

(2019) 11 GAU CK 0038

In the Gauhati High Court

Case No : Criminal Appeal No. 49, 125 Of 2017

Abul Kalam And Anr

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 15-11-2019

Acts Referred:

Indian Penal Code, 1860 — Section 148, 149, 302

Code Of Criminal Procedure, 1973 — Section 161, 164, 313, 357(A)

Citation : (2019) 11 GAU CK 0038

Hon'ble Judges : Mir Alfaz Ali, J; Sanjay Kumar Medhi, J

Bench : Division Bench

Advocate : H R A Choudhury, M Barmanr, M Khan

Final Decision : Allowed

Judgement

Mir Alfaz Ali, J

1. Heard Mr. HRA Choudhury, learned senior counsel assisted by Mr. A Ahmed, learned Advocate appearing for the appellants. Also heard Ms. B

Bhuyan, learned Additional Public Prosecutor, Assam and Ms. M Barman, learned counsel for the informant/respondent.

2. These two appeals arose out of the judgment and order dated 27.01.2018 passed by the learned Addl. Sessions Judge, Dhubri in Sessions Case

No.161/2006 and therefore, we propose to dispose of both the appeals by this common judgment. By the impugned judgment, learned Addl. Sessions

Judge convicted the appellants under sections 148/302 IPC read with section 149 IPC and sentenced them to imprisonment for life and fine of

Rs.1,000/-each with default stipulation u/s 302 IPC and imprisonment for 1 (one) year u/s 148 IPC.

3. As per the prosecution case, on 05.06.2002 at about 8.30 am, when the

informant, his father, Ohedur Rahman, Karimuddin and the deceased Jasijul Hoque were going towards the Pipulbari Bazar, the four accused persons named in the FIR along with some others attacked the deceased Jasijul and inflicted injuries with â??daoâ??. Initially the accused Baten Seikh hit the deceased, causing injuries and thereafter the appellants Azgar Seikh and Kalam Sk. also inflicted injuries to the deceased with dagger and after committing the offence, both of them left the place. Initially a GD entry was made on the basis of information given by one Kadam Ali followed by the FIR (Ext.-1) lodged by PW-7 Rafiqul Islam. On the basis of the FIR lodged by PW-7, Rafiqul Islam, the police registered Mankachar PS Case No.84/2002 and commenced investigation. In course of investigation, police recorded the statement of the witnesses under section 161 Cr.P.C., got the inquest report prepared, send the deceased for post-mortem examination and on completion of investigation, laid charge-sheet against 9 (nine) accused persons including the present appellants. One of the accused, namely, Baten Seikh died during pendency of the trial and eventually 8 (eight) accused persons stood trial.

4. In course of trial, learned Sessions Judge framed charges against the appellants under section 148/302 IPC read with section 149 IPC, which were abjured by all the accused/appellants. In order to bring home the charges, the prosecution examined as many as 17 witnesses. The trial Court also examined a witness as court witness. Upon completion of the prosecution evidence, the accused persons were examined under section 313 Cr.P.C., wherein all of them pleaded innocence and examined 2 (two) witnesses in their defence. On appreciation of evidence, learned Sessions Judge convicted the appellants under section 302/148 IPC read with section 149 IPC and awarded sentence as indicated above.

5. We have considered the submissions made by the learned counsel for the appellant and learned counsel for the respondent No.2 as well as the learned Addl. PP, Assam.

6. Learned senior counsel, Mr. HRA Choudhury submits, that though all the prosecution witnesses implicated the accused Baten Seikh (since deceased), none of the independent witness examined by the prosecution implicated the present appellants in the commission of offence. PW-6, PW-7, PW-8, PW-10, PW-12 & PW-13, who sought to implicate the present appellants

were all interested witnesses being related to the deceased and their testimonies also suffered from the vice of material contradictions and glaring inconsistencies rendering them unworthy of reliance and therefore, no conviction could have been based on the oral testimony of these six prosecution witnesses, submits Mr. HRA Choudhury. Learned Addl. P.P., contends that since conviction of the appellants were recorded with the aid of Section 149 IPC actual participation or overt act on the part of each and every accused was not necessary. Refuting the submission of the learned Public Prosecutor, Mr. Choudhury contends, that there was no evidence or material to invoke the provision of section 149 IPC in order to attribute vicarious liability to the appellants, nor the learned trial Court recorded any finding as to the common object, and as such, the conviction of the appellants with the aid of section 149 IPC was also erroneous. To buttress the above submission, Mr. Choudhury placed reliance on the following two authorities.

