

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

Crl. A. No. 01 (AP)/ 2015

Ha Tadok

**S/o Late Ha Tassa, Village-Tamin-III,
PO & PS-Ziro, Dist-Lower Subansiri,
Arunachal Pradesh.**

....Appellant

-Versus-

**The State of Arunachal Pradesh through its
Public Prosecutor.**

....Respondent

- B E F O R E -
HON'BLE DR. (MRS.) JUSTICE INDIRA SHAH

For the Appellant : Mr. Tony Pertin, Advocate.

For the respondent/State : Mr. K. Tado, Public Prosecutor

Date of hearing : 02-04-2015

Date of judgment : 24-04-2015

JUDGMENT & ORDER (CAV)

This is an appeal against the judgment and order dated 03-11-2014 passed by the learned Sessions Judge, West Sessions Division, Yupia, in Session Case No. 106/2010 whereby the appellant has been convicted under Section 304 Part-I IPC and sentenced to undergo rigorous imprisonment for 7(seven) years with fine of Rs.5,000/-, in default, further rigorous imprisonment for 5 (five) months..

2]. I have heard Mr. Tony Pertin, learned counsel appearing for the appellant and Mr. K. Tado, learned P.P., appearing on behalf of the State of Arunachal Pradesh.

3]. The prosecution case, in brief, is that on 13-06-2007, the accused appellant Ha Tadok assaulted the deceased Jogesh Dolley inflicting knife blows causing severe injuries in his stomach. An FIR being lodged by the victim himself, the Officer-in-Charge of the Ziro Police Station, registered a case under Section 326 IPC. Immediately police rushed to the district hospital at Ziro where the victim was admitted for treatment. The statement of the victim and other witnesses available there were recorded. On the basis of the FIR as well as the statement of the witnesses including the victim, the accused appellant was arrested. The victim was referred to the Naharlagun General Hospital but on his way to Naharlagun General Hospital, he succumbed to his injuries.

4]. An inquest on the dead body of the deceased was conducted but it was not subjected to post-mortem examination. On completion of the investigation, charge sheet under Sections 326/304 IPC was laid against the accused appellant.

5]. During the trial, the accused pleaded not guilty to the charge framed against him under Section 304 IPC and claimed to be tried.

6]. Altogether 13 witnesses were examined by the prosecution. The accused in his statement recorded under Section 313 Cr.P.C. denied all allegations leveled against him and pleaded that he is innocent. He took the plea of alibi, however, did not adduce any defence evidence.

7]. On completion of trial, the learned trial Court held the accused guilty under Section 304 IPC and passed the impugned judgment of conviction and sentence as stated earlier.

8]. It is submitted by Mr. Pertin, the learned counsel for the accused appellant that the prosecution miserably failed to prove the FIR itself. Moreover, the conviction has been awarded on the basis of only the FIR and dying declaration made by the deceased. There was no eyewitness to the occurrence. The prosecution also failed to establish the motive of the crime.

9]. Per contra, learned Public Prosecutor, Mr. K. Tado, has submitted that conviction can be maintained on the basis of dying declaration alone. In this case, the conviction of the accused appellant is on the basis of dying declaration and circumstantial evidence.

To appreciate the rival submissions, let me discuss the evidence on record.

10]. P.W.1, Smti Haa Yapi, deposed that in the evening of 12-06-2007, the victim Jogesh Doley came to her house in seriously injured condition. He fell down and her husband removed him to the hospital. In cross-examination, she stated that she cannot say who assaulted the victim.

11]. P.W.2, Shri Haa Tanak, turned hostile to the prosecution. He stated in his examination-in-chief that he removed the victim to the hospital and the

victim was bleeding from stomach but he denied that the victim told him that he was stabbed by the accused. P.W.3, Smti Haa Yali, wife of the accused also turned hostile to the prosecution.

12]. P.W.4, Shri Taba Tasar, stated that he shifted the injured person to the hospital at Hapoli. He had noticed the injuries in the stomach of the deceased. One, Manila (P.W.11), who was an electrician, also accompanied him to the hospital at Hapoli. In cross-examination, he stated that the victim was unconscious and was not able to speak properly.

13]. P.W. 5, Dr. (Mrs.) Radhe Angku, who was posted at District Hospital at Ziro attended the victim. She deposed that the victim was brought in the hospital with grievous stabbed injuries and he was referred to Itanagar hospital for further treatment. She exhibited the injury report. In the injury report, she has mentioned that on queries, the victim revealed that some one has stabbed him by a knife. In cross-examination, she stated that although the victim was serious but able to answer the queries made by the doctor. However, she did not ask the victim as to who stabbed him.

