



THE GAUHATI HIGH COURT
(The High Court of Assam: Nagaland: Mizoram and Arunachal Pradesh)

ITANAGAR PERMANENT BENCH

Crl. Appeal No. 03(AP)/2016

Shri Lukcham LomiAppellant

Vs.

The State of Arunachal Pradesh & Ors. Respondent

BEFORE

HON'BLE MR. JUSTICE SUMAN SHYAM

HON'BLE MR. JUSTICE KALYAN RAI SURANA

For the Appellant : Ms. D. Yoka, Advocate
For the respondent : Ms. M. Tang, Addl. P.P.
Mr. K. Lollen, Advocate
Date of hearing : 17th & 18th May, 2017
Date of Judgment : 18th May, 2017

Judgment and Order (Oral)

(Suman Shyam, J.)

Heard Ms. D. Yoka, learned counsel appearing for the appellant. Also heard Ms. M. Tang learned Addl. P.P., Arunachal Pradesh for the State as well as Mr. K. Lollen, learned counsel representing respondent No. 2.

2. Assailing the judgment and order dated 03-11-2014 passed by the court of Additional District and Sessions Judge, Basar, West Siang district, Arunachal Pradesh convicting the appellant for the murder of Kojir Rumdo and sentencing him to imprisonment for life with a fine of Rs. 2,000/- for the offence committed

under Section 302 of the Indian Penal Code (IPC) with default clause and also to undergo rigorous imprisonment (RI) for 04 years with fine of Rs. 500/- for committing offence under Section 201 IPC, the present appeal has been filed by the sole appellant / co-accused.

3. The prosecution case, in brief, is that on 10-01-2010 an FIR was lodged by Sri Nyajum Rumdo before the Officer-in-Charge, Tirbin Police Station, West Siang district, Arunachal Pradesh informing that his father (paternal uncle) Kojir Rumdo went missing from the village Tedu Doke since 26-12-2009 at about 1300 hrs. and after conducting search in the nearby villages and jungles, he could not be traced out. In the FIR it was also mentioned that after conducting enquiry at the local level, he came to know today, i.e. 19-01-2010 that his father has been murdered by his mother Smti. Tokir Rumdo and Sri Lukcham Lomi of Tedo village on 26-12-2009 and concealed the dead body by burying the same in the jungle.

4. On receipt of the FIR, Tirbin P.S. Case No. 01/2010 was registered under Section 302/201/34 IPC and thereafter, the matter was taken up for investigation. During investigation, both the accused persons, viz. Smti. Tokir Rumdo and Sri Lukcham Lomi, i.e. the appellant, were arrested and the damaged butt and barrel of the gun were seized on being recovered by the police on the disclosure made by the appellant. The dead body was exhumed on 19-01-2010 and postmortem examination was conducted on the dead body. On completion of the investigation, charge-sheet was submitted against the

appellant and the co-accused Smti. Tokir Rumdo under Section 302/201/34 IPC for conspiring and murdering the deceased Kojir Rumdo. In addition to the aforesaid sections of the IPC, the appellant was also charged under Section 25(1B)(A)/27 of the Arms Act.

5. Charges were framed under Section 302/201/34 IPC on 26-09-2011 to which both the accused person pleaded not guilty. Therefore, the accused were made to face trial jointly. On completion of the joint trial, the learned trial court had convicted the appellant under Section 302/201/34 IPC for murdering Kojir Rumdo and also imposed a fine of Rs 2000/-. The appellant was, however, acquitted in respect of the charge framed under Section 25(1B)(A)/27 of the Arms Act. The co-accused Tokir Rumdo, who is the wife of the deceased, was also convicted under Section 201/34 of the IPC and sentenced to rigorous imprisonment for 04 years with a fine of Rs. 500/- with default clause.

6. During trial, the prosecution side had examined as many as 07 witnesses. The defense side did not adduce any evidence.

