

(2019) 05 GAU CK 0081

In the Gauhati High Court

Case No : Criminal Appeal No. 132, 143, Of 2017

Alimuddin Laskar @ Alimuddin And Anr

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 21-05-2019

Acts Referred:

Indian Penal Code, 1860 — Section 147, 148, 149, 302, 323, 447
Code Of Criminal Procedure, 1973 — Section 161

Citation : (2019) 05 GAU CK 0081

Hon'ble Judges : Achintya Malla Bujor Barua, J; Mir Alfaz Ali, J

Bench : Division Bench

Advocate : A Ahmed, A Y Choudhury

Final Decision : Allowed

Judgement

Achintya Malla Bujor Barua, J

1. Heard Mr. HRA Choudhury, learned senior counsel for the appellants and Ms. B Bhuyan, learned Additional Public Prosecutor, appearing for the State of Assam.

2. Office Note dated 17.07.2017 shows that AD card with signature in respect of informant/respondent No.2 had been received and accordingly, service was accepted to be completed but none appears for the informant/respondent No.2.

3. The criminal appeal No.143/2017 had been preferred by the accused Alimuddin Laskar @ Alimuddin and Moniruddin @ Pakhi Mia, whereas, criminal appeal 132/2017 had been preferred by Azim Uddin, Ramiz Uddin, Chunu Mia and Batu Mia.

4. All the five appellants have been convicted in the judgment and order dated 15.02.2017 of the learned Sessions Judge, Hailakandi in Sessions Case No.56/2008 under sections 147/148/447/323 IPC read with Section 149 IPC, whereas, the accused/appellants Alimuddin Laskar @ Alimuddin and Moniruddin @ Pakhi Mia have been convicted under Section 302 IPC.

5. An ejahar dated 13.10.1998 was lodged by Aftarun Nessa before the Officer-in-charge of Lala PS, Hailakandi stating that the accused persons, named therein, armed with dao lathi etc, had attacked her husband when he was returning home from his workplace. It is stated that the accused persons Alimuddin and Pakhi Mia gave dao blows on the head of her husband and other parts of the body and the other accused persons kept on beating him with lathi, thereby causing grievous injuries. When she went forward to save her husband, accused Bulbul inflicted a dao blow on her hand. It was also stated that hearing hue and cry Sifat Ali and Siraj Uddin Laskar arrived at the place of occurrence and when they came forward, accuseds' Alimuddin and Pakhi Mia as well as Mannaf grievously injured Siraj Uddin by assaulting him with dao and lathi.

6. PW-1 Angura Nessa wife of deceased Siraj Uddin Laskar in her deposition stated that at the time of occurrence, she was in her house and her husband was coming from the river side towards his home. At that time all the accused persons attacked her husband on the bank of the river armed with dao and lathi. Upon hearing commotion when she rushed to the place of occurrence, she saw that the accuseds' Pakhi Miyan and Alimuddin were assaulting her husband with dao and wooden pieces. When she tried to intervene in the matter, accused Alimuddin assaulted her with lathi on her head and as a result, she sustained injuries. In cross, in response to a suggestion, PW-1 stated that it is not a fact that during investigation, she did not state before police that hearing halla she rushed to the place of occurrence and also, it is not a fact that she did not state before police that during investigation she had seen the accuseds' Pakhi Mia and Alim Uddin assaulting her husband with dao and wooden stick. The Investigating Officer Sajal Chandra Deb while deposing as PW-10, in his cross stated that the PW-1 did not state before the police that at the time of the incident her husband was proceeding towards his house from the river side and on hearing halla she rushed to the place of occurrence and saw the accuseds' Alim Uddin and Pakhi Mian inflicting injuries on her husband with dao and a piece of wood. When we look into the statement of PW-1 under Section 161 Cr.P.C., we find that no such statement was made by the PW-1 before the police that upon hearing the halla she rushed to the place of occurrence and saw that the accused Alimuddin and Pakhi Mia were inflicting injuries on her husband with dao and a piece of wood.