14]. One Dr. S. Kakoty (P.W.6) was also present at the relevant time. P.W.6 Dr. S. Kakoty also stated that the patient told them (doctors) that he was stabbed by his friend. The name of the assailant was not disclosed by the victim to the doctors.

15]. P.W.7, L/S.I. C.T. Lombi held inquest on the dead body of the deceased in presence of witnesses. P.W.8, S.I. Michi Tade was posted at Ziro Police Station and on 12-06-2007, he was at Ziro Police Station as emergency night duty officer. He received telephonic information from the district hospital, Ziro that a patient has come to the hospital with a wound in his body. On receipt of the information he went to the hospital and found the victim in the causality room of the hospital. He also found Haa Tani and Taba Tassar at the hospital.

According to P.W.8, the victim told him that Shri Haa Tadok (accused) had stabbed him in his stomach by means of a knife. He also told him that in the evening after watching TV in the house of Haa Tani, when he was returning home, suddenly Haa Tadok appeared before him and assaulted him. Haa Tani also stated that the victim told him that he was attacked by Haa Tadok (accused). Taba Tassar stated that as per request of Haa Tani, he accompanied the victim and Haa Tani to the hospital.

16]. When P.W.8 visited the hospital the victim was still alive and was able to talk. In cross-examination, P.W.8 stated that he cannot say who lodged the FIR in the case. He only went to the hospital and had a talk with the victim and the persons accompanied him.

17]. P.W.9, S.I. S. Singh investigated the case. He deposed that the FIR was received at the Police Station on 13-06-2007 from Jogesh Doley (Deceased). On receipt of the FIR, initially the case under Section 326 IPC was registered and P.W.9 was endorsed to investigate the case. P.W.9 visited the place of occurrence, recorded the statement of witnesses and he collected the injury report from the hospital. He also seized the cover of weapon of the offence but the weapon of offence i.e. knife could not be seized. Inquest on the dead body was held by another S.I. C.T. Lombi. P.W.9 could not meet the deceased. However, he exhibited the photographs of the dead body of the deceased. On completion of investigation, he filed the charge sheet against the accused appellant under Sections 326 and 304 IPC.

18]. In cross-examination, he stated that A.S.I. Michi Tade (P.W.8) recorded the statement of the deceased in the hospital at Ziro. However, he could not say whether the statement of the deceased was recorded prior to lodging of the FIR. According to him, FIR was brought by A.S.I. Michi Tade himself and it was received on 13-06-2007 at 12.30 P.M. On receipt of information with regard to the death of the deceased, inquest on the dead body was held.

However, no post-mortem was conducted as the relatives of the deceased requested the magistrate not to conduct postmortem over the dead body of the deceased.

19]. P.W.10, Shri T. Murtem, Judicial Magistrate, First Class, Ziro recorded the statement of one of the witnesses namely, Ha Tanak under Section 164 Cr.P.C. He exhibited the statement.

20]. P.W.11, Shri Moni Laa was co-worker along with the deceased. He deposed that at 9.00 P.M. one boy informed him that there was an incident with Jogesh Doley (deceased). When he rushed to the place of occurrence, he found Jogesh Doley had already boarded a TATA Mobile. P.W.2 requested him to accompany to the hospital. He noticed injuries in the stomach of the victim. According to him, the victim Jogesh Doley was conscious and was able to speak. The victim Jogesh Doley was carried to hospital at mid-night and then police was called at 4.00 A.M. Doctor told them that injured person should be taken to Itanagar. He (P.W.11) stated about the oral dying declaration of the deceased stating that injured Doley told him that accused Haa Tadok caused injury to him. In cross-examination, he affirmed that Jogesh Doley(deceased) told them that he was injured by Haa Tadok. Therefore, the dying declaration was made while the victim Jogesh Doley was on his way to Ziro hospital.

21]. P.W.12, Shri Tap Tago is a seizure witness. A cover of weapon of assault made by bamboo was seized in his presence by the Investigating Officer. P. W.13, Smt. Haa Yage is also a seizure witnesses but she could not identify the seized article shown to her in the court. She stated that the seized article was not shown to her by the Investigating Officer at the time of seizure.

22]. The case of the prosecution is based on the circumstantial evidence and dying declaration of the deceased. The evidentiary value of the dying

declaration has been dealt with in the case of **Kushal Rao Vs. The State of Bombay**, reported in **1958 AIR 22**, wherein, it is held as under:-

“Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case.”

