
(2009) 01 GAU CK 0024
In the Gauhati High Court
Case No : Criminal Appeal No. 27 of 2004

Aditya Sarkar and Others

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 27-01-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 149, 302, 304, 427

Citation : (2009) 1 GLD 559

Hon'ble Judges : C.R. Sharma, J;Aftab H. Saikia, J

Bench : Division Bench

Advocate : J.M. Choudhury, B.M. Choudhury, R. Sekhar, U. Choudhury, for the Appellant; K.C. Mahanta, Learned P.P., for the Respondent

Final Decision : Allowed

Judgement

Aftab H. Saikia, J.—Heard Mr. J.M. Choudhury, learned senior counsel assisted by Mr. B.M. Choudhury and Mr. U. Choudhury, learned Counsel for the Appellants and also heard Mr. K.C. Mahanta, learned PP, Assam.

2. The learned Additional Sessions Judge, (for short, the learned Judge) Cachar at Silchar by his judgment and order dated 4.12.2003 passed in Sessions Case No. 88/99 convicted all the 12 (twelve) Appellants herein including one Ranu Sarkar who is not before us, under Sections 302/149, IPC, having found them guilty of committing the crime of killing one Haripada Sarkar (hereinafter referred to as "the deceased") and sentenced each of them accordingly to undergo Rigorous Imprisonment (for short, "RI") for life and to pay a fine of Rs. 1000/- each, in default of payment of fine, to undergo RI for another 6 (six) months.

3. The Appellants Aditya Sarkar and Dhirendra Das @ Dhirendra Sarkar were also convicted u/s 427, IPC and sentenced to undergo RI for 3 (three) months each.

4. The above conviction and sentence of the Appellants have been founded on the following allegations as alleged in the FIR lodged by one Bishnupada Sarkar

(PW 3) on 20.10.1998 with I/C Molugram TOP under Silchar Police Station.

5. The above-mentioned FIR disclosed that on 19.10.1998 when "Shyama Puja" was going on at the house of the complainant, PW 3, around 11 or 11/30 p.m., the accused Bidu Sarkar, Gope Sarkar (both of them were found to be absconders and declared proclaimed offenders) and Aditya Sarkar @ Aditya Biswas and Dharendra Das being armed with sharp deadly weapons suddenly trespassed into their houses and started scolding and beating them. When came out of his house he found all those accused persons caused grievous injuries in the head and hands of his father Hiramoni Sarkar (PW 1) by assaulting him with sharp weapons held by them. They left the place of demolishing idol of Goddess "Kali". There after half an hour later all the accused persons namely, 1. Bidu Sarkar, 2. Gope Sarkar, 3. Aditya Biswas @ Aditya Sarkar, 4. Dharendra Das, 5. Himangshu, 6. Bhanu Sarkar, 7. Kanu Sarkar, 8. Ranu Sarkar, 9. Paresh Sarkar, 10. Gopal Sarkar, 11. Rana Sarkar, 12. Ananta Biswas, 13. Sanjit Sarkar, 14. Giri Sarkar and 15. Haridhan Biswas being armed with deadly weapons, lathi, sword, dagger spear etc. and also forming an unlawful assembly trespassed into their houses and attacked and assaulted his father, mother, brother and sister-in-law. The accused Bidu Sarkar dragged his elder brother Haripada Das (since deceased) and killed him by assaulting in the chest with a sharp dagger. When they raised alarm, neighbours came and all the accused persons fled away.

6. On the basis of this claim, police initiated the investigation and on completion of the same submitted charge-sheet against all the Appellants.

7. During the trial the accused Bidu Sarkar @ Bidu Biswas @ Bidhan as well as Gope Sarkar were found to be absconders and declared proclaimed offenders when the present Appellants faced the trial.

8. The prosecution examined as many as 12 witnesses including PW 1, Hiramoni Sarkar, PW 2 Bijoy Sarkar, PW 3, Brishupada Sarkar, PW 4 Kalipada Sarkar and PW 9 Maharatna Biswas as eyewitnesses to the occurrence when PW 10 Dr. K.K. Chakravorty and PW 12 Dr. Arun Deb Nath, who performed autopsy on the dead body of the deceased and examined the injured PW 1 Hiramoni Sarkar respectively were projected as official witnesses.

9. The learned Judge having appreciated the evidence on record in its entirety and also upon hearing the learned Counsel for the parties was of the view that all the Appellants were involved in commission of the offence of murder so charge-sheeted against all of them under Sections 302/149, IPC and convicted and sentenced them accordingly.

10. The aforesaid conviction and sentence have been questioned in this criminal appeal.

11. Mr. J.M. Choudhury, learned senior counsel in support of the appeal as well as assailing the impugned conviction and sentence has forcefully contended that the evidence of so-called eye-witnesses PW 1 to PW 4 were not reliable, credible

and believable and such testimony as eye-witnesses cannot be accepted in the facts and circumstances of this case.

12. While drawing our attention to the deposition of those witnesses word by word, it is argued by the learned senior counsel that the deposition of all those witnesses were full of infirmities, inconsistencies and uncorroborative. He has further contended that since basically all the four witnesses i.e. PW 1 to PW 4 were related and interested witnesses, they were tutored and their evidences cannot be taken into consideration. Rather strong emphasis has been placed by Mr. Choudhury, learned senior counsel that the only ocular evidence of the sole independent witness PW 9 had its credibility and if the evidence of this witness is believed, the testimony of all other 4 (four) eye-witnesses deserve to be ignored and brushed aside. According to Mr. Choudhury, it was the accused Bidu Sarkar @ Bidu Biswas who inflicted "bhujali" blows on the chest of the deceased. PW 9 in his evidence categorically stated that it was Himangshu only who went inside the house and brought the deceased out from inside the house and at the same time he also deposed that accused Kanu and Ranu brought the deceased from inside the house. Amongst all the 7 (seven) accused persons named by him namely, Bidu, Himangshu, Sanjit, Aditya, Kanu, Ranu and Gope, one of them stabbed the deceased on the chest with "kiris" and at that time deceased fell down. The learned senior counsel has also drawn our attention to the medical evidence where PW 10 Dr. K.K. Chakravorty who conducted autopsy on the dead body of the deceased, found the following injuries on the dead body of the deceased.