7. In view of the above, we are not inclined to accept the evidence of PW-1 by which she seeks to project herself as an eye witness, who had seen the assault on the deceased Siraj Uddin by accused Alim Uddin and Pakhi Mia.

8. PW-2 in her deposition had stated that on the day of occurrence while she was coming back from the house of Nur Ahmed and Manik Laskar, and was crossing the river Kathakahal by swimming, the accused Alim Uddin, Pakhi Mia and Bulbul came towards him and tried to assault him with a dao, cycle chain etc., but at that time one fisherman Shibat Ali came and saved him by taking him away in his boat. When his brother Siraj Uddin came towards him, he was assaulted by Alim Uddin with a lathi and when he fell down on the ground, accused Pakhi Mia

and Bulbul assaulted him with a bamboo stick. He further deposed that thereafter the accused persons rushed to the place of occurrence and at that time the wife of Siraj Uddin also arrived at the spot. We have already taken note of that Angura Nessa had deposed as PW-1 and sought to project herself as an eye witness, which for the reasons stated above was rejected. When we look into the evidence of PW-2, we find that PW-1 had arrived at the place of occurrence after the occurrence had taken place and from the said point of view also, our rejection of PW-1 as eye witness stands fortified. Although in cross, suggestions were made that PW-2 did not state before police that accused Alim Uddin has assaulted Siraj Uddin with a stick but PW-10 states that PW-2 had not stated before police that accused Alim Uddin had assaulted Siraj Uddin with a stick made of chaur tree and then Siraj Uddin fell down on the ground. But when we look into the statement of PW-2 recorded under Section 161 Cr.P.C., we find that accused Pakhi Mia had given lathi blows on the head of the deceased Siraj Uddin and then he fell down on the ground.

9. In view of such conflicting statements of PW-2 recorded under Section 161 Cr.P.C., it cannot be ascertained as to who had given the lathi blow on the head of the deceased Siraj Uddin i.e., whether it was Alimuddin as stated in the deposition-in-chief or whether, it was accused Pakhi Mia as stated under section 161 Cr.P.C.

10. PW-3 in her deposition, stated that hearing the hulla, she came out from the kitchen and asked Siraj Uddin to enquire as to why her husband had raised an alarm. She also deposed that she saw accused Bulbul had inflicted a blow on her husband with a bicycle chain when he was on a boat. At that time, some people had assembled on the other bank of the river, who also asked Bulbul not to create any trouble. It was deposed that by that time all the accused persons Alim Uddin, Pakhi, Bulbul, Kala, Batu, Putan, Chunu and Monai armed with lathi had assembled on the road in front of their house. Then Siraj Uddin had also arrived there and requested the accused persons not to assault, but they did not pay any heed and at the outset the accused Alim Uddin assaulted Siraj with a stick and the blow fell on the head of Siraj. It was deposed that accused Pakhi had assaulted Siraj Uddin with a lathi on his forehead, which caused a fracture on his scalp.

11. We also take note of the sketch map, which was exhibited by the defence as Ext. A. From a reading of the sketch map, it is seen that the river 'Katakhal' is on the northern side and is separated from the houses of the various persons by a 'bundh' (dyke) and the place of occurrence is in front of the house of deceased Siraj Uddin. We also take note of the injuries sustained by the deceased, which is as follows :-

(i) one lacerated wound over middle of the left parietal region of the scalp of size 6cm. x 2cm. x bone deep.

(ii) Fracture on the left parietal bone seen on dissection corresponding to the

injury."

