

(2006) 05 GAU CK 0048
In the Gauhati High Court
Case No : Criminal Appeal No. 182 of 1999

Iman Ali and Others

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 09-05-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 109, 302, 304, 323, 34

Citation : (2006) 4 GLT 278

Hon'ble Judges : Iqbal Ahmed Ansari, J

Bench : Single Bench

Advocate : P. Sarma, for the Appellant; B.S. Sinha, for the Respondent

Judgement

I.A. Ansari, J.—By the impugned judgment and order, dated 15.7.1999, passed, in Sessions Case No. 02/1999, by the learned Sessions Judge, Morigaon, while the accused-Appellant No. 1, namely, Iman Ali, stands convicted u/s 304 Part-II IPC, the accused-Appellant Nos. 2 and 3, namely, Omar Ali and Mosab Ali respectively, stand convicted u/s 323 IPC and the accused-Appellant No. 4, namely, Mustt. Milajan Begum, stands convicted u/s 109 read with Section 323 IPC. While the accused-Appellant No. 1, Iman Ali, has been sentenced to undergo rigorous imprisonment for 6 (six) years and pay fine of Rs. 2,000.00 and, in default, suffer rigorous imprisonment for a further period of one month, the accused-Appellant Nos. 2, 3 and 4, namely, Omar Ali, Mosab Ali and Mustt. Milajan Begum respectively, stand sentenced to undergo rigorous imprisonment for 6 (six) months.

2. The case against the accused-Appellants, as unveiled at the trial, may, in brief, be described thus: On 10.1.1998, at about 7 a.m., on noticing accused Iman Ali cutting earth from the path, which passes by the side of the boundary of Taleb Ali's homestead, when Taleb Ali objected to the cutting of the earth, Iman Ali assaulted Taleb Ali on his back with the reverse side of a spade. On being so assaulted, Taleb Ali fell down on the ground. After Taleb Ali, so fell down on the

ground, accused Omar Ali and accused Mosab Ali too, on being instigated by accused Milajan Begum, kicked Taleb Ali and gave him fist blows. On seeing assault on Taleb Ali, when his relatives, who were present at the house of Taleb Ali, raised halla, the accused went away. Taleb Ali was brought to his house in injured condition and he was, then, taken to the Civil Hospital, Morigaon. As his condition deteriorated and he was being shifted to Gauhati Medical College & Hospital, Guwhati, for treatment, he succumbed to his injuries on the way. With regard to the occurrence, First Information Report was lodged by the mother of Taleb Ali, namely, Minaki Begum. Based on this First Information Report, Mikirbheta P.S. Case No. 06/1998 under Sections 302/34 IPC was registered against the accused-Appellants. During the course of investigation, police held inquest over the said dead body, drew a sketch-map of the alleged place of occurrence, seized a dao from the house of accused Iman Ali and, on completion of investigation, laid charge-sheet against the accused-Appellants under Sections 302/34 IPC.

3. To the charges framed, at the trial, u/s 302 read with Section 34 IPC against the accused-Appellant Nos. 1, 2 and 3, namely Iman Ali, Omar Ali and Mosab Ali respectively, all of them pleaded not guilty. As against the accused-appellant No. 4, namely, Milajan Begum, charge was framed u/s 109 read with Section 302 IPC. To the charge, so framed, accused-Appellant No. 4 too pleaded not guilty.

4. In support of their case, prosecution examined altogether 8 (eight) witnesses. The accused were, then, examined u/s 313 Code of Criminal Procedure and in their examination aforementioned, the accused denied that they had committed the offences alleged to have been committed by them, the case of the defence being that of total denial. The accused Appellant No. 3, namely, Mosab Ali took the plea of alibi and adduced evidence in support of this plea. On, however, finding the accused evidence in support of this plea. On, however, finding the accused-Appellant No. 1, Iman Ali, guilty of the offence u/s 304 (Pt. II) IPC, the learned trial Court convicted him accordingly and passed the sentence as mentioned hereinabove. Similarly, on finding the accused-Appellant Nos. 2 and 3, namely, Omar Ali and Mosab Ali respectively guilty of the offence u/s 323 IPC and accused-Appellant No. 4, namely, Milajan Begum, guilty of the offence u/s 109 read with Section 302 IPC, the learned trial Court convicted them too accordingly and passed sentences against them as indicated hereinabove.