- i) Kuldip Yadav & Ors. Vs. State of Bihar, (2011) 5 SCC 324.
- ii) Joseph Vs. State represented by Inspector of Police, (2018) 12 SCC 283.

7. PW-15 the Medical Officer who conducted the post-mortem examination on the body of the victim found the following injuries:

- 1) Incised wound 3½" over right parital region.
- 2) Incised wound 3½" over shoulder (R)
- 3. Incised wound over back of wound 6½" cutting muscles, cervical spine, spinal cord, left carotid artery, left fore-febule, left mandible and saft tissue.
- 4. Incised wound 3½" over right fore-arm.
- 5. Incised wound 1½" over right thumb.
- 6. Incised wound 2½" over left elbow. Blood clots found in the wound and wound margins were blood stained which could not be washed off.

8. In the opinion of the doctor, the cause of death was shock and haemorrhage as a result of the injuries sustained by the deceased. During cross-examination of the doctor, it was elicited that the injuries sustained by the victim could be caused by a single person or by multiple persons. However, the factum of homicidal death of the deceased has not been disputed in this appeal, and as such, the only question needs to be considered, as to who

caused the death or in other words whether the present appellants were liable for causing homicidal death of the deceased. Therefore, it will be apt to scan the evidence, brought on record.

9. PW-1, Juljan Bewa testified, that at about 8.30 am hearing commotion towards the road she came out and saw, that Baten was dealing cut blows to Jasijul Dewani (deceased) with a dao. Receiving the injury Jasijul fell down on the ground and Baten had fled away from the scene. During cross-examination this witness further stated that she did not see PW-6, PW-7, PW-10 & PW-13 at the place of occurrence.

10. PW-2 also deposed in the same tune, that hearing commotion she came out and had seen the accused hitting Jasijul Dewani with a "dao". In her cross-examination it was elicited that after about 1 hour of the occurrence, PW-13 and Awal took away the victim in a "thela".

11. PW-3 stated that hearing commotion on the road she came out and saw the accused Baten dealing blows to the victim Jasijul with a dao. She further stated that after the occurrence PW-6, PW-7 & PW-13 took the victim from the place of occurrence in a "thela". In her cross-examination it was elicited that PW-1 & PW-2 also accompanied her to the place of occurrence. It was further confirmed in her cross-examination that while coming to the place of occurrence, she did not notice any other person at the place of occurrence.

12. PW-4, Phuleja Bibi also testified in the same manner and stated that hearing commotion on the road, she came out and saw the accused Baten hitting deceased Jasijul randomly with a dao and thereafter people gathered there. She also stated that after about 1 hour of the occurrence, Rafiqul, Sarejahan, Gule Hussain, Karimuddin put the victim on a "thela" and took him away from the place of occurrence. It was elicited during cross-examination that she (PW-4) also saw PW-1, PW-2 and PW-3 at the place of occurrence.

13. PW-5, Kadam Ali deposed that hearing commotion, he went to the house of the deceased, where he came to know that Jasijul Dewani had been killed and immediately he went to the police station and informed the police about the occurrence. In cross-examination, PW-5 stated that Rafiqul, Sarejahan, Gule Hussain and Karimuddin were partners of Jasijul as lessor of Pipulbari market.

14. PW-6, Gule Hussain deposed, that when he along with Rafiqul (PW 7), Sarejhahan (PW-13), Wahidur(PW 10), Karimuddin (PW-12) and Jasidul

(deceased) were going to Pipulbari market, they were confronted with accused Ajgar at the Harindoba bridge. Ajgar had discussion with Jasidul about

certain domestic matter and in the meantime, Baten arrived there from the nearby jungle and hacked Jasijul with a dao. Having received the injury,

when Jasijul ran towards the courtyard of a nearby house raising alarm, "save me, save me", the accused Azgar, Baten, Kalam, Sekatullah, Jalil

and Monowar chased him. Azgar hacked Jasijul, (deceased) with a long curved dao and Kalam inflicted injury to the deceased with a dao. Accused

Baten, Jalil, Sheiktullah and Monowar also hit the deceased with a long curved dao.

