

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

PRINCIPAL SEAT AT GUWAHATI

CRIMINAL APPEAL (J) No. 80 of 2014

Sri Kanai Nayak,
Son of Sri Gogon Nayak,
Resident of Deohal Tea Estate,
Raitok Purana Line
Police Station - Bordubi,
District - Tinsukia, Assam.

..... *Appellant/Accused.*

–VERSUS–

State of Assam

..... *Respondent.*

Advocate for the Appellant : Mr. Bibeka Nanda Gogoi,
Amicus Curiae,

Advocate for the Respondent : Mr. Nava Kumar Kalita,
Additional Public Prosecutor, Assam.

B E F O R E

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

Date of Hearing : 18-11-2017

Date of Judgment & Order : 22.12.2017

JUDGMENT & ORDER (CAV)

(M.R.Pathak,J)

This criminal Appeal from jail is preferred by the accused appellant Sri Kanai Nayak, being aggrieved with the judgment and order dated 26.06.2014

passed by the learned Sessions Judge, Tinsukia in Sessions Case No. 199 (T) of 2007, arising out of Bordubi Police Station (District-Tinsukia) Case No. 97 of 2007, by which the appellant/accused was convicted under Section 302 of the Indian Penal Code and sentenced him to undergo Imprisonment for Life and also to pay fine of Rs. 1,000/-, in default to undergo Rigorous Imprisonment for further period of 1 (one) month.

2. The prosecution case, as it emerges from the First Information Report dated 29.09.2007 (Exhibit-2) lodged by one Robin Nayak (PW.2) before Bordubi Police Station, is that in the morning around 6 am of the same day while his son Bijoy Nayak (the deceased) was proceeding from home to his place of work, the accused persons namely, Suman Nayak, Sujit Nayak, Raju Nayak and Kanai Nayak, who are residents of his line, killed his said son on the cross road (*Chariali*) near the weighing house of Section No. 27 of their garden, assaulting him with iron rod, dao, sword etc. In the said FIIR, the informant also conveyed that prior to the said incident those accused persons on 12.08.2007 assaulted his other son (*maju* son) Sri Deba Nayak and caused him grievous injury, for which an FIR was already lodged before the same police station. Accordingly, on receipt of said FIR, Bordubi Police Station (District-Tinsukia) Case No. 97/2007 (corresponding to GR Case No. 1114/2007) under Section 302/34 of the IPC was registered against the accused persons of the case, including the appellant herein.

3. During investigation, the Investigating Officer visited the place of occurrence, drawn its sketch map (Exhibit-6), conducted the inquest on the dead body and prepared the Inquest Report (Exhibit-3), sent the dead body of the deceased for post mortem examination, recorded the statements of the persons who are acquainted with the facts of the case under Section 161 Cr.P.C., obtained the Post Mortem Report of the deceased Bijoy Nayak dated 29.09.2007 (Exhibit-1), arrested the accused persons and on completion of the investigation, finding sufficient incrimination materials and evidence against the appellant/accused persons, filed the Charge Sheet vide No. 60/2007 dated 27.10.2007 (Exhibit-8) against the accused persons, the present appellant Kanai Nayak and two others, namely, Suman Nayak and Sujit Nayak, for the offence under Section 302/34 of

the IPC. On receipt of the aforesaid charge sheet of the case, learned Chief Judicial Magistrate, Tinsukia by his order dated 12.11.2007 committed the said G.R. Case No. 1114/2007 (arising out of Bordubi PS Case No. 97/2007) to the Court of learned Sessions Judge, Tinsukia as Section 302 IPC is exclusively triable by the Court of Sessions.

4. On receipt of the record of the aforesaid G.R. case, the same was registered and numbered as Sessions Case No. 199 (T) of 2002007 in the Court of learned Sessions Judge, Tinsukia and on 10.01.2008, a formal charge under Section 302/34 IPC was framed against the accused persons including the appellant for allegedly murdering Bijoy Nayak, which was read over & explained to them, to which those accused persons pleaded not guilty and claimed to be tried. Accordingly, the trial began.

5. To bring home the charge under Section 302 of the IPC against the accused appellant, the prosecution examined nine prosecution witnesses including the autopsy doctor PW 1, who conducted post-mortem examination of the deceased, the informant PW 2, father the deceased, an alleged eye witness to the incident PW 3 and the Investigating Officer of the case PW 9. All the prosecution witnesses were thoroughly cross examined by the defense and thereafter they were discharged. The defense also examined two witnesses from its side who were cross examined by the prosecution. Further, one Court witness was also examined and the learned Trial Court recorded the statement of the accused under Section 313 Cr.P.C; where he denied of committing the Crime in the case. Learned Session Judge, Tinsukia upon appreciation of the evidence adduced by the prosecution and the defense, recorded the impugned judgment of conviction as aforesaid and hence, the present appeal.

