
(2019) 12 GAU CK 0014
In the Gauhati High Court
Case No : Criminal Appeal No. 437 Of 2017

Gobinda Saha And 3 Ors

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 06-12-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 341
Code Of Criminal Procedure, 1973 — Section 161

Citation : (2019) 12 GAU CK 0014

Hon'ble Judges : Mir Alfaz Ali, J;S. Hukato Swu, J

Bench : Division Bench

Advocate : N Mahajan, H Sarma

Final Decision : Allowed

Judgement

Mir Alfaz Ali, J

1. Heard learned counsel, Mr. B.K. Mahajan for the appellants and learned Addl. P.P., Mr. T.K. Mishra for the State-respondent.

2. This appeal is directed against the judgment and order passed by the learned Sessions Judge, Chirang in Sessions Case No.97(B)/2015, whereby, the learned Addl. Sessions Judge convicted the appellants under section 302/341 IPC and sentenced them to imprisonment for life and fine of Rs.10,000/- each with default stipulation u/s 302 IPC. The appellants were further sentenced to rigorous imprisonment for 15 days u/s 341 IPC.

3. As per prosecution case on 20-03-2011, at about 11.30 pm when the husband of the informant Basanti Saha (PW-1) was coming from Bijni market, the accused persons named in the FIR, in pursuance of a conspiracy, obstructed him in front of the house of one Ganesh Saha and assaulted him by wooden and bamboo 'lathis', thereby causing serious injuries to him. The deceased was taken to the hospital immediately after the occurrence. However, he succumbed to the injuries. Initially a GD Entry was made on the basis of oral information given by

the PW-1 Basanti Saha. Later on, she lodged a written FIR, on the basis of the which, police registered Bijni P.S. No. 70/2011 u/s 341/302/34 IPC and commenced investigation. In course of investigation, police recorded the statement of the witnesses, prepared the inquest report, send the body for post mortem examination and Dr. Rajendra Kumar conducted the post mortem examination on the body of the deceased.

4. Dr. Rajendra Kumar (PW-10), who conducted the post mortem examination on the body of the deceased, found one sharp incised wound over the occipital region size of 3" x 1" x1". On dissection -- expulsion of brain matter were found. Another sharp cut injury was found between right thumb and index finger. Approximate size of 2" x1 x1.

5. The doctor opined that the injuries were ante mortem and the cause of death were haemorrhage and neurogenic shock as a resulting of the injuries.

6. On conclusion of the investigation charge-sheet was laid against six accused persons including the present appellants. Two of the charge-sheeted accused persons, absconded and eventually the present appellants stood trial.

7. In course of trial, charges u/s 302/341 IPC were framed against the appellants, to which all of them pleaded not guilty. Twelve witnesses were examined by the prosecution to establish the charges and on appreciation of evidence learned Sessions Judge convicted all the four appellants u/s 302/341 IPC and awarded sentence as indicated above.

8. We have carefully scrutinized the evidence brought on record and on scrutiny of the evidence, we find that the entire prosecution case is banking on the oral testimony of PW-1 and PW-2 and the investigating officer.

9. Mr. B.K. Mahajan, learned counsel strenuously arguing for acquittal of the appellants, submits, that the oral testimony of PW-1 & PW-2, upon whom the learned Sessions Judge heavily relied were not believable as their presence at the place of occurrence was itself doubtful. Mr. Mahajan further contends that both the PW 1 & PW-2 stood contradicted with their previous statement on material facts and PW-1 (informant) has given different different version at different stages implicating different persons in GD Entry, FIR and statement u/s 161 CrPC as well as the evidence before court. Therefore, no conviction could have been recorded on the basis of the oral testimony of PW-1 & PW-2, submits Mr. Mahajan.

10. Learned Addl. Public Prosecutor, Mr. Mishra, however supported the judgment of the learned Sessions Judge. Mr. Mishra submits that though, there are some discrepancies in the oral testimony of PW-1 & PW-2 raising some amount of doubt, the same cannot demolish the entire prosecution case so as to warrant interference with the impugned judgment.

11. PW-1, Basanti Saha stated in her evidence, that at 7.30 pm, her husband, the deceased Biswajit Saha went to attend an invitation. After 14/15 minutes of

his departure, she heard scream of her husband saying that "I have been attacked". Immediately she rushed to the place of occurrence and found her husband lying on the road near the house of appellant Ganesh. She also stated to have seen Ganesh Saha, Gopal Saha, Gobinda Saha, Rajkumar Saha and Champa Saha assaulting her husband. According to her, accused Champa had an iron rod, Hutu had 'dao' and the rest of the accused persons had bamboo sticks in their hands. She further stated that her son Bimal Saha was also with her, who came a little later. During cross-examination, she stated that hearing scream of her husband, she went to the place of occurrence first and there was no electricity at that point of time. She also stated that she did not see any person except the accused. According to PW-1, her son Bimal (PW-2) reached the place of occurrence after about half an hour of her arrival.