7. PW-1, Sri Nyajum Rumdo had deposed before the court that the deceased Kojir Rumdo was his paternal uncle. On 01-01-2010, he came to know that his uncle was missing since 26-12-2009 on being informed by the son of the deceased, viz. Jirken and Jirdo. The witness had deposed that he went to the house of the deceased and asked his wife, i.e. Smti. Tokir Rumdo about her husband and she replied that her husband Kojir Rumdo had left the house with his cloths and other belongings. The PW-1 Nyajuñ Rumdo had further deposed

that when he made enquiries about the whereabouts of Kojir Rumdo he was told by Kipi Gadi and Linto Doke that Ms. Bane Doke had seen the deceased quarrelling with the accused Lukcham Lomi on 26-12-2009. The PW-1 had also deposed that he went straight to Bane Doke to enquire about the matter and she told him that while she was coming from her village Ragi to Chodow to meet Kipi Gadi, on the way at Tedu, she had seen the accused Lukcham Lomi quarrel with Kojir Rumdo and that Lukcham Lomi was holding a stick in his hand and was beating Kojir Rumdo. The witness had further stated that Bane Doke had told him that after reaching Chodow she narrated the incident to Kipi Gadi and Linto Doke. Then he went to the house of the deceased and asked his wife whether she along with the accused Lukcham Lomi had killed his uncle (deceased). Then she replied that on that day, she was the one who had quarreled with her husband and not with Lukcham Lomi. PW-1 had further stated that dead body was found on 19-01-2010 while it was in the process of decomposition and there were injury marks, one in the head and another in the left chest, which was bullet injury mark.

8. PW-1 had further stated that his deceased uncle had earlier lodged two complaints against the accused Lukcham Lomi before the local Keba (Kebang) alleging that Lukcham Lomi was having illicit relationship with his wife. But on 03-11-2009, the Keba imposed a fine of Rs. 10,000/- on his uncle for going to the house of the accused Lukcham Lomi and quarreling with him and his family members. On 19-11-2009, the adultery case was also decided by the Keba in

favour of the accused on the ground that there was no eye witness to establish the illicit relationship between the accused and the wife of the deceased. During the cross-examination the witness had stated that the accused Lukcham Lomi was his maternal uncle.

9. PW-2, Banu Doke had deposed that on 26-12-2009, at about 12 or 1 p.m., she saw Kojir Rumdo and Lukcham Lomi quarrelling on the road near Tedu village. The witness had stated that she saw one 'dao' in the hand of Kojir Rumdo and one stick in the hand of Lukcham Lomi. After seeing the quarrel she had left the place and narrated the incident to her paternal aunt, i.e. Kipi Gadi of Sodo Doke village . During cross-examination, the witness had stated that the accused Lukcham Lomi is her cousin and that both Kojir Rumdo and Lukcham Lomi were her relatives. The witness had, however, clarified that she did not see Lukcham Lomi committing murder of Kojir Rumdo.

10. PW-3, Sri Jirge Rumdo is the son of the deceased. He had deposed that Lukcham Lomi was his cousin. The witness Jirge Rumdo had also confirmed that suspecting illicit relationship between his mother and the accused Lukcham Lomi, his father had earlier lodged a compliant before the village authority, which had ended in the fine being imposed upon his deceased father for lodging false complaint. PW-3 had further stated that after the verdict of the Keba, the two accused persons acted in connivance to kill his father. The witness (PW-3) had also stated that on 26-12-2009, he had left for picnic in the morning but when he did not find his father in the evening, he had enquired with his mother

and then she replied that after quarrelling with her, Kojir Rumdo had gone somewhere. On being satisfied with the reply given by his mother, he had left for his place of study. But when his father could not be traced out even after 2/3 days, he returned back to his village and started enquiring about the whereabouts of his father. He had stated that after about 17/ 18 days the dead body of his father was recovered from the jungle. During cross-examination, the witness had deposed that his parents used to have frequent quarrel amongst themselves on the issue of illicit relationship with the accused Lukcham Lomi.

11. PW-4 Smti. Kipi Gade had confirmed that the version given by Ms. Bane Doke (PW-2) by stating that Bane Doke had come to her residence on 26-12-2009 at about 01:30 p.m. in a frighten state and told her that Kojir Rumdo was holding a 'dao' and was fighting with one man who was wearing a long pant and holding one wooden stick like weapon in his hand near Tedu Stream.

