
(2001) 10 GAU CK 0035
In the Gauhati High Court
Case No : Criminal Appeal No. 160 of 1999

Hiralal Baisnab and Others

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 16-10-2001

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 302, 341

Citation : (2002) 1 GLT 141

Hon'ble Judges : P.G. Agarwal, J;J.N. Sharma, J

Bench : Division Bench

Advocate : J.M. Choudhury, B.M. Choudhury, Rabindra Baisnab, Nabajit Bharali, M. Singh and G. Singh, for the Appellant; P.P. and B. Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

1. Heard Sri J.M. Choudhury, learned senior advocate for the Appellants and Sri B. Banerjee learned Public Prosecutor, Assam.
2. The five Appellants before us were convicted of the offence u/s 302 IPC read with Section 149 IPC by the Addl. Sessions Judge, Cachar, Silchar, in Sessions Case No. 69/97 and sentenced to imprisonment for life and also to pay fine of Rs. 500/- each in default of payment of fine, to undergo further imprisonment of one month. The Appellants were also convicted and sentenced u/s 148 and 341 IPC read with Section 149 IPC.
3. The prosecution case is that on the date of occurrence i.e., 25th of December 1993, PW-2 Shri Ganga Charan Baisnab, PW-7 Sri Ramani Baisnab and the deceased Harendra Ch. Baisnab were returning home from Gumrabazar. The time of occurrence was about 5 p.m. When PW-7 reached near his house he parted company and proceeded towards his house. PW-2 and the deceased proceeded further and suddenly all the five accused persons armed with dagger, sword, ballam, dao etc., appeared at the scene and started assaulting Harendra. Both

Harenda and PW-2 raised alarm, hearing which, Ramani also returned back to the place of occurrence. The accused persons after assaulting the deceased left the place. PW-2, PW-7 with the help of Ors. , carried the injured to the Police Outpost. Hiralal Baisnab, son of the deceased on receiving information came towards the place of occurrence and met the group on the road. He was informed by PW-2 and Ors. about the assault by the accused persons. PW-1, thereafter, lodged the F.I.R. Ext.1 naming the accused/Appellants. The injured was sent to Kalain P.H.C., where doctor declared him dead. Post-mortem Was conducted and police after usual investigation, submitted charge-sheet.

4. PW-10 is Dr. B.K. Bora, who held autopsy and found as follows:

Body of a male with average build about 70 years of age wearing one white underwear only, which was stained with blood, rigormortis present on the limbs.

Injury No. 1: One transverse cut wound of 10 x 2 cm. size starting from right angle of the mouth and extending laterally up to maxillary region which is muscle deep.

Injury No. 2: One transverse cut injuries on the middle part of the back of the right forearm measuring 8x1 cm, which is muscle deep.

Injury No. 3: One stab wound of 3 x 1 cm. size on the mid-axillary plane of right side thoracic wall at the 6th intercostal space and gone in to the thoracic cavity.

Injury No. 4: One stab wound on the roof of the right side of the neck of 3 x 1 cm. size and 6 cm.

Injury No. 5: One transversely placed stab wound of 4 x 2 cm. size situated on the left 5th intercostal space of back of the thorax, which is 8 cm. left lateral to the midline and gone inside the thorax.

Injury No. 6: One stab wound of 4 x 2 cm. size on the back side of the thorax and left 10th intercostal space 6 cm. lateral to the midline and gone inwards and downwards.

Injury No. 7: One stab wound on the back of the abdominal wall on the left side, which is 4 x 2 cm. in size situated 7 cm. lateral to the midline and gone into the abdominal cavity.

Injury No. 8: One stab wound of 5 cm. x 2 cm size situated on the right of the abdominal wall 3 cm. below the 11th rib and at the posterior axillary plane in an axillary cavity. All injuries were ante-mortem and recent.

The liver was penetrated under the wound No. 8 producing a wound of 4 cm. x 1 cm. 6 cm. deep.

Spleen: The spleen was penetrated under wound No. 6 producing one wound of 3 cm. x 1 cm.

Ribs & Cartilages: Intercostal muscles were cut under wound No. 3, 5 and 6.

Plura: Plura on left side was cut under wound No. 3, 5 and 6.

Lung:- The left lung was cut under the wound No. 3,5 and 6. right lung healthy. Th stomach was empty contains much membrane was healthy.

Opinion: In my opinion, death was due to shock and haemorrhage as a result of ante-mortem injuries caused by the impact for sharp cutting pointed weapons. The injuries are homicidal.

5. The death of the deceased, was a result of the injuries sustained by him, on the date of occurrence, is well established from the evidence on record and has not been disputed in this case. The entire prosecution case rests on the testimony of two eyewitnesses, namely PW-2 and PW-7. PW-2 was all along with the deceased when the incident took place. He has categorically stated the accused Sonakumar gave the first blow with sword on the mouth of the deceased, whereupon Harindra fell down, raising cry; thereafter, all the other accused persons assaulted the deceased. The witness has stated, that the accused persons are known to him from before as they are persons of the neighbouring villages. Moreover, it was a moonlit night and he could recognise the persons. Identification of the accused persons as such is not disputed. This witness disclosed the name of all the five accused persons to PW1 and the other witnesses, who arrived at the scene of occurrence immediately afterwards. The FIR containing the name of the accused persons was filed by PW-1 on the basis of the information received from PW-2.