5. I have heard Mr. P. Sarma, learned Counsel for the accused-Appellants, and Mr. B.S. Sinha, learned Additional Public Prosecutor, Assam, appearing on behalf of the State Respondents.

6. While considering the present appeal, what needs to be noted is that prosecution examined P.Ws. 1, 2, 3 and 4 as eye-witnesses to the alleged occurrence of the result on Taleb Ali. All these witnesses are, admittedly, close relatives of each other. There is also no dispute with regard to the fact that for causing death of Lakidhar Sheikh, father of the accused-Appellant Iman Ali, Taleb Ali (since deceased) and P.W. 3 (Jahuruddin) had been tried on a charge of

murder. While P.W. 3 was acquitted, Taleb Ali was convicted and the appeal against his conviction was pending, when the alleged occurrence leading to Taleb Ali's death took place. There was, thus, serious enmity existing between Taleb Ali and his family members including Jahuruddin (P.W. 3) and his wife, Safirun Nessa (P.W. 2), on the one hand, and accused-Appellant Iman Ali and the remaining accused-Appellants, on the other. The existence of such inimical relation between the parties concerned was, thus, a double-edged weapon. While this enmity could have been a reason for the accused-Appellants to assault Taleb Ali, the existence of such inimical relation could have also been the reason for roping in the innocent persons alongwith the guilty ones. When the witnesses are hostile and inimical to the accused, their evidence needs to be carefully and closely scrutinized and all reasonable possibilities of the accused having been falsely implicated must be ruled out before any reliance is placed on the evidence of such inimical witnesses.

7. Bearing in mind the above fundamental aspects of criminal jurisprudence, when I turn to scrutinize the evidence on record, I find that P.W. 4 (Khudeja Begum), who is widow of deceased Taleb Ali, has deposed that on the day of the occurrence, at about 6.30 a.m., while she was husking paddy at their verandah, she heard cries and saw accused Iman Ali assaulting her husband on his back with the reverse of the spade. P.W. 4 has also deposed that she saw accused Millazan Begum instigating the other accused persons to assault Taleb Ali, when Taleb Ali was lying on the ground and, on being so instigated, accused Omar Ali and Mosab Ali started kicking Taleb and giving him fist blows. P.W. 4 has further deposed that on their raising cries for help, the accused persons went away, whereupon injured Taleb was shifted to the Civil Hospital, Morigaon, for treatment, but as his condition deteriorated and he was being shifted to Guwahati Medical Hospital for treatment, he died.

8. What is, now crucial to note is that P.W. 4 was cross-examined by the defence and notwithstanding her denial, the Investigating Officer (P.W. 7) has confirmed that in her statement made before the police, P.W. 4 had stated that on hearing halla, when she went out, she found that someone had left her husband, on the road, after having assaulted him and she had also seen that Iman Ali was standing near her husband with a spade in his hand and that the accused Mosab and Milizan were also present there. The investigating Officer has also confirmed that P.W. 4 has not stated before the police that she had seen Iman Ali assaulting her husband with a spade and/or accused Mosab and accused Omar kicking Taleb or giving him fist blows or accused Milizan instigating the other accused persons.

9. From what have been pointed out above, it becomes abundantly clear that though P.W. 4 has projected herself, at the trial, as an eyewitness to the alleged occurrence of assault on Taleb Ali, she had not, according to her previous statement recorded by the police, seen any of the accused assaulting Taleb Ali, though even before the police she claimed to have seen accused near Taleb Ali, when Taleb Ali was lying on the ground and that at that time accused Iman Ali

had a spade in his hand and the remaining accused were also present there.

