

# **IN THE GAUHATI HIGH COURT**

(THE HIGH COURT OF ASSAM: NAGALAND: MIZORAM & ARUNACHAL PRADESH)

## **CRIMINAL APPEAL (J) No. 15 OF 2014**

Anil Nath,  
Son of Late Srikanta Nath,  
Sarukhetri, P.S. Sarthebari,  
Dist. Barpeta, Assam.

----- **Accused/Appellant**

– **VERSUS** –

State of Assam.

----- **Respondent.**

### **BEFORE**

**HON'BLE MR. JUSTICE MANASH RANJAN PATHAK**  
**HON'BLE MR. JUSTICE HITESH KUMAR SARMA**

Advocate for the appellant : Mr. Z Hussain, *Amicus Curiae*.

Advocate for Respondent : Mrs. SH Bora, Addl. P.P.

Date of hearing :: 18<sup>th</sup> of November, 2017.

Date of Judgment & Order :: **8<sup>th</sup> of December, 2017.**

### **JUDGMENT & ORDER (CAV)**

*(By H.K. Sarma, J)*

This is an appeal from jail, preferred by accused/appellant, Anil Nath, who has been convicted by judgment and order dated 18-12-2013, passed by the learned Sessions Judge, Barpeta, in Sessions Case No. 31/2008, arising out of GR Case No. 802/2000, under Section 302 of the IPC, to undergo imprisonment for life and also to pay a fine of Rs. 5,000/-, in default, further rigorous imprisonment for 3 (three) months.

2. I have heard Mr. Z Hussain, learned *Amicus Curiae*, appearing on behalf of accused-appellant, and Mrs. SH Boro, learned Additional Public Prosecutor, Assam.

3. The fact of the case is that on 15-06-2000, at about 9.00 pm, the accused-appellant went to the house of the informant, Niranjana Sarma, and induced his younger brother to go with him to his house, and thereafter, the accused-appellant killed him by causing injuries with sharp weapon.

4. On the above facts, the informant lodged an FIR with the Sarthebari Police Station, which was registered as Sarthebari Police Station Case No. 73 of 2000, under Sections 341/302 of the IPC.

5. During the course of investigation, police visited the place of occurrence, conducted inquest over the dead body of the deceased and sent the dead body for autopsy examination, seized one spear stained with blood from the house of the accused-appellant alongwith one bamboo lathi stained with blood, collected evidence including the statements of the witnesses under Section 161 of the Cr.P.C., and finally, submitted charge sheet against the accused/appellant, under Sections 302 of the IPC.

6. Since the case is exclusively triable by the Court of Sessions, learned trial Court of Chief Judicial Magistrate, Barpeta, committed the case to the Court of learned Sessions Judge, Barpeta. Learned Sessions Judge, Barpeta, having found *prima facie* case and sufficient materials to proceed against the accused-appellant,

framed a formal charge against the accused-appellant, under Section 302 of the IPC, to which the accused-appellant pleaded innocence.

7. During the trial, prosecution examined as many as 10 witnesses and the defence examined none. After closer of prosecution evidence, statement of the accused-appellant was recorded under Section 313 of the Cr.P.C. and in his such statement, he declined to adduce evidence in his defence.

8. When we look into the evidence on record, the evidence of pw 1, Sri Niranjan Sarma is that at about 9 p.m the accused went to his house and called his deceased brother Surjya Sarma who went along with the accused. Thereafter, at about 11 p.m one Bichitra Das, a co-villager informed him that deceased is lying in a drain. Pw 1, thereafter, went to the said place and found his brother dead.

9. Pw 2 Kanak Nath deposed that at about 11 p.m he was informed that a dead body is lying on the drain. He deposed that he had accompanied the Police team to the residence of accused appellant where the accused admitted before the Police of having killed the deceased Surjya Nath. Pw 2 also deposed that Police seized the blood stained spear. He also deposed that he had seen blood stains on the verandah of the residence of the accused.

10. Pw 8, Prafulla Sharma also deposed that he had accompanied the police team to the residence of the accused where the accused admitted that he had killed Surjya Sarma and also produced the spear used in killing the deceased.

11. The evidence of pw 3, Raben Nath, pw 4, Bichitra das, pw 5 Chandra Kanta Sarma, pw 6, Banajait Adhikary, pw 9, Niranjan Nath, pw 10, Arun Das, do not establish any incriminating circumstances against the accused.

12. It may be pointed out here that so far as the alleged admission of guilt by the accused appellant, before pw 2, Kanak Nath and pw 8, Prafulla Sharma is concerned, the same is inadmissible in evidence because it was made in the presence of Police Officer and is accordingly hit by Section 25 of the Evidence Act. The fact, however, that a spear was seized from the residence of the accused, may be a circumstance appearing against the accused.

13. Perused the impugned judgment. The circumstances which the learned Sessions Judge has relied upon, in order to sustain the conviction, may be summarized as follows;

- Last seen together theory
- Recovery of spear from the residence of the accused
- Non explanation by the accused about the whereabouts of the deceased.