12. PW-5 Sri Kolo Rumdo, who is also related to both the accused, has deposed in his evidence that Smti. Tokir Rumdo is his sister-in-law. When Kojir Rumdo could not be traced out for many days, the local village boys were engaged for searching him and even local puja was performed so as to ascertain the location of Kojir Rumdo. On being guided by a local priest, he, along with other village persons, went searching for Kojir Rumdo in the jungle. When he noticed some fresh soil and stones, he suspected that the dead body could be found buried underneath and accordingly, informed the villagers. Later on, the police arrived at the place of burial and in presence of the doctor, the

body was exhumed. The witness further deposed that he saw gunshot injury in the dead body in the chest area and the head was flat with injuries. According to the witness, post mortem was conducted on the body and after that it was buried once again.

13. PW-5 had further deposed that he was aware about the fact that both the accused persons were having illicit relationship as a result of which, Keba had to be held twice. The witness had also stated that during the time when Kojir Rumdo was being searched, on being asked by the children about the whereabouts of their father, accused Smti. Tokir Rumdo had informed that he had gone to Liromoba looking for some work and in the meantime, the Tokir Rumdo had stealthily burnt the cloths of Kojir Rumdo which was witnessed by one of the children, viz. Master Jirken Rumdo.

14. Dr. G. Riba (PW-6) is the doctor in whose presence the dead body was exhumed. PW-6 had deposed that the body was identified by R. Dirchi, Constable; Y. Riba, CT; T. Yangi, S.I. and Ms. Jarter Rumdo (daughter of the deceased), Master Jirge Rumdo (son of the deceased) and Sri Otem Jamoh, CO, Tirbin. PW-6 had also deposed that on examination of the body it was found to be decomposed. According to the witness (PW-6) there was laceration on the scalp, injury marks were seen on the chest and upper right quadrant of the abdomen. There were fractures on the scalp, the occipital bone, right temporal bone as well as right maxilla bone. Membranes were ruptured, brain was lacerated. The witness had further deposed that on examination of the chest,

bullet injury mark was found on the chest wall, opening at left third intercostals space and at fifth right intercostals space, pleurae was damaged bilaterally. On the right lung, there was open injury on lower lobe, on left lung open injury on upper lobe was seen. On examination of the abdomen, the doctor (PW-6) had stated that two-three small abrasion marks on right upper quadrant of abdomen measuring .5x1 c.m. was found. According to the witness (PW-6) the death was caused due to brain injury as a result of head injuries and extensive hemorrhage due to injury to both the lungs and the probable time since death was approximately one month. The witness had also confirmed that he had conducted the post mortem on the body of the deceased, and that P.Ext.-2 is the post mortem report bearing his signature.

15. PW-7 Shri Tashi Yangi is the Investigating Officer in this case who had deposed that the preliminary investigation in the case was done by one Sri T.K. Saikia, Circle Inspector, Basar who had arrested both the accused persons. PW-7 had deposed that the dead body was exhumed in the presence of the Executive Magistrate of Tirbin and Board of Doctors from CHC, Basar who had conducted the post mortem at the place of occurrence itself. The Investigating Officer had also deposed that he had seized the weapon of offence in two parts. The bent barrel was seized from the ceiling roof of the house of the accused Lukcham Lomi on being disclosed by the accused himself. The butt of the gun was seized from the Church, Sodo-Doke where the accused's family had shifted after their house was destroyed by the villagers at Tedu-Doke. Sri Tashi Yangi

(PW-7) had also deposed that since the dead body was exhumed after about 24 days, the doctors could not recover the bullet pellet from the body of the deceased and hence, the seized weapon was not sent for FSL examination. During the cross-examination the witness had mentioned that the incident had occurred on 26-12-2009 and the complaint was lodged on 19-01-2010.

16. The witness PW-7 had further deposed that as per the information gathered by him, the original fight between the accused Lukcham Lomi and the deceased Kojir Rumdo had taken place in the jungle and later the deceased while running towards the road got severe injury which was seen by the witness Banu Doke. In his cross-examination, the PW-7 had stated that during the enquiry it was further revealed that the accused Lukcham Lomi had sprayed phenol near the place of occurrence on the road side so as to disperse the smell of the corpse. The complaint was not lodged immediately because the wife of the deceased Smti. Tokir Rumdo had said that the deceased had gone to Liromoba village.