6. We have heard Mr. Bibeka Nanda Gogoi, learned *Amicus Curiae*, for the accused appellant and Mr. Nava Kumar Kalita, learned Additional Public Prosecutor, Assam representing the State.

7. Mr. BN Gogoi, learned *Amicus Curiae* for the appellant stated that as the prosecution failed to prove the guilt of the accused beyond reasonable doubt to

bring home the charge of Section 302 IPC against him, therefore the impugned judgment of conviction and sentence against the accused appellant being bad in law is liable to set aside and quashed.

8. On the other hand Mr. NK Kalita, learned Additional Public Prosecutor supporting the judgment and order of conviction submitted that prosecution has placed sufficient materials to prove guilt of the accused beyond all reasonable doubt.

9. We have considered the submissions advanced by the learned counsels appearing for the parties and also perused the evidence adduced by the parties in said Sessions Case No. 199 (T)/2007, apart from the judgment of conviction recorded by the learned Trial Court.

10. In order to appreciate the arguments, advanced by the learned counsels appearing for both the parties and to examine the correctness of the impugned Judgment and Order of conviction, it will be appropriate to briefly scrutinize the evidence on record.

11 It is to be noted herein that after framing of charge in the Trial Case, accused appellant Kanai Nayak did not appear in the case and after observing all formalities, learned Trial Judge issued the order of Proclamation and Attachment against the accused appellant herein and later vide order dated 25.04.2012 he was declared absconder after going through the report of P & A issued by the Executing Officer. It is only when a separate Misc. proceeding was initiated against the bailor of said accused person Kanai Nayak, he was apprehended by police on 05.12.2013 and was produced before Court. As the evidence of PW 9 was earlier recorded in absence of said accused person Kanai Nayak on 05.01.2013, therefore, said PW 9 was reexamined by the said accused on 20.05.2014. Further, the statement under Section 313 CrPC of said accused was recorded on 03.06.2013 and he refused to give any defense evidence.

12. The prosecution examined **PW 1**, Dr. Dilip Kr. Gogoi, the Autopsy Doctor, who conducted the post-mortem examination of the dead body of the deceased Bijoy Nayak on 29.09.2007 at Tinsukia Hospital and gave the Post Mortem Report

vide Exhibit-1. In his evidence said PW.1 deposed that said deceased was about 25 years old and during his examination of the dead body of said deceased, he found a young adult man with multiple cut injuries all over the body with rigor mortis present all over it with the following wounds:---

- (i) A sharp cut injury of size 5 inch X 3 inch on left elbow with fracture of humerus and head of the radial and ulna.
- (ii) A sharp cut injury of size 4 inch X 2½ inch on left leg over peroneal compartment bone deep.
- (iii) A sharp cut injury on back of size 7 inch X 5 inch with cutting of vertebrae spine extending from C-7 to T-4 level downward.
- (iv) A sharp cut injury of size 3 inch X 1 inch at thoracic 12 level placed horizontally.
- (v) A sharp cut injury on left side of abdomen of size 3 inch X 2 inch horizontal in direction.
- (vi) A sharp cut injury of size 3½ inch X 2 inch on left side of chest placed obliquely with exposure of ribs.
- (vii) A sharp cut injury of size 2 inch X 1 inch on left side at thoracic 10 level.
- (viii) A sharp cut injury of size 1½ inch X 1 inch on left side of chest 2 inch above the injury No. (vii).
- (ix) A sharp cut injury of size 1 inch X ½ inch on xiphisternum obliquely placed.
- (x) A sharp cut injury of size 1 inch X ½ inch on right side of chest vertically placed at thoracic 10 level.
- (xi) A piercing wound on neck above sternum with sharp cut margins piercing the trachea 3 inch X 2 inch in size.
- (xii) A sharp cut injury on sternum of size 1½ inch X 1 inch, 2 inch below the injury No. (xi).
- (xiii) A sharp cut injury on sternum of size 2½ inch X 1 inch on left side of neck, horizontal in direction.
- (xiv) A sharp cut injury on sternum of size 3 inch X 1 inch, 1½ inch below the injury No. (xiii).
- (xv) A sharp cut injury of size 4 inch X 1 inch horizontal in direction below thyroid cartilage on neck.
- (xvi) A sharp cut injury of size 4 inch X 1 inch, on right side of neck obliquely placed 2 inch above injury No. (xv).

