

(2018) 01 GAU CK 0105
In the Gauhati High Court
Case No : 207 of 2012

APURBA KALITA & ORS

APPELLANT

Vs

THE STATE OF ASSAM

RESPONDENT

Date of Decision : 04-01-2018

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 161](#) - Examination of witnesses by police
[Indian Penal Code, 1860](#), [Section 149](#),
[Section 304-I](#) - Every me

Citation : (2018) 01 GAU CK 0105

Hon'ble Judges : Mir Alfaz Ali

Bench : Single Bench

Advocate : K. Sarma, D. Das, A. Hussain, KM Sarma, B.B. Gogoi

Final Decision : Allowed

Judgement

1. Mr.K. Sarma, learned counsel assisted by Mr. D. Das, A. Hussain and Ms. KM Sarma, appearing for the appellants and Mr. BB Gogoi,

learned Addl. Public prosecutor for the State were heard.

2. This appeal is directed against the judgment and order dated 29.09.2012 passed by learned Addl. Sessions Judge (FTC) No. 2, Kamrup in

Sessions Case No. 190(K)/2006. By the said judgment, the appellants were convicted u/s 304 Pt-I IPC and sentenced to imprisonment for five

years and to pay fine of Rs. 1,000/- each with default stipulation.

3. As per prosecution case, on 24/06/1996, all the appellants armed with various weapons like dao, axe etc attacked the informant party causing

serious injuries to them. Immediately thereafter, they appeared before the Chandmari Police Station and police arranged for their treatment. The

husband of the victim Pralad Das succumbed to the injuries on 25/06/1996. An FIR was lodged by the wife of the victim, on the basis of which,

police registered a case and after usual investigation laid charge-sheet against the accused/appellants.

4. In course of trial, charges were framed against all the accused/appellants u/s 148/323/324/302 read with section 149 IPC, to which the

appellants pleaded not guilty. Altogether 7 (seven) witnesses, including the doctor and the investigating Officer were examined by the prosecution

to establish the charge and on appreciation of evidence, learned trial court convicted the accused/appellants u/s 304 Pt. I read with section 149

IPC and awarded sentence as indicated above.

5. Being aggrieved, the accused/appellants have preferred the instant appeal. I have considered the submission made by the learned counsels as

well as the evidence and materials brought on record.

6. Learned counsel for the appellants Mr. Sarma submitted, that no independent witness was examined. Although there were independent witness

present, only the interest witness being the informant and her two sons had been examined by the prosecution and therefore, no reliance could be

placed on the testimony of such interested witnesses, who were also evidently inimical, submits Mr.Sarma. Further contention of the learned

counsel was that there was quarrel between the parties upon dispute relating to land and some of the appellants also sustained injuries in the

incident which took place at the spur of the moment and therefore, no element of common object was present in the instant case.

7. From the testimony of PW 1, PW 2 & PW 3, it appears that initially the quarrel took place between the PW 2 and the accused/appellant

Monoj. Evidently thereafter the accused persons allegedly caused damage to the shop house of the complainant and when the husband of the

complainant (deceased) raised objection, the quarrel took place. It is also evident that the members of both the sides sustained injuries and there

were also cross cases. Admittedly when the quarrel started initially between the accused Monoj and PW 2, Monoj did not have any arm in his

hand. Thus, the fact that initially quarrel took place between the accused/appellant Monoj and PW 2 and they were unarmed and subsequently

others arrived and the occurrence took place, where both the parties admittedly

sustained injury, clearly demonstrated the absence of common object or formation of unlawful assembly with the common object to cause death of the victim. Indeed no evidence has been brought on record to prove the formation of unlawful assembly with the common object to cause death of the victim. Therefore, I am of the considered view, that section 149 was not available to the prosecution in the present case.

8. Having held that section 149 IPC was not applicable, in so far as causing of death of the victim Pralad Das in the instant case is concerned, it would be necessary to find out as to who could be responsible individually for causing death of the victim Pralad Deka.

