

SUPREME COURT OF INDIA

Kajal Sen

Vs.

State of Assam

Crl.A.No.908 of 1999

(M.B. Shah and Doraiswamy Raju JJ.)

15.01.2002

JUDGMENT

M.B. Shah, J.

1. The High Court of Gauhati in Criminal Appeal No. 102 of 1994 confirmed the judgment and order dated 7.7.1994 passed by the Additional Sessions Judge, Silchar in Sessions Case No. 9 of 1992 convicting the appellants for the offence punishable under Sections 302/149 and 148 of IPC and sentencing them to undergo rigorous imprisonment for life and to pay a fine of Rs. 2000/- each for the offence under Section 302/149 IPC and further imposing sentence of one year rigorous imprisonment for the offence punishable under Section 148 IPC. That order is challenged by filing this appeal.

2. It is the prosecution version that deceased Dipak Deb alias Piklu, resident of Silchar went out for buying and chewing 'Paan (Betel)' at about 10 p.m. on 14.12.1990. On hearing his cry for help, brothers of the deceased went at the scene of the offence. It is their say that deceased Piklu was caught by the accused persons and at their instance, Nepal Deb (since deceased) gave a dagger blow on the left side of the chest of Piklu. The accused thereafter escaped. Deceased was taken to Civil Hospital at Silchar and subsequently shifted to Silchar Medical College Hospital. Dr. Debabrata Singh (PW10) recorded the dying declaration of the deceased. On the next day, PW5 Ranjan Deb, the elder brother of deceased lodged FIR before the Officer-in-charge Silchar Police Station. Piklu died on 17.12.1990.

3. It has been contended by the learned counsel for the appellant that so-called dying declaration is unreliable as it does not inspire any confidence. He further submitted that even if we take dying declaration as it is, it is inconsistent with what has been deposed by the eye-witnesses. The evidence of alleged eye-witnesses is not reliable as they refused to state correct facts on the day of incident and thereafter till 18.12.1990 despite the fact that the Investigating Officer wanted to record their statements on relevant dates.

4. It has come on record that PW5 Ranjan Deb elder brother of the deceased gave information, for which entry at police station was made at about 10.10 p.m. on the date of

incident i.e. 14.12.1990. As per the said information at about 10.00 p.m., Kajal Sen, Nepal Deb. Khukan Kar, Munna Kar and Bappa Sen stabbed the deceased with a knife and the injured was under treatment at Silchar Medical College. In the Court, it is the say of the witness that at about 9.30-9.45 p.m. he along with his brother Surjit and Nripendra heard the scream of his brother and they ran to the direction of the scream. There, he saw Kajal Sen holding deceased by the hair, Bappa Sen holding him in arms and Kishan Kairi, Munna Kar, Bakul Kar, Khakan Kar and Nepal standing near by carrying weapons. Kajal Sen asked Nepal to hit the deceased. Immediately, Nepal assaulted Piklu with a weapon. On hearing their shouts, the accused fled away. Piklu fell down on the ground and was removed to the hospital. It is to be noted that there is clear improvement by this witness in what he stated in the FIR and in his deposition. In FIR he has not mentioned that Nepal gave knife blow but has stated that all the accused stabbed the deceased. Apart from this, other detail cross-examination is not required to be referred to.

5. Other evidence is that of mother of the deceased - PW2 Smt. Pritilata Deb - who stated that on the night of occurrence, after the meal at about 9.30 pm or 10.30 pm, Piklu asked her for a "Paan" and that he would go to the nearby "Paan shop" and would come back soon. After sometime, Piklu came back and told that Bappa (A4) and Kajal Sen (A1) had called him to discuss something. Thereafter, he went out with them. On going out, she found A-4 in her courtyard and A-1 near the Gate. The witness tried to dissuade Piklu and asked him "where are you going so late in the night". A-1 then replied that they were going with Piklu and that after some discussion, he would return home. The witness also asked her sons, Nipu, Ranjan and Sujit as to why A-4 and A-1 had taken Piklu with them. After sometime, she heard the shout "save me, save me, elder brother". Thereafter, her sons Nipu, Ranjan (PW5) and Sujit (PW4) went running out of the house followed by the witness. On reaching the spot, she found her son Piklu lying on the ground smeared with blood on the Radha Madhab Road in front of Purna Decorous. Thereafter, she lost her senses. In her cross-examination, she admitted that her son PW4 Sujit instituted a criminal case against the accused persons alleging that they had looted his shop and that she was a witness in that case. The witness was also cross-examined relating to cases against deceased Piklu and one Babu Ray under the Arms Act in which A-2 Khukan Kar and A-1's younger brother Dulan Sen were the witnesses, about which she expressed her ignorance.