12. PW-2 deposed, that he was sitting in the house of Ganesh Saha. Hearing hue and cry he came in a run and found her father lying on the road. His mother too came to the place of occurrence and had seen the accused Ganesh, Gobinda, Raj Kumar, Champa and Hutu assaulting the deceased. During cross-examination, PW-2 stated that just after five minutes of his arrival at the place of occurrence, his mother came there. PW-2 also stated, that on reaching the place of occurrence he found his father (deceased) lying on the ground in an unconscious state. He also stated that hearing scream of his father, he alone came to the place of occurrence and after arrival of his mother at the P.O., one Satish also arrived there. The GD Entry made on the basis of the information given by PW-1 has been proved and marked as Ext.-7. Although PW-1 stated in her evidence, that hearing scream of the deceased, she arrived at the place of occurrence followed by her son and had seen the appellants and other co-accused assaulting the victim, her evidence has been contradicted by PW-2, who also claimed to be eye witness, inasmuch as, according to PW-2, he arrived at the place of occurrence before PW-1 and found his father lying unconscious at the place of occurrence. Whereas, according to PW-1 after ½ hour of her arrival at the place of occurrence, PW-2 came to the place of occurrence, meaning thereby, both the PW-1 and PW-2, who have projected themselves to be eye witness sought to belie the evidence of each other. Because, if the evidence of PW-2 is believed than PW-1 (first informant) cannot be considered as an eye witness of the occurrence.

13. We also notice that immediately after the occurrence PW-1 verbally informed the police, on the basis of which, Ext. -1 GD Entry was made, wherein PW-1 has implicated as many as eight persons. However, on the same night after an hour, she lodged the written FIR, wherein she has implicated six persons leaving aside the two, who were initially implicated in the first information, on the basis of which GD Entry was made. In the first information given by the PW-1, on the basis of which Ext.-7, GD entry was made, the PW-1 did not attribute any specific overt act to any of the person mentioned therein, nor made any whisper regarding any weapon carried by any particular accused. Whereas in the written report (Ext.-), she had stated that the accused persons assaulted the deceased

with iron rod, bamboo 'lathi' etc. However, while deposing in court she stated, that the absconding accused Champa and Hutu had iron rod and 'dao' respectively in their hands and rest of the accused named in the FIR were armed with bamboos and sticks. If we look at the statement of PW-1 made at different stages of the proceeding starting from the GD Entry till the deposition in court, as well as the statement recorded u/s 161 CrPC, we find that she made self contradictory and mutually destructive statement implicating different different persons at different stages of the proceeding. PW-2, son of the PW-1, stated categorically in his evidence, that on his arrival at the place of occurrence, he found his father lying on the road in unconscious condition and thereafter his mother arrived at the place of occurrence, meaning thereby, the PW-2 also did not have the opportunity to witness the assault or tried to suppress the real genesis of the occurrence. Therefore, in view of the contradictory and mutually destructive evidence, in our considered view, no credibility can be attached to the oral testimony of the PW1 & PW-2, who projected themselves as eye witness.

15. The medical evidence of PW-10 transpires, that the deceased sustained two sharp cut injuries, one on the occipital region and the other in between the right thumb and index finger. Referring to the inconsistency between the medical evidence and the oral testimony of PW-1 & PW-2 with regard to the injuries, Mr. Mahajan contends that, had the deceased been attacked by a group of not less than six persons with multiple weapons like iron rod, dao, lathi etc, there could not be only one injury on the head. Mr. Mahajan, learned defence counsel further contends, that since the oral testimony of PW-1 & PW-2 is not inspiring confidence in view of glaring inconsistencies, the medical evidence must be given weight and we find force in the submission, having regard to the nature of oral testimony of the PW-1 & PW-2. Having considered the evidence of the prosecution in it's entirety, we are of the view, that no reliance can be placed on the oral testimony of the PW1 & PW-2 to record conviction of the appellants without any independent corroboration, which we found totally absent.

16. Thus, if the oral testimony of PW-1 & PW-2 is discarded and not taken into consideration, the prosecution is left with no evidence at all to substantiate the charge against the present appellants. Thus, the evidence and materials brought on record crystallizes that the prosecution evidence was grossly inadequate to prove the charge against the appellants beyond reasonable doubt. Therefore, the conviction and sentence of the present appellants cannot be sustained. Accordingly, we set aside the conviction recorded and sentence awarded by the learned Sessions Judge and allow the appeal filed by the present appellants.

17. The appellants be set at liberty forthwith, if not required in any other case.

18. Send back the LCR.