12. When we look at the injuries sustained by the deceased, it is noticed that there was only one injury on the left parietal region of the scalp and no other injury is shown to have been inflicted upon the deceased. When we correlate the deposition of PW-1 and PW-2, the position of the place of occurrence as shown in the sketch map and the injuries reflected in the injury report, we find an inconsistency to the extent that if we go by the deposition of PW- 2, who is an eye witness, the occurrence took place between the river and the river dyke and in such event, the place of occurrence could not have been visible from the house of Siraj Uddin, which is shown as mark-B in the sketch map. Secondly, if we go by the injuries sustained by the deceased, there was only one injury on the left parietal region of his scalp. Therefore, the evidence of PW-2 that Alim Uddin had given the blow on the forehead of the deceased, whereupon, he fell down and thereafter accuses Pakhi and Bulbul had given a further blow has to be dis-believed. Again if we look at the evidence of PW-2 it has been deposed that it was the accused Alim Uddin, who had given a blow on the left parietal region of the scalp of the deceased, but in her previous statement under section 161 of the Cr.P.C. it was stated that the accused Pakhi had given a blow on his forehead. In view of the aforesaid inconsistencies, it cannot be held with certainty as to who between the accuseds Alimuddin and Pakhi had given a blow on the left parietal region on the scalp of the deceased which had resulted in causing his death.

13. In view of the situation, where one cannot say with certainty as to who between the accuseds Alimuddin and Pakhi had given the single blow on the left parietal region of the scalp of the deceased which caused his death, it would be unsafe to arrive at the conclusion against either of the two accuseds. As regards the aspect of bringing the incident within the purview of section 149 of the Indian Penal Code, we have taken note of that the evidence of PW-2 clearly reveals that it was the accuseds Alimuddin, Pakhi and Bulbul, who had participated in the assault. In order to bring in section 149 of the Indian Penal Code, it is essential that along with a common object there must also be an unlawful assembly. As an unlawful assembly requires five persons in order to form such assembly and when the evidence on record reveals the presence of three persons, we are unable to accept that an unlawful assembly was constituted in the present case. It being so, the incident cannot be brought within the purview of section 149 of the Indian Penal Code. The evidence of PW-2 also clearly reveals that the other accused persons arrived at the place of occurrence only after the assault on the deceased Siraj Uddin had taken place, which again goes against the formation of an unlawful assembly.

14. As the incident cannot be brought within the purview of section 149 of the Indian Penal Code, we are now required to determine the individual liability of the accused persons in committing the assault. As already concluded, the individual liability cannot be assigned to any of the accused persons as to who

had given the single fatal blow on the left parietal region on the scalp of the deceased and it being so, we have to accept that it is a case where, the prosecution had failed to prove beyond all reasonable doubt which of the accused persons had given the single blow resulting in the death of the deceased. Accordingly, the conviction of the accused/appellants, namely, (1) Alimuddin Laskar @ Alimuddin and (2) Moniruddin @ Pakhi Mia under sections 147/148/447/323/302 read with Section 149 of the Indian Penal Code and sentencing them to rigorous imprisonment for 3 (three) months each under section 147 of the Indian Penal Code; rigorous imprisonment for 6(six) months each under section 148 of the Indian Penal Code; rigorous imprisonment for 3(three) months each under section 447 of the Indian Penal Code; rigorous imprisonment for 6(six) months each under section 323 of the Indian Penal Code and rigorous imprisonment for life with fine of Rs. 5,000/-, in default, further 6(six) months simple imprisonment each under section 302 of the Indian Penal Code are accordingly set aside. Accordingly, the conviction of the accused/appellants, namely, (1) Azim Uddin, (2) Ramiz Uddin, (3) Chunu Mia and (4) Batu Mia under sections 147/148/447/323 read with Section 149 of the Indian Penal Code and sentencing them to rigorous imprisonment for 3 (three) months each under section 147 of the Indian Penal Code; rigorous imprisonment for 6(six) months each under section 148 of the Indian Penal Code; rigorous imprisonment for 3(three) months each under section 447 of the Indian Penal Code; rigorous imprisonment for 6(six) months each under section 323 of the Indian Penal Code are also set aside.

15. The accuseds (1) Alimuddin Laskar @ Alimuddin and (2) Moniruddin @ Pakhi Mia are set at liberty forthwith, provided they are not required with any other offence and in respect of accuseds Azim Uddin, Ramiz Uddin, Chunu Mia and Batu Mia their respective bail bonds stand discharged.

16. Both the appeals are allowed to the extent indicated above.

17. Send back the LCRs forthwith.