

GAHC010242512017



THE GAUHATI HIGH COURT

(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

Case No: **Crl. A. (J) 103/2017**

Rajesh Racha

..... Appellant

Versus

The State of Assam & Anr.

..... Respondents

: BEFORE ::

HONOURABLE MR. JUSTICE SUMAN SHYAM

HON'BLE MRS. JUSTICE MALASRI NANDI

For the Appellant/Petitioner : Mr. T.R. Sarma, (Amicus Curiae)

For the Respondents : Ms. S. Jahan (Addl. P.P, Assam)

Date of Hearing : **21.04.2022**

Date of delivery of
Judgment and Order : **29.04.2022**

JUDGMENT & ORDER (CAV)

Malasri Nandi, J.

1. Heard Mr. T.R. Sarma, learned Amicus Curiae, appearing for the appellant. We have also heard Ms. S. Jahan, learned Addl. P.P, Assam, appearing for the State.
2. This appeal is directed against the judgment and order of conviction dated 01/09/2017 passed by learned Additional Sessions Judge, Tezpur, Sonitpur, arising out of Sessions Case No 260/2014 u/s 302 IPC. The appellant was sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs. 3000/- in default to suffer simple imprisonment for 3 months.
3. The prosecution case, as unfolded, is that on 11/05/2014 one Makani Lagi Siri, the village head of Bharali Basti village under Chariduar PS of Sonitpur district lodged an Ejahar before the OC Chariduar PS stating inter alia that on 09/05/2014 at about 5:30 PM accused Rajesh Racha assaulted his sister in law Pakju Racha, and dealt a dao blow following a quarrel with her over some domestic issues. Due to the alleged assault Pakju Racha sustained grievous injuries on her person. Immediately she was taken to Mission Hospital, Tejpur but the doctor declared her brought dead.
4. The aforesaid FIR led to the institution of Chariduar PS case no 50/2014 whereupon investigation was taken up. During investigation the investigating officer recorded the statement of the witnesses, prepared the site plan and seized one dao from the place of occurrence vide material exhibit 1. Then the inquest on the dead body of the deceased was conducted and thereafter the dead body was sent for post mortem examination. The accused was arrested accordingly and produced

before the court and he was remanded to judicial custody. After conclusion of investigation, charge sheet was submitted against the accused Rajesh Racha u/s 302 IPC before the court of Additional CJM Tezpur, Sonitpur and the case was committed to the court of Sessions and thereupon the trial commenced.

5. In order to substantiate its case, the prosecution had examined eight witnesses out of whom PW4 was considered to be an eye witness. Learned Trial Court convicted the accused/appellant on the basis of the evidence of PW2, PW4 and PW6. During trial the trial court marked six exhibits and one material object.

6. The defence case as is evident from the mode of cross examination as well as from the statement recorded u/s 313 Cr.P.C is of complete denial as well as pleading innocence. The defence did not choose to adduce any evidence in support of their case.

7. Manifold arguments have been made on behalf of the appellant while assailing the impugned judgment of conviction and sentence. Criticizing the appreciation of evidence and the findings recorded by the learned trial court, learned Amicus Curie Mr. T. Sharma has contended that two crucial witnesses namely Mugdali Munda i.e. the maid servant who had seen the incident and the daughter of the deceased Sunita who was found sitting near the deceased have not been examined and their non-examination creates a grave doubt about the version set forth by the prosecution. His further submission is that though P.W-4 was projected as eye witness of the incident but he did not state before the police that he had seen the incident which was confirmed by the investigating officer while deposing before

the court.

8. The learned amicus curie would also submit that there are other contradictions found in the evidence of other witnesses regarding production of seized dao. According to the witnesses, the maid servant brought the dao before the police but the investigating officer PW8 while deposed before the court stated that the accused showed and handed over one dao to him by which he had killed the deceased. Learned counsel for the appellant also raised another point regarding delay in lodging FIR. It was also pointed out by the learned counsel for the appellant, the explanation in section 162 Cr.P.C wherein it is clearly stated that omission amounts to contradictions. The last plank of argument of Mr. T. Sharma is that the anomalies pointed out by him are sufficient to acquit the accused/appellant on benefit of doubt.