9. The doctor (PW 5), who conducted the post mortem examination of the body of the victim, found the following injuries : -

Injuries :-

No. 1 : Paternal abrasion with surrounded contusion 8 cm X 1cm X skin deep, contusion present on left hypochondrium and left lumbar region on abdomen.

No. 2: Abrasion all around the lower part of right leg X 1 cm, above the ankle joint.

No. 3. One contusion 5 cm X 3 cm, present in postero- medial aspect of left forearm joint, above the writ -joint.

No. 4: One stitched wound on lateral part of left forehead and left temple. On antero-posterior direction the anterior and being 2cms above the lateral and of left eye-brow and the posterior end being 6 cms above the pinna of left ear. The wound is incised one X scalp, skull and brain deep.

No. 5. One abrasion with contusion 3.5 cma X 1.5 cm, on right cheek, 1 cm lateral canthus of right eye.

No. 6 : Both upper eye-lids bruised, bluish -black discoloration present (Black eyes). Sub-conjunctival haemorrhages present in both eyes.

No. 7: One cut wound, 2cms X 1 cm X scalp layers deep, present on posterior part of right parietal region over parietal meninges. Bolld clots adherent in the wound.

Scalp : As described in Injury No. 4 and No. 7.

The stitched wound was incised cut and cut the whole layers of scalp, skull and 2 cm deep in brain matters. The brain matters are coming out

through the wound.

Skull : Whole thickness of the left frontal and anterior left parietal bone cut. Depressed comminuted fracture present at the site of the cut area.

Blood clots adherent at cut and fracture sites.

Vertebrae : Healthy.

Meninges : Cut at the site of brain cut.

Sub-dural and sub-arachnoid haemorrhages present in left hemispheres.

Brain : cut at frontal (left) lobe and anterior part of left parietal lobe. Left frontal lobe lacerated. Rest of the brain congested.

Spinal Cord : not examined.

Liver : congested.

Spleen : congested.

Kidneys : Both congested.

Organs of generation : Healthy.

Walls of ribs and cartilages : All healthy.

Pleurae : congested.

Larynx & trachea : healthy.

Lungs : both congested.

Pleura : Healthy.

Heart : Healthy, chambers full with fluid blood.

Coronaries - healthy.

Vessels : Healthy.

Diseases or deformity : Nil

Dislocation : Nil.

10. In the opinion of the doctor cause of death of the victim was due to coma resulting from the injuries sustained on his head. Injury Nos. 4 and

7 were caused by heavy sharp cutting weapon and other injuries were caused by blunt weapon. All the injuries were ante-mortem and homicidal in nature.

11. PW 4, the another doctor, who examined the injured (PW 1 & PW 2) as well as the accused Purnima Kalita found as follows :-

Medical report of A.K. Das (PW 2) :

Aged 25 years. registration No. 294/96, Hospital No. A29841. As per record, injuries were as follows :

History of assault on 24.6.96 at 3.30 pm. No history of unconsciousness and vomiting present. Cut injury is recorded as 1.5 cm X 0.5 cm. No

fracture of any bone found clinically.

Medical report of Purnima Kalita.

Aged 45 years , female , Hospital No. A 29893, Registration No. 29423. As per record injuries were as follows :-

History of alleged assault. No history of unconscious and vomiting. Pulse recorded 104 per minute. B.P. : 170/110. Abdomen : Soft, tenderness

over epigastric region. Tenderness over lumbosacral region. Type of weapon was blunt and nature of injury was simple.

Medical report of Syama Das (PW 1) :-

Aged 40years. registration No. A29424, Hospital No. 29850. Date of examination :- 24.6.96 at 3.30 pm. As per record, injuries were as follows

:

Alleged cut injury of middle finger of right hand, size 4 cm X 1 cm. Cut of left hand (middle finger).