- (xvii) A sharp cut injury of size 1 inch X 1½ inch, on right side of chest at thoracic 11 level.
- (xviii) A sharp cut injury on right side of chest of size 1 inch X ½ inch placed vertically at thoracic 12 to No. 1 level.
- (xix) A sharp cut injury of size 4 inch X ½ inch, over pirna of left ear.
- (xx) A sharp cut injury on right hand of size 4 inch X 2 inch on right forearm, 1 inch above wrist joint.
- (xxi) A sharp cut injury of size 3 inch X 2 inch on right forearm, 1 inch above wrist joint.
- (xxii) All digits of right hand were cut at distal phellenx and were attached to hand by tags of skin.

The said Autopsy Doctor, PW 1 opined that the deceased died due to shock hemorrhage following multiple cut injuries and that all injuries were ante-mortem and homicidal in nature. He further opined that the injury No. (xi) noted above is individually sufficient to cause death of a person in the ordinary course of nature and it may be also accumulative effect of multiple injuries. The defense declined to cross examine the said PW 1.

13. It is seen that the prosecution by examining said PW.1, the Autopsy Doctor, could prove the injuries found on the body of the deceased and also the cause of his death. We are, therefore, required to see as to whether the prosecution could bring home the charge under Section 302 of the IPC against the accused appellant.

14. PW 2 Robin Nayak, the informant, father of the deceased stated that after his son, the deceased left for his duty in the morning on the date of incident, one Subhash Mahali (PW 3) came running to him and reported that his son was being assaulted by the accused persons, namely Suman, Raju and Kanai at a cross road near Section 27 and then he along with 10-12 persons went to the place of occurrence where he found his son lying dead by the side of the drain and one dagger, one iron chain, one pair of sandal were found at the place of occurrence. He further deposed that the bicycle of the deceased was found at a short distance from the said place. He also deposed that his said deceased son borne several cut injuries all over his body and police seized those materials.

In his cross examination PW 2 stated that said Subhash Mahali is not his relative but resides in the same line about 50-60 meters away from his house and that said Subhash Mahali did not name any person other than the accused persons that he named. He also stated that there are 2 sections of the gardens in between his house and the place of occurrence. He denied the suggestion of the defense that said Subhash Mahali did not report before him that the accused persons did not assault his son with sword, dao and chain. During his cross examination by the defense, said PW 2 further stated that the accused persons also inflicted dao blow on his other son Debaru Nayak on 12.08.2007 and thereafter, the accused persons left the garden on their own. He also denied the suggestions that the accused persons were evicted from the garden before 3 months of the incident.

15. PW 3, Subhash Mahali who is the eye witness to the incident in his evidence deposed that when he went to answer nature's call around the place of occurrence on the date of the incident, he saw the incident that all the accused persons were inflicting wounds on Bijoy Nayak, the deceased with dao, which they had in their hand. He also stated that seeing the said incident, he informed the father of the deceased and thereafter went back to the place of occurrence with PW 2 and some other persons and found the deceased lying dead near the weighing house on the road and saw several injuries on the dead body.

During his cross examination by the defense PW 3 stated that though he was allotted with a quarter in the garden, but the door of the latrine of his quarter got damaged and he reaffirmed his statement stating that he saw the incident from a distance of about 50 meters and that at the time of occurrence, winter was setting on and it was slightly foggy. He further stated that the informant PW 2, to whom he reported about the incident, is not his relative. He also reiterated that during investigation he stated the same before police that the accused persons inflicted dao blows on the deceased. But he denied the suggestion made by the defense that all the accused persons did not inflict dao blows on the deceased.

16. PW 4, Ganesh Mishra though declared as hostile witness, but he admitted in his evidence before the court that he saw the accused persons armed with dao

and lathi dragged the deceased towards the weighing house. He went on saying that on seeing the said incident he fled away out of fear.

17. PW 5, Sibaram Nayak younger brother of the deceased in his evidence deposed that around 6 am on the date of the incident his elder brother left for his duty by cycle and after a while of his leaving, Ganesh Misra, PW 4 came to their house and reported that all the accused persons killed his brother, the deceased and on hearing it, he along with others went to the place of occurrence and there he found that his brother was lying dead and could find the cycle of his deceased brother about 1 km away from said place.