In support of his submissions learned counsel has relied on the following case law –**AIR 1989 SC 1762 (Shivaji Dayanu Patil v. State of Maharashtra)**

9. Per contra, learned Additional PP Ms. S. Jahan controverted the submissions raised on behalf of the appellant and submitted that the death of Pakju Racha is an admitted fact. The medical officer also supported the death of the deceased as homicidal one. Learned Addl. P.P. further contended that the contradictions as pointed out by the learned counsel for the appellant are not material so as to rule out their evidentiary value. The statement of P.W-2 under Section 161 Cr.P.C, his statement before the Court and his cross-examination are consistent throughout that he had seen the accused running away from the house of the deceased.

10. It is also the submission of learned Addl. P.P that although non-examination of the maid servant to some extent is fatal to the prosecution case but P.W-4 and P.W-6 have supported the prosecution case by stating that they had seen the accused/appellant running away from the scene of occurrence with the weapon of offence.

11. She has also argued that it is not the rule that non examination of a particular witness will debilitate the prosecution case, rather, the court has to see if the evidence available on record proves the prosecution version, and if it is found that the charge has been proved, then, in that event, non-examination of other witnesses would not make any dent to rely on the prosecution case.

12. Learned Additional PP would further submit that the evidence of P.W-2, P.W-4 and P.W-6 deserve acceptance as they are found to be reliable and the trial court has correctly appreciated the same and therefore the view expressed by it as regards the conviction cannot be found fault with.

13. Be it noted that there is no dispute over the fact that the deceased sustained several injuries on her person. The post mortem report reveal the following injuries as confirmed by the medical officer P.W-5, who conducted post mortem examination of the deceased.

I – EXTERNAL APPERANCE

1. Condition of subject stout emaciated decomposed etc.

An approximate 45 years old female dead body, fair complexion examined, rigor mortis present, eyes and mouth were closed.

2. Wounds position and character

(A). Clean stitched incised wounds were seen in the following sites –

- i. Left hand approximate 30 cm extending from med side of arm (below axilla) up to lateral side of mid fore arm with drainage in situ.
- ii. Anterior chest wall at the xyphisternum level of approx. 1.5 x 0.5 cm.
- iii. 1.5 x 0.5 cm sized mid line.
- iv. 2 x 4 x 1 cm lateral side of left abdomen (umbilical level).
- v. 4 x 0.5 cm left thigh (lateral side).
- vi. 8 x 0.5 cm lateral side of left chest (Xyphisternum level).

(B) Patechia of approx 10 x 10 cm seen posterior side of left arm.

3. Bruise- position, size and nature – Nil

4. Marks of ligature on neck dissection etc – Nil

II- CRANIUM AND SPINAL CANAL

- | | |
|------------------------------|----------------------|
| 1. Scalp skull, vertebrae :- | No injury mark noted |
| 2. Membrane :- | Healthy |
| 3. Brain and spinal cord :- | Healthy |

III- THORAX

1. Walls ribs and cartilages: - Right sides rib fracture seen (10th & 11th anterior one third).
2. Pleurae :- Right sides pleura was adherent to lung & nail crest wall. Lt sides pleura- normal.
3. Larynx and tracheae :- healthy

Right lung: - Anterior surface of right lung along with its pleura was adherent to crest wall.