10. Bearing in mind what have been indicated above, when I turn to the evidence of P.W. 1, P.W. 2 and P.W. 3, I find that P.W. 1 (Mineki Begum) is mother of deceased Taleb, P.W. 3 (Jahuruddin) is deceased Taleb's cousin and P.W. 2 (Sarifun Nessa) is the wife of Jahuruddin. P.W. 2 (Sarifun Nessa) and P.W. 3 (Jahuruddin) have, I find, deposed that on the day of the occurrence, at about 6/7 a.m., they were sitting by the side of fire, at the courtyard of Taleb's house, warning themselves and at that time, on noticing accused Iman Ali cutting earth from the path, which is located in front of the house of Taleb Ali and touches his boundary, Taleb Ali went out and objected to the cutting of the earth by accused Iman Ali and when Taleb Ali so objected, accused Iman Ali gave a blow on Taleb's back with the reverse side of the spade, Taleb fell down and after Taleb so fell down, accused Mosab and Omar came there and these two accused, on being instigated by accused Milizan, kicked Taleb and gave him fist blows. While it is in the evidence of P.W. 2 that on witnessing Taleb being assaulted, she raised halla and the accused persons went away, her husband (P.W. 3) states that when he (P.W. 3) and his wife (P.W. 2) raised halla, accused Iman Ali and Mosab came rushing towards them and, on seeing them coming, he went inside the house of Taleb to bring a lathi, but by the time he came out of Taleb's house with a lathi, the accused had already left the place of occurrence.

11. Thus, the evidence given by P.W. 3 to the effect that Iman Ali and Mosab came rushing towards him (P.W. 3) to assault him is not supported by the evidence of his wife (P.W. 2). This apart, the Investigating Officer (P.W. 7) has confirmed that P.W. 3 had not stated before the police that Mosab and Omar had kicked Taleb and/or gave him fist blows. Had Jahuruddin been sitting along with Taleb by the side of fire and had he (P.W. 3) really seen Mosab and Omar assaulting and kicking Taleb, there was no reason for him not to state before the police that Mosab and Omar too had assaulted and kicked Taleb. P.W. 3 has, thus, made substantial improvement on his previous statement made before the police implicating accused Mosab and Omar. A witness, who makes such substantial improvement on his previous statement and implicate persons, whom he had not named in his previous statement as assaults, cannot be readily believed in or relied upon. It is, therefore, necessary that the evidence of P.W. 3 is minutely and dispassionately scrutinized in order to determine and conclude confidently that besides accused Iman Ali, accused Mosab and Omar too had assaulted Taleb.

12. Keeping in view what have been indicated above, when I turn to the evidence of P.W. 1, I find according to her evidence, on the day of the occurrence, Taleb and Jahuruddin (P.W. 3) were present in the courtyard by the side of fire and she (P.W. 1) was washing utensils at the courtyard. It is in the evidence of P.W. 1 that at that point of time, accused Iman Ali was cutting earth from the path, which passes by the side of the boundary of Taleb's house. Having noticed accused Iman so cutting the earth, she (P.W. 1) went inside the house to keep

the washed utensils and when she was inside the house, she heard Taleb's cries and, on coming out, she found accused Iman giving blow on Taleb's back with his spade and on moving forward, she found Taleb lying on the ground. It is also in the evidence of P.W. 1 that at that time, accused Milizan was instigating accused Mosab and Omar to assault Taleb and, then, Mosab and Omar kicked Taleb and gave him fist blows. P.W. 1 has deposed that on witnessing assault on her said son, when she raised hue and cry, the accused went away. There is absolutely nothing in the evidence of either P.W. 1 or even P.W. 2 to show that accused Iman Ali, Mosab or Omar had rushed towards Jahuruddin (P.W. 3) to assault the later. Viewed thus, it is clear that P.W. 3 cannot be implicitly relied upon.

