

(2021) 11 GAU CK 0010
In the Gauhati High Court
Case No : Criminal Appeal No. 206 Of 2018

Md Kismat Ali And Anr

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 09-11-2021

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 307, 326, 341, 342
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2021) 11 GAU CK 0010

Hon'ble Judges : Suman Shyam, J; Marli Vankung, J

Bench : Division Bench

Advocate : T. J. Mahanta, D.K. Bhattacharyya, B. Bhuyan

Final Decision : Allowed

Judgement

1. Heard Mr. T.J. Mahanta, learned senior counsel assisted by Mr. D. K. Bhattacharyya, learned counsel appearing for the appellants. We have also heard Ms. B. Bhuyan, learned APP, Assam, appearing for the State/ respondent No.1. None has appeared for the informant/respondent no.2.

2. This appeal is directed against the judgement and order dated 07/05/2018 passed by the learned Sessions Judge, Kamrup, Amingaon, in Sessions Case No. 124/2014, convicting both the appellants under Sections 302/34 of the Indian Penal Code (IPC) for causing death to the victim Ajijur Rahman in furtherance of a common intention and also convicting them under Sections 341/342 of the IPC for wrongfully restraining the deceased. Accordingly, both the appellants were sentenced to undergo rigorous imprisonment for life and also to pay fine of Rs. 2000/- each with default stipulation for committing the offence under Sections 302/34 of the IPC. They were also sentenced to undergo simple imprisonment for one month each for the offence committed under Sections 341/34 of the IOC and to suffer simple imprisonment for six months for the offences committed under Section 342/34 of the IPC. Aggrieved thereby, the appellants have approached this Court by filing the present appeal.

3. The prosecution case, in a nutshell, is that the appellants had wrongfully restrained the deceased and grievously assaulted him inside the house of the appellant no. 1 Kismat Ali, which had resulted in his death. On 22/12/1999, the mother of the deceased, viz, Sayada Bibijan Begum had lodged an ejahar before the Officer-in-Charge of Hajo Police Station reporting that about 4-5 days back, the six accused persons named in the ejahar, had cut some portions of their K.P. patta land, as a result of which, an altercation took place between her son Sayad Ajijur Rahman and the accused persons. Around 9 a.m. on 22/12/1999, when her son was coming from Barmi Village Chowk towards their residence and had reached the house of co-villager Md. Safique Ali, all the accused persons, out of rage, had attacked her son on the road with the intention to murder him. They tied his hands and legs and dragged him forcibly to the residence of the accused no. 1 i.e. Md. Kismat Ali. They locked him inside a room and stabbed him with sharp weapon and daggers, thus inflicting various injuries on his body. According to the informant, the accused persons had also beaten him with iron rod and broke the bones of his both hands and legs and made him blind by pouring acid. Thereafter, the accused persons had left the house leaving the injured boy in a critical condition. The family members later took him to the Guwahati Medical College and Hospital (GMCH) in a grievously injured condition and presently he was battling with life. On receipt of the ejahar, Hajo PS case No. 229/1999 was registered under Sections 341/342/326/307 of the IPC and the matter was taken up for investigation. However, in the meantime, the victim Ajijur Rahman succumbed to his injuries, as a result of which, Section 302 of the IPC was added.

4. Upon completion of investigation, the Investigating Officer (IO) had submitted charge-sheet against three accused persons, viz. the two appellants herein and one Md. Pahbor Ali, who was declared as an absconder by the Court vide order dated 17/06/2013. Since the IO did not find any evidence against the other three accused persons, they were not sent up for trial. Based on the charge-sheet submitted by the I.O, charges were framed against the appellants under Section 341/342/302/34 of the IPC which was read over and explained to them. However, since the accused persons had pleaded not guilty, they were made to face trial.

5. The prosecution case is based on circumstantial evidence wherein heavy reliance was placed on the testimony of PW-2, who is the informant and mother of the victim as well as another witness i.e. PW-4, who had claimed to have seen the incident, save and except, what had happened in the confinement of the house of the appellant no.1. After, the prosecution had lead evidence, the statement of the accused persons under Section 313 of the Cr.P.C. was recorded wherein, they had denied all the incriminating circumstances put to them. The appellant no. 2 has also specifically denied his involvement in the incident. The defence side, however, did not lead any evidence.

6. Based on the evidence adduced by the prosecution side, the learned trial Court has held that the charges brought against the accused persons stood

established beyond reasonable doubt and accordingly, convicted and sentenced the two appellants, in the manner as aforesaid.