Left lung: - Healthy

Pericardium :- Healthy

Heart:- Healthy

Vessels :- Healthy

IV- ABDOMEN

1. Walls – Normal
2. Peritoneum – Haemoperitoneum seen
3. Mouth, pharynx, esophagus – Healthy
4. Stomach and its contents – Healthy
5. Small intestine and its contents and large intestine and its contents – Healthy
6. Liver – Healthy
7. Spleen – a linear tear of approx. 4 x 3 x 2 cm seen along with inferior border of spleen.
8. Kidneys – Healthy
9. Bladder – Healthy and empty
10. Organs of generation, extema and internal – Healthy

V- MUSCLES, BONES, AND JOINTS

1. Injury – NIL
2. Disease or deformity – NIL
3. Fracture – right sides rib fracture seen (10th& 11Th anterior one third)
4. Dislocation – NIL.

The doctor opined that the injuries were anti-mortem in nature. The death was due to shock and hemorrhage as a result of injuries sustained by the deceased. From the medical report, it transpires that the death was homicidal in nature.

14. The question that arises for consideration is whether the prosecution has been able to establish the involvement of the appellant in the crime in question. At this juncture, we have to look into the evidence of the witnesses deposed in this case.

15. P.W-1 is Pango Welley, who deposed in his evidence that the occurrence took place in the month of May 2014. On that day at about 3/4 PM he got information that the accused assaulted his elder brother's wife Pakju Racha with a dao and he was loitering in the vicinity of the house of the deceased by waving the dao in his hand. He also learnt that the accused was caught by the villagers. Then he rushed to the place of occurrence i.e. the house of the deceased. Immediately police also came to the place of occurrence. The injured was taken to the hospital. He reached the place of occurrence and found one girl (maid servant) in the house of the injured (deceased) and on being asked the said girl stated before him and the police that prior to the incident the accused started to assault the said girl (maid servant) and the deceased on hearing hulla came over and asked the accused as to why he assaulted the maid servant. Thereupon the accused who was holding a dao in his hand inflicted blows with the said dao to the deceased Pakju Racha as a result of which she sustained injuries on her person. She was taken to Baptist Christian Hospital, Tezpur but the doctor declared her brought dead.

This witness also stated that the villagers tied up the accused to an electric post from where the police took him to the police station. Then police again came to the place of occurrence and recorded the statement of the witnesses and seized one "mit dao" on being produced by the maid servant vide exhibit 1 seizure list wherein

he had put his signature.

16. In his cross examination PW1 replied that the occurrence took place in the village Duangbari and he was the Gaon bura of the village Labarghari, situated at a distance of one and half km from the village where the incident occurred. When he got the information regarding the incident he informed police over telephone. When he reached the place of occurrence police also came. He did not see the accused tied up to an electric post.

This witness admitted in his cross examination that he did not state before the police that he heard from the maid servant that the accused assaulted her and the deceased asked the accused as to why he assaulted her.

17. P.W-2 is Ram Bahadur Newar. From his deposition it reveals that on the date of occurrence he was at his house. His house is near the house of the deceased. He heard noise from the house of the deceased and went there and found Pakju Racha lying on the floor with cut injuries on her stomach and hand. Blood was oozing out from the wounds. He had seen the accused running away from the house of the deceased. Some villagers chased after the accused. He went forward to the injured. She was taken to the hospital. The villagers caught the accused and handed him over to the police. On the next day the police came to the place of occurrence and seized one dao on being produced by the maid servant.

18. In his cross examination P.W-2 replied that he saw the accused running away at a distance of about 30 meters. On entering the house of the injured he found her lying on the floor of the "chang ghar" and her daughter Sunita was sitting nearby. At

the scene of occurrence i.e. in the chang ghar he also found another girl of the injured and the maid servant.

19. P.W-3 is the informant Makani Lagi Siri. She deposed in her evidence that about one year back on the date of incident at about 5 P.M. a commotion took place in their village as a result of which the accused dealt a dao blow to Pakju Racha causing injury to her abdomen. On receipt of the information she went to the place of occurrence and found that Pakju Racha had already been taken to the hospital. Pakju Racha died in the hospital. As a village head she lodged an Ejahar at Chariduar P.S. vide exhibit 2. On the following day police arrived on the spot and seized one dao from the house of the accused on being produced by the maid servant.

