

**IN THE GAUHATI HIGH COURT  
(THE HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA,  
MANIPUR, TRIPURA, MIZORAM AND ARUNACHAL PRADESH)  
ITANAGAR BENCH  
Crl. Ref.(H) 10(AP) 2007**

State of Arunachal Pradesh

Vs.

1. Gopal Murmu
2. Bolai Murmu
3. Narayan Murmu
4. Gulu Murmu.

..... Accused Convicts.

BEFORE  
THE HON'BLE MR. JUSTICE B. K. SHARMA  
THE HON'BLE MR. JUSTICE C R SARMA

For the State of AP : Mr. I Basar, Addl. PP

For the Accused Convicts : K Ete, Amicus Curiae.

Date of hearing & Judgment : 03.05.2010.

**JUDGEMENT AND ORDER (ORAL)**

**B. K. Sharma, J**

This Criminal Reference under Section 30 of the Assam Frontier (Administration of Justice) Regulation, 1945 has arisen out of the judgment of conviction and sentence dated 28.09.2007 by which the accused convicts, namely Bolai Murmu, Gopal Murmu, Narayan Murmu and Gulu Murmu have been convicted under Section 109/112/302/307/201/34 of IPC. Upon such conviction the accused appellant Bolai Murmu convicted under Section 109

accused appellant Bolai Murmu convicted under Section 109 IPC has been sentenced to Rigorous Imprisonment for life with a fine of Rs.1,000/-(One thousand) and other accused convicts have been sentenced to Rigorous Imprisonment for life under Section 302 IPC, 4 years under Section 307 IPC and 3 years under Section 201 IPC with a fine of Rs.1,000/- (Rupees one thousand) each and in default to undergo a further term of one month simple imprisonment. All the sentences are to run concurrently.

**[2]** The prosecution case in brief is that on 02.09.2001 an FIR was lodged by one Sri Mongal Kherna with the Officer-in-Charge, Namsai Police Station to the effect that on the intervening night of 01.09.2001 to 02.09.2001 some unknown persons killed his parents, namely Ram Kherna and Rani Mardi and also attempted to kill his younger brother Sri Sankar Kherna at Nengroo Chariali, Namsai. It was also stated that the dead bodies were lying at the spot and the head of the father of the first informant was missing.

**[3]** The Police on receipt of the said FIR registered Namsai PS Case No.59/2001 U/S 302/210/307/34 IPC and carried out investigation etc. The case chargesheeted under Section 112/302/201/307 IPC being exclusively triable by the Court of Sessions, the Judicial Magistrate, 1<sup>st</sup> Class, Namsai by his order dated 27.07.2002 committed the case to

the Court of Sessions. Charge was framed against the accused convicts by order dated 05.01.2002 and such charge was under Section 302/201/307 IPC in respect of the accused Gulu, Narayan and Gopal. So far as accused Bolai Mormu is concerned, charge was also framed under Section 112 IPC.

[4] During trial, the prosecution examined six witnesses while the defence examined two. The accused convicts also made confessional statements under Section 164 Cr.P.C. and they were also examined under Section 313 Cr.P.C. Based on the evidence of record, the learned trial Court having convicted and sentenced the accused convicts as aforesaid, this reference under Section 30 of Assam Frontier (Administration of Justice) Regulation 1945 has come before us.

[5] We have heard Mr. K Ete, learned appointed Amicus Curiae as well as Mr. I Basar, learned Additional Public Prosecutor, Arunachal Pradesh. While Mr. Ete, learned Amicus Curiae has submitted that on the basis of the evidences on record, the learned trial Court could not have convicted the accused convicts as aforesaid. Mr. Basar, Learned Additional Public Prosecutor, on the other hand submits that the evidences against the accused convicts being overwhelming so as to convict them as has been done

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by the learned trial Court, this Court will be reluctant to interfere with the same.

[6] We have given our anxious considerations to the submissions made by the learned counsel for the parties. We have gone through the entire materials on record and on the basis of the same we record our findings as follows :

[7] There is no eye-witness to the alleged incident. The conviction is on the basis of the circumstantial evidence supported by the confessional statements made by the accused convicts. At this stage, it will be appropriate to refer to the evidence on record so as to appreciate the correctness or otherwise the findings arrived at by the learned trial Court.

[8] The first informant, Sri Mongal Kherna whose parents got killed and brother also got injured in the incident is not a prosecution witness. PW 1 is Sri Sarker Mardi. He in his deposition has stated that the accused convicts are known to him as they are from the same village. While narrating the incident he has stated that the accused convicts had told him that as there was some Black Magic being performed by the deceased, they would kill him. On the date of occurrence the witness was performing some Puja and the proposed killing of the deceased was carried out on that night. According to him, all the accused convicts had killed

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the deceased and injured Sarker Kherna. In Cross-examination he has stated that he was also arrested by Police and that he did not see the incident.

[9] PW 2 and 3 have generally stated about the incident but in their cross-examination they are categorical that they did not see themselves the incident. PW 4 is one Sri D K Das, who allegedly recorded the confessional statement of the accused convicts. He in his deposition admitted that he did not enquire from the accused convicts as to when they were arrested. In cross-examination he has stated that the accused convicts were brought by police for recording confessional statements. He further stated that he did not remember as to after how many days of detention of the accused convicts he had recorded the confessional statements. He has further stated that in the confessional statement he did not mention the time of recording the statement and that he also did not mention the duration of time which was afforded to the accused convicts for reflection. His further statement is that he had not mentioned the specific provision of the statute under which he had recorded the confessional statement.