Sri Ramani Baisnab, PW-7 had left the company of PW-2 and the deceased just prior to the occurrence, but on hearing hulla of PW-2, he rushed back to place of occurrence and on the way, he saw the five accused persons running away from the place of occurrence. He found the deceased lying on the ground with cut injuries. PW-2 told him that the deceased has been assaulted by the accused persons. Thus, although PW-7 did not see the actual assault on the deceased, he did see the accused persons running away from the place of occurrence. The names of the accused persons were reported to him immediately thereafter by PW-2.

6. In this case, the evidence of the eyewitnesses stands fully corroborated from the medical evidence on record as stated above. The deceased was assaulted with sharp weapons like sword, dagger etc. and the Doctor's findings has mentioned about sharp cut injuries. The learned Counsel for the Appellant however submits that PW-2 has stated specifically about first assault on the deceased by Appellant Sona Kumar Baisnab but, has not given any specific statement as to who assaulted the deceased thereafter and with what weapons. The witness has however made a statement that five accused persons thereafter assaulted the deceased with the weapons carried by them. Placing reliance on a decision of the Apex Court in the case of Manoj @ Bhau and Others Vs. State of Maharashtra, Sri Choudhury submits in absence of any evidence regarding definite covert act on the part of other accused persons, the other accused

persons are entitled to acquittal. In the case of Manoj (supra), the Apex Court found that the evidence against the two other persons in that case is not sufficient and the witnesses did not state about carrying weapons by those accused persons and the necessary ingredients of Section 149 IPC are not established, the case was decided more or less on the basis of the facts and the evidence available.

7. The learned Counsel for the Appellants has also drawn our attention to the alleged dying declaration of Harendra to show that only Sonakumar and Sunil were named by the deceased and as such the other three accused persons are entitled to acquittal. PW-2 has stated as below:

The injured Harendra somehow managed to speak out to us that as because he (injured) settled the bichar of Sonakumar and Sunil, they attacked me and injured me.

From the above, it can be seen that the deceased gave the motive of the assault on him by the accused persons by stating that he had settled a bichar of Sonakumar and Sunil (both accused Appellant before us), they attacked and injured him. The above statement cannot be read to suggest that the assault was made by Sona Kumar Baisnab and Sunil Kumar Baisnab only. The word "They" pointed to all the accused persons. Hence, from the oral dying declaration of the deceased, we find no material to exclude Appellants Navadeep, Shyamacharan and Hiralal.

8. In order to bring home the charge of murder with the aid of Section 149 IPC, the prosecution is required to show the common object of the assembly and that five or more persons did certain acts in prosecution of that object. This is not a case of chance encounter or an occurrence taking place at the spur of the moment. The five accused persons, armed with deadly weapons, were waiting on the roadside jungle and when the deceased and PW-2 arrived at the selected place, on their way to their house, they pounced upon them and caused as many as 8 Nos. of injuries. Admittedly, all the injuries were not caused by a single person and there is evidence of PW-2 that after the first assault by Sona Kumar, the deceased fell down and then all the five accused persons assaulted the deceased. The fact that the accused persons assaulted the deceased only and at no point of time tried to assault his companion PW-2, it shows that the common object of the assembly was to assault the deceased Harendra only and the members of the assembly pursued their objective. The fact that they were armed with weapons like sword, dao, ballam, etc. and attacked the victim with those weapons is established by the medical evidence on records, it is apparent that they were members of the unlawful assembly with common object of committing murder.

9. In the case of Nallamsetty Yanadaiah and others Vs. State of Andhra Pradesh, the Apex Court held that for the purpose of application of Section 149 IPC, the prosecution has to prove the presence and participation in an unlawful assembly.

The presence of the five Appellants at the place of occurrence is established from the evidence of PW-1, PW-2 and PW-7. The accused persons had no business to wait on the roadside with deadly weapons at that hour of the day. This goes to show that their object was unlawful. As regards the purpose, PW-2 has categorically stated that all the five accused persons assaulted the deceased and this finds support from the number of injuries found on the deceased. Now, the question is, whether PW-1 was expecting to give graphic details of the incident as to the sequence of the assault and as to who assaulted and with what weapon. Murder of a 70-year-old unarmed person is a gruesome act and when such occurrence takes place suddenly, people react in different manner. Some persons flee away and then some persons may pass out in such a situation, no one can be expected to keep a track of sequence of assault.

10. The Trial Court has relied on the testimony of the eyewitness PW-2 and on perusal of the evidence we found no reason whatsoever, to take a contrary view of the matter. We find PW-2 is a reliable, trustworthy, and convincing witness and his evidence stands fully corroborated.

11. There cannot be any direct evidence regarding intention of the members of unlawful assembly, it is to be gathered from the facts and circumstances of each case, the nature of and the location of the injuries, the weapons used etc. etc. As discussed above all the five accused were waiting near the place of occurrence and being fully armed with deadly weapons and after assaulting the deceased fled away together.

We therefore find that all the ingredients of Section 149 IPC has been established and the conviction and sentence entered into by the Trial Court needs no interference.

12. In the result, there is no merit in this appeal and the appeal stands dismissed. If the accused/Appellants are on bail, they are directed to surrender forthwith before the Addl. Sessions Judge, Cachar, Silchar, to serve out the sentence.