
(2016) 09 GAU CK 0010
In the Gauhati High Court
Case No : Criminal Appeal No. 59 (J) of 2014

Md. Maktar Ali

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 02-09-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (2016) 167 AIC 575 : (2016) 5 GauLJ 748 : (2016) 4 GauLT 671

Hon'ble Judges : Mr. Ajit Singh, CJ. and Mr. N. Chaudhury, J.

Bench : Division Bench

Advocate : Mr. Biplab Bora, Learned Amicus Curiae, for the Appellant/Accused;
Mr. K.A. Mazumdar, learned Additional Public Prosecutor, Assam, for the
Respondents

Final Decision : Allowed

Judgement

Mr. Ajit Singh, C.J.—The sole appellant Md. Maktar Ali has been convicted under Section 302 of Indian Penal Code and sentenced to imprisonment for life and fine of Rs. 5,000/- with default stipulation.

2. The victim of the incident was Sirajuddin Choudhury, aged about 70 years.

3. According to the prosecution case, Sirajuddin was resident of village Jamira. On 7.4.2003, around 7 a.m., he visited the house of his daughter at Sahabad, where she is married. Around 11 a.m., he left his daughter's house and was waiting for bus in front of the Tea Stall of Giasuddin (PW-7) at Sahabad Bazar in order to return home. At that point of time, the appellant, out of some previous grudge, suddenly came and hacked him on the back of his head and back of shoulder with a sharp dao. After causing injuries to Sirajuddin, the appellant ran away. Son-in-law Azir Akmad Laskar (PW-4) of Sirajuddin was immediately informed, who came and carried him to Lala Police Station in an Auto Rickshaw. But, Purnananda Konwar (PW-14), Officer In-charge of the Police Station sent Sirajuddin to Primary Health Centre, because his condition was serious and

needed emergent medical care. The doctor of the Primary Health Centre, having regard to the critical condition of Sirajuddin, further referred him to Hailakandi Hospital, where he was declared as "brought dead".

4. On 7.4.2003, Dr. K.Z. Choudhury conducted the post mortem examination on the dead body of Sirajuddin. He found one incised wound over right occipital region. The doctor, in his post mortem examination report, opined that Sirajuddin died due to head injury, which was caused by a sharp cutting weapon. The post mortem examination report is exhibit 3.

5. Ejahar of the incident was made by Md. Alauddin Choudhury (PW-1) at Police Station Lala on 8.4.2003, which was registered as First Information Report. Ejahar is exhibit 1. In the ejahar, Md. Alauddin mentioned the name of appellant as the assailant of Sirajuddin. But, he did not claim himself to be an eye witness to the incident. Md. Alauddin stated in the ejahar that he came to know about the incident from Sirajuddin and Azir Akmad Laskar.

6. Since the appellant reportedly absconded, Investigating Officer Purnananda Konwar, after investigation, filed the charge sheet showing him as absconder.

7. During trial, the appellant abjured his guilt and pleaded false implication.

8. The trial court mainly relying upon the evidence of oral dying declaration of Sirajuddin made before Md. Alauddin Choudhury (PW-1), Azir Akmad Laskar (PW-4), Roisuddin Mazumdar (PW-11) as well as the evidence of eye witness Farash Uddin Laskar (PW-5) convicted and sentenced the appellant as aforesaid.

9. After hearing the learned counsel for the appellant and learned Additional Public Prosecutor, we are of the view that the appeal deserves to be allowed. As mentioned above, Md. Alauddin stated in the ejahar that he came to know about the incident from Sirajuddin and Azir Akmad Laskar. But, he, in his evidence, testified that he came to know about it from Azir Akmad Laskar and Roisuddin Mazumdar. Md. Alauddin in his entire evidence did not say that any declaration was made to him by Sirajuddin against the appellant. Azir Akmad Laskar is son-in-law of Sirajuddin. Likewise, Roisuddin Mazumdar is cousin of Sirajuddin. Both have testified that on reaching the place of occurrence, they found Sirajuddin in an injured condition and therefore, arrangement was made for immediately carrying him to the Police Station. They have also testified that on their asking, Sirajuddin disclosed that appellant had caused injuries to him with a dao. But both these witnesses did not mention about this oral dying declaration in their Police Station Diary Statements recorded under Section 161 of the Code of Criminal Procedure. Purnananda Konwar in his evidence has categorically deposed that no such statement was made by either Azir Akmad Laskar or Roisuddin Mazumdar to him during investigation. We, therefore, find the evidence of oral dying declaration of Sirajuddin against the appellant as totally false.

10. Now we shall examine the evidence of sole eye witness Farash Uddin Laskar

(PW-5). This witness has admitted that he is related to Azir Akmad Laskar and therefore to Sirajuddin. He says that at the time of incident, he was in the shop of his cousin brother, which is situated at Sahabad and there, he saw Sirajuddin waiting for bus on a road to go to his house. According to him, he then saw Shua, Billal along with some others talking with Sirajuddin that some matter must be disposed of by tomorrow and at that point of time, appellant suddenly appeared and asked Sirajuddin to dispose it of there and then. The appellant then inflicted one blow with a dao on the back side of his head and second blow on the shoulder. Farash Uddin Laskar further says that on seeing the incident, he immediately rushed to the spot and brought Sirajuddin to the Verandah of shop, where he along with others gave first aid to him and sent information to Azir Akmad Laskar, who came and carried Sirajuddin in an Auto Rickshaw towards Lala. Farash Uddin also admits that he did not go in the Auto Rickshaw with Sirajuddin and the incident was witnessed by number of persons. But, neither Azir Akmad Laskar nor Roisuddin Mazumdar have stated in their evidence that Farash Uddin Laskar was present at the place of occurrence. In fact, they have not uttered anything regarding his presence. It is also to be noted that ejahar was made after 24 hours of the incident and in the meantime, body of Sirajuddin was cremated in the presence of all relatives. As seen above, Md. Alauddin, who made the ejahar and Farash Uddin Laskar are both related to Sirajuddin. If Farash Uddin Laskar had seen the incident, this fact would have been known to all the relations. and Md. Alauddin, in turn, would not have missed mentioning of his name in the ejahar as eye witness. Md. Alauddin instead stated therein that he came to know about the incident from Azir Akmad Laskar. Not only this, owner of Tea Stall Giasuddin (PW-7), in front of whose shop the incident took place, has also not stated about the presence of Farash Uddin Laskar at or near the spot. For these reasons, we are unable to believe that Farash Uddin Laskar was an eye witness to the incident.

11. There is yet another reason to discard the evidence of Farash Uddin Laskar examined by the prosecution as PW-5. His deposition sheet reveals that he is son of Mahmud Ali Laskar and is aged about 55 years, whereas, in the charge sheet submitted by the police, eye witness Farash Uddin is shown to be son of Abdul Mozaid, aged about 35 years. There is, thus, a serious doubt whether Farash Uddin Laskar shown as eye witness in the charge sheet, is the same person who has been examined by the prosecution as eye witness. Moreover, according to the evidence of Farash Uddin Laskar, the appellant had dealt two blows with a dao on the back of head and back of shoulder of Sirajuddin. But, in the post mortem examination report, only one injury is shown on the back of head of Sirajuddin.

12. We accordingly set aside the conviction and sentence of the appellant and acquit him of the charges. The appellant is in jail. He be released forthwith, if not wanted in any other case.

13. The appeal is allowed.