17. As has been mentioned above, the defense side did not adduce any evidence. In the statement of the accused recorded under Section 313 Cr.P.C. the appellant had admitted that there was a quarrel between him and the deceased Kojir Rumdo who wanted to assault him with a 'dao' and that he was defending himself with a stick. The appellant had also stated that after the fight, both of them went towards different directions. The accused had, however, admitted that the quarrel took place on the road near Tedu village and that on

the date of occurrence, he had come out of Tedu Jungle, when the deceased had assaulted him with his 'dao' alleging that he was having illicit relationship with the wife of the deceased.

18. As has been noted above, there is not eye witness to the incident and the prosecution case is based on circumstantial evidence. The conviction of the appellant is primarily based on the "last seen together" theory.

19. The testimony of the PW-2 clearly goes to show that the deceased was last seen alive when he was quarrelling with the appellant in the afternoon of 26-12-2009 and the aforesaid fact has also been admitted by the appellant in his 313 Cr.P.C. statement. The PW-4 Kipi Gadi had confirmed that Ms Bano Doke i.e. the PW-2 has narrated the incident to her on 26-12-2009 stating that she had seen the deceased Kojir Rumdo having a quarrel with the appellant at Ted Village in the afternoon of 26-12-2009. The version of the PW-2 is also corroborated from the testimony of PW-1. During cross examination, the testimony of the said witnesses could not be shaken. After 26-12-2009 nobody had seen Kojir Rumdo alive nor is there any plausible information about his whereabouts. Therefore, it is evident that the prosecution side has been able to prove that the appellant and the deceased were last seen together on 26-12-2009 at about 01:00 p.m. while they were engaged in a fierce fight with each other.

20. From the evidence of the PWs 6 and 7 we find that the autopsy was conducted on the dead body by a team of doctors from CHC immediately after the body was exhumed on 19-01-2010. From the post mortem report P.Ext-2 as well as the testimony of PW-6 it is established beyond doubt that the deceased had suffered a homicidal death.

21. From the testimony of PW-1 Sri Nyajum Rumdo and PW-5 Kolo Rumdo, both of whom are related to both the appellant and the deceased, it is established that there was a long standing quarrel between the deceased and the appellant on the ground that the appellant was having illicit relationship with the wife of the deceased. The aforesaid dispute was also taken to the village level adjudicating authority (Keba) wherein the complaint of the deceased was apparently turned down and a fine was imposed upon the deceased for making false complaint. From the testimony of the prosecution witnesses it has also come on record that the deceased Kojir Rumdo had a quarrel with his wife Smti. Tokir Rumdo on the issue of illicit relationship even on 26-12-2009, i.e. the day on which the incident allegedly took place. Therefore, it is evident that there is a history of animosity between the deceased and appellant which could furnish the motive for committing the crime of this nature.

22. What would be further significant to note herein is that the appellant, though admitted that he was having a quarrel with the deceased on 26-12-2009, has not come up with a clear version as to what had actually happened to the deceased after the quarrel took place at Tedu village in the afternoon of 26-

12-2009. Save and except stating that after the quarrel he had left for his house and the deceased went on his own, the appellant had failed to furnish any satisfactory explanation of the entire incident. The appellant had even turn down the offer to produce any witness so as to establish his innocence. There is also no explanation furnished by the appellant as to the nature of injury suffered by the deceased due to the quarrel. In his statement recorded under Section 313 Cr.P.C. although the appellant had stated that he suffered injury due to assault made by the deceased by his 'dao', yet there is neither any description of such injury nor any medical record to support such a claim.

23. In the case of ***Rohtash Kumar Vs. State of Haryana***, reported in ***(2013) 14 SCC 434***, the Hon'ble Supreme Court has observed that the doctrine of last seen together shifts the burden of proof to accused requiring him to explain as to how the incident had occurred and failure on the part of the accused to furnish any explanation in this regard would give rise to strong presumption against him. In the case in hand the appellant has not been able to explain as to how the incident had occurred and in what manner both of them had parted after having engaged in such a fierce fighting that had admittedly taken place on 26-12-2009. The appellant has also failed to give any explanation as to how the barrel of the gun got bent.

24. In the case of ***Ashok Vs. State of Maharashtra***, reported in ***(2015) 4 SCC 393***, the Hon'ble Supreme Court, while elucidating the theory of "last seen together", had made the following observation:-

"12. From the study of abovestated judgments and many others delivered by this Court over a period of years, the rule can be summarized as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of Indian Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused etc., non-explanation of death of the deceased, may lead to a presumption of guilt."