6. From the evidence, it is apparent that there is change in the prosecution version as she has stated that A-4 and A-1 came near her courtyard. It is not stated by the other brothers of deceased who were at the house namely Sujit Deb and Ranjan Deb. Further, there is inconsistency in what has been deposed by her that she followed her sons at the scene of offence and saw Piklu lying on the ground smeared with blood. However, his sons have stated that they saw accused assaulting the deceased.

The prosecution has also relied upon the dying declaration recorded by PW10 Dr. Debabrata Singh which reads thus:-

"I, Sri Dipak Deb son of late Nirpada Deb of Purnapaul Road, P.S. Silchar, am giving this dying declaration in full sense and without any pressure. While I was walking

today at around 9.30 p.m. after dinner in the road, I was attacked by a group of youngmen whom I know well. I was held by Kajal Sen and his brother Bappa Sen of Radha Madhab Road, along with Khokan Kar, Ajoy Kar and Munna Kar of Komal Road by force, making me unable to move, Nepal Deb stabbed me in the chest with a sharp weapon. This statement is to be considered as my dying declaration. Sri Nepal Deb resides in the house of Sri Durga Acharjee of Radhamadhab Road, Silchar."

PW10 has stated in his evidence that dying declaration of deceased was recorded at 11.00 p.m. and deceased made the same in Bengali language, which he translated in English and explained the dying declaration by translating it in Bengali to the deceased. He has also admitted that the patient was surrounded by many attendants and they were talking with deceased but he was not hearing the same. He also admitted that he was knowing Bengali. He first heard the entire statement of Piklu in Bengali and keeping the same in memory, he wrote down the dying declaration in English. He admits that he has not mentioned so in the dying declaration. It was suggested to him that dying declaration was prepared after the death of Piklu. He has also not taken a bed-head ticket in which the treatment and condition of patient are recorded. Further, it is difficult to believe that deceased would state that this be considered as his dying declaration. Therefore, it appears that the entire story of recording dying declaration is doubtful.

7. Further, it has come on record in the deposition of PW12 SI Jatindra Mohan Roy that during the course of investigation he recorded the statement of accused Nepal Deb (deceased) which led him to the recovery of a 'dagger' - a weapon of offence. The said statement as reproduced in his deposition as under:-

"On 14.12.1990, at night, while I was coming from Fatakbar to my house on the Radha Madhab Road, I saw, at about 10.30/11 p.m., Piklu Deb and Sujit Deb of Purna Pal Road and Jatin Deb Nath of Kanakpur Gopal Akhra Road. On the Radha Madhab Road in front of the Purna Pal Road, Piklu had a dao in his hand, about this time, Sujit Deb and his accompanying brother Piklu had an altercation with said Jatin Deb Nath. The altercation took place among themselves regarding some matters. About this time, Piklu saw me going along the road and said : "He, son of bitch, stop". And then he attacked me with a dao. When I tried to flee away, Piklu intercepted me on the road. Then I stabbed Piklu with the knife in my hand from the front side and then fled away. At the time of my fleeing away, I threw away the knife in my hand somewhere at the place of occurrence. I can show the place."