20. In her cross examination P.W-3 replied that she did not see the incident. She came to know that the deceased sustained injuries on her abdomen. She did not see the deceased. She heard that the death was caused by inflicting of dao blow.

21. P.W-4 is Jonai Natung. From his deposition it discloses that the deceased Pakju Racha was his paternal aunt. The accused is the younger brother of the husband of the deceased. Hearing commotion in the evening of 09/05/2014 in the house of his paternal aunt he went there and saw the accused stabbing Pakju Racha in her abdomen with a knife and thereafter fled away from the scene. The incident took place at the courtyard of their house and there was blood all over the courtyard. His paternal aunt and the accused stay together. He brought the injured to Mission Hospital, Tezpur and she died in the hospital. Police came to the hospital and held

inquest on the dead body, prepared inquest report vide exhibit 3 wherein he put his signature.

22. In his cross examination, PW4 replied that he did not state before the police that he had seen the incident of stabbing with knife in the abdomen of the deceased and noticed blood all over the courtyard and after the incident accused ran away from the spot.

23. P.W-6 Bhim Bahadur Newar deposed in his evidence that the occurrence took place on 09/05/2014. At about 4 PM he heard hulla at the house of the accused and he went there and saw Pakju Racha lying on the courtyard of the house of the accused with cut injuries on her arm, leg and stomach. He had seen the accused running away from the place of occurrence with blood stained dao on his hand. Immediately he called 108 ambulance and brought the injured to Mission Hospital, Tezpur but the doctor declared Pakju Racha as brought dead.

24. But this witness subsequently replied in his cross examination that he had not stated before police that he had seen the accused running away with a blood stained dao in his hand. He had not stated about the noticing of cut injuries on arm, leg and stomach of Pakju Racha. This witness admitted in his cross examination that he had made the aforesaid statement in the court for the first time.

25. P.W-7 is the investigating officer Jugal Kalita. He deposed in his evidence that on 10/05/2014 he was posted at Kachari Gaon outpost under Tezpur PS. On that day the incharge Kachari Gaon out post received information from Baptist Christain

hospital that one woman Paju Racha while undergoing treatment due to some injuries had expired in the hospital. The said information was entered in the General Diary of Kachari Gaon outpost vide GDE no 186 dated 10/05/2014. The incharge directed him to visit Mission hospital. Accordingly he visited the hospital and saw the dead body of Paju Racha. After identification of the dead body by the family member of the deceased he conducted inquest over the dead body in presence of the witnesses. He had noticed cut injury on the left hand and left buttock of the deceased. He had also noticed bandage over the lower abdomen of the deceased. Thereafter he sent the dead body of the deceased to Kanklata Civil Hospital, Tezpur for post mortem examination. During investigation he also collected the post mortem report of the deceased and thereafter he submitted the SCD to OC Chariduar PS.

The cross examination of P.W-7 was declined.

26. P.W-8, another investigating officer Prabhat Saikia deposed in his evidence that on 11/05/2014 he was posted as officer in-charge of Chariduar P.S. On that day at about 4:30 PM he received one written FIR from one Makuni Lagi Siri alleging that on 09/05/2014 at about 5:30 PM accused Rakesh Racha had killed his sister in law by means of a dao. He registered the said FIR as Charidaur P.S case No 50/2014 u/s 302 IPC and took up the investigation by himself. He examined the informant at the police station. He visited the place of occurrence i.e. the house of the accused as Duang Bari gaon. He found the accused there and apprehended him. The accused had showed and handed over one dao to him by which he had killed Pakju Racha. He seized the said dao in presence of the witnesses vide exhibit 1 seizure list. As Pakju

Racha died in Mission Hospital under Kachari Gaon outpost and as such they had completed the formalities in respect of preparation of inquest and post mortem examination etc. and subsequently submitted the SCD and other documents to him. He prepared the sketch map of the place of occurrence vide exhibit 5 and also recorded the statement of the witnesses. He arrested the accused and got him medically examined and thereafter forwarded him to court. Thereafter due to his transfer he handed over the case diary to subsequent in charge SI Punaram Saikia. On the basis of his investigation SI Punaram Saikia submitted the charge sheet against the accused Rajesh Racha u/s 302 IPC vide exhibit 6.

