
(2014) 05 GAU CK 0006
In the Gauhati High Court
Case No : Criminal Appeal No. 60 of 2011

Rahmat Ali and Hiramoni Mazumdar	Vs	APPELLANT
The State of Assam		RESPONDENT

Date of Decision : 22-05-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313, 357A
Penal Code, 1860 (IPC) — Section 147, 148, 300, 302, 304

Citation : (2014) CriLJ 4276 : (2015) 1 GLT 62

Hon'ble Judges : Prasanta Kumar Saikia, J; Brojendra Prasad Katakey, J

Bench : Division Bench

Advocate : M.H. Rajbarbhuiya, Ms. R. Chetri, Ms. L. Das, Advocate for the Appellant; K.A. Mazumdar, Additional Public Prosecutor, Assam, Advocate for the Respondent

Final Decision : Allowed

Judgement

Brojendra Prasad Katakey, J.—These appeals are directed against the judgment, dated 10-02-2011, passed by the learned Additional Sessions Judge (FTC), Cachar at Silchar, in Sessions Case No. 118 of 2009, convicting Rahmat Ali and Hiramoni Mazumdar, appellants in Criminal Appeal No. 60 of 2011, u/s 323/34 and 324/34 IPC and sentencing them to undergo rigorous imprisonment for 2(two) years each and to pay fine of Rs. 2,000/- each, in default of payment of fine, to suffer rigorous imprisonment for a further period of 2(two) months each, for the offence punishable u/s 324/34 IPC; and to undergo simple imprisonment for 3(three) months each and pay fine of Rs. 500/- each, in default, to undergo simple imprisonment for further period of 15 days, for their offence, punishable u/s 323/34 IPC, and also convicting Moni Mia Mazumdar, appellant in Criminal Appeal No. 62 of 2011, u/s 302 IPC and sentencing him to undergo rigorous imprisonment for life and to pay fine of Rs. 5,000/-, in default, to undergo rigorous imprisonment for a further period of 6(six) months.

2. Criminal investigation was set in motion on lodging a First Information Report

(FIR) by Aminul Haque Mazumdar (PW1) on 04-06-2008, with the Officer-in-Charge of Lakhipur Police Station alleging that Moni Mia Mazumdar (appellant in Criminal Appeal No. 62/2011), Rahmat Ali Mazumdar and Hiramoni Mazumdar (appellants in Criminal Appeal No. 60 of 2011), Toibun Bessa, Husiwar Begum and Zanam Begum, on 04-06-2008, at about 8.30 a.m., assaulted, by a Ballam, the first informant's elder brother, Abdul Haque Mazumdar, who was ploughing his land, adjacent to the house of the accused persons and also abused the first informant while he was passing by the accused persons' house taking Tiffin for his elder brother. Hearing hue and cry, another brother of the first informant, Moinul Hoque (since deceased) reached the place in a run in order to save them, when Moni Mia Mazumdar dealt repeated blows by means of a Ballam on the person of Moinul Hoque and as a result of which, he died.

3. On the basis of the said FIR, Lakhipur Police Station Case No. 147 of 2008, under Sections 147/148/447/326/302/34 IPC has been registered. The police, during investigation, visited the place of occurrence, got the inquest of the dead body done, sent the dead body for post mortem examination, sent the PW1 and PW4 for medical examination, recorded the statement of the witnesses acquainted with the facts and circumstances of the case u/s 161 Cr.P.C. and prepared the sketch map.

4. On completion of the investigation, the police filed the charge sheet against the present appellants, under Sections 323/324/302/34 IPC. The case being exclusively triable by the Court of Sessions, the learned Additional Chief Judicial Magistrate, Cachar, Silchar, vide order, dated 28-07-2009, passed in GR Case No. 1935 of 2008, committed the same to the Court of Sessions for trial and accordingly Sessions Case No. 118 of 2009 has been registered. The learned Additional Sessions Judge, thereafter, on 27-10-2009, framed charges under Sections 323/34 and 324/34 IPC as well as u/s 302/34 IPC against all the accused-appellants which, when read over and explained to them, they pleaded not guilty and claimed to be tried. Hence, the trial commenced.

5. The prosecution, in order to bring home the charges levelled against the accused-appellants, examined 9(nine) witnesses, namely, Aminul Haque Mazumdar (PW1), Kalimuddin Mazumdar (PW2), Md. Abdul Hakim Mazumdar (PW3), Abdul Haque (PW4), Smtil Mira Begum (PW5), Musst. Moniram Begum (PW6), Dr. BC Roymedhi (PW7), Dr. Bishnu Pinak Ranjan N.G. (PW8) and Sri Ninar Ali Saskar (PW9).