15. PW-7 (informant) deposed in the same tune that he along with Ajgar, Karimuddin, Gule Hussain, Wahidur were proceeding to Pipulbari market

and upon reaching the wooden bridge, the accused Azgar accosted the deceased on the matter of construction of his house. At that point of time,

Baten arrived there from somewhere and hacked the deceased with a dao. Having received the cut injury when the victim was running away, the

accused Azgar and Baten chased him. Accused Jalil, Sk. Abdullah and Latif Mondal, who were also armed with dao confronted the deceased and

being confronted with them, the deceased returned back. At that point of time, Azgar again came and hacked Jasijul with a dao. According to him,

Kalam hacked the deceased with a "khukri". Sk. Abdullah and Baten hit the deceased with a dao. He further deposed that Khaibar prevented

them from going closer to the deceased and after committing the offence, the accused persons left the place and thereafter all of them took the victim

to Pipulbari market on a "thela". In cross-examination, this witness stated that the house of Amzad (husband of PW-2) was situated near the

bridge, where the occurrence took place.

16. PW-8, Abdullal Sk. deposed that having come to know about the incident, he rushed to the place of occurrence and noticed that accused persons

Kalam, Baten, Azgar, Jalil, Monwar, Sk. Abdullah & others were running away from the place of occurrence after committing the murder. He also

stated to have seen the deceased lying with injuries at the place of occurrence. He further went on saying that there was large crowd near the place

of occurrence. In cross-examination, he stated that he resides at a distance of about 2 km. and he came to know about the incident, when he was at a distance of 1 km from the place of occurrence. He also stated to have come to the place of occurrence accompanied with other people.

17. PW-10, Wahidur Islam deposed that he along with Sarejahan, Karimuddin, Rafiqul and the deceased were going towards the market. When they reached the bridge, accused Azgar, Baten, Kalam, Sk. Abdullah and Jalil came out from under the bridge and confronted the deceased. According to PW-10, accused Baten hit the deceased with a curved dao. The accused Azgar and Kalam also inflicted injury to the deceased with a curved dao and khukri respectively. Thereafter, he himself along with Gule & Sarejahan shifted the deceased to the hospital. In cross-examination, he stated that he resides in the same campus with the deceased and his father Gule regarded the deceased as his father.

18. PW-12, Karimuddin deposed, that while he along with the deceased were going to market, they met the accused Azgar on the bridge, who asked the deceased about the construction of his house. At that point of time, Baten came out from the hiding place and hacked the deceased with a dao.

Having received the injuries the deceased ran away and entered the house of a woman, where he was confronted with Sirajdaulla (not accused) and

having so confronted with Siraj, when the deceased returned back, accused Azgar hit him with a dao on his right hand, Kalam hit him with khukri and

Baten hacked him with a dao and thereafter, all of them had fled away from the place of occurrence.

19. PW-13, Sarejahan Ali testified that when he along with Karimuddin, Gule, Wahidur, Rafiqul and the deceased were proceeding to Pipulbari market

and reached the bridge, they found Azgar standing on the bridge, who asked the deceased about the construction of his house and argument ensued

between them. In course of argument, Baten arrived there from behind and hacked Jasijul with a long curved dao. Having received the injuries the

deceased ran towards the market and confronted with one Abul Kalam, who was standing about 20 cubits away from the bridge. Abul Kalam also

hacked the deceased on his forehead with a â??khukriâ??. Having received the injuries inflicted by Abul Kalam, the victim ran away shouting â?

â??save me, save meâ? and at that point of time accused Jalil, Azgar and Baten chased the deceased and Azgar hacked the deceased on his left

hand with a long curved dao. Having received the injuries, the deceased fell down on the road, whereupon Jalil and Latif also inflicted cut injuries to the deceased with a dao. Jalil and Khaibar prevented him (PW-13) from going near to the deceased. In cross-examination, he stated that the deceased was his brother. He also stated in his cross-examination, that the houses of PW-1, PW-2, PW-3 and PW-4 were situated near the bridge, where the occurrence took place.

