
(2021) 04 GAU CK 0021

In the Gauhati High Court

Case No : Criminal Appeal No. 384 Of 2018, 178 Of 2020

Md Fazar Ali

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 23-04-2021

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 313, 372, 374(2)
Indian Penal Code, 1860 — Section 96, 100, 146, 147, 148, 149, 299, 300, 302, 304, 325, 326

Citation : (2021) 04 GAU CK 0021

Hon'ble Judges : Ajit Borthakur, J

Bench : Single Bench

Advocate : K Sarma, B B Gogoi, M H Choudhury

Final Decision : Disposed Off

Judgement

1. As both the above appeals are arising out of the same impugned judgment and order, this court proposes to dispose of the same by this common judgment and order.
2. Heard Mr. K. Sarma, learned counsel appearing for the accused/ appellant. Also heard Mr. B.B. Gogoi, learned Addl. Public Prosecutor for the State/ respondent No. 1 and Md. M.H. Choudhury, learned counsel for the informant/ respondent No.2 in Crl. Appeal No. 384/2018.
3. Heard Md. M.H. Choudhury, learned counsel appearing for the informant/ appellant. Also heard Mr. B.B. Gogoi, learned Addl. Public Prosecutor for the State/ respondent No. 1 and Mr. K. Sarma, learned counsel for the accused/ respondents No.2 to 6 in Crl. Appeal No. 178/2020. It may be pointed out that the accused/ respondent No. 2 being convicted has preferred Crl. Appeal No. 384/2018.
4. The Crl. Appeal No. 384/2018 under Section 374(2) Cr.P.C. is preferred against the judgment and order, dated 30.11.2018, passed by learned Sessions

Judge, Sonitpur at Tezpur convicting the accused/ appellant under Section 304, Part-II of the IPC and sentencing him to undergo rigorous imprisonment for 9(nine) years and to pay fine of Rs.5,000/-, in default to undergo rigorous imprisonment for 3(three) months in Sessions case No. 105/2012 arising out of G.R. case No. 615/2007.

5. The Crl. Appeal No. 178/2020 under Section 372 Cr.P.C. is preferred by the informant Md. Abul Basar against the judgment and order of acquittal of the other accused persons. Leave granted vide order, dated 20.08.2020, passed in I.A.(Crl.) No. 361/2019.

6. The prosecution case, in brief, is that one Abul Basar, son of Abdul Khaleque, a resident of Kachamari, under Jamuguri Police Station lodged an F.I.R. with the Officer In-charge of the said Police Station on 18.04.2007 alleging, inter alia, that on that day at around 6 a.m. while his elder brother Mosha Ali along with sister-in-law Mainul Hoque was ploughing on the land belonged to Bhimlal Sharma and Tharpalal Sharma taken on 'bandhak' for two years, the convicted accused appellant and other 7 acquitted accused respondents being armed with dao, lathi etc. attacked them and caused grievous injuries on their persons. Thereafter, the said injured persons were shifted to Dhalaibil PHC. However, at around 7.30 a.m., Mosha Ali succumbed to his injuries.

7. Based on the above F.I.R., Jamuguri P.S. case No. 42/07 under Sections 147/148/149/325/326/302 of the IPC, dated 18.04.2017, was registered and on completion of investigation laid a charge-sheet under the aforesaid Sections of the IPC against the present convicted accused/ appellant and other 7 acquitted accused persons. After the case was committed for trial, learned Sessions Judge, Sonitpur at Tezpur made over the case to the court of learned Addl. Sessions Judge, F.T.C., Tezpur for trial. Accordingly, after consideration of the evidence of the case diary and hearing of both sides, the charges as charge-sheeted were framed and read over to the accused persons to which they pleaded not guilty and claimed to be tried. In order to prove the charges, the prosecution examined sixteen witnesses. After completion of evidence of the prosecution side, the statements of the accused persons were recorded under Section 313 Cr.P.C. They reiterated their innocence and examined one witness in their defence. After hearing the learned counsel of both sides and consideration of evidence of both sides, the learned Sessions Judge, Sonitpur, convicted and sentenced the present accused/ appellant in Crl. Appeal No. 384/2018 under Section 304, Part-II of the IPC as stated above, while his co-accused persons, named in Crl. Appeal No. 178/2020 were acquitted of the charges.

