
(2014) 05 GAU CK 0058
In the Gauhati High Court
Case No : Crl. A. No. 190 of 2011

Majibur Rahman

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 28-05-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 109, 147, 148, 149, 300

Citation : (2014) 2 GLD 184 : (2014) 3 GLT 150

Hon'ble Judges : M.R. Pathak, J;Biplab Kumar Sharma, J

Bench : Division Bench

Advocate : H.R.A. Choudhury, Sr. Advocate and S. Islam, Advocate for the Appellant; S. Jahan, Addl. P.P, Advocate for the Respondent

Final Decision : Allowed

Judgement

Biplab Kumar Sharma, J.—This appeal is directed against the judgment of conviction dated 29.09.2011 passed by the learned Additional Sessions Judge, Nagaon, Assam in Sessions Case No. 03(N)/2003 convicting the accused/appellants u/s 326/302/34 IPC and sentencing each one of them to undergo rigorous imprisonment for life with fine of Rs. 5000/- and in default, rigorous imprisonment for another six months each. We have heard Mr. H.R.A. Choudhury, learned senior counsel assisted by Mr. S. Islam, learned counsel for the accused/appellants. We have also heard Ms. S. Jahan, learned Additional Public Prosecutor. Be it stated here that out of the five appellants, who have been convicted by the learned trial Court, Abdul Hamid Pandit, father of the present appellants died during trial. In the present appeal we are concerned with four accused/appellants namely, Majibur Rahman, Azizul Hoque @ Azizur Rahman, Zakir Hussain and Abdul Hussain. Another accused namely, Sadiqur Rahman has already been released as per the provision of the Juvenile Justice (Care and Protection of Children) Act, 2000 vide order dated 06.06.2012 passed in Criminal Misc. Case No. 813/2011.

2. On the basis of the Ext. 2 FIR dated 03.09.2002 lodged with the Officer in Charge, Batadraba Police Station, Batadraba P.S. Case No. 51/2002 was registered u/s 147/148/149/109/326/302 IPC. The story narrated in the FIR was that when the first informant Abdul Salam along with the deceased Abdul Malek (his brother) had gone to Md. Azizul Hoque and Md. Hussain Ali, who were engaged in transplanting paddy seedling in the field, to demand the money due to them, the accused persons in a group under instruction of Mr. Abdul Hamid @ Pandit (who died during trial) being armed with sharp weapons attacked them as a result of which the deceased sustained severe injuries on his person. Though he was taken to Nagaon Civil Hospital, but the doctor declared him dead.

3. On completion of investigation, the Investigating Officer submitted charge sheet and upon framing of the charge against the accused/appellants, the trial started. During trial, the prosecution examined 10 witnesses as PW-1 to PW-10. The defence also examined one witness as DW-1. The accused/appellants were also examined u/s 313 Cr.P.C.

4. The learned trial Court on the basis of the evidence on record having convicted the accused/appellants, they have approached this appeal challenging the same.

5. According to Mr. Choudhury, learned senior counsel representing the accused/appellants, the evidence on record did not warrant conviction of the accused/appellants u/s 302 IPC. Referring to the said evidence, he submits that it being not a case of committing the alleged offence with a pre determined mind, even if the offence alleged against the accused/appellants is such to have been committed by them, at best it can be a case falling u/s 304-11 IPC and not u/s. 302 IPC. In this connection, he has placed reliance on two decisions reported in Salim Sahab Vs. State of Madhya Pradesh, and Subodh Paul and Others Vs. State of Assam, .

6. Opposing the aforesaid submission, Ms. S. Jahan, learned Additional Public Prosecutor, Assam on the other hand has submitted in reference to the evidence of PW-1, PW-2, PW-3 and PW-4 that their evidence being trustworthy and in absence of any contradiction in the cross examination, the prosecution version is required to be accepted upholding the impugned judgment and order. Although Mr. Choudhury, learned counsel for the accused/appellants has referred to the exception curved in section 300 IPC, Ms. S. Jahan, learned Additional Public Prosecutor, Assam submits that the same is not applicable to the case in hand and thus the accused/appellants are not entitled to the said exception.

7. We have given our anxious consideration to the submissions made by the learned counsels for the parties and have also considered the entire materials on record.

8. PW-1 is the informant and brother of the deceased. He in his deposition stated about borrowing Rs. 10,000/- from him by the accused Zakir Hussain. When the money was not paid back, he made demand to him, but instead of paying the same, he rebuked him. As per the testimony of this witness, on the day of

occurrence, he had gone to the accused persons along with the deceased. At that point of time, the accused persons were working in the field and on their arrival, they attacked the deceased and the first informant with lathis. One of the accused/appellants namely Azizur gave the deceased a blow in the left chest with an iron stick (lathi) and he fell down. Thereafter the PW-1 raised hue and cry and on arrival of the persons named in his deposition, the injured was taken to doctor and thereafter to Nagaon Civil Hospital, where he was declared dead.

