

**IN THE GAUHATI HIGH COURT  
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM &  
ARUNACHAL PRADESH)  
ITANAGAR BENCH**

**CRIMINAL APPEAL NO.04 (AP) OF 2014**

Shri Bar Tatum .....Accused

Represented by - Smt. Bar Shu,  
Wife of Sri Bar Tatum  
Village Boasimla  
District Lower Subansiri  
Arunachal Pradesh.

.....Appellant

Advocates for the Appellant:  
Mr. Subu Koyang,

**-VERSUS-**

1. The State of Arunachal Pradesh, represented by the Public Prosecutor, Government of Arunachal Pradesh.
2. Smt. Bar Yalla,  
Wife of Late Bar Kakum  
P.O. Boasimla  
District Lower Subansiri  
Arunachal Pradesh.

.....Respondents.

Advocate for the Respondents:  
Mr. Kholie Tado, learned Public Prosecutor for respondent No. 1.

**∴∴BEFORE∴∴  
HON'BLE (MR.) JUSTICE AJIT BORTHAKUR**

Date of hearing : **26-04-2017.**  
Date of Judgment & Order : **01-05-2017.**

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

Heard Mr. S. Koyang, learned counsel appearing for the appellant and Mr. K. Tado, learned Public Prosecutor for the State of Arunachal Pradesh, respondent No.1 herein.

**2.)** This is an appeal under Section 374 read with Section 482 Cr.P.C., preferred against the judgment and order, dated 30.06.2014, passed by the learned Sessions Judge, West Sessions Division, Yupia in Sessions Case No.130(YPA)/2010, whereby the accused appellant has been convicted and sentence to suffer rigorous imprisonment for 05(five) years and to pay fine of `5000/- only in default of payment of fine to undergo further R.I. for 03(three) months, under Section 304 Part-II of the IPC.

**3.)** The prosecution case in brief is that one Smt. Bar Yala, wife of Late Bar Kakum of Boasimla, lodged an FIR, dated 13.10.2009, before the Officer-in-Charge, Ziro Police Station alleging that on that day at around 1 a.m., midnight, the accused appellant, namely, Sri Bar Tatum, stabbed to death her husband near his house at Boasimla. On receipt of the aforesaid FIR, Ziro Police Station Case No.92/2009, under Section 302 IPC was registered and the Officer-In-charge, Inspector Tab Tech, endorsed the case to S.I. Punyo Tatu, to investigate into the case. In the course of investigation, the I.O. Punyo Tatu visited the place of occurrence, drew up the sketch map thereof seized the weapon of offence, viz. one broken arrow, and prepared the inquest report over the dead body of the deceased Bar Kakum. The I.O. further recorded the statement of the witnesses, arrested the accused appellant on his surrender at the Ziro Police Station, sent the accused appellant to the nearby Magistrate to get his confessional statement recorded under Section 164 Cr.P.C. and on completion of the investigation, submitted the Charge-Sheet under Section 302 IPC against the accused appellant.

**4.)** Since the Charge-Sheeted offence under Section 302 IPC is exclusively tryable by the Court of Sessions, the learned Judicial Magistrate, First Class, Ziro, after completion

of necessary formalities under Section 207 Cr.P.C., committed the case, under Section 209 Cr.P.C. to the Court of learned Sessions Judge, Yupia for trial.

**5.)** On hearing the learned counsel of both the sides and on perusal of the documents placed the learned Sessions Judge, Yupia framed charge under Section 302 IPC, vide order, dated 24.05.2011. The charge was read over and explained to the accused appellant to which he pleaded not guilty and claimed to be tried.

**6.)** In order to prove the charge, the prosecution examined as many as 04(four) witnesses, including the I.O., while the defence cross-examined them. On closing the evidence of the prosecution side, the statement of the accused appellant was recorded under Section 313 Cr.P.C., vide order dated 01.06.2012. The accused pleaded not guilty and declined to examine any witness in defence. However, later on, he examined him as D.W.-1. Upon hearing the arguments advanced by the learned counsel for both the sides and on perusal of the evidence on record the learned Sessions Judge, Yupia held the accused appellant guilty under Section 304 Part-II IPC and sentenced him as stated above.