13. What is, now, of utmost importance to notice is that the Investigating Officer has confirmed that according to the evidence of P.W. 4, when she had heard halla, her mother-in-law (P.W.) was cooking rice inside the house. In the face of this statement of P.W. 4 made before the police, it is wholly unsafe to readily rely upon the evidence of P.W. 1 that she had been washing utensils outside her house and when she had gone inside her house to keep the washed utensils, she had heard the cries of her said son and come out. At any rate, in the face of the disquieting features which have been noticed above coupled with the fact, that there is serious enmity existing between the accused persons, on the one, and P.W. 1, P.W. 2, P.W. 3 and P.W. 4, on the other, the evidence on record, as already pointed out above, needs to be carefully scrutinized in order to confidently hold that all the four accused named by these four witnesses were involved in the alleged occurrence of assault on Taleb.

14. My quest for answer to the question as to how far the evidence given by P.Ws. 1, 2 and 3, namely, Mineki Begum, Safirun Nessa and Jahuruddin can be relied upon brings me to the evidence of P.W. 5 (Ilahi Ali), a neighbour of accused Iman Ali and deceased Taleb Ali. This witness has deposed that on hearing hue and cry, he came out of his house and, on reaching the house of Taleb, he found Taleb Ali staggering at his courtyard and, on witnessing the condition of Taleb, he (P.W. 5) and accused Omar Ali caught hold of Taleb and gave him water. It is in the evidence of P.W. 5 that Taleb told him that Iman Ali had assaulted him with his spade. In his cross-examination, P.W. 5 has clarified that while reaching the house of Taleb, he did not see accused Iman Ali, accused Mosab Ali and even accused Milizan Begum.

15. What is, now, immense importance to note is that P.W. 5 was not declared hostile and was not also cross-examined by the prosecution. His entire evidence has gone wholly unchallenged except to the extent that the defence suggested to him that Taleb Ali had not named Iman Ali as his assailant. Nothing was, however, elicited from the cross-examination of P.W. 5 by the defence to show that the evidence given by this witness (P.W. 5) to the effect that Taleb had named accused Iman as his assailant is untrue or false. Situated thus, I see no reason as to why P.W. 5 shall not be believed and if his evidence is believed,

which I see no reason not to believe, it clearly surfaces that immediately after Taleb Ali sustained injuries, P.W. 5 arrived at the house of Taleb and, on finding Taleb in injured condition, P.W. 5, with the help of accused Omar Ali, comforted Taleb and gave him water. It also surfaces convincingly from the mistaken evidence of P.W. 5 that injured Taleb named only accused Iman Ali as his assailant. It also further surfaces from the evidence of P.W. 5 that apart from the fact that the deceased Taleb did not name any one, other than the accused Iman Ali, as his assailant, accused Omar helped P.W. 5 in making injured Taleb comfortable in giving water to injured Taleb for the purpose of stabilizing him.

16. Coupled with the above, the evidence of P.W. 6, (Atari Begum) is that her house is adjacent to the house of the accused and also the deceased. Her evidence is that on the day of occurrence, when she came out of her house, she saw an altercation between accused Iman Ali and Taleb Ali and, following this altercation, she saw accused Iman Ali raising his spade on Taleb Ali and, on witnessing the same, she became frightened and ran away from the place of occurrence and, after sometime, when she came out again, she saw Taleb Ali lying on the ground in injured condition and, then, Taleb was taken to hospital and that Taleb died.

17. Nothing could be elicited from the cross-examination of P.W. 6 by the defence to show that her evidence was unbelievable. If the evidence of P.W. 5 and P.W. 6 be considered together, their unshaken evidence clearly reflects that an altercation between accused Iman Ali and deceased Taleb Ali did take place and following this altercation, accused Iman Ali was seen raising his spade on Taleb Ali to assault him and, moments thereafter, Taleb Ali was found lying injured at the said place of occurrence and, on hearing hue and cry, when P.W. 5 came to the Taleb's courtyard, he found Taleb in injured condition and Taleb Ali reported to P.W. 5 (Ilahi Ali) that he (Taleb Ali) been assaulted by Iman Ali. It also clearly emerges from the evidence of P.W. 5 and 6, both of whom are independent and disinterested witnesses, that Taleb Ali sustained injuries at the hands of accused Iman Ali and not at the hands of any of the order accused-Appellants.