9. PW-2, PW-3 and PW-4 in their depositions stated more or less the same thing. However, PW-7, who is an independent witness, stated in his deposition that the first informant and the deceased had gone to the paddy field and seeing them the accused/appellants moved away about 25 Nal's backward and stood at a ridge of the field. Thereafter, a fight took place between the parties. When he reached the spot, he found the deceased lying in an injured condition.

10. PW-9 is the Investigating Officer, who in his deposition stated that the witnesses examined u/s 161 Cr.P.C. did not state before him that when the deceased was caught by Hussain both of them fell down and then the other accused/appellants dealt lathi blows on him. For a ready reference, the relevant portion of the statement is quoted below:-

"PW Abdul Salam did not state before me that Hussain dealt lathi blows on the head of Maleque. The said witness did not state before me that when Hussain caught Maleque, both of them fell down and then Sadeque Rahman, Fizu Rahman, Abdul Hussain dealt lathi blows. That witnesses did not state that Azizul dealt blows with a katia (one pronged spear) below the left arm and chest. That witnesses did not state before me that when he had raised a hue and cry Nurul Amin, Abdul Hai and Sabed Ali had come there and had saved his life and that he had visited Doctor Subhan. Witness Sahed Ali did not state before me that the accused persons were standing on a ridge of the field and that they had assaulted taking out lathi and Katia (spear) from under the ridge. Witness Abdul Hai did not state before me that accused had borrowed Rs. 10,000/- and in earlier occasion also there had been a quarrel when the money had been asked for and that the matter had been compromised. That witnesses did not state before me that Azizur kept Salam holding. That witness did not state before me that Hussain and Malek had engaged in scuffle and that he requested both the parties to stop quarrelling. Witness Abdul Salam stated before me that he saw the occurrence from one furlong away. I know that there was a cross case in connection with this occurrence and I was the Investigating Officer of that case, too. The land of the place of occurrence belongs to Abdul Matin. Except the bamboo lathi, I seized nothing. I did not maintain in the Sketch map that there was blood (at the place of occurrence). The place of occurrence is a muddy one. The occurrence took place by the side of ridge (of the field)."

11. From the above scrutiny of the evidence, what is seen is that there was no pre determination on the part of the accused/appellants to commit the offence falling u/s 302 IPC. It is in this connection Mr. Choudhury has referred to the

exception 4 of Section 300 IPC. In exception 4 culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

12. From the evidence on record, it is seen that the accused/appellants were in a liability to repay the loan that was taken from the deceased. Earlier also quarrel took place between them on demand of repayment of the loan. On the day of occurrence also as per the evidence of PW-7 the first informant was carrying a lathi like object with them had visited the paddy field, where the accused/appellants were engaged in agricultural works. As per the evidence of PW-7, seeing the first informant along with the deceased, the accused/appellants moved back about 25 Nal's and stood on a ridge of the field. Thereafter, fight took place between the parties. It was during that fight, the deceased sustained a single injury as a result of which subsequently he died.

13. It will be appropriate at the stage to refer to the injuries sustained by the deceased (post-mortem report)

14. From the above injury report it is found that as against the story of the prosecution that there was multiple attacks on the deceased by the accused/appellant, there was only one injury. Other two injuries are bruises as indicated in the report. The Investigating Officer (PW-9) in his deposition categorically stated that during the examination of the witnesses u/s. 161 Cr.P.C., they did not narrate the incident the manner in which they narrated during trial.

15. In *Salim Sahab (supra)*, the Apex Court was inclined to convert the conviction u/s 302 IPC to Section 304-II IPC when it was found that there was a quarrel between the parties i.e. the deceased and the accused. It was in that quarrel, the accused attacked the deceased with a pair with scissors as a result of which he died. In *Subodh Paul (Supra)*, where it was found that the accused/appellant had no intention to cause the death of the deceased, the conviction was liable to be altered to Section 304-II IPC instead of Section 302 IPC.

16. In view of the aforesaid factual position, we are of the considered opinion that the applicable provision would be Section 304-II IPC and not Section 302 IPC. The conviction is accordingly altered. We are of the opinion that the custodial sentence of 07 (seven) years rigorous imprisonment would be sufficient having regard to the facts and circumstances involved in the case. It is ordered accordingly.

17. Needless to say that from this period of sentence, the period the accused/appellants has already undergone during trial and after conviction shall stand excluded. The appeal is partly allowed. Registry is directed to send back the Case Records to the Trial Court along with a copy of this judgment and order.