Patient was found conscious. Pulse recorded 88 per minute. B.P. 120/80. There were stitches on the right hand finger.

Type of weapon was sharp and nature of injury was simple.

12. During cross, PW 4 stated that, on the same day he also examined the injured Naba Kalita and proved the injury report of Monoj Kalita as

Ex-A and injury report of Naba Kalita as Ex-B.

13. PW 1, the informant stated, that initially altercation took place between Aswini (PW 2) and the accused/appellant Monoj. She scolded Aswini

(PW 2) and asked him not to quarrel. Thereafter all the accused persons, namely, Monoj with axe in his hand, Purnima and Newton with dao, the

accused Naba with ""chiprang"" and accused Apurba with stick came towards their house, rebuked them (complainant party) and started to hit on

the wall of their shop. Seeing the accused persons, the wife of the victim kept her both sons, i.e., PW 2 and PW 3 confined in the house by locking

the door from outside. Her husband, the victim, when asked the accused, as to

why they were causing damage to the shop, all the accused persons caught him and mounted assault on him. She also stated that both Monoj and Naba hit on the head of her husband with axe and "chiprang" respectively. In the meantime, Aswini came to the place of occurrence and he also sustained injury. She also stated to have sustained injury on her hand, while trying to save her husband. During cross-examination, she admitted that they had dispute with the accused persons over a plot of land since 1993. During cross, she admitted to have not stated in her statement recorded u/s 161 CrPC, as to which accused was armed with what weapon. She also admitted to have not stated as to which accused assaulted whom and with what weapons. She admitted to have stated before police that her son Aswini sustained injury on being attacked by the accused persons, but she did not state about her husband sustaining injury. She also admitted that accused Monoj, Purnima and Naba were also taken to hospital. However, she pleaded ignorance about sustaining injury by them.

14. PW 2 stated in his evidence that they have a plot of land in front of their house, which they were possessing for a long time and the accused party also claimed the said land and there was an incident prior to the present occurrence for which police case was filed. He further stated, that while he was coming from school, Monoj hit him from the back side and there was altercation and scuffle between them. He also stated that after the quarrel, he came home and informed his parents about the occurrence and after half an hour the accused persons armed with dao, axe etc came and caused damage to their shop. They also rebuked the complainants. According to him, his mother did not allow him and PW 3 to go out and his father (deceased) went out to see as to what had happened. When his father went out, the accused Monoj and Naba inflicted injuries on his head. According to him, his mother (PW 1) also sustained injury on her finger, but he did not see as to who caused such injury. During cross-examination he stated that one Pralad Deka and Mahendra Barman took them to the police station. He also admitted that the accused Monoj, Naba and Purnima also sustained injuries in the same incident and they were also taken to hospital. He further stated that during altercation between Monoj and himself, Monoj did not have any weapon in his hand.

15. According to PW 3, while he was in the house, hearing scream of PW 2 by saying "" ""hunto muk basa"" (Hunto, save me) "", he came out and

found Monoj and PW 2 quarreling. According to him, he brought PW 2 home and immediately after 10 minutes the accused persons came and

started rebuking them. They also caused damage to the shop and his father came forward to raise objection. According to him, both he and PW 2

were inside the house. He further stated that PW 2 saw the occurrence through the window, but he could not see the occurrence properly. On

reaching the place of occurrence, he noticed that his father was lying at the place of occurrence. He also stated that the neighboring people came

there and disbursed the accused persons from the place of occurrence. During cross examination he admitted to have stated before police that his

father was assaulted by rod, but he did not see as to who assaulted his father.