8. He stated that after recording of the said statement, the deceased led him to the place where weapon was thrown away. However, the weapon was not found from the said place. It is his further say that deceased Nepal Deb was produced before the Chief Judicial Magistrate, Silchar, for the purpose of recording confessional statement but he declined to make the same before the Judicial Magistrate. In cross-examination, he has stated that after visiting the place of occurrence on 15.12.1990 at about 2.15 p.m. he examined five persons and thereafter went at the house of the injured. He met the mother of the deceased and other

family members but they declined to make any statement regarding the occurrence on the ground that injured was in hospital and that their mental condition was not well. He also contacted brothers of the deceased in the hospital on 16.12.2001 at about 11.35 p.m. They also declined to make statements relating to the occurrence. On 17th, he received the information with regard to the death of the injured and he went to medical college hospital at 9.45 a.m. On 17th also, the brothers and other relatives of the injured had not made any statement. Finally, on 18th, he recorded the statement of other persons but they were not in a position to throw any light with regard to the occurrence and that up to 12.35 p.m., he was not having any material how the occurrence took place and who committed the offence. Thereafter, he recorded the statement of PW5 Ranjan Deb, Nripendra Deb, Sujit and Smt. Pritilata Deb.

9. From the aforesaid course of investigation, it is apparent that the IO was not having any information till 18th, how the incident took place and who committed the offence. The FIR which was recorded on 15.12.1990 only mentions that four persons caused injuries to the deceased and does not mention how the incident took place. As against this, the statement of one of the accused which was recorded under Section 27 of the Evidence Act for search of the weapon of offence clearly indicates that the deceased was having a 'dao' in his hand and there was some altercation between the deceased and other accused. When deceased saw Nepal Deb coming on the road, he said 'hey, son of bitch, stop' and as Nepal Deb attacked him with 'dao', he tried to flee away but he intercepted him on the road and at that stage he gave knife blow and fled away. Hence, the improved story of the so-called eye-witnesses, namely PW2 Smt. Pritilata Deb, PW4 Sujit Deb, PW5 Sri Ranjan Deb and PW7 Sibaji Ray involving rest of the accused (appellants) is inconsistent with what has been brought on record by the prosecution. However, the learned counsel for the respondent submitted that statement made by the accused Nepal Deb before the Investigating Officer cannot be taken into consideration so as to doubt the prosecution version as deposed by the eye-witnesses. In our view, this submission is without any substance. Once the prosecution has led the evidence before the Court which has remained unchallenged, it was open to the accused to rely upon the same for their defence.

10. Further, there is much force in the contention of the learned counsel for the appellants that prosecution witnesses have not disclosed true and correct facts before the Court and, therefore, evidence is not reliable and they refused to divulge any fact with regard to the incident from 14th to 18th as stated by the Investigating Officer. Investigating Officer stated that till 18th he was not having any material or clue how the occurrence took place and who committed the same. It is further clear that PW2 Smt. Pritilata Deb has improved the prosecution version by stating that accused No. 4 and accused No. 1 came near her compound for calling the deceased. This version is not narrated by her two sons PW5 Ranjan Deb and PW4 Sujit Deb. In so-called dying declaration, the version is different. The oral information which was given by PW5 at the police station immediately after the incident only mentioned that accused stabbed the deceased with a knife and the injured was under the treatment at Silchar Medical College. Investigating Officer recorded the statement of the accused deceased Nepal Deb who has stated that after some altercation with the deceased Piklu, who abused him by saying that he was son of bitch and who attacked him with 'dao',

he stabbed Piklu with the knife which was in his hand and thereafter he fled away. This prosecution version nowhere involves rest of the accused in the crime. In our view, while appreciating the evidence it was the duty of the Courts below to appreciate the same minutely, carefully and analyse the same. However, for the reasons best known, this aspect is not at all considered by the Courts below.

11. From the aforesaid evidence, it is apparent that the prosecution story with regard to involvement of appellants is doubtful and cannot be relied upon for convicting them for the offences punishable under Section 302/149 and 148 of IPC. The role assigned to them by the witnesses is not believable and admittedly the fatal blow was given by the deceased Nepal Deb.

12. In the result, this appeal is allowed. Appellants are acquitted for the offences for which they are charged and convicted. They be released forthwith, if not required in any other case. Appeal allowed.