8. Mr. K. Sarma, learned counsel appearing for the accused/ appellant, submitted that the appellant in Crl. Appeal No. 384/2018 is convicted and sentenced on erroneous appreciation of evidence inasmuch as based on the same set of evidence, however, his co-accused persons are acquitted of the charges violating the principle of equality and equal protection in law. Mr. Sarma further submitted that non-official witnesses have not specifically implicated the accused/

appellant, as a whole, with assaulting to death of Mosha Ali and also the alleged weapon of offence the dao used in inflicting such fatal blow was not seized during investigation. According to Mr. Sarma, the learned trial court ignored the evidence of long term land dispute between both the parties and the deceased Mosha Ali having seen ploughing on the disputed land gave rise to a 'marpit' between them, where the accused party reasonably exercised their right of defence of their persons and property. Mr. Sarma submitted that the conviction and sentence of the accused/ appellant Fazar Ali in view of the material contradictions in evidence of the related witnesses as are elicited in cross-examination of the investigating officer (P.W.16) is not only illegal, but also the punishment awarded to him is disproportionate to the nature of offence, if he committed at all. Mr. Sarma, learned counsel, appearing for the accused/ respondents in Crl. Appeal No. 178/2020 submitted that the learned trial court for adequate reasons recorded in the impugned judgment and order acquitted the other accused respondents. Mr. Sarma submitted that unless the order of acquittal is found to be patently wrong and wholly unsustainable, no interference in appeal is called for. In this regard, Mr. Sarma relied on the ratio of the judgments rendered in Mohammed Ankoos & Ors. -vs- Public Prosecutor, reported in 2010 1 SCC 94 and Rohtash -vs- State of Haryana, reported in 2012 6 SCC 589.

9. Per contra, Mr. B.B. Gogoi, learned Addl. Public Prosecutor, submitted that P.Ws 3, 6, 10, 11, 12 and 13 have tendered credible evidence implicating the present convicted accused/ appellant and the acquitted accused persons with the alleged offences committed in broad daylight and as regards the prima facie actual possession of the land where the occurrence had taken place. Mr. Gogoi also submitted that the impugned judgment and order being well-reasoned based on fair appreciation of evidence of both sides no interference is called for in respect of the convicted accused/ appellant namely Fazar Ali in Crl. Appeal No. 384/2018 and as the acquittal of the other co-accused persons is based on the same set of evidence they deserve conviction under the charges framed.

10. Md. M.H. Choudhury, learned counsel appearing for the informant/ respondent No. 2 in Crl. Appeal No. 384/2018 referring to the evidence of the eye-witnesses namely P.Ws 3, 6, 10, 12 and 13, submitted that all the accused persons being armed with deadly weapons in a pre-planned manner attacked the deceased Mosha Ali and Mainul Hoque, who were working at the relevant time on their paddy field, and in the midst of such a collective attack, the accused/ appellant Fazar Ali dealt a fatal blow by a 'dao' on the head of the said deceased, and the accused Achiya Khatoon inflicted cut injuries on Mainul Hoque. As such, Mr. Choudhury submitted that all the accused persons including the convicted accused/ appellant in prosecution of their common object, being armed with deadly weapons apparently committed the alleged offences and in such backdrop of evidence it is not correct under Sections 299/300 of the IPC to say that it was a case of culpable homicide not amounting to murder, but a clear case of 'murder' defined in Section 300 of the IPC for which they all were punishable

under the charges. Md. Choudhury, however, further submitted that the injured Mainul Hoque was not examined in the case despite being the most material witness.

11. Mr. Choudhury, therefore, emphatically submitted that all the accused persons may be held guilty, inter alia, under Section 302 of the IPC setting aside the impugned order of acquittal.

12. I have considered the above submissions made by the learned counsel of both sides. Perused records including the impugned judgment and order.

13. A perusal of the impugned judgment and order, it is revealed, the learned trial court found that all the said five related eye-witnesses namely P.Ws 3, 6, 10, 12 and 13 have consistently implicated all the accused persons including the said convicted accused Fazar Ali and held that their presence at the place of occurrence cannot be doubted and further, that their manner of assault, the weapon of assault used by them are established in the case beyond doubt. The learned trial court also held that the oral testimony of the said eye-witnesses is fully supported by the evidence of the autopsy surgeon P.W.4. However, the learned trial court holding that there is no sufficient evidence to show that the accused persons shared a common object to assault the deceased, acquitted of the charges of the accused persons namely Ainul Hoque, Guljar Hussain, Sabirul Hoque, Jamaluddin, Najrul Islam while accused Achiya Khatun is acquitted on benefit of doubt for the sole reason that the injured Mainul Hoque, who was alleged to be hurt by her, was not examined by the prosecution. The learned trial court convicted and sentenced the accused/ appellant Fazar Ali based on consistent implicating evidence that he intentionally killed the deceased Mosha Ali @ Alam by inflicting cut injuries on his person by a 'dao', while he was ploughing on the land in exceeding the right of private defence over land dispute which act, the learned trial court held amounted to culpable homicide not amounting to murder.