7. Assailing the impugned judgement and order dated 07/05/2018, Mr. Mahanta, learned senior counsel appearing for the appellants has argued that there are material contradictions and improvement in the testimony of PW-2, who is an interested witness, being the mother of the victim. As such, the learned trial Court ought not to have relied upon the testimony of this witness to convict the appellants. The learned senior counsel has further argued that there is not even an iota of evidence available on record to convict the appellant no.2, viz. Majibar Ali @ Rahman and, therefore, the impugned judgement of the learned Sessions Judge, in so far as the conviction of the appellant no. 2 is concerned, is wholly unsustainable in the eye of law on such count alone. As such, the impugned judgement is liable to be set aside by this Court.

8. Opposing the said submission, Ms. B. Bhuyan, learned APP, Assam, has argued that the victim in this case was a mentally unstable person and he has been brutally murdered by a group of persons including the appellants out of personal grudge. According to the learned APP, the said fact has been established from the evidence adduced by the prosecution side. Under the circumstances, submits Ms. Bhuyan, there is no cogent ground for this Court to interfere with the impugned judgement and order dated 07/05/2018 passed by the learned trial Court.

9. We have considered the submissions advanced by the learned counsel for both sides and have also carefully gone through the materials available on record. Since Mr. Mahanta has argued that the charges brought against the appellants could not be proved beyond reasonable doubt, it would be necessary for us to briefly discuss and re-appreciate the evidence brought on record by the prosecution side.

10. The first witness examined by the prosecution side in this case is Nabiruddin Khan (PW-1) who has deposed before the Court that on 22/12/1999, he was posted as the incharge of the GMCH Out Post. On that day, he had received a W.T. Message from the Hajo Police Station that an injured person by the name of Md. Ajijur Rahman (with multiple injuries) was admitted to the GMCH and, therefore, he was required to record the dying declaration of the victim in connection with Hajo PS Case No. 221/1999. The PW-1 has, however, deposed that he had again received a W.T. Message from the Hajo Police Station that Ajijur Rahman had succumbed to his injuries at the GMCH and, therefore, he was required to make arrangement for conducting post-mortem examination on the dead body. In view of the above development, the PW-1 could not record the dying declaration of the victim. This witness has also deposed that on 22/12/1999, he had received a letter from the Casualty Department of the GMCH wherein, it was mentioned that Ajijur Rahman had died while he was being carried to the Casualty Department. On the basis of the aforesaid letter he has made GD entry No. 413 dated 22/12/1999 and thereafter, went to the casualty department of the GMCH and saw that the dead body of Ajijur Rahman

was lying there. Inquest was held on the dead body and thereafter, the same was sent for post-mortem examination. PW-1 has also stated that he has received the post-mortem report and thereafter sent the same along with all relevant documents to the Hajo Police Station.

11. In his cross examination, PW-1 has stated that when he had held inquest, he had seen injuries on the forehead and on the right hand of the deceased. The bone of his right hand was broken and right hand fingers were swollen. He had also seen black injury mark in the left hand fingers, in the left elbow and in the right leg. The ankles of both the legs were broken and blood was oozing out from the knees towards the lower part of the leg. PW-1 has also deposed to have seen black injury mark in the left side of the back.

12. Bibijan Begum was the next witness examined by the prosecution as PW-2. She is the informant in this case and also the mother of the victim. PW-2 has deposed that she is the complainant in this case and had put her thumb impression in the ejahar. PW-2 has stated that victim Ajijur Rahman was her son and that the occurrence took place at about 9 a.m. when she was at her home. The distance between her house and the place of occurrence is slightly less than one mile. People on the road had told her that Kismat and Pahbor had tied up Ajijur Rahman with "Paga" and felled him. On reaching the place of occurrence she had seen Kismat and others taking Ajijur to their house. PW-2 has also stated that she had seen Pahbor tie Ajijur up. When she asked Ajijur as to why he was being beaten and tied up, she received an answer that he did nothing. Accused Kismat and others prevented her from speaking with Ajijur and told her to go from there. She had forbidden the accused persons from beating Ajijur and told them that if her son had done something wrong, he should be handed over to the public for holding a "Bichar". Since Ajijur was wearing only a pair of trousers, she came back home to bring him a shirt. But later on, she came to know that her son was no more. Police came to the place of occurrence, took Ajijur to a doctor at Hajo and later to the GMCH, where he died.

13. During her cross-examination, PW-2 has stated that the ejahar was written by a scribe and read over to her and that many people had informed her about the incident. PW-2 had also stated that Ajijur had worked in the Army and became mad during the period of his service. He had assaulted people and the Police.

