

IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE:.....**UDALGURI**

**Present : Smti. N. Talukdar,
Addl. Sessions Judge,
Udalguri.**

Crl. Appeal No. 05/2019

Dimbeswar Sarma @ Koundinya.....Accused/Appellant.

-Vs-

State of Assam.....Respondent.

For the Appellant : Mr. L. C. Chouhan, learned Advocate.

For the Respondent : Mr. M. Khaklari, Addl. Public Prosecutor

Date of Argument : 22-07-2019.

Date of Judgment : 03-08-2019.

J U D G M E N T

1. The impugned judgment and order dtd. 28-02-19, passed by learned Chief Judicial Magistrate, Udalguri, in connection with GR Case No. 349/18, convicting and sentencing the accused/appellant Dimbeswar Sarma @ Koundinya to TRC under Section 304-A IPC and to pay a compensation amount of Rs. 20,000/- (twenty thousand only) as per Section 357(3) Cr.P.C. in default of the compensation amount, simple imprisonment for a period of two(2) months, is under challenge in the present criminal appeal preferred by the accused person as appellant.

2. The prosecution case in brief, is that on 08-04-18, at about 4 pm, while deceased Odal Basumatary was coming on bicycle from Swapangaon market to his home, at Alubasti a vehicle bearing registration no. AS 27 A5779 which was coming from Bhairabkunda driven at an excessive speed and negligently, knocked down the bicycle of the deceased from behind and dragged the cycle to a distant. As a result Odal Basumatary died on the spot. The police of Bhairabkunda Outpost came to the place of occurrence and detained the driver of the vehicle. Next day i.e. on 09-04-18, informant Samkhar Basumatary, the son-in-law of deceased Odal Basumatary, lodged an FIR with the Officer-in-Charge of Udalguri P.S. in connection with the incident.
3. On the basis of the F.I.R. Udalguri P.S. Case No. 83/18 under Section 279/304-A I.P.C, was registered and after completion of investigation police submitted charge sheet under Section 279/304-A I.P.C, against the accused Dimbeswar Sarma @ Koundinya.
4. Learned trial court having found sufficient materials to proceed against the accused person issued processes against him. Accordingly, the accused person appeared before the court. Learned trial court explained the particulars of offences under Section 279/304-A I.P.C, to the accused person to which he pleaded not guilty and claimed to be tried.
5. During trial the prosecution examined 06 (six) prosecution witnesses who were duly cross examined by the defence.
6. Defence case was of total denial and no witness was examined by the defence.

7. Learned Chief Judicial Magistrate, Udalguri, upon consideration of materials on record vide impugned Judgment and Order dated 28-02-19, having found the accused Dimbeswar Sarma @ Koundinya guilty convicted him and sentenced to TRC under Section 304-A IPC and to pay a compensation amount of Rs. 20,000/- (twenty thousand only) as per Section 357(3) Cr.P.C. in default of the compensation amount, simple imprisonment for a period of two (2) months.
8. I have heard learned counsel Mr. L.C. Chouhan for accused/appellant and learned Addl. PP. Mr. M. Khaklari appearing for the Respondent, the State.
9. Learned counsel for the appellant has submitted that the prosecution has failed to prove that the accused rode the motorcycle in a rash and excessive speed. PW1, who was near the place of occurrence had not deposed that the motorcycle was coming in a rash and excessive speed. Though PW3 had deposed that he had seen the incident, but in cross-examination, he revealed that he did not state before the police that the accident before him as such the evidence of PW3 is no reliable. He has further submitted that there was another person who sustained injury as a result of the accident. He was a vital witness of the case but prosecution has failed to examine the other injured person of the case. he has further argued that prosecution has failed to examine the Medical Officer and prove the postmortem report of the deceased. Thus prosecution has miserably failed to establish the cause of death of the deceased.
10. In order to appreciate the arguments advanced by the learned counsel for appellant as well as the State/Respondent it would be

apposite to discuss the evidence on record which is relevant for the purpose of deciding the instant appeal.