During his cross examination by defense, PW 5 denied the suggestion of the defense that Ganesh Mishra, PW 4 did not report about the said incident to him and also denied that the accused persons did not murder his brother.

18. PW 6, Hiron Nayak is a hearsay witness of the incident and also a seizure witness, whom the defense did not cross examine.

19. PW 7, Sambhu Nayak who is line Chowkidar of the garden in his evidence deposed that when Santosh Nayak and Kiron Nayak came to his house around 7 in the morning on the date of the incident to take his pushcart so as to carry said Bijoy, who was murdered, to the hospital, he also went to the place of occurrence and found the deceased lying dead and that he saw many cut injuries on his body. He also deposed that prior to the said incident, the accused Suman hacked Deba Nayak, the younger brother of the deceased and caused injuries upon him. He further deposed that he saw iron rod and chain near the dead body that were seized by police and he identified those seized articles in the Court.

In his cross examination by the defense, he stated that he was not informed as to why his signature had been obtained in the seizure list and that though he gave his signature in the seizure list, he was not aware about contents of the same as it was not read over to him and he stated that he does not know English.

20. PW 8, Robi Nayak is also a hearsay witness of the incident. In his evidence he deposed that after hearing the incident he went to the place of occurrence and

found the deceased with many cut injuries on his person. He also deposed that before hacking Bijoy, the accused persons hacked Deba, the younger brother of Bijoy.

During his cross examination by the defense he reaffirmed that Deba, brother of the deceased was hacked about 2 (two) months prior to the said incident and denied the suggestion of the defense that the deceased did not had any quarrel with the accused persons. He also denied the suggestion that the deceased being his nephew, he adduced false evidence favouring the father of the deceased.

21. PW 9, Pradip Kr. Das the Investigating Officer of the case in his evidence deposed that after getting the information he went to the place of occurrence saw the deceased and found blood near the spot where the dead body was lying. He also deposed that he found marks of blood to the South east side of the spot where the dead body was lying and found steel chain and a pointed iron rod lying nearby that were seized by him in presence of witnesses. He also stated that during the inquest of said deceased he found many cut injuries, including deep cut injuries on his person and also large cut injury on the right side of the neck, deep pierced injury from below the trachea to the chest. He also stated that the bicycle of the deceased was found lying beside the road away from the place of occurrence. He further stated that he arrested the accused persons while they were hiding in the house of one Ratan Tanti of Jangali line and seized one dao from them on their arrest. He also deposed that during investigation, while recording statement of Ganesh Mishra (PW 4), he stated that upon tethering cows while he was coming on foot through the garden he saw the accused persons armed with dao and lathi etc. dragging the deceased person towards the weighing house near No. 27 line and found a bicycle on the road and on seeing the incident he got scared and then went to Bijoy's house in a run and later came back to the place of occurrence along with people of the garden and found Bijoy lying dead. The PW 9, Investigating Officer of the case also placed and exhibited (Exhibit 9) the statement of said Ganesh Mishra (PW 4) made before him during investigation of the case.

The PW 9 during his cross examination by defense stated that when the accused persons were arrested from the house of Ratan Tanti, said seizure witness was not present in his house and rather it is his wife, who was the witness to the seizure of the daos from the arrest accused persons. Said PW 9 further stated that when the house of said Ratan Tanti was searched he did not inform any influential person of the locality, since as per the information of their spies, the accused persons, who were in the house of said Ratan Tanti, might run away. The said I.O. in his cross examination by the defense also stated that he did not ask the witness Ganesh Mishra (PW 4) as to from what distance he saw the occurrence and he replied that the said witness Ganesh Mishra did not state before him that the accused persons assaulted Bijoy.

In his cross examination by the defense for the accused person Kanai Nayak, said PW 9 stated that at the time of search of the house of accused persons at night neighbours were not present and he recovered the 3 numbers of dao, one each from the accused persons which they kept in the house of Ratan Tanti. He also stated that the witness Subhash Mahali during investigation of the case stated before him that he saw the incident from a distance of about 200 meters. He also stated that there is no inhabitant near the place of occurrence and denied the suggestion that accused person Kanai Nayak was not involved in the case.

22. CW 1, Smti Mariam Tanti deposed before the Court that when Police arrested the accused persons from her house and took them away, she was not present in her house and it was her little children who were present in it and that police seized the dao in her absence from her said house.

Said CW 1 was not cross examined either by the prosecution or by the defense.