23]. Herein in this case P.W.8, A.S.I. Michi Tade rushed to the hospital on being informed by the hospital authority that a patient has been admitted with wound in his body. According to him, the victim made a dying declaration that the accused had stabbed him in his stomach by means of a knife. However, he did not state that he recorded the statement of the victim under Section 161

Cr.P.C. or the dying declaration was reduced to writing by him. In the case diary, the statement of the victim under Section 161 Cr.P.C. is available. The dying declaration, recorded by P.W.8 is also available but it was never exhibited during the trial either by P.W.8 or by the Investigating Officer (P.W.9).

24]. P.W.9 stated that the statement of the victim was recorded by A.S.I. Michi Tade (P.W.8). P.W.11 Moni Laa, stated about the oral dying declaration of the deceased while the deceased prior to his death was carried in a vehicle to the hospital.

25]. The FIR, as per P.W.9, was brought by A.S.I Michi Tade himself to the police station. But it was not exhibited by A.S.I. Michi Tade to prove the contents of the FIR as well as the thumb impression of the informant. Who is scribe of the FIR was not disclosed by P.W.8. When there was a dying declaration reduced into writing, it was the incumbent upon the prosecution to exhibit the document as because the prosecution case hinges upon the dying declaration as well as the FIR lodged by the deceased himself.

26]. Thus, it appears from the aforesaid discussions that it is a fit case of remission. Learned counsel for the appellant relying on the case of Chandigarh **Administration and Another Vs. Jasmine Kaur and Others**, reported in **(2014) 10 SCC 521** has submitted that a *de novo* trial should be last resort and that too only when such a course becomes so desperately indispensable. It should be limited to the extreme exigency to avert "a failure of justice". It was held in para 58, in the cited case, as under:-

"58. Thus, in summation, we are of the considered opinion that the exercise of remitting the matter to the trial court for de novo trial should be done only when the appellate court is satisfied after thorough scrutiny

of records and then recording reason for the same that the trial is not summons trial but summary trial. The non-exhaustive list which may indicate the difference between both modes of trial is framing of charges, recording of statement under Section 313 of the Code, whether trial has been done in the manner prescribed under Sections 262-265 Cr.P.C., how elaborately evidence has been adduced and taken on record, the length of trial, etc. In summary trial, the accused is summoned, his plea is recorded under Section 263(g) Cr.P.C. and finding thereof is given by the Magistrate under Section 263(h) Cr.P.C. of his examination.”

27]. The case in hand is neither summons case, nor summarily triable, it is sessions triable case. In this case, the FIR as well as the dying declaration of the deceased was annexed along with the charge sheet. The statement of the victim was available in the case diary and neither the FIR was properly proved nor the dying declaration or statement of the deceased recorded under Section 161 Cr.P.C. were exhibited. The prosecution could establish that deceased sustained injuries in his stomach. He was referred to the hospital at Itanagar for better treatment but on the way to hospital, he succumbed to his injuries. Thus, prima facie, the prosecution could establish that the death of the deceased was homicidal in nature.

28]. When there was no eyewitness to the occurrence, the prosecution ought to have exhibited the dying declaration of the deceased and to prove the FIR in accordance with law. It is also noticed that the learned trial Court has relied upon the statement of the witnesses recorded under Section 161 Cr. P.C. as well as under Section 164 Cr.P.C. The statement of witnesses under Section 161 Cr.P.C. or 164 Cr.P.C. are not substantive evidence. No order of conviction or acquittal can be passed on the basis of the statement recorded either under

Sections 161 or 164 Cr.P.C, though the statement can be used for the purpose of corroboration or contradiction only.

29]. It is a serious case where a person lost his life and for mere technicalities or irregularities of the trial, the assailant should not escaped. The remission of the case will not amount to filling up of the lacunae by the prosecution, since the FIR/dying declaration as well as the statement of the victim were already on record.

30]. In view of the circumstances, this matter is remanded back to the learned trial court with a direction to the learned Sessions Judge, West Sessions Division, Yupia to re-examine P.W.8 who purportedly recorded the dying declaration of the deceased and who brought the FIR lodged by the deceased to the police station. It is hereby made clear that the defence should be given an opportunity to further cross-examine the P.W.8.

31]. Therefore, The impugned judgment and order dated 03-11-2014 passed by the learned Sessions Judge, West Sessions Division, Yupia, in Session Case No. 106/2010 is hereby set aside. Registry is directed to send the LCR along with the copy of the judgment and order to the learned Sessions Judge, Yupia forthwith.

32]. With the above observations and directions, this appeal stands disposed of.

JUDGE

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