18. In the face of the evidence given by P.W. 5 and P.W. 6, as discussed above, there can be no escape from the conclusion that accused Iman Ali did give blow with his spade on Taleb Ali causing injuries on Taleb's person. The doctor (P.W. 8), who performed post-mortem examination on the body of Taleb Ali, clearly stated that he had found lacerated wound on the left side of the scalp, abrasion in the left buttock and in the back side of the chest wall on the left side. The doctor has also deposed that blood was present in hemi-tho-rax and in peritoneal cavity. In the opinion of the doctor (P.W. 8), the death was caused due to blood loss following injuries leading to cardio-respiratory failure. The evidence, so given by the doctor (P.W. 8), does strength the inference, as already indicated above, that none other than accused Iman Ali had assaulted Taleb Ali.

19. What, thus, crystallizes from the above discussion is that on the day of occurrence, at about 6/7 a.m., accused Iman Ali started cutting earth from the

path, which passes by the side of the boundary of Taleb Ali's house. When Taleb Ali objected to such cutting of the earth, Taleb Ali's objection resulted into an altercation between accused Iman Ali and Taleb Ali. The fact that such an altercation had taken place between accused Iman and deceased Taleb have not, in fact, been seriously disputed by the defence. In such a situation, when the evidence of P.W. 5 and P.W. 6 are considered, in the light of the medical evidence on record, there is no room for doubt that accused Iman Ali assaulted Taleb by spade and caused the injuries, which were found by P.W. 8 on the dead body of the said deceased.

20. Reverting, once again, to the question as to whether the remaining accused-Appellants had taken part in causing injuries to Taleb Ali or not, it is noteworthy, that the evidence of P.W. 6 is that he had not seen any one other than Iman Ali at the place of occurrence. It is also in the evidence of P.W. 6 that when Taleb Ali was taken to hospital, accused Omar Ali went with him. Even the evidence of P.W. 5 is to the effect that he (P.W. 5) and accused Omar Ali gave water to injured Taleb Ali. Notwithstanding the fact that the evidence of P.W. 5 and 6 shows that the accused Omar Ali gave water to injured Taleb Ali and also accompanied injured Taleb to the hospital, P.W. 1 has asserted that as the occurrence took place during the month of Ramjan, no one had given water to injured Taleb Ali. In the face of the categorical assertions of the independent and disinterested witnesses, such as P.W. 5 and P.W. 6, that accused Omar gave water to Taleb Ali and accompanied him to the hospital, the evidence, so given by P.Ws. 5 and 6, cannot be discarded, particularly, when I notice that even the evidence of P.W. 2 is to the effect that accused Omar Ali came to the hospital to make enquiry about the welfare to Taleb Ali. In fact, even the evidence of P.W. 5's husband, Jahuruddin (P.W. 3), is that after the occurrence, accused Omar and he (P.W. 3) gave water to Taleb Ali.

21. In the face of the evidence on record that accused Omar Ali came to the house of injured Taleb Ali, gave him water, made him comfortable, accompanied him to the hospital and also made enquires about the welfare of Taleb Ali at the hospital, it is not only difficult, but well-nigh impossible to hold that accused Omar Ali was one of the assailants of Taleb, for, had Omar Ali been an assailant, P.W. 1, who is mother of the injured, and P.W. 3, who is the brother of the injured, and P.W. 2, who is sister-in-law of the injured, would have created a scene, if accused Omar had come to their house or accompanied injured Taleb to hospital. This apart, I have already pointed out above that in view of the fact that P.W. 6 had not seen any one, other than accused Iman Ali, having altercation with Taleb Ali or attempting to assault Taleb and P.W. 5, has deposed that injured Taleb Ali named none other than accused Iman Ali as his assailant, it is not only difficult, but highly unsafe to implicitly rely on the evidence of P.Ws. 1, 2, 3 and 4 given to the effect that the remaining accused too had participated either in the assault on Taleb or had instigating any one to assault Taleb Ali.

