of witness PW 2 Bistiram was postponed by us because, his evidence would reflect upon bona fides of investigation. Witness Bistiram Basumatari was examined to prove and extra-judicial confession by accused 1, 2 and 3 to him. This is how his evidence in examination-in-chief has been recorded. Let it be extracted :

I know Heramba Brahma (appellant 1) and Amar Singh (appellant 2). They were with me in Hajat. They told me that they had assaulted Amiya's son. Amar Singh, Heramba and Inder (accused 1 since acquitted) told me that they had assaulted Amiya's son.

17. This is all his evidence in examination-in-chief. Now, who is this witness ? This witness Bistiram was arrested for having committed an offence of dacoity and while he was in jail,

according to him, the aforementioned three accused including the present appellants were, possibly with him in jail, when this dubious extra-judicial confession is alleged to have been made to him. This extra-judicial confession is vague and ambiguous because it is not clear whether each one spoke separately and what were the words used by each of the accused. Witness speaks of an extra-judicial confession by three accused persons having simultaneously made and when reproduced in his language, it makes no sense. It is dangerous to rely upon such extra-judicial confession even if the witness's credentials are not in question. The question that agitates our mind is what language was used by each accused, in what words confession was made and whether each used the same language ? Evidence of the witness does not reproduce the words used by each accused. It is the witness's ipse dixit that is being deposed to. And examine the credibility of the witness. And who is that witness ? Here is an under-trial prisoner awaiting trial for dacoity. We fail to see how these young boys should confide in this person suspected of dacoity. But, the most objectionable part of this concocted evidence is as to how the Investigating Officer came to know that the three accused persons made an extra-judicial confession to another under-trial in jail. What led the Investigating Officer of the present case to question an under-trial ? Or did the witness of his own accord approach the Investigating Officer ? Was this witness trying to please the Investigating Officer by approaching him that he would speak about the confession ? Was there any quid pro quo ? We put searching questions and waited for the answer in vain.

18. We are at a loss to understand how the High Court accepted the evidence of this extra-judicial confession without examining the credentials of PW 2 Bistiram; without ascertaining the words used; without referring to the decision of this Court to be presently mentioned wherein it is succinctly stated that extra-judicial confession to afford a piece of reliable evidence must pass the test of reproduction of exact words, the reason or motive for confession and person selected in whom confidence is reposed. In *Rahim Beg v. State of U.P.* ((1972) 3 SCC 759 : 1972 SCC (Cri) 827 : 1972 Cri LJ 1260), this Court while examining the evidence as to extra-judicial confession made by two accused to Mohammad Nasim Khan (PW 4) observed that : (SCC p. 765, para 18 : SCC (Cri) p. 833)

There was no history of previous association between the witness and the two accused as may justify the inference that the accused could repose confidence in him. In the circumstances, it seems highly improbable that the two accused would go to Mohammad Nasim Khan and blurt out a confession.

19. So saying the Court rejected the evidence as to extra-judicial confession. Position in this case is more deplorable. If the High Court had examined the decision of this Court, there would have been no difficulty in rejecting the evidence of extra-judicial confession. It fails to pass all the tests. We reject this evidence of extra-judicial confession, as unworthy of belief. We, therefore, find it difficult to subscribe to the reasoning of the High Court that the evidence of Dilip Kumar against the present appellants is corroborated by the evidence in the form of extra-judicial confession.

20. The evidence herein discussed is all the evidence against the present appellants. Evidence given by PW 5 Dilip Kumar revealed error in identification of appellant 3. High Court was not inclined to act upon it without corroboration. In this background, we sought corroboration to the evidence of Dilip Kumar as was done by the High Court. The evidence furnished by extra-judicial confession for the reasons herein mentioned is not available. Therefore, there remains the uncorroborated evidence of Dilip Kumar which itself for the reason herein stated is not sufficient to bring home the charge.

21. Add to this, our discomfiture arising from non-examination of Dharmeswar whose presence at the time of occurrence was unquestionably established and the Head Master Panchanan Medhi who submitted the written report Ex. 6 about the occurrence, and the picture becomes wholly blurred.

22. On totality of the circumstances here discussed, we are of the opinion that the case of the present appellants cannot be distinguished from the 15 other acquitted persons and, therefore, they must get the same benefit which others have received. We, therefore, hold that the prosecution has failed to bring home the charges against the appellants.

23. We accordingly allow this appeal and set aside the judgment and order of the High Court as also of the Sessions Court and acquit the appellants of all the offences for which they were convicted and quash the sentence imposed upon them. Both the appellants were exempted from surrendering by our Order dated February 10, 1982 and they need not surrender.

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