One penetrating wound present on the left chest wall in upper torn and laterally 2 c.m. below the lateral left clavicle 3 c.m. x 1/2 x apex of left lung margins-regular. On tracing the path it has entered into apex of by lung making a wound 1-1/2 c.m. x 1/2 x 1 c.m. on the left lung.

13. Referring to the above single injury, Mr. Choudhury, has stressed that when from the medical evidence, it appears, only one fatal injury was inflicted, it is common knowledge that keeping in view the assault caused on the deceased, as narrated by those witnesses, PW 1 to PW 4, definitely there ought to have been more injuries i.e. multiple injuries found on the body of the deceased. However, all the four witnesses i.e. PW 1 to PW 4 adduced to the effect that it was Bidhan who gave the fatal single blow being corroborated with the medical evidence. It is stated that there was no intention to kill the deceased. He has also argued that it has come on evidence on record that there was a quarrel occurred between all of them as regards offering of "prasad" at the place of worship of "Kalipuja". It has also argued on behalf of the Appellants that PW 1, PW 3 and PW 4 had given a different version as regard to the offending weapons. As per PW 1 "bhujali" blow was given upon the deceased when according to PW 4 it was a "kiris" blow and PW 3 deposed that it was a "chaku" blow.

14. That being the true factual position, according to the learned senior counsel, it is not a case for conviction u/s 302, IPC but it may be a case of 304 Part-II,

IPC.

15. That being so, the moot question is as to whether the conviction of all those Appellants can be sustained u/s 302, IPC by indicting them for their involvement in the offence in furtherance of the common object to attract the provision of Section 149, IPC. True it is that as per evidence of PW 1 to PW 4 and PW 9 all those Appellants came to the house of the complainant (PW 3) for the second assault but of them 4 accused namely Bidhan, Gope, Aditya and Dharendra took active part in search of Haripada and three of them namely Gope, Aditya and Dharendra entered into the house and brought out the deceased, It is on evidence that it was Bidhan who inflicted "bhujali" or "chaku" blow on the chest of the deceased. This evidence however, to some extent has been diluted by the evidence of PW 9 Maharatna. According to him Bidhan, Aditya, Gope, Ananta and Himangshu came out from the house and at that time PW 7 restrained all those Appellants and amongst the 7 persons one of them struck the deceased with a "kiris" blow on his chest. Since all the 4 eye-witnesses already corroborated in their evidence as regards the fatal blow, we have unhesitatingly inclined to hold that it was Bidhan who inflicted the fatal injury along with all those Appellants herein in furtherance of an unlawful assembly committed such crime so as to indicate their involvement in the offence u/s 149, IPC. We fully agree with the view taken by the learned trial Court.

16. Now as regards the conviction of the Appellants u/s 302, IPC, there is evidence that initially there was a quarrel started amongst all of them pertaining to the distribution of "prasad" in Kalipuja and at that time 4 accused persons namely Bidhan, Aditya, Dharendra and Gope assaulted PW 1 whose injuries has been duly corroborated by the medical evidence of Dr. PW 12 Arun Deb Nath who found the following injuries on the person of PW 1.

1. Sharp injury over right side of head about (L x B). = 3 c.m. x 1/2 c.m. and another about 4 c.m. x 1 c.m.
2. One blunt injury over left side of head.
3. Abrasion over face by the side of both eyes in-front of ear.

17. It has come on record by way of suggestion that it was the deceased who earlier chased away of the accused persons and assaulted Gope for making hulla in the Puja Mandap. Later on a sequel of earlier quarrel with a view to retaliate the earlier grudge, the Appellants in a group attacked the house of the deceased and ultimately in the process the deceased was dragged out and it was the Bidhan who thrust the fatal blow. It also appears from the scrupulous scrutiny of the fact situation, there was no intention to kill the deceased keeping in view the single fatal injury inflicted by the Appellant Bidhan with a "Chaku" or, "Bhujali" blow on the chest of the deceased. There was no word in the evidence as regard the participation of the rest of the Appellants in the commission of offence.

18. Having considered the facts and circumstances in its totality and also upon

hearing the learned Counsel for the parties, we are of the firm view that the offence of committing the crime charged does not fall within the purview of Section 302, IPC, rather it is a case of Section 304 Part-II, IPC. However, maintaining the conviction u/s 149, IPC, we intend to convict the Appellants u/s 304 Part-II, IPC and accordingly sentenced them RI for 6 (six) years.

19. In the result, this appeal stands partly allowed to the extent of modification of sentence and conviction as indicated above.

20. Send down the LCR forthwith.

21. At this stage Mr. Choudhury, learned senior counsel has submitted that the Appellant Ranu Sarkar, who did not prefer any appeal, may also be given the benefit of this decision. In making this submission, he has relied upon the decisions of the Supreme Court reported in (2005) 12 SCC 209 Sohan Singh Vs. State of Uttaranchal, Sohan Singh v. State of Uttaranchal. It was held in both the above cited authorities that non-appealing co-accused would be entitled to the benefit given to the accused/Appellants who came before the Court in appeal.

22. In view of the above and also having regard to the above cited cases, the benefit of this decision be also extended to Sri Ranu Sarkar who is non-appealing accused.