20. PW-9 and PW-11 were not the witnesses to the occurrence. They came to know about the occurrence later on. PW-17 is a Judicial Officer, who recorded the statement of one Nasiran Bibi u/s 164 CrPC. However, said Nasiran Bibi was not examined in this case. PW-16 was the police officer, who prepare the inquest report.

21. PW-14, the investigating officer deposed, that on 05-06-2002 he made a GD Entry in the police station at 9.15 am on the basis of information given by one Kadam Ali (PW5) and proceeded to the place of occurrence. The GD Entry has been proved as Ext.-11. He also stated, that on getting the information he visited the place of occurrence, recorded the statement of the witnesses, conducted inquest on the body of the deceased through one Dhaniram Bharali (PW-16) and thereafter sent the body to civil hospital for post mortem examination and on 06-06-2002 the FIR was lodged by Rafiqul Islam (PW-7).

22. CW-1 was a home guard attached to Salmara Police Station, who proved the GD Entry (Ext.-11), which was made on the basis of information given by PW-5 on the day of occurrence.

23. DW-1, Badiur Zaman and DW-2, Rezzak stated that when both of them along with PW-7, PW-13 and PW-10 were collecting tolls at the market, heard commotion, that Baten killed the deceased at the Harindoba bridge. DW-1 and DW-2 further stated that immediately they came and found the body of the victim lying with injuries, at the place of occurrence.

24. On our assessment of the evidence and perusal of the impugned judgment, we find that prosecution has put forward two stories about the occurrence through two sets of witnesses. One set comprised of PW-1, PW-2, PW-3 and PW-4 and other set comprised of PW-6, PW-7, PW-8, PW-10, PW-12 and PW-13. Learned Sessions Judge recorded the conviction of the appellants primarily relying on the oral testimony of PW-6, PW-7,

PW-8, PW-10, PW-12 and PW-13 and did not take into account the evidence of PW-1, PW-2, PW-3 and PW-4. However, the learned Sessions

Judge has not given any reason as to why the oral testimonies of PW-1, PW-2, PW-3 and PW-4 were not considered. On scrutiny of the evidence,

we find that residence of PW-1, PW-2, PW-3 and PW-4 were situated in close proximity to the place of occurrence. They arrived at the place of

occurrence immediately upon hearing commotion and stated to have seen accused Baten inflicting injury to the deceased. It is also in their evidence,

that at the time of occurrence when Baten was inflicting injuries to the victim, no other person was present. That the residence of these four

witnesses were at the close proximity to the place of occurrence is evident from the sketch map (Ext.-8) as well as the admission of the PW-13 &

PW-7. We also notice that all these four witnesses were independent witnesses and there is no material on record to view the oral testimonies of the

these four witnesses with any suspicion, inasmuch as, their presence at the place of occurrence was quite natural. Therefore, apparently all these four

witnesses were independent witnesses and all of them have consistently deposed that it was only Baten, who caused injuries to the deceased and no

other person was involved except Baten, and such consistent and coherent evidence of PW-1, PW-2, PW-3 and PW-4 remained unshaken during

cross-examination.

25. PW-6, PW-7, PW-10 & PW-13 deposed that at the time of occurrence all of them along with the deceased and PW-12 were proceeding together,

when the occurrence took place. Whereas, PW-12 deposed that it was only he, who was accompanying the deceased Jasijul at the time of

occurrence. The PW-12 further stated that he alone took the victim to hospital from the place of occurrence. He did not tell about other witnesses

(i.e. PW-6, PW-7, PW-10 and PW-13) accompanying the deceased. Thus, the oral testimony of PW-12 belies the testimony of PW-6, PW-7, PW-10

& PW-13 that they also accompanied the deceased at the time of occurrence. PW-8 deposed that hearing about the incident, he ran to the place of

occurrence and noticed that the accused Azgar, Jalil, Monwar, Kalam and Baten were running away from the place of occurrence. According to

PW-8, he heard about the occurrence, when he was at a distance of 1 km from the place of occurrence and after hearing about the occurrence, he

came and found a large gathering at the place of occurrence. Above admission of the PW-8 that he heard about the occurrence when he was at a

distance of 1 km and on arrival at the place of occurrence found large number of people gathered at the place of occurrence raises a reasonable doubt

on his testimony of having seen the accused persons running away from the place of occurrence. Therefore, in our considered view no credibility can

be attached to the oral testimony of the PW-8.