16. Dispassionate scrutiny of the testimony of PW 1, PW 2 and PW 3 makes it appear, that although PW 1 has elaborately stated in her evidence

after 10 years of occurrence, that accused Monoj was armed with axe, Purnima with dao, Naba with axe, Newton with dao and Apurba with

stick, but in the FIR lodged by herself immediately after the occurrence, she did not state specifically as to which accused was armed with what

weapon. She also admittedly did not state before police as to which accused assaulted whom or by what weapon. She also admittedly did not

state before police regarding her husband sustaining injury. She only stated about the injury sustained by PW 2. This being the position, the

testimony of PW 1 that she had seen the accused Monoj and Naba hitting the victim with axe and ""chiprang"" is hardly convincing. According to

PW 3, he and PW 2 were kept confined in the house and the door was bolted from outside, because of which he could not see the occurrence.

When he and the PW 2 came to the place of occurrence, he found his father lying on the ground. According to PW 3, the PW 3 and PW 2 came

together to the place of occurrence; whereas, according to Aswini (PW2), he came first and PW 3 came later. If the evidence of PW 1, PW 2 &

PW 3 is believed that PW 1 kept PW 2 and PW 3 confined inside the room and bolted the door from outside, then question arises how they could

see the occurrence. PW 3 himself admitted that because of remaining inside the house he could not see the occurrence and only after arriving at the

place of occurrence found his father lying with injury. Therefore, the testimony of PW 2 and PW 3, that they had seen the accused Naba and

Monoj hitting the victim with axe and ""chiprang"" also appear to be doubtful.

17. Admittedly three persons from the informant side also sustained injuries. Although PW 1 denied about their sustaining injury, PW 2 admitted

that accused Naba, Monoj and Purnima also sustained injuries in the same incident. It is also admitted position that for the same occurrence the

accused party also lodged an FIR giving rise to a cross case. That the accused/appellant Monoj, Naba and Purnima sustained injury is also

supported by the doctor (PW 4), who examined the injured after the occurrence.

18. Admittedly there was long standing enmity between the parties because of land dispute. Admittedly both the parties sustained injuries in the

occurrence. It is also evident that initially the accused persons did not attack the victim or any members of the victim's family, but they only caused

damage to the shop of the victim. It is also evident that initially the occurrence took place between PW 2 and Monoj. Although PW 1 and PW 2

sought to project that the occurrence in which the victim sustained injury took place after half an hour of the quarrel between PW 2 and Monoj,

such evidence was belied by PW 3, who stated that only after 10 minutes, the incident of assault took place, which clearly demonstrates that

initially quarrel took place between Monoj and Aswini and subsequently, the incident of assault took place by participation of the persons from

both the sides. No evidence has been brought on record to show, as to who was the aggressor, though evidently quarrel took place for the dispute

relating to land, which was admittedly claimed by both the parties. Admittedly there were independent persons at the place of occurrence, who

disbursed the accused persons and immediately after the occurrence one Pradip and Mahendra Barman took the injured to the hospital, but

surprisingly prosecution has not examined any of the independent witness in support of the prosecution case, except the wife and two sons of the

victim, who were evidently inimical to the appellant and interested witness.

19. Thus, the unreliability of the testimony of PW 1, PW 2 and PW 3, who are evidently interested witnesses, and inimical to the appellant, non-

examination of any of the independent witnesses, who were admittedly present at the place of occurrence and absence of explanation from the

prosecution as to how three persons from the accused side sustained injury cast serious doubt on the case projected by the prosecution, more

particularly as to who caused the injury to the victim, which ultimately caused his death. Although PW 1 and PW 2 stated that accused Monoj and

Naba hit on the head of the victim, but from the discussion made hereinabove revealed that such testimony of these two witnesses are not reliable

and worthy of inspiring confidence. What therefore, crystallizes from the totality of the evidence and the facts and circumstances of the case is that

prosecution has not been able to discharge its burden to prove the guilt of the accused/appellants beyond all reasonable doubt and therefore,

conviction and sentence of the accused/appellants deserves to be set aside.

20. For the reasons stated supra, the conviction and sentence of the accused/appellant is set aside. Appeal stands allowed. Bail bond stands

discharged.

21. Send back the LCR.