14. PW-4 Md. Joinal Ali is a key witness in this case. He has deposed that he knew the informant as well as the deceased. PW-4 has also stated that he could recognize the accused persons present in the dock, who are all residents of the same village. According to PW-4, the occurrence took place on 22/12/2019. At the time of occurrence, he was at his home. The place of occurrence is situated in the middle of their village. Ajijur was going to his house through the PWD road and was about 10 'tar' away from his home, he was talking to a person. At that time, accused Kismat Ali came and grabbed Ajijur. Both of them had a scuffle. Pahbor Ali came from the village and then Ajijur ran. Both of them had chased

Ajijur, caught hold of him and tied him up. When the public called the village head, both the persons were handed over to the village headman. The village headman told that if found guilty, he would hand them over to the Police. Thereafter, the accused Mujibur (appellant No. 2) had arrived. PW-4 had stated that the accused persons had said that they had three questions to ask (to the victim) and thereafter they would hand him over to the Police. PW-4 has further deposed that the accused persons took Ajijur to their house and after entering their house, they had shut the doors and windows. Thereafter, he left the place. He had only heard what had happened thereafter but did not witness it. The young boys present there said that the accused persons assaulted Ajijur inside the house and he had shouted. However, PW-4 did not see the occurrence. In his cross-examination, PW-4 has stated that he had stated before the police that at 11 a.m., the accused persons had called Ajijur in the courtyard of Rasun Ali.

During his cross-examination, testimony of PW-4 has remained unshakened.

15. PWs 3 and 5 to 9 are all residents of the same village and were known to the informant as well as the accused persons. However, these witnesses did not see anything as they were not present at the place of occurrence on the date of the incident but had later heard about the incident from various sources including their family members. As such, the evidence adduced by the said witnesses are in the nature of hearsay evidence and therefore, would not have any relevant bearing in the outcome of this appeal. In view of the above, we do not consider it necessary to discuss the evidence adduced by these witnesses for the purpose of deciding this appeal.

16. PW-10 Dr. Kanak Chandra Das is the doctor who had conducted the post-mortem examination on the dead body. The doctor has proved the post-mortem report Ext. 5. According to the post-mortem report, the following injuries were found in the dead body :-

"Injury No.1 : Multiple burn injury present over the face, both shoulder, both upper limbs & front of both thigh, size varying up from 2 cm x 1 cm to 1.5 cm x 1 cm which are deuro epidermal in nature (depth). The injuries are highly congested. A zone of hyper aemia area present on healthy skin adjacent to the burn area.

Injury No. 2 : One patterned contusion present in back of chest, right side, oblique in portion size 7 cm x 3 cm.

Injury No. 3 : One patterned contusion on back of chest, left side. Size 6 cm x 3 cm oblique in portion.

Injury No. 4 : Closed fracture of right elbow joint with surrounding muscle contusion present.

Injury No. 5 : Closed fracture of left elbow joint.

Injury No. 6 : Crush injury present on both feet including both ankle joints. The

skins muscles, bones, nerves, vessels are all crushed. Clotted blood found adherent to the wound margin which are resistant to washing."

17. The doctor has opined that the death was due to shock and hemorrhage as a result of injuries described. All injuries were ante-mortem and caused by blunt weapon and homicidal in nature. PW-10 has also stated that injury No.1 is ante-mortem burn injury.

18. PW-11 M.K. Dutta is the I.O. who had conducted investigation in connection with Hajo PS case No. 221/1999. PW-11 has deposed that he had received information over telephone from Md. Faruk Ali, a person present in the place of occurrence, that one dacoit Md. Ajijur Rahman has been caught on a road and that he had been kept tied up in the house of Md. Kismat Ali. On receiving the information, he had made GD entry No. 512 dated 22/12/1999 and thereafter, proceeded to the place of occurrence along with Constable Ranjit Patowary and other armed party. On reaching the place of occurrence, he found that one person was lying injured in the courtyard of Md. Kismat Ali. He took him to the Public Health Centre (PHC) for treatment. The injured victim was referred to the GMCH for better treatment. Later, he got information over telephone from the GMCH that the injured had succumbed to his injuries. Then he made a request to the learned CJM to add section 302 of the IPC in the case, arrested accused persons, viz. Chana Ali @ Bhanu Ali, Md. Kismat Ali and Md. Majibur Rahman in connection with the case and forwarded them to the Court. The IO has also confirmed that the inquest over the dead body was conducted by the In-charge GMCH O.P. who had also collected the post-mortem report and forwarded the same along with relevant documents to the Hajo Police Station. However, as he was transferred from the Hajo Police Station, he had handed over the documents of the case to the Officer-in-Charge of Hajo Police Station.

19. PW-12 Khagen Chandra Das is the Officer-in-Charge of Hajo Police Station, who has deposed that after the transfer of the I.O. M. K. Dutta, who was investigating the case, he had collected the documents, recorded the statement of the accused, completed the investigation and submitted the charge-sheet against the accused persons. PW-12 has proved the charge-sheet Ext. 10 before the Court.