26. The PW-7, the informant, mentioned the name of four accused in the FIR and attributed overt act only to three of them, namely, Azgar, Baten and

Kalam. As per his version in the FIR, accused Azgar, Baten and Kalam inflicted injuries to the deceased. While deposing in court, he has considerably

improved his version and stated, that accused Ajgar, Baten, Kalam, Jalil, Monowar and Sk. Abdullah inflicted injuries to the deceased and thereby

stood contradicted with his previous statement on material facts. PW-6 stated that after receiving the injuries, while the deceased was running

towards the house of a nearby woman, he was chased by Ajgar, Baten, Kalam, Sekatullah, Jalil and Monowar. Whereas according to PW-7, the

deceased was chased only by accused Baten and Azgar. DW-12 and PW-13 did not tell about the deceased being chased by anyone. According to

PW-12, after receiving injuries, when the deceased was running towards the house of a woman, he was confronted by one Sirajdaulla (not an

accused) and returned back. Whereas, according to PW-13 after receiving the injuries caused by Baten, the deceased ran towards the market and

was confronted with Kalam, who hacked him with â??khukriâ??. According to PW-7, when the deceased was running on being chased by Azgar

and Baten, he returned back being confronted with Jalil, Sk. Abdullah and Latif Mondal (not accused). As regards the weapon used and the

participation of the appellants also, we find glaring inconsistencies in the oral testimonies of these five witnesses. What is therefore, evident is that the

oral testimonies of the PW- 6, PW-7, PW-8, PW-10, PW-12 and PW-13 were not only contradictory against each other on material facts, they also

stood contradicted with their previous statement. This apart, PW-1 and PW-3 categorically stated that they did not see any other person except

accused Baten, which again belies the oral testimonies of the PW-6, PW-7, PW-8, PW-10, PW-12 and PW-13. We also notice that all the six

prosecution witnesses, i.e., PW- 6, PW-7, PW-8, PW-10, PW-12 and PW-13 were closely related to the deceased. In view of all these facts and

circumstances, in our considered opinion, no credibility can be attached to the oral testimonies of the PW-6, PW-7, PW-8, PW-10, PW-12 and PW-13.

27. Once the oral testimonies of the PW-6, PW-7, PW-8, PW-10, PW-12 and PW-13 are discarded, the prosecution is left with the oral testimonies of

PW-1, PW-2, PW-3 & PW-4, which clearly established, that the present appellants were not involved in the occurrence or at least complicity of the

present appellants was extremely doubtful. Looking from another angle, what is evident, as we have mentioned at the outset, that two different stories

of the prosecution have been put forward, through the two sets of witnesses. It is the settled principle of criminal jurisprudence, that when there are

two versions; one exonerating the accused and the other implicating the accused, either the court has to reject both or to accept the one, which

favours the accused. Therefore, in any view of the matter, in our considered view, the prosecution in the instant case has not been able to discharge

its burden to prove the charges against the appellants beyond reasonable doubt.

28. The prosecution having failed to establish the presence of the appellants at the place of occurrence or their complicity in the offence in any

manner, there was no scope for invoking the provision of Section 149 IPC for attributing constructive criminal liability to the present appellants. Be

that as it may, what is loud and clear from the facts and circumstances of the case as discussed here-in-before is that the prosecution has failed to

discharge its burden to prove the guilt of the accused/appellants beyond reasonable doubt, and as such, the impugned judgment of conviction and

sentence of the appellant cannot be sustained. Accordingly, we set aside the conviction recorded and sentence awarded by the learned Addl. Sessions

Judge and allow the appeals. The appellants be released forthwith if not required in any other case.

29. We direct the State Legal Services Authority to examine the necessity of providing compensation to the dependents of the victim, if any, u/s 357-A

CrPC as per the Victim Compensation Scheme.

30. Return the LCRs.