
(2019) 05 GAU CK 0047
In the Gauhati High Court
Case No : Criminal Appeal No. 70 Of 2016

Md Billal Hussain And Anr	Vs	APPELLANT
State Of Assam And Anr		RESPONDENT

Date of Decision : 14-05-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 300, 302, 304, 323

Citation : (2019) 05 GAU CK 0047

Hon'ble Judges : Achintya Malla Bujor Barua, J; Mir Alfaz Ali, J

Bench : Division Bench

Advocate : N Uddin

Final Decision : Partly Allowed

Judgement

1. AM Bujor Barua, J Heard Mr. N Uddin, learned counsel for the appellants. Also heard Ms. B Bhuyan, learned Additional Public Prosecutor, Assam for the State authorities.

2. Office note dated 24.05.2016 shows that the A/D card with signature of the informant/respondent No.2 have been received back and the order dated 20.06.2016 of this Court also accepts that the notice had been served.

3. An ejahar dated 03.11.2011 was lodged by one Md. Afsar Ali before the Officer-in-Charge of Mererchar Police Station, inter alia, stating that on 03.11.2011 at about 11 AM, while his wife Basiran Nessa was doing domestic work near their house, there was an altercation between his wife and the accused No.2 who were neighbours, over an issue as regards disposal of garbage. In the circumstance, the accused No.2 had assaulted his wife with a bamboo lathi at the instigation of the other accused persons and the accused No.1 had brought an axe from his house and dealt a blow on the left side of his wife's lower abdomen with the axe. It is taken note of that the accused No.1 is the appellant No.1 whereas the accused No.2 is the appellant No.2 in this appeal. In the circumstances, both the accused appellants were charged under Section

302/34 of the IPC for having intentionally causing the death of Basiran Nessa in furtherance of a common intention.

4. PW-3, the informant in his deposition stated that while he was working in the betelnut orchard near his house, a quarrel took place between his wife Basiran Nessa and the accused person Billal and Sabia Khatoon as regards disposal of garbage, whereupon the accused Sabia had assaulted Basiran Nessa with a steel Gamla (an open vessel or container) and bamboo lathi and the accused Billal had dealt her with a blow on the left side of her abdomen with the blunt side of the axe.

PW-3 had further deposed that the deceased Basiran Nessa is an ASHA worker.

5. We have noticed that neither it has been confronted nor there is a suggestion in the cross that the PW-1 had not witnessed the occurrence as stated in his evidence in examination-in-chief.

6. PW-4, Almina Khatun in her deposition stated that on the day of the occurrence her mother reached home from Bongaigaon when the accused Sabia had thrown certain garbage in their land and when her mother resisted, the accused Sabia Khatun had assaulted her mother in the back with a steel Gamla. Thereafter she also gave a blow in the back of her mother with a bamboo lathi. At that stage, the accused Billal brought an axe from his house and dealt with a blow on the left side below the chest of the mother with the blunt side of the axe.

To a suggestion, PW-4 in cross denied that on the day of occurrence she was rolling bidi in the house of Rustam and that she was not present in the place of occurrence. She also denied that it is not a fact that she did not tell the police that Sabia had dealt with a blow on the back of her mother with a steel Gamla and a bamboo lathi and that it is also not a fact that she did not tell before the police or Magistrate that accused Billal had death with a blow on her mother with the blunt side of an axe.

7. All the other prosecution witnesses had arrived at the place of occurrence after the occurrence had taken place and, therefore, we do not for the purpose of this appeal take into consideration their evidences.

8. PW-10, Darbesh Ali Ahmed, the investigating officer in his cross stated that PW-4 Almina Khatun did not tell him that accused Sabia had assaulted the deceased with the back side of a Gamla and bamboo lathi and also that the witness did not tell him that the accused Billal had assaulted the deceased with the blunt side of an axe. We also take note of that, in his deposition PW-10, investigating officer had not stated anything about the PW-3 not having told him regarding the assault by accused Sabia with the Gamla and bamboo lathi and accused Billal with the blunt side of an axe. Accordingly, we can conclude from the evidence-in-chief of PW-3 that accused Sabia had assaulted the deceased with the back side of a Gamla and that the accused Billal had assaulted on the left side of her abdomen remains uncontroverted. Neither there is any

confrontation nor there is any suggestion by the defence to PW-3 as regards his deposition that accused Sabia Khatun had hit the deceased with the back side of a Gamla and the accused Billal gave a blow with the blunt side of an axe on the left side of her abdomen. As regards the deposition of PW-10, Investigating Officer that PW-4 Almina Khatun had not told him that the accused Billal had made an assault with the blunt side of an axe. We have verified the statement under Section 161 of PW-4 and found that PW-4 had infact stated before police that the accused Billal had hit the deceased with an axe.

9. In view of the aforesaid materials on record, the evidence of both PW-3 and PW-4 remains intact, and it is established that the accused Sabia Khatun had hit the deceased with the back side of a steel Gamla and the accused Billal had given her a blow with the blunt side of an axe on the left side of her abdomen. We also take note of the medical evidence of PW-9, which states about the following injuries on the deceased :-

"On examination I have found a fresh female body aged about 35 yrs with history of assault.

On external examination a hematoma with sharp cut injury above 5cm X 2 cm on the left lower chest at mid aviliarry line.