23. The accused appellant in his statement under Section 313 CrPC, recorded by the learned Trial Judge on 03.06.2013, denied his involvement with the alleged crime and also refused to examine any defense witness.

24. From the above it is seen that the post-mortem examination report of the

deceased (Ext. 1) reveals that he sustained 22 nos. of injuries on his person and all of them were ante-mortem and homicidal in nature, which have been proved by the PW 1, the Autopsy Doctor. Entire action of the murderer of the said deceased reflects brutality. In the FIR itself (Ext. 2) the informant PW 2 stated about the previous incident that took place about two months prior to the present incident where the accused persons assaulted his other son Sri Deba Nayak and caused him grievous injury, for which an FIR was already filed. During their evidence, said PW 2, the father of the informant and PWs 7 and 8, two independent prosecution witnesses also stated about causing grievous injury to Deba Nayak, brother of the deceased. This evidence of the prosecution remained un rebutted, which clearly proves about the previous enmity of the accused person and the family of the deceased.

25. PW 2 in his evidence stated that it is PW 3 who saw the incident, informed him about it and then he along with PW 3 and others went to the place of occurrence and found the deceased lying dead with several cut injuries. PW 3 an independent witness in his evidence stated that all the accused persons inflicted wounds on the deceased with dao, which he informed the father of the deceased (PW 2) and thereafter went back to the place of occurrence with PW 2 and other persons and found the deceased lying dead near the weighing house on the road with several injuries. Though the defense during cross examination of said PW 3 could extract that he saw the said incident from a distance of 50 meters and that at the time of occurrence was setting on and it was slightly foggy. But the incident took place in the morning of 29.09.2007 and normally in the end of September there cannot be any dense fog, as winter just sets in. The defense could not thwart the evidence of said PW 3 that he saw the incident that accused persons inflicted dao blows on the deceased, as the defense failed to establish the fact that said PW 3 could not have seen the incident from a little distance.

26. From the above there is clear evidence regarding previous enmity of the accused persons and the family members of the deceased. Multiple sharp cut injuries on the person of the deceased, all together 22 injuries in numbers in various parts of his body, like at hand, leg, vertebrae, spine, abdomen, chest,

thoracic level, neck, ear, piercing wound on neck piercing the trachea etc. reflects the brutality of the accused persons in inflicting injuries on the deceased.

27. Both PWs 3 Subhash Mahali and PW 4 Ganesh Mishra are independent witnesses. The evidence of PW 3 that on the date of incident he saw the incident of assaulting the deceased by all the accused persons inflicting dao blows on him remained intact and unshaken. Similarly, though PW 4 was declared hostile, but his statement prior to the declaration of he being a hostile witness, that on the date of the incident he saw the accused persons armed with dao and lathi dragging the deceased towards the weighing house could not be shattered by the defense. At the same time it is also seen that the PW 9, Investigating Officer of the case by the Exhibit-9 confirmed that part of the statement of PW 4 made by him under Section 161 CrPC. Further the seizure of arms and sharp weapons from the place of occurrence also reflects about the crime.

28. For the reasons aforesaid, we are of the considered opinion that from the evidence adduced by the PWs, the prosecution could lead cogent and reliable evidence to prove that it is the accused appellant Kiran Nayak with other accused persons like Suman Nayak murdered the deceased person Bijoy Nayak, on the fateful morning of the date of the incident beyond all reasonable doubts with regard to their guilt in the case.

29. In view of the aforesaid discussion, we are of the view that the judgment of conviction and sentence dated 26.06.2014 with regard to the present accused appellant Kiran Nayak has rightly been recorded by the learned Sessions Judge, Tinsukia in Sessions Case No. 199 (T) of 2007, arising out of Bordubi PS Case No. 97/2007, which does not require any interference in appeal and accordingly we affirm the conviction and sentence recorded by the learned Trial Court.

30. We hereby appreciate the valuable assistance rendered by both Mr. Bibeka Nanda Gogoi, learned *Amicus Curiae*, for the accused appellant and Mr. Nava Kumar Kalita, learned Additional Public Prosecutor, Assam representing the State. The learned *Amicus Curiae* Mr. Bibeka Nanda Gogoi, is entitled to Rs. 7,000/-

towards his hearing fees to be paid by the State Legal Services Authority, Assam, Guwahati.

31. Accordingly, this appeal stands dismissed.

32. Registry shall send down the records along with copy of the Judgment. A copy of this Judgment shall also be furnished to the accused appellant through the Superintendent, District Jail, Tinsukia.

JUDGE

JUDGE

Rupam