27. In his cross examination P.W-8 replied that there was no record and no other person other than the informant had informed telephonically about the incident in their police station prior to the filing of the FIR. He visited the place of occurrence on 11/05/2014.

28. After going through the evidence of the aforesaid witnesses, it reveals that P.W-4 for the first time stated before the court that he had seen the incident of stabbing of the deceased by the accused. PW4 also admitted the fact in his cross examination by stating that he did not state before the investigating officer that he had seen the incident. According to P.W-6 on his arrival on the spot he had seen cut injuries on the person of the deceased and he had also seen the accused running away from the place of occurrence. But this witness also admitted during his cross examination that he did not state before the police that he had seen the accused running away from the spot with blood stained dao in his hand and noticed cut injuries on the person of

the deceased.

29. As is manifest, neither the maid servant nor the daughter of the deceased have been examined. Submission of Mr. T. Sharma is that they are natural witnesses and no explanation has been given for their non- examination and hence adverse inference against the prosecution deserves to be drawn.

30. We have gone through the Judgment of the learned Trial court. It is curious to note that learned Trial court did not utter a single word regarding non examination of the material witness like the maid servant who had seen the incident. It also appears from the record that the statement of the maid servant was recorded by the investigating officer during investigation u/s 161 Cr.P.C. Summons were issued to the maid servant several times to procure her attendance before the Trial Court but prosecution has failed to produce the maid servant during trial without taking such initiative which is expected from the prosecution to reveal the truth.

31. In the case of **Surinder Kumar v. State of Haryana** reported in **(2011) 10 SCC 173**, wherein it has been held, though in a different context, that a failure on the part of the prosecution in non-examining the two children aged about 6 and 4 years respectively, when both of them were present at the site of the crime, amounted to failure on the part of the prosecution. In this context reference to the decision in **State of HP v. Gain Chand** reported in **(2001) 6 SCC 71** would be profitable. The court while dealing with non-examination of material witnesses has expressed that-

“Non examination of a material witness is not a mathematical formula for

discarding the weight of the testimony available on record, howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court leveled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses are available for being examined in the court and were yet withheld by the prosecution". The Three Judge Bench further proceeded to observe that the court is required first to assess the trustworthiness of the evidences available on record and if the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted upon though there may be other witnesses available who could also have been examined but were not examined."

32. In the case of **Takhaji Hiraji v. Thakore Kubersing Chamansing and others**, reported in **(2001) 6 SCC 145**, the court has ruled that it is true that if a material witness who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige a court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced non-examination of such other witnesses may not be material. In such a case the court ought to scrutinize the worth of the evidence adduced. The court should pose the question whether in the facts

and circumstances of the case; it was necessary to examine such other witness and if so whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it uninfluenced by the factum of non-examination of other witnesses.

33. In another case **Dahari v. State of UP** reported in **(2012) 10 SCC 256**, while discussing about the non-examination of the material witness, the court expressed the view that when he was not the only competent witness who would have been fully capable of explaining the factual situations correctly and the prosecution case stood fully corroborated by the medical evidence and the testimony of other reliable witnesses, no adverse inference could be drawn against the prosecution.