11. PW1 is informant Swmkhwr Basumatary. In his evidence PW1 had deposed that on the date of occurrence at about 04 pm, while his father-in-law was coming from market on bicycle at Udalguri to Bhairabkunda road, he was knocked down by a motor cycle coming from the same direction. At that time PW1 was at a distance from the place of occurrence. On hearing hue and cry he rushed to the place of occurrence and saw his father-in-law lying on the road dead. The rider of the offending motorcycle was detained by the villagers. The police came to the place of occurrence and seized the motor cycle and bicycle and arrested the accused. Next day of the incident PW1 lodged the FIR. Ext.-1 is the FIR. Ext.-2 is the seizure list. Ext.-1(1) and Ext.-2(2) are the signatures of PW1. In cross-examination, PW1 had revealed that he had not seen as to how the incident happened. There were two injured persons and a dead body was lying in the place of occurrence. He did not know who was riding the motorcycle.
12. PW2 is Jewel Daimari. His evidence is to the effect that he had seen the deceased Odal Basumatary lying dead on the road. The police came to the place of occurrence and seized one motorcycle. Ext.-2 (2) is the signature of PW2 in Ext.-2 seizure list. In cross-examination, PW2 had revealed that he had not seen as to how the incident happened.
13. PW3 is Edward Basumatary. In his evidence PW3 had deposed that on 08-04-18, at about 4 pm while he was going to the market of Swapangaon, deceased Odal Basumatary was coming from the opposite direction on a bicycle. At that time a motorcycle coming at

a excessive speed from the same direction of the deceased hit the deceased from behind. Immediately Odal Basumatary fell down, the rider of the motorcycle also fell down and died on the spot. PW3 informed the police about the incident. In cross-examination, PW3 had stated that at the time of incident there was no other person or vehicle on the road. The road was wide. The motorcycle was coming through the middle of the road. PW3 had denied the suggestion that the accident did not happened due to mistake of the rider of the motorcycle and that the accident happened due to the mistake of the deceased. PW3 had admitted that he did not state before the police that the incident happened in front of him.

14. PW4 is Madan Basumatary. PW4 had deposed that on the date of occurrence at about 4 pm, he was following the deceased Odal Basumatary riding on a bicycle. At that time one motorcycle coming from the same direction at an excessive speed knocked down Odal Basumatary from behind, as a result he fell down alongwith his bicycle. The riders of the motorcycle also fell down and sustained injuries. After a while Odal Basumatary died on the spot. Later on, police came to the place of occurrence and seized the offending motorcycle. In cross-examination, PW4 had stated that at the time of incident he was about 150 meters away from the place of occurrence. There was no other vehicle or people on the road at that time. The motorcycle was coming on his own side. He had denied the suggestion put forward by defence.

15. PW5 is Kharga Prasad Sarmah, the father of the accused. In his evidence PW5 had deposed that on the date of occurrence he was informed by a boy over phone that his son had met with an accident by his motorcycle. On getting the information he immediately rushed to the place of occurrence where he found the old person

lying dead. In cross-examination, PW5 had stated that he did not know as to how the incident happened.

16. PW6 is I/O Jatin Ch. Deka. In his evidence PW 6 had deposed that on 08-04-18, while he was working as In-charge of Bhairabkunda Outpost under Udalguri P.S., at about 4 pm, one Edward Basumatary had informed him over phone that at Alubasti a person was knocked down by a motorcycle. Then PW6 recorded GD entry no. 101 dated 08-04-18, and went to the place of occurrence. At the place of occurrence he had seen one old person lying unconscious and the accused persons who was detained by the public. PW6 called 108 ambulance and sent the injured old person and the riders of the motorcycle to the hospital for treatment. On the date of occurrence itself the old person died while undergoing treatment. The other two injured persons were sent to Guwahati for better treatment. Next day of the incident the FIR was filed and on the basis of the FIR a case was registered by the O/C, who entrusted PW6 to conduct preliminary investigation. During the course of investigation PW6 collected the postmortem report of the deceased, recorded statements of the witnesses and seized the cycle and the motorcycle. On 20-04-18, the accused himself appeared before the police station. He was arrested and released on bail. After completion of investigation PW6 had submitted the charge-sheet against the accused under Section 279/304-A IPC. Ext.-2 and 3 are the seizure list. Ext.-4 is the sketch map. Ext.-5 is the charge-sheet. Ext.-2(3), Ext.-3(1), 4(1) and 5(1) are the signatures of PW6. In cross-examination, PW6 had denied the suggestion that while the deceased was trying to cross the road, the accident happened and there was no fault on the part of the accused.

17. On appraisalment of the evidence on record it is appeared that as per the evidence of PW3 and PW4, they have seen the occurrence. According to them at the time of accident the speed of the motorcycle rode by the accused was high and it hit the cycle of the deceased from behind. Though PW3 had deposed in examination-in-chief that he had seen the incident but in cross-examination he revealed that before the police did not state that the occurrence took place in front of him. Thus a reasonable doubt arises as to the truthfulness of the evidence of PW3 that the incident happened in front of him as immediately after the incident he did not make any such statement before the police. In this case apart from PW3, the other witness, who had claimed that he had seen as to how the incident happened, is PW4. As per evidence of PW4 he was on a bicycle following the deceased from behind. According to him the accused over taking him by his motorcycle hit the deceased Odal Basumatary from behind. According to PW4 the motorcycle was coming at a high speed.

