
(2018) 04 GAU CK 0071
In the Gauhati High Court
Case No : Crl.A. 70 of 2010

PRAFULLA BORAH and ANR

APPELLANT

Vs

THE STATE OF ASSAM

RESPONDENT

Date of Decision : 19-04-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34

Citation : (2018) 04 GAU CK 0071

Hon'ble Judges : MIR ALFAZ ALI

Bench : Single Bench

Final Decision : Partly Allowed

Judgement

1. Heard Mr. T.J. Mahanta, learned Senior Counsel for the appellants and Mr. D.Das, learned Addl. Public Prosecutor for the State.

2. This appeal is directed against the judgment and order dated 05.04.2010 passed by learned Addl. Sessions Judge (FTC), Biswanath Chariali in

Sessions Case No. 167/2007. By the said judgment, learned Sessions Judge convicted the appellant No. 1 u/s 326 IPC and sentenced him to rigorous

imprisonment for 2 (two) years and fine of Rs. 5,000/- with default stipulation. The accused appellant No. 2 was sentenced to imprisonment for one

year u/s 324 IPC.

3. As per prosecution case, on 11/4/06, at about 7.30, in the evening, ten accused persons named in the FIR dragged PW 10, Prafulla Borah from his

house and took him near a PCO, where all the accused persons named in the FIR , mounted assault on him causing serious injuries. An FIR was

lodged by PW 3, Kamal Borah, on the basis of which, police registered a case and after usual investigation, submitted charge-sheet against six

accused persons, including the present appellants u/s 326/307 IPC read with Section 34 IPC. Eventually all the six accused persons against whom charge-sheet was filed, stood trial.

4. In course of trial, learned Sessions Judge framed charge against all the six accused persons u/s 307 read with Section 34 IPC, to which they pleaded not guilty. In order to substantiate the charge, prosecution examined 11 (eleven) witnesses. On appreciation of evidence, the learned trial court convicted the appellant No. 1 u/s 326 IPC and appellant No. 2 u/s 324 IPC and awarded sentence, as indicated above. Rest of the accused persons standing trial were exonerated by the learned trial court, as the charge against them was held not proved.

5. Aggrieved by the said judgment of conviction and sentence, the appellants preferred the instant appeal.

6. Learned Senior Counsel, Mr. T.J. Mahanta submits that though, initially charge was framed u/s 307 read with Section 34 IPC, learned trial court acquitted all the accused persons, including the appellants of the said charge and convicted the present appellants u/s 326 and 324 IPC respectively without any evidence to prove as to which injury was caused by which of the appellants. Learned Senior Counsel, Mr. Mahanta for the appellant contended, that when there was no ingredient to invoke Section 34, IPC each of the accused would be liable for individual act and as such, without ascertaining as to which injury was caused by which of the accused, conviction of the appellants under different sections of law, was perverse and cannot be maintained.

7. Out of the eleven witnesses examined by the prosecution PW 10, the victim as well as PW 1, PW 2 & PW 5 were vital, inasmuch as, rest of the non-official witnesses stated to have known about the occurrence later on, and they did not have any personal knowledge about the occurrence.

8. The doctor, who attended the injured, was examined as PW 9. As per the evidence of the doctor, the following injuries were found on the person of

PW 10:-

â??(i) One incised wound of about 3â? X 2â?X 1â?? on right mid-forearm laterally, oblique pointing outwards distally. The wound is fresh and with active bleeding. There is fracture of right ulna of shaft and mid.

(ii) One incised wound on right arm, mid oblique laterally pointing upwards. The

size of the wound is about 3" X 2" X 1" with active bleeding.

(iii) One incised wound about 1" X ½" X ½" at right post auricular area extending upwards with active bleeding.