22. It may also be pointed out, at this stage, that accused Mosab Ali examined

Amrit Chandra Nath as a defence witness. This witness has, I find, deposed that on the day of occurrence, both he (Amrit Chandra Nath) and Mosab Ali went to Phulaguri Bazar at about 3 a.m., because both of them buy and sell cows and they returned to their village from the said market on that day at about 6.30 pm. The learned trial Court has not believed the evidence given by P.W. 1 merely on the ground that no receipt has been produced as record of sale and purchase of cows.

23. While considering the evidence of D.W. 1, it is extremely important to note that D.W. 1 was virtually left without cross-examination by the prosecution and his evidence to the effect that accused Mosab Ali went, on the day of occurrence, as early as 3.30 am, to Phulaguri market and came back to his village as late as 6.30 pm, has remained completely unshaken. The learned trial Court was, therefore, wholly incorrect in discarding the evidence of D.W. 1 on the ground that no receipt as regards sale and purchase of cows has been produced by the defence. Without any question, as regards the receipt of sale and purchase of cows having been put to D.W. 1 by the prosecution and without giving D.W. 1 any opportunity to have his say on this aspect of his evidence, the non-production of the receipt could not have been made a ground for ignoring or rejecting his evidence. Thus, the plea of alibi taken by accused Mosab stands well proved. This is yet another circumstance, which causes serious doubt as regards the veracity of the evidence given by P.Ws. 1, 2, 3 and 4 implicating accused Mosab Ali.

24. Because of what have been pointed out above, it is impossible to confidently hold that Mosab Ali and Omar Ali were either present at the scene of occurrence and/or that they had assaulted or kicked Taleb Ali and/or that accused Milijan Begum had instigated the other accused-Appellants to assault Taleb Ali.

25. Because of what have been discussed and pointed out above, it also become transparent and there remains no room for doubt that the accused-Appellant No. 1, namely, Iman Ali had, in the light of the evidence on record, committed offence u/s 304 Part-II IPC and his conviction does not need any interference. However, as far as remaining accused-Appellants are concerned, the evidence on record is not sufficient to hold, boldly and confidently, that the accused-Appellant Nos. 2,3 and 4, namely, accused Omar Ali, accused Mosab Ali and accused Milijan Begum respectively, had participated in the alleged occurrence of assault on Taleb Ali.

26. As far as the sentence passed against the accused-Appellant No. 1, namely, Iman Ali is concerned, I am of the view that since the assault on Taleb Ali was not pre-meditated and was, as noticed by the learned trial Court, not aimed at causing or intended to cause death, the sentence of rigorous imprisonment for 6 (six) years is, somewhat, unreasonable and harsh.

27. Considering, therefore, the matter in its entirety and in the interest of justice, I am of the firm view that the sentence passed against the accused-

Appellant Iman Ali needs to be reduced.

28. In the result and for the foregoing reasons, this appeal partly succeeds. While conviction of the accused-Appellant, Iman Ali, u/s 304 part (II) IPC is maintained, the conviction and sentence passed against the remaining accused-Appellants are hereby set aside. The accused Iman Ali is sentenced to undergo rigorous imprisonments for 4 (four) years and pay a fine of Rs. 1,000.00 (Rupees one thousand) and, in default, suffer rigorous imprisonment for a further period of one month.

29. The bail bonds of the accused-Appellant Nos. 2, 3 and 4 are hereby cancelled and their sureties are discharged. The bail granted in favour of accused Iman Ali by order, dated 19.9.2000, in Misc. Case No. 202/2000, arising out of Criminal Appeal No. 182/99, is hereby cancelled and he is directed to surrender, forthwith, in the Court of the Chief Judicial Magistrate, Morigaon, to undergo the sentence of imprisonment passed against him.

30. With the above observations and directions, this criminal appeal shall stand disposed of.

31. Send back the LCRs.