18. On careful scrutiny of PW4 it appears that in cross-examination he revealed that there was no other vehicle or people on the road at the time of accident. This statement of PW4 is contradictory to the evidence of PW3 that at the time of incident he was coming from the opposite direction. Moreover, PW3 had also revealed in cross-examination that at the time of incident there was no other person or vehicle on the road which is also inconsistent with the evidence of PW4 that at the time of incident he was riding on a bicycle behind the deceased Odal Basumatary. In view of such contradictory evidence of PW3 and PW4 a reasonable doubt arises as to the credibility and truthfulness of their testimony that they were present at the place of occurrence and they had witnessed the incident. The evidence of other prosecution witnesses is only to the effect that

after the accident they arrived at the place of occurrence. They did not have knowledge as to how the incident happened. The conviction of the accused/appellant by the learned trial court is mainly basing on the evidence of PW3 and PW4 but on careful scrutiny of their evidence this court for the reasons discussed above is not inclined to accept their evidence that they had seen as to how the incident had taken place.

19. Moreover, in this case the learned trial court without examining the Medical Officer convicted the accused/appellant under Section 304-A IPC. According to learned trial court examination of M.O. is not necessary as PW1, PW2 and PW5 deposed that they saw the deceased Odal Basumatary lying dead on the road and that the deceased died in the occurrence is not disputed by the defence. Learned trial court has failed to take into account the evidence of PW6, the Investigating Officer of the instant case. According to PW6 on getting the information about the accident he reached the spot alongwith his staffs, found one old man in unconscious state and detaining the accused persons by the local people. He immediately called ambulance, send the old man and other two injured persons to the hospital for preliminary treatment. He has further stated that the old injured person succumbed to his injuries while undergoing treatment on the same day and the other two injured were sent to Guwahati for better treatment. Thus, what has been transpired from the evidence of Investigating Officer that death of the deceased Odal Basuamatary had not occurred on the spot of the accident but he died while undergoing treatment. In such a situation cause of death of the deceased has to be ascertained by the prosecution by examining the Medical Officer.

20. In the decision reported in **Rajib Debnath Vs. State of Tripura, 2011 (5) GLT 525**. In the said decision the Hon'ble Gauhati High Court has stated as follows:

" 9. Admittedly there is no medical evidence or injury report to show that the petitioners had sustained injury, which was sufficient to cause death of the deceased. Therefore in the absence of any medical evidence, it is hardly possible to conclude, that the death of the deceased was caused due to the injuries, if any, sustained by him in the said accident.

10. In view of above, in the absence of any medical evidence, the conclusion of the courts below that the deceased died due to the injuries, sustained by him, in the said accident, can't held to be reasonable. Therefore, I am inclined to hold, that the prosecution failed to establish, beyond all reasonable doubt that the death of the deceased was caused due to rash and negligent driving, on the part of the accused- petitioner and as such the conviction and sentence, recorded under section 304-A I.P.C. can't stand in the eye of law. Accordingly, the impugned conviction and sentence, recorded under section 304-A I.P.C, is liable to be set aside and quashed and I do so".

21. In this case also it appears that the prosecution has failed to examine the Doctor to prove the cause of death of the deceased Odal Basumatary and also to prove the nature of injury sustained by deceased Odal Basumatary. In absence of medical evidence it cannot be decided conclusively that the death of Odal Basumatary was caused due to rash and negligent driving on the part of the accused/appellant. Moreover in absence of medical evidence the nature of injury sustained by the injured person cannot be ascertained. Hence, conviction of the accused/appellant under Section 304-A I.P.C. is liable to be interfered with.

22. In view of above discussions conviction and sentence of the accused/appellant under Section 304-A I.P.C. is interfered with and set aside. Accordingly the present appeal is allowed.
23. Bail bond of the accused/appellant is extended for a period of six months under Section 437-A Cr.P.C.
24. Send back the original case record being GR Case No. 349/18 to the learned Chief Judicial Magistrate, Udalguri alongwith a copy of this Judgment and Order.
25. Given under my hand and seal of this court on this 03rd day of August, 2019, in the open Court.

Dictated and Corrected

**(N.Talukdar)
Addl. Sessions Judge
Udalguri**

**(N.Talukdar)
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Udalguri**