On examination of thorax hematoma formation of 5cm X 2 cm on the left lower chest with 2 cm cut mark at the middle of the hematoma with fracture 5th and 6th rib.

Plueræ - lacerated and congested at the site of hemotama.

Larynx and trachea - Intact and congested.

Right lung - Intact and congested.

Left lung - Collection of blood above 2 ml blackish red in colour at the lower chest between pleuræ and lung with nuymothroax.

Pericardium - is pushed to the right for numothorax and hemuthorax heart is in tact and pushed to the right.

Abdominal wall, peritoneum, mouth pharynx and esophagus, stomach and its contents, small intestine and its contents, large intestine and contents are intact and healthy, liver, spleen, kidney intact and congested.

Bladder - Intact and empty.

Organs of external and internal organs are intact and healthy.

Brain and spinal cord are intact and healthy.

Lower chest with blunt and heavy object causing hematoma with laceration of the chest resulting collection of blood in pleuræ space and direct communication from pleurary space to external environment through the cut causing mud

memothorax with haemothorax which is about 6 to 8 hours."

10. The medical evidence is also consistent with the ocular evidence that the accused had given a blow with the blunt side of an axe on the left side of the abdomen of the deceased. In the circumstance, we conclude that the accused Sabia Khatun had given a blow with the back side of a Gamla and the accused Billal Hussain had given a blow with the blunt side of an axe on the left side of the abdomen of the deceased causing the injuries stated hereinabove, which had resulted in her death. But at the same time, we also take note of the evidence of PW-3 that a quarrel took place between the deceased Basiran Nessa and the accused Billal and Sabia regarding disposal of garbage, whereupon the assault had taken place. We also take note of that the evidence of PW-3 reveals that when initially the quarrel took place, the accused Billal was not armed with an axe, but subsequently he went inside the house and brought an axe. We also take note of that the quarrel initially started between the deceased Basiran Nessa and the accused Sabia Khatun and the accused Billal had entered the quarrel at the subsequent stage.

11. When we take into consideration the aforesaid two mitigating circumstances regarding the existence of quarrel initially between the deceased Basiran Nessa and the accused Sabia Khatun and compare the same with the provision of Exception 4 of Section 300 of the Indian Penal Code, we can conclude that the act on the part of the accused persons, particularly, the accused Billal in inflicting the injuries on the deceased was without premeditation, in a sudden fight, in the heat of passion, upon a sudden quarrel and where the offender had not taken undue advantage nor acted in a cruel or unusual manner. In this respect reference is made to the decision of the Hon'ble Supreme Court in *Rambir Vs. State of NCT, Delhi* (Crl. Appeal No. 839 of 2019) in its judgment dated 06-05-2019, wherein in a similar circumstance, a view was taken that the accused is entitled to the benefit of Exception 4 of Section 300 of the Indian Penal Code. Accordingly, we are of the view that the act committed by the accused/appellant Billal Hussain can be brought within the purview of Exception 4 of Section 300 of the Indian Penal Code by concluding that the act of causing the injuries upon the deceased is a culpable homicide not amounting to murder. We also take note that the accused had caused the injuries, firstly with the blunt side of the weapon and secondly, in the left side of the abdomen of the deceased, which again is an indication that while committing the act, the accused did not have the intention of causing death. Accordingly, we are of the view that the act on the part of the accused/appellant Billal Hussain in causing the injuries upon the deceased, which had resulted in her death, comes within the purview of Section 304 Part-II of the Indian Penal Code.

12. Considering the circumstance, under which the injuries were inflicted and the manner in which it was done, we are of the view that in the interest of justice, a sentence of rigorous imprisonment for 5(five) years by retaining the fine imposed on the accused/appellant Billal Hussain by the learned Additional Sessions Judge

(FTC), North Salmara, Abhayapuri would be sufficient for the purpose. Accordingly, the conviction of the accused/appellant Billal Hussain under Section 300/34 of the Indian Penal Code is interfered and he is accordingly convicted under Section 304 Part-II of the Indian Penal Code and sentenced to a rigorous imprisonment of 5(five) years by retaining the fine of Rs. 10,000/-, in default, thereof, a further R.I. of 1 (one) year as imposed by the learned Additional Sessions Judge, (FTC), North Salmara, Abhayapuri. In respect of accused Md. Billal Hussain, the period of imprisonment undergone by him of approximately 3 years and 8 months be set off against the substantive sentence.

13. As regards Sabia Khatun, the evidence on record shows that she had assaulted the deceased with the back side of a Gamla and the medical evidence does not indicate any such serious injury, though such assault may have occasioned. Accordingly, we convict the accused Sabia Khatun of having committed the offence under Section 323 of the Indian Penal Code. As the accused Sabia Khatun had already undergone imprisonment for 7 (seven) months, we convict her for the imprisonment she had already undergone. We are also of the view that the manner in which the offence was committed, i.e., first quarrel took place between the deceased Basiran Nessa and the accused Sabia Khatun resulting in a blow being given by the accused Sabia with the back side of the Gamla and thereafter accused Billal had joined the quarrel and then he went inside the house and brought an axe, by which a blow was given, leads us to a conclusion, that there was no common intention between the accused Billal and Sabia to commit the offence. Accordingly, their respective convictions also under Section 34 of the Indian Penal Code are interfered.

14. The bail bond of accused Sabia Khatun stands discharged.

15 In terms of the above, the appeal stands partly allowed.

16. Send back the LCR.