14. With respect to the theory of last seen together the Hon'ble Supreme Court in the case of *Shyamal Ghosh v. State of W.B., (2012) 7 SCC 646*, held that application of the "last seen theory" requires a possible link between the time when the person was last seen alive and the fact of the death of the deceased coming to light. There should be a reasonable proximity of time between these two events. This proposition of law does not admit of much excuse but what has to be seen is that this principle is to be applied depending upon the facts and circumstances of a given case. The Hon'ble Supreme Court in the said case of *Shyamal Ghosh* (supra), re-iterated the settled law that the last seen theory comes into play where the time gap between the point of time when the accused and the

deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. The reasonableness of the time gap is, therefore, of some significance. If the time gap is very large, then it is not only difficult but may even not be proper for the court to infer that the accused had been last seen alive with the deceased and the former, thus, was responsible for commission of the offence. The purpose of applying these principle, while keeping the time factor in mind, is to enable the court to examine that where the time of last seen together and the time when the deceased was found dead is short, it inevitably leads to the inference that the accused person was responsible for commission of the crime and the onus was on him to explain how the death occurred.

15. Again, in the case of *Kanhaiya Lal v. State of Rajasthan, (2014) 4 SCC 715*, the Hon'ble Supreme Court held that circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, by itself, cannot lead to proof of guilt against the appellant.

16. The learned Sessions Judge has invoked the provisions of Section 106 of Evidence Act in order to sustain an order of conviction against the accused appellant because he had offered no satisfactory explanation as to the whereabouts of the accused.

17. In *State of Rajasthan v. Kashi Ram (2006) 12 SCC 254*, the Hon'ble Supreme Court has held that the provisions of Section 106 of the Evidence Act

itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain.

18. Reiterating the law laid down in the case of *Kanhaiya Lal (supra)* the Hon'ble Supreme Court in the case of *Anjan Kumar Sarma vs State of Assam, Crl App 560/2014*, dated 23.05.2017, held that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of

other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.

**19.** Thus, absence of explanation from the accused can be an incriminating circumstance only when the other circumstances point towards the guilt of the accused.

**20.** The evidence of pw 1 establishes beyond doubt that at about 9 p.m accused appellant had called the deceased and two hours later his brother, the deceased, was found dead. The accused appellant on his part had denied the evidence that he had gone to the house of pw 1 and that he had called Surjya Sarma, the deceased but the cross examination of pw 1 does not shake the credibility of the pw 1 on this count. It is, thus, established that accused appellant had called the deceased and thereafter the deceased was found dead. However, there is absence of other circumstances which could provide a complete chain of events suggesting that none else but the accused is guilty of committing the murder of the deceased.

**21.** For instance, there is lack of proof on motive. The prosecution evidence is absolutely silent on the motive behind the alleged killing of the deceased by the accused appellant. In fact, the evidence of pw 1 goes to establish that there was no enmity between the deceased and the accused appellant.

**22.** Secondly, there is no evidence that the blood stains found in the seized spear matched with the blood samples in the body of the deceased. The mere recovery of spear is not by itself any incriminating circumstance establishing a link between the accused appellant and the cause of death of the deceased because the

spear, as alleged, was smeared in blood and yet no forensic examination of the spear and the blood stains has been conducted to ascertain whether the blood stains matched the blood stains of the deceased. In the absence of any proof that blood stains in the spear matched with the blood sample of the deceased it would be unsafe to rely on the proposition that the spear seized from the residence of the accused appellant was used in the killing of the deceased. There is also no evidence that the injury was caused by the said seized spear.

23. Thirdly, as between the time when the deceased and the accused appellant were seen together, the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is considerably large, approximately two hours, hence the possibility of any person other than the accused being the author of the crime cannot be ruled out.

24. The prosecution's burden to establish all the facts by independent proof cannot be relieved because of non-explanation of any particular circumstance by the accused. As laid down in the case of *Anjan Kumar Sarma* (supra), it is only in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.

25. In view of the discussions held hereinbefore, it cannot be said that prosecution has been able to establish the charge against the accused appellant

beyond all reasonable doubt. The accused appellant is thus entitled to the benefit of doubt.

26. In the result, the findings arrived at by the learned Sessions Judge calls for any interference.

27. The accused appellant is, accordingly, acquitted of the charges under Section 302 IPC on benefit of doubt and set at liberty forthwith, if not wanted in any other case.

28. Appeal is, accordingly allowed.

29. The accused-appellant be released from jail forthwith.

30. Send down the LCR with a copy of this judgment.

31. Send down the LCR to the Court below with a copy of this judgment and order immediately.

32. The Registry shall inform the Superintendent of District Jail, Barpeta, to release the accused-appellant forthwith in the above noted case, with a copy of this judgment and order.

33. Send a copy of this judgment and order to the Superintendent of District Jail, Barpeta, for furnishing the same to the accused-appellant.

34. This Court records its appreciation for the assistance rendered by Mr. Z Hussain, learned *Amicus Curiae* and an amount of Rs. 7,000/-, be paid to him as remuneration for his assistance.

**JUDGE**

**JUDGE**

*Paul*