14. It may pertinently be pointed out that the rioting has been defined in Section 146 of the IPC and rioting with deadly weapons is punishable under Section 148 of the IPC, which is a distinct offence. On the other hand, Section 149 of the IPC says that every member of an unlawful assembly is guilty of offence committed in prosecution of the common object. In order to hold an accused guilty of an offence with the aid of Section 149 of the IPC sharing of common object by the unlawful assembly must be established beyond all reasonable doubt. On the other hand, the right of private defence embodied in Sections 96 to 100 of the IPC when read together is such that the apprehension of danger to life and property must be real and well founded and the harm inflicted on the assailant should not be more than necessary as demanded by a given situation, which are always questions of fact depending on those circumstances and background.

15. In the instant case, there is no dispute that the deceased Mosha Ali died due to multiple cut wounds sustained more particularly on the head which caused

brain matter even coming out vide the evidence of P.W.4 Dr. Tek Bahadur chetry and Ext. 4, the post-mortem report.

16. Coming to the root cause of the occurrence, the F.I.R. lodged by P.W.3 Abul Basar, it is revealed that the land where the occurrence took place, shown in Ext. 7, the sketch map, was taken on 'bandhak' from P.W. 7 Bhimlal Sharma and P.W. 11 Kharkalal Sharma by the said informant's party and the incident occurred in the second year when the deceased and one Mainul Hoque were ploughing on the said land in the early morning hours (Around 6 a.m.), the accused persons armed with deadly weapons attacked them. On perusal of the evidence of said P.Ws 7 and 11, it transpires that P.W.7 gave his share of land to the deceased Mosha Ali while P.W.11 gave his share of land to the accused/ appellant Fazar Ali for cultivation, that is, on lease. Total land area was 9 bigha. Accordingly, as stated by P.W.11, the accused/ appellant Fazar Ali was cultivating on the said plot of land for about 9-10 years. These facts have come in the evidence of D.W.1 Bhakta Chetry, the V.D.P. Secretary. However, the nature of land dispute has not come up clearly in their evidence.

17. On close scrutiny of the evidence of P.W.3 Abul Basar (informant), P.W.6 Aftabuddin @ Atabuddin, P.W.10 Nazir Ahmed, P.W.12 Roshanara Begum and P.W.13 Jahura Khatoon, who are related and who witnessed the occurrence, have consistently implicated all the accused persons with the commission of the alleged offences. In this regard, they have firmly withstood the test of cross-examination.

18. However, it is noticed that despite best efforts being made by the learned trial court of Sessions Judge, Sonitpur from 15.09.2017 to 15.09.2018, the F.I.R. named injured Mainul Hoque, who was not cited as a witness in the charge-sheet could not be examined as a Court Witness as his evidence appeared to be material in the case despite summon was duly served on him. Thus, the injured Mainul Hoque was kept out of the witness box. This court therefore, finds that had he been examined, the backdrop facts and circumstances leading to the incident would have certainly come to light which might have an impact on the ultimate logical inference in the case, where the accused Fazar Ali was convicted while all his co-accused persons were acquitted on the same set of evidence. The impugned judgment and order thus significantly manifests material contradictions in reasonings resulting in clear miscarriage of justice to both sides.

20. Thus, when the eyewitnesses deposed to have seen the accused persons equipped with deadly weapons, one of them inflicting fatal blow on the head of the deceased and another causing injuries on the person of Mainul Hoque, conjectures and surmises cannot have place therein and as such, this court finds it appropriate to interfere in the order of acquittal of the accused persons and in the conviction of the appellant Fazar Ali under Section 304, Part II of the IPC on the ground of his exercise of the right of defence of person and property.

21. For the above stated reasons, the impugned judgment and order is set aside

and the case is remanded back to the learned trial court for the compelling exceptional reasons, discussed above, with direction to examine Mainul Hoque as a Court Witness subject to cross-examination by the defence and additional defence evidence etc. if any, confining to his evidence only and deliver a fresh judgment in accordance with law.

22. It is hereby made clear that no observation made in course of this judgment and order shall have a bearing in the fresh judgment and order to be passed by the learned trial court in due course.

23. Both the parties are directed to appear before the court of learned Sessions Judge, Sonitpur at Tezpur on 25.05.2021 positively to receive further instructions. The accused appellant namely, Fazar Ali with one surety of like amount to Sonitpur at Tezpur. is directed to be released on bail of Rs.30,000/-the satisfaction of the learned Sessions Judge,

Return the LCR.

Appeal stands disposed off.