**7.)** Now, let us look at the evidence on record.

The PW-1, Smt. Bar Yala is the informant and wife of the deceased Bar Kakum. Her evidence is that the accused appellant is her neighbour. On 12.10.2009, evening, when her deceased husband was at home, the accused appellant called him from outside. The accused appellant, who was armed with an arrow, knocked at the door and asked her husband to come out of the house to face him. Her husband went out of the house. She followed her husband to stop him. However, she did not find her husband. At about 1200 hrs, midnight, one Smt. Rakhe Yapa (PW-2) informed her that her husband was lying near her house. She went to the spot and found the dead body of her husband lying near the house of said Rakhe Yapa, situated at about 200 metres away from their house. She found the dead body of her husband with bleeding injury. She

along with her relatives took the dead body from the spot and kept at the house of the accused appellant. Thereafter, the dead body was buried in the land of the accused appellant. Before the disposal of the dead body police arrived. She filed the FIR Ext-1. In cross-examination, she *inter alia* stated that she has not seen with her own eyes assaulting her husband. She has no idea in what circumstances her husband died. She does not know, whether she lodged any FIR before the Police. The post mortem examination of the deceased was not done. She does not know if her deceased husband gave a chase to the accused appellant.

PW-2, Smt. Rakhe Yapa is the neighbour of the deceased and PW-1. According to her, in the relevant night, when she went out of her house, she found the dead body of the deceased Bar Kakum lying near their house, she immediately informed the incident to the wife of the deceased (PW-1). The dead body was taken by her relatives to the house of the accused appellant. She has not seen anybody assaulting the deceased. Police did not record her statement.

PW-3, A.S.I. Punyo Tatu is the Investigating Officer. His version is that the accused appellant was produced before the magistrate to get his confessional statement recorded under Section 164 Cr.P.C. The accused appellant confessed his guilt before the magistrate. According to him, it was revealed during investigation that a sum of `11,000/- was received during the election period for disbursement among them. However, as the deceased did not distribute the amount, a quarrel broke out between the accused appellant and the deceased. In the relevant night, the accused appellant went to the house of the deceased and challenged him to come out from his house to fight with him. The deceased came out of his house and thereupon, he shot an arrow at him which penetrated into his chest and died on the spot. He recognised Ext-2, the charge-sheet which he submitted in the case, Ext-3 the inquest report, Ext-4 the seizure list, and Ext-5 the rough sketch map of the place of occurrence. In cross examination, he, *inter alia*, stated that the deceased sustained

injury on the left side of his chest. The said injury was probably caused by either knife or arrow. He did not find any knife or arrow. He seized one arrow with its head torn from the door of the house of the deceased. There was no blood stain on the said seized arrow. According to him, the torn head of the arrow might have penetrated into the chest of the deceased, but the same could not be recovered as the dead body was not sent for post mortem examination. The wife of the deceased was the eye witness to the incident. He could not say whether the accused appellant shot the arrow at the deceased in order to save himself from the deceased, who chased him with a dao.

PW-4, Lod Taker was the Magistrate, who recorded the confessional statement of the accused appellant on 27.11.2009, on the direction of the learned CJM, Ziro. According to him, in the confessional statement, the accused appellant confessed before him that he shot an arrow at the deceased's stomach. He had taken every step before recording the confessional statement of the accused appellant as per the provisions of law, giving clear warning that if he gives his statement then the same shall be used as evidence against him in the case and that the confession was made voluntarily. In cross examination, he has stated that he had given ample time to the accused appellant for reflection and that he cautioned him that he was not bound to give the confessional statement and if he gives the confessional statement it will be used against him. The accused appellant has given his statement voluntarily and accordingly, he has given the certificate in the confessional statement so recorded. He admitted the defence suggestion that the accused appellant stated before him that he shot an arrow at the deceased thinking that the deceased person attempted to cut him with a dao. He further admitted the defence suggestion that the accused appellant's intention was to shoot arrow at the leg of the deceased and not on his stomach.

**8.)** DW-1 Bar Tatum, is the accused appellant. According to him, the deceased Bar Kakum died. He does not know who had killed the deceased Bar Kakum. On hearing that the police was looking out for him, he went to the Police Station, whereupon, he was arrested. He had given his confessional statement before the magistrate. He denied the allegation levelled against him before the magistrate. The confessional statement was not read over to him before his signature was obtained thereon. In cross-examination by the prosecution he denied the charge that he had killed the deceased Bar Kakum. He denied the defence suggestion that he had given confessional statement before the magistrate confessing that he shot at Bar Kakum by an arrow.

**9.)** Now, let us appreciate the above evidence.

Section 304 IPC creates no offence, but provides the punishment for culpable homicide not amounting to murder. If the act of the accused falls within any of the clauses 1, 2, 3 of Section 300 IPC, but is covered by any of the Five Exceptions, it is punishable under part-I, but if the act comes under clause 4 of Section 300 IPC, which is covered by any of the Five Exceptions, it is punishable under part-II. The basic difference between part- I and part II is that Part I applies, when there is intention to cause death or such bodily injury as likely to cause death, whereas part II applies if there is knowledge that the injury is likely to result in death, but there is no intention to cause death. In the instant case, there is no dispute from the defence side that the death of Bar Kakum was 'culpable homicide' defined in Section 299 IPC.