25. Again in the case of **Ravirala Laxmaiah vs State of Andhra Pradesh** reported in **(2013) 9 SCC 283**, the Supreme Court had held that in a case based on circumstantial evidence, where no eye witness account is available, when an incriminating circumstance is put to the accused and the accused either offers no explanation for the same or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete.

26. Another important point that deserves to be mentioned herein is that in the case in hand, the approximate time of death, as opined by the medical expert, is about a month from the date on which the dead body was exhumed. The evidence on record establishes that the dead body was exhumed on 19-01-2010 and the post mortem examination was conducted on the same day. Calculated from the date of quarrel between the appellant and the deceased i.e. 26-12-2009, the postmortem was conducted about 25 days from the date of death. Therefore, the opinion of the medical expert, in our view, lends further

credence to the prosecution story that the deceased was murdered on 26-12-2009, i.e. the date of the quarrel, which was also the last time the deceased was seen alive.

27. In the case of ***Mahavir Singh Vs. State of Haryana***, reported in ***(2014) 6 SCC 716***, the Supreme Court has observed that the last seen together theory comes into play only in a case where the time-gap between the point of time when the accused and the deceased were seen alive and when the deceased was found dead is very small. The observation made in paragraph 12 of the said decision is quoted herein below for ready reference:-

"12. Undoubtedly, it is a settled legal proposition that last seen theory comes into play only in a case where the time gap between the point of time when the accused and the deceased were seen alive and when the deceased was found dead (sic is small). Since the gap is very small there may not be any possibility that any person other than the accused may be the author of the crime. In the instant case, if we examine the medical report minutely, it becomes evident that the deceased Suraj Mal had been murdered one week prior to the post mortem. Thus, it becomes evident that he had been killed in a very proximity of time when the deceased was seen alive with the appellants and Jagbir Singh, co-accused."

28. From a careful analysis of the evidence on record we find that the prosecution side has been able to prove the motive behind the crime. The last seen together theory has also been firmly established by leading cogent evidence on record but the appellant has not been able to explain the incriminating circumstances put to him. The weapon used in the murder had also been seized by the Police on the basis of disclosure made by the appellant. Although the learned counsel for the appellant has made an attempt dig a hole

in the prosecution case by pointing out at the fact that the seized gun was not sent to the FSL laboratory, we are not inclined to accept the said argument on account of the fact that there is evidence on record to show that no bullet could be recovered from the dead body and therefore, sending the gun to FSL lab would serve no practical purpose in this case. In the present case, we find that the circumstances established by the prosecution side are consistent only with the hypothesis of guilt on the part of the appellant and the possibility of any person other the appellant committing the murder of the deceased, in the facts and circumstances of the case, is completely non-existent.

29. Learned counsel for the parties have informed us that the co-accused Smti. Tokir Rumdo has not preferred any appeal against the impugned judgment and order dated 03-11-2014 passed by the trial court whereby the sentence of 04 years rigorous imprisonment had been imposed upon her under Section 201 IPC.

30. Having held as above, we must also note here-in that our attention had been invited by the learned counsel for the appellant to the fact that even if the prosecution story is to be believed, it is established that the deceased was carrying a 'dao' (sharp weapon) when the quarrel took place on 26-12-2009 and therefore, the plea of the appellant that he had acted in self defense deserves due and proper consideration by this Court.

31. In the present case, the materials on record clearly points towards the fact that a quarrel took place between the deceased and the appellant on 26-

12-2009 and the deceased was armed with a 'dao'. As such it is apparent that the appellant was exposed to serious risk of suffering grievous bodily injury in the combat. Under provocation from the deceased, the possibility of the appellant acting in excess of the right of private defense cannot, therefore, be ruled out. Having regard to the facts and circumstances of the case, we are of the opinion that the appellant would be entitled to the benefit of Exception 4 of Section 300 IPC.

32. We, accordingly, set aside the conviction of the appellant under Section 302 of the IPC as well as the sentence of life imprisonment imposed upon him by the trial court and instead, convict the appellant under Section 304 Part-II of the IPC and sentence him to undergo Rigorous Imprisonment (RI) for 10 years, which period, however, shall stand reduced by the period of jail sentence already undergone.

The appeal is partly allowed.

JUDGE

JUDGE

GS