34. From the aforesaid authorities, it is quite vivid that non-examination of material witnesses would not always create a dent in the prosecution case. However, as has been held in the case **Gian Chand** (Supra) the charge of withholding a material witness from the court leveled against the prosecution should be examined in the background of facts and circumstances of each case so as to find out whether the witnesses were available for being examined in the court and yet were withheld by the prosecution. That apart the court has first to assess the trustworthiness of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted on though there may be other witness available who could also have been

examined but were not examined. Another aspect which is required to be seen whether such witness or witnesses are the only competent witnesses who could have been fully capable of explaining correctly the factual situations. As we have noticed in the case in hand, the maid servant was the eye witness and the daughter of the deceased who was found in the house of the deceased are the most natural and competent witnesses. They really could have thrown immense light on the factual score but they have not been examined. It is also not the case of the prosecution that the maid servant had not been cited as witness in the charge sheet as her evidence would have been duplication or repetition of evidence or there was an apprehension that she would not have supported the case of the prosecution. In the absence of any explanation whatsoever and also regard being had to the presence of the maid servant and the daughter of the deceased at the place of occurrence we are of the considered opinion that it has affected the case of the prosecution. We are inclined to hold so as we find the prosecution has even otherwise not been able to establish the charge brought against the appellant and therefore, non-examination of the material witnesses cannot be regarded as inconsequential.

35. As we find, the conviction wholly rests on the sole testimony of P.W-4 the projected eye witness. It is well settled in law that the conviction can be based on the testimony of a single witness. It has been held in the case of **Sunil Kumar v. State (Govt of NCT of Delhi)** reported in **(2003) 3 SCC 169** that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of section 134 of the Evidence Act 1872. But if there are doubts about

the testimony, the courts will insist on corroboration. The same principle has been reiterated in the case of **Namdeo v. State of Maharashtra** reported in **(2007) 14 SCC 150** by stating that it is open to a competent court to fully and completely rely on a solitary witness and record conviction, if the quality of the witness makes the testimony acceptable.

36. Reverting back to the present case, the Trial court has placed reliance on the evidence of P.W-4 who had seen the accused stabbing the deceased with a dao on her abdomen while deposing in his examination-in-chief but subsequently he denied the fact during his cross examination. According to P.W-1, the maid servant disclosed that the accused assaulted her and the deceased asked the accused as to why he assaulted the maid servant as a result of which the incident occurred. P.W-1 in his cross examination denied the fact that the maid servant had disclosed before him anything about the incident. Though P.W-6 stated in his evidence that he had seen the accused running away from the place of occurrence with a blood stained dao in his hand but subsequently this witness also denied the fact in his cross examination. This witness specifically stated that he had made the said statement in the court for the first time. There is no explanation on the part of the prosecution as to why P.W-4 did not disclose the fact during investigation before the IO that he had seen the incident. So also in the case of P.W-6 as to why he did not disclose the fact of running away by the accused with a blood stained dao in his hand before the IO during investigation. Under such backdrop, we are of the considered view that the conviction recorded by the learned Trial court on the evidence of P.W-4 and P.W-6 are totally unsustainable.

37. Another glaring inconsistency noticed in the evidence of the witnesses that P.W-1, P.W-2, P.W-3 stated in their evidence that police seized the dao on being produced by the maid servant. But PW8 the investigating officer while deposed before the court specifically stated that he visited the place of occurrence on 11/05/2014 i.e. after two days of the incident. According to him he found the accused there and apprehended him. The accused had showed and handed over one dao to him by which he had killed Pakju Racha and accordingly he seized the said dao. But PW1 stated that on receipt of the information about the incident he went to the house of the deceased and immediately police also came to the place of occurrence. According to P.W-2 on the next day police came to the place of occurrence and seized dao on being produced by the maid servant. The informant i.e. P.W-3 stated that he lodged an FIR on the following day of the incident i.e. on 10/05/2014. But according to P.W-8 he received the written FIR on 11/05/2014. From exhibit 2 FIR it also reveals that the FIR was lodged on 11/05/2014 which was registered on the same day. There was no explanation in the FIR regarding delay of lodging the same in exhibit 2. The witnesses are also silent in respect of failure to lodge the FIR in time which is definitely fatal to the prosecution case.

38. In the result, we allow the appeal and set aside the Judgment of conviction. If the detention of the accused/appellant is not required in connection with any other case, he be set at liberty forthwith.

39. Send down the LCR.

JUDGE

JUDGE

Comparing Assistant