[10] The above statement of PW4 will have to be considered in reference to the purported confessional statements of the accused convicts which are exhibits P.Ex-2,

P.Ex-3 and P.Ex-2. On a bare perusal of the purported confessional statements what is revealed is that the said statements were recorded by one Sri S. Mining, Judicial Magistrate, 2<sup>nd</sup> Class, Lohit District and not by D K Das (PW-4). Apart from that, the confessional statements were not recorded as per requirements of the provisions of Section 164 Cr.P.C. Although the accused convicts were produced on 26.02.2002 and time was given to them on 27.02.2002, but they were again sent to the Police custody and were brought to the Court next day for the purpose of recording their confessional statements. The accused convicts were all brought in handcuffs.

**[11]** We have gone through the original records and on perusal of the same, the revelation is that although, the thumb impression of the accused convicts under their purported confessional statements were taken but there was no identification of the said thumb impressions identifying them to be that of the appellants. The important columns such as date and time of production etc. were not filled up in the prescribed format.

**[12]** Apart from above, in the purported confessional statement made by Bolai Murmu, he has stated about the commission of the offence by the other three accused persons and the purported reporting of the same to him by them.

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Thus, there is no confessional statement so far as the accused Bolai Murmu is concerned. Be that as it may, what is important to note is that the confessional statements were not recorded following the due procedure as laid down in 164 Cr.P.C.

**[13]** Once the confessional statement is not accepted as valid in law, it will have to be seen as to whether the accused convicts could have been convicted on the basis of the evidences laid down by the prosecution witnesses. We have already noted the depositions made by PW 1 to 4. PW-5 is the Doctor, who carried out the PM examination on the dead bodies. PW-6 is the Police personnel, who had arrested the appellants and carried out the investigation. He in his deposition has stated that the injured son of the deceased could not identify the assailants as it was dark. He in his deposition only stated about the purported confessional statements of the appellants.

**[14]** DW-1 and 2 in their depositions have stated that the accused convicts were all along with them on the night of occurrence and thus, there was no possibility of their committing the offence as alleged by the prosecution. In the cross-examination they could not be dislodged from what they had stated in their examination-in-chief.

[15] It is on the above basis it is to be seen as to whether the accused convicts have committed the offence for which they have been convicted and sentenced as aforesaid. As already observed above, there is no eye-witness to the incident.

[16] Even the first informer and the injured Sri Sarker Kherna have not been examined by the prosecution. As noted above, the I.O(PW-6) in his deposition has stated that the injured could not identify the assailants as it was dark. Thus, if the injured person in the spot could not identify the assailants, it will be too much to convict the accused convicts on the purported circumstantial evidence. PW-1 in his deposition has only stated about intention of the accused convicts to kill the deceased as they believed that they were possessing Black Magic. Even if his statement that the accused convicts had divulged before him about their intention to kill the deceased is accepted coupled with the fact that the deceased were killed on the same very night, that by itself will not be sufficient to hold that it was the accused convicts who had killed the deceased and had also injured their son. This witness did not even remember the date as to when the accused convicts had told him about their intention to kill the deceased. The learned trial Court has heavily relied upon this witness but from what has been discussed above

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we are of the considered opinion that the deposition of the PW-1 is not sufficient to hold the accused appellant guilty of the offence and for that matter to hold it is the accused convicts who has committed the murder of the deceased.

[17] The fatal irregularities in the purported confessional statements have been noted above. While it is the PW-4, namely Sri D K Das, who had deposed that it was he who had recorded the confessional statements, but on perusal of the confessional statements what is revealed is that the said statements were recorded by one Sri S Mining, Judicial Magistrate, 2<sup>nd</sup> Class and not by Sri D K Das. Even if the same is ignored what has been revealed is that the confessional statements were not recorded strictly as per the provisions of Section 164 Cr. P.C. Even the minimum procedure required for recording the confessional statement was not followed. Thus, it will be totally unsafe to hold the accused convicts guilty of the offence based on their purported confessional statements.

[18] At this stage, Mr. Basar, learned Additional Public Prosecutor, Arunachal Pradesh has pointed out that Mr. S Mining, had taken the confessional statement of only Bolai Murmu but so far as the accused convicts, namely Gopal Murmu and Gulu Murmu are concerned, their statements

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were recorded by Sri D K Das, the Judicial Magistrate. Even if the same is correct, in view of the findings arrived at by us regarding the manner and method in which the confessional statements had been recorded, irrespective of the fact as to who was the Judicial Magistrate who recorded the statement of the accused convicts, the said statements cannot go to establish the charges against the accused convicts.

**[19]** Although, the learned trial Court has held the accused convicts guilty of the offence on the basis of purported circumstantial evidence and so also aforesaid confessional statements, but from the evidence on record, which has been discussed above, we do not find any circumstantial evidence not to speak of establishing the chain of events, which can be said to be such piece of evidence so as to conclude that the charges against the accused convicts have been established beyond all recoverable doubt.

**[20]** For all the aforesaid reasons we are of the firm opinion that the impugned judgment of conviction and sentence dated 28.09.2007 is not sustainable in law and the same is interfered with by setting aside and quashing it.

**[21]** The reference is answered in the above manner and in view of the same the accused convicts shall be set at

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liberty forthwith, if not wanted in connection with any other case.

[22] Let the LCR be sent down along with the copy of this judgment and order.

[23] While appreciating the assistance rendered by Mr. K. Ete, learned Amicus Curiae, we hereby order that he will be entitled to two days hearing fee @ Rs.2,500/- (Rupees two thousand five hundred only) per day.



**JUDGE**



**JUDGE**

*Sukhendu*