9. According to the doctor, injury No. 1 was grievous and injury Nos. 2 & 3 were simple in nature.

10. Although PW 10, the injured, stated in his evidence, that the incident took place in presence of PW 1 & PW 5 in the PCO owned by PW 1 and

they witnessed the occurrence, both PW 1 & PW 5 did not support such version of PW 10. Rather, they stated that the victim (PW 10) came running

to the PCO with injury and they shifted the victim to the hospital. According to PW 5 and PW 1, they did not see as to who caused the injury.

11. PW 3, the younger brother of the PW 10, was also not an eye witness. He came to know about the occurrence from the PW 10. Therefore, the

entire prosecution case hinges on the sole testimony of PW 10 and the medical evidence of PW 9, the doctor. This being the position, let me now scan

the evidence of PW 10, the sole witness of the occurrence.

12. PW 10, stated in his evidence, that while he was going home riding his motorcycle, the accused Dhaneswar Borah, Jiten Hazarika, Ananta

Baruah, Tapan Rajkhowa, Prafulla Borah and Dhiren Bharali along with some other persons manhandled him and tried to drag him from there. He ran

away and entered the PCO, belonging to Haren Gogoi (PW 1). When he was running to the PCO, the accused Prafulla Borah coming from other side

dealt a blow with a dao. When he tried to ward off the blow by raising his hand, the dao blow landed on his hand causing serious injury. When he was

entering the PCO, the accused Tapan Rajkhowa also hit him with a dao aiming to his neck. PW 10, somehow, resisted the blow by raising his hand

and consequently, he received injury on his hand. According to him, one Jiten Gogoi also assaulted him by giving leg blows. He also stated that he was

shifted to hospital by Haren Gogoi (PW 1) and Kamal Saikia (PW 5). According to PW 10, both the appellants hit him with dao and while he tried to

ward off the attack, both the blows landed on his hand and he sustained injury.

13. The evidence of the doctor (PW 9) shows, that the victim received three injuries on his right hand. Out of the three injuries received by the victim

on his hand, except the injury No. 1, others were simple in nature and caused by sharp weapon. Evidently the victim was attacked by the appellants

and other accused suddenly and there was no ingredient of common intention to invoke Section 34 IPC. Learned trial court also convicted the accused persons on the basis of their individual liability. The evidence of PW 10, that he received injuries on his hand is reinforced by the evidence of the doctor, since there was no element or ingredient to attribute constructive liability, each appellant would be liable for his own act. Though it is proved that both the appellants dealt dao blows, but medical evidence shows that PW 10 sustained three injuries on hand and there was no evidence or material on record to identify as to which blow was given by which of the accused.

14. It is pertinent to mention that the learned counsel for the appellant has not challenged the conviction and sentence of the accused appellants on merit. The only ground of challenge against the impugned judgment is that the appellant No. 1 ought not to have been convicted u/s 326 IPC as there was no evidence that the grievous injury was caused by the appellant No. 1. Apparently prosecution has not been able to establish beyond reasonable doubt that the grievous hurt sustained by the victim was caused by the appellant Prafulla Borah. Since the involvement of the accused and causing injury to the victim were not in dispute and the victim was also found to have sustained three injuries on his right hand, this Court is of the view that the conviction and sentence of the accused appellant Prafulla Borah deserves to be modified, reason being that the prosecution evidence falls short of proving the fact that grievous injury was caused by the appellant Prafulla Borah. Accordingly, the accused/appellant Prafulla Borah is also convicted u/s 324 IPC.

15. It has been brought on record through the evidence that the incident arose out of clash between two political groups and other persons were also involved. However, in absence of evidence, the co-accused were exonerated.

16. Having considered the facts and circumstances under which the occurrence took place, this court is of the view that sentence of fine alone u/s 324 IPC would meet the ends of justice. Accordingly, the sentence of the appellants also stands modified to the effect that both the appellants shall pay fine of Rs. 2,000/- each and in default, shall undergo imprisonment for three months.

17. With the above modification in the sentence, the appeal is partly allowed.

18. The accused appellants shall surrender before the learned trial court and pay the fine amount or serve out the sentence imposed therefor.

19. Send back the LCR.