20. Sri P.K. Deka was summoned as Court Witness (CW-1) who proved the GD entry Nos. 512 and 513 connected with this case.

21. Upon evaluation of the evidence available on record, the learned trial Court has recorded the following findings as regards the guilt of the accused persons/appellants herein, which are reproduced herein below for ready reference :-

"31. After due hearing from the parties and on scrutiny and discussion made above on the testimony of prosecution witnesses, it appears that while the scuffling took place between accused Kismat Ali and Ajijur (deceased) co-accused Pahbor Ali joined with accused Kismat Ali and chased Azizur and tied him with a rope. According to the confident version of PW-4 at that point of time accused

Mojibar came and joined there who told them that they had some queries with the Ajijur and thereafter they will hand over Azizur to police. It reveals from the testimony of PW-4 further that all the three accused took Azizur (deceased) to the house of Kismot Ali and bolted the door and windows. Further, PW-2 claimed that she saw her son Azizur was taken to the house of accused Kismat and also saw accused Pahbor tying him with a rope. Though she has not categorically mentioned the name of Majibar but she stated that accused took her son to the house of Kismot which implies that those persons who joined Kismot in the happenings together took her son to the house of Kismot and she was asked to leave the place immediately by the accused. From the above facts established by the prosecution, it appears that section 34 IPC in the above happenings is invoked."

22. From a careful scrutiny of the evidence available on record, we find that the PW-4 has narrated the entire incident whereby the victim was assaulted by the appellant no.1 and accused Pahbor Ali. Not only that, these accused persons appear to have dragged the victim to the house of the appellant no.1 and thereafter, locked him up inside the room with the doors and windows closed, and had severely assaulted the victim inflicting grievous injuries upon him. The post-mortem report and the testimony of PW-1 and the doctor (PW-10) establishes beyond doubt that the victim had received multiple injuries on his body, resulting into homicidal death. Therefore, the fact that the victim had died a homicidal death due to the incident which took place on 22/12/1999 is established beyond doubt.

23. In so far as the involvement of appellant No.1 Kismat Ali and Pahbor Ali is concerned, the same also stand established from the testimony of PW-4. The version of PW-4, in so far as the involvement of appellant no. 1 Kismat Ali and accused Pahbor Ali is concerned, find due corroboration from the evidence adduced by PW-2. The IO (PW-11) has also categorically deposed that the victim was recovered in an injured condition from the courtyard of appellant no.1 Kismat Ali and there is no cross-examination of the IO on the aforesaid point as well.

24. Based on appreciation of the evidence available on record, we find ourselves in agreement with the conclusion of the learned trial Court to the effect that the prosecution has succeeded in establishing the murder charge brought against the appellant no.1 Kismat Ali beyond reasonable doubt.

25. Having held as above, we deem it appropriate to point out that save and except a solitary statement of the PW-2, who has stated that "Md. Majibar Rahman had arrived at the place", there is not even an iota of evidence to implicate the appellant no.2, viz. Majibar Rahman in the incident. PW-4 has not indicated in any manner that Majibar Rahman was involved in any covert or overt act leading to the injuries sustained by the victim. There is also no finding by the learned trial Court as regards any overt act committed by the appellant no. 2 Majibar Rahman.

26. In the above context, it is also to be noted herein that in the ejahar, as many as six accused persons were named by the informant but the IO could not find any evidence against the three accused persons, as a result of which, they were not sent up for trial. Therefore, merely relying on a vague statement made by PW-4 "that the accused persons" had taken the victim to the house of the appellant No. 1 Kismat Ali, it would be un-safe for this Court to draw a presumption that Md. Majibar Rahman, who is also an accused named in the FIR, had taken part in dragging the victim to the house of the appellant no. 1 and thereafter, he had grievously assaulted him. As a matter of fact, evidence available on record is wholly insufficient to draw such a conclusion against the appellant no. 2. We are, therefore, of the unhesitant view that there is no evidence to sustain the conviction of the appellant no. 2.

27. Since we have observed that there is no evidence available on record to implicate the appellant no. 2 Majibar Rahman in this case, hence the judgement and order of the learned trial Court convicting the appellant no.2 Majibar Rahman is held unsustainable in the eye of law.

28. For the reasons indicated herein above, we hold that the present appeal succeeds in part. The impugned order dated 07/05/2018, in so far as it relates to the conviction of appellant no. 2 Majibar Rahman, is concerned, is hereby set aside. The appellant no.2 Majibar Rahman is set at liberty.

29. We, however, affirm the conviction and sentence awarded by the learned trial Court upon the accused/appellant no.1 Kismat Ali.

30. We are informed that the appellant no. 2 Majibar Rahman is presently in jail. We, therefore, direct that the appellant no. 2 be forthwith released from jail if his detention is not found to be necessary in connection with any other case.

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