The F.I.R., dated 13.10.2009, vide Ext.P.Ext.1, lodged by the deceased's wife P.W.-1 Smti. Bar Yala, before the officer-In-charge of Ziro P.S. revealed that the accused appellant namely, Bar Tatum, on 13.10.2009 at about 1 a.m., midnight, stabbed to death of her husband namely, Bar Kakum, on the spot. However, her (P.W.-1) evidence shows that the information about the death of her husband was received from her neighbour P.W. 2 Smti Rakhe Yapa at about 12 O'clock, midnight, and that his dead body was lying near her (P.W.-2) house at a distance of about 200 mtrs from her (P.W.-1) house, whereupon she (P.W.-1) rushed to the spot and found the dead body boring bleeding injury just below the chest and further, with the help of her husband's relatives shifted the dead body to the house of the accused appellant. According to P.W.

– 1, the police arrived before the dead body was buried in the land of the accused appellant. P.W. - 2 has corroborated the evidence of P.W.-1 so far giving the information of death of Bar Kakum to P.W.-1. Naturally both the P.WS 1 and 2 stated that they did not witness as to who, in fact, caused death to Bar Kakum. The prosecution has not examined the relatives of the deceased or any villager who might have seen the occurrence, without any explanation. It is also noticed from the evidence of P.W.-1, the informant and wife of the deceased and P.W.-3, S.I. Punyo Tatu, the investigating officer that after preparation of the inquest report vide P.Ext-3 and the sketch map of the places of occurrence vide P.Ext.5, the dead body was not sent for post mortem examination for the purpose of corroboration as to his cause of death, for which the prosecution has also not advanced any satisfactory explanation. The mere statement of the I.O. that due to protest by the villagers to send the dead body for post mortem examination cannot be accepted being the reason is contrary to Law. Therefore, the evidence of P.W.-1, the informant and wife of the deceased in her examination-in-chief that the accused appellant went to their house in the relevant evening, armed with arrow and challenged her husband to come out of house to fight with him and further, in the midnight, that is, in later point of time, the possibility of assault on him by arrow, in the absence of any eye witness account, it is difficult to be accepted on surmise and suspicion. P.W.-3 the investigating officer also cast doubt on the possibility of use of arrow, seized by P.Ext.4, the seizure memo, in causing death to Bar Kakum as he stated in cross-examination, expressing inability to say whether the accused shot arrow in order to save himself from the deceased, who chased him with a dao and on the other hand, he being not an expert, presumed the same on observation of injury as a common man. The prosecution has miserably failed to discharge its burden of proving the charge by way of leading even some convincing and credible circumstantial evidence, in accordance with law, pointing to the guilt of the accused appellant beyond all reasonable doubt, but rested on the inculpatory confessional statement of the accused appellant, which is discussed hereinafter.

**10.)** It is pertinent to mention that it is well settled that the confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3 of the

Evidence Act and therefore, cannot be made the foundation of conviction, but can be used in support of other evidence provided further such confession is perfectly voluntary and true. The evidence of P.W.-4 Lod Takar, the learned Judicial Magistrate, 1<sup>st</sup> Class, Ziro reveals that on 27.11.2009, that is, after more than one and half months from the occurrence that took place on 13.10.2009, he recorded the confessional statement of the accused appellant as per procedure provided in Section 164 Cr.P.C., vide P.Ext.6. A perusal of the said confessional statement vide P.Ext.6, it is seen that the accused appellant was arrested on 15.10.2009 and he was produced before P.W. 4 for recording his confession and he was given time for reflection from 10 a.m. and on the same day, the same was recorded after allegedly cautioning him, about the consequence of making a confessional statement. However, the aforesaid statement does not show recording of the answers given by the accused appellant against each such prescribed questions except a foot certificate certifying satisfaction of voluntariness. On the other hand, D.W. -1, the accused appellant in his evidence denied to have made any confessional statement confessing commission of the crime and stated that his statement was not read over to him, before obtaining his signature thereon. In such a situation, this Court is constrained to hold, in the absence of any credible evidence led by the prosecution in the case, that no reliance can be placed on such confessional statement to warrant conviction of the accused appellant with the alleged offence beyond reasonable doubt.

**11.)** For the above stated reasons, the appeal stands allowed and the impugned judgment and order holding the accused appellant guilty of the offence under Section 304 part-II IPC is set aside and accordingly the accused-appellant viz. Bar Tatum is acquitted of the charge and set at liberty.

**12.)** Send back the LCR along with a copy of this judgment and order.

**13.)** Issue release order forthwith.

**JUDGE**