6. PW1, PW4, PW5 and PW6, according to the prosecution, are the eye witnesses, out of whom, Aminul Hoque Mazumdar (PW1) and Abdul Hoque (PW4) are claimed to be the injured witnesses. PW7, Dr. BC Roymedhi had conducted autopsy on the dead body of Moinul Hoque. PW8, Dr. Bishnu Pinak Ranjan N.G. medically examined PW1 and PW4 for their injuries and submitted the injury reports, which are proved and marked as Ext. 4 and Ext. 5. PW9, Sri Ninar Ali Laskar, is the Sub-Inspector of Police, who conducted a major part of the investigation. After examination of the prosecution witnesses, the statements of

the accused-appellants u/s 313 Cr.P.C. were recorded. The accused-appellants, however, did not examine any defence witness, despite the opportunity given. The trial Court, upon appreciation of the evidence on record, passed the judgment of conviction as aforesaid. Hence, the present appeals.

7. We have heard Mr. M.H. Rajbarbhuiya, the learned counsel appearing for the appellants and Mr. K.A. Mazumdar, the learned Additional Public Prosecutor, Assam, appearing of the State in both the appeals.

8. Mr. Rajbarbhuiya, the learned counsel appearing for the appellants, referring to the depositions of the prosecution witnesses, more particularly, the depositions of PW1, PW4 and PW8, has submitted that there being material contradictions between the statements of PW1 and PW4 relating to the injuries caused on their persons by Rahmat Ali Mazumdar and Hiramoni Mazumdar and their evidence having not been supported by the doctor (PW8), who has proved the injury reports, being Ext. 4 and Ext. 5, the trial Court ought not to have convicted Rahamat Ali Mazumdar and Hiramoni Mazumdar (appellants in Criminal Appeal No. 60 of 2011), under Sections 323/34 and 324/34 IPC.

9. Mr. Rajbarbhuiya, the learned counsel has also submitted that it is evident from the depositions of the prosecution witnesses, more particularly, the statement made by them and from their cross-examinations that there prevailed a dispute relating to a land as well as a fishing pond, a part of which, according to the Investigating Officer (PW9), fell in the share of the land belonging to the informant side and a part of which fell on the accused side. It has further been submitted that it is evident that the appellant, Moni Mia Mazumdar, had exercised the right of private defence of his property, which, however, having been exceeded, it comes within the 2nd exception to Section 300 IPC. The learned counsel, therefore, submits that the trial Court ought not to have convicted Moni Mia Mazumdar (appellant in Criminal Appeal No. 62 of 2011), u/s 302 IPC and he ought to have been punished under Part-II of Section 304 IPC, there being no premeditation and intention to kill or cause such bodily injury, which is likely to cause the death of Moinul Hoque.

10. Mr. Mazumdar, the learned Additional Public Prosecutor, Assam on the other hand supporting the judgment of conviction, has submitted that it is evident from the deposition of PW1 and PW4 as well as the injury reports (Ext. 4 and Ext. 5), proved by the doctor (PW8), who medically examined PW1 and PW4 that Rahmat Ali Mazumdar and Hiramoni Mazumdar inflicted the blows on the persons of PW1 and PW4 by blunt as well as dangerous weapon, hence, they have rightly been convicted under Sections 323/34 as well as under Sections 324/34 IPC for having shared the common intention to commit such a crime.

11. Mr. Mazumdar further submits that it is also evident from the deposition of PW1, PW4, PW5 and PW6 that it was Moni Mia Mazumdar (appellant in Criminal Appeal No. 62 of 2011), who has given a Ballam blow on the neck of the deceased Moinul Hoque, as a result of which he died on the spot. It is also

submitted that such versions of PW1, PW4, PW5 and PW6 have been supported by the medical evidence, being the post mortem report (Ext. 3), proved by Dr. B.C. Roymedhi (PW7). The learned Additional Public Prosecutor, therefore, submits that the appellant, Moni Mia Mazumdar, has rightly been convicted by the trial Court u/s 302 IPC.

12. We have considered the submissions advanced by the learned counsel for the parties.

Criminal Appeal No. 60 of 2011

13. We shall, first, take up the Criminal Appeal No. 60 of 2011 for consideration, i.e., whether the prosecution could bring home the charges against the accused-appellants, Rahmat Ali and Hiramoni Mazumdar, framed under Sections 323/34 and 324/34 IPC, beyond reasonable doubt.

14. PW1, in his deposition, has stated that on the day of the occurrence, Moni Mia Mazumdar gave one Ballam blow on the neck of Moinul Hoque (deceased) and Rahmat Ali, thereafter, gave spade blow on the back of Moinul Hoque and, then, Hiramoni dealt a Sabol (pointed iron rod used for digging) blow on Moinul Hoque. PW1 has further deposed that Moni Mia Mazumdar, thereafter, pulled out the Ballam from the body of Moinul Hoque and gave blow on the back of Aminul Haque Mazumdar (PW1) causing injuries on his person. This witness has not stated inflicting of any injury on PW4 either by Rahmat or Hiramoni.

15. The version of PW1 that Moni Mia Mazumdar gave one Ballam blow on his back causing injuries, has not been supported by medical evidence, as PW8, who has proved the medical examination report, being Ext. 5, in his deposition has stated that tenderness in the public region caused by the blunt weapon, was found on the person of PW1.

16. PW4, another witness, who, according to the prosecution, received the injuries, caused by Rahmat Ali and Hiramoni, in his evidence has stated that accused Rahmat Ali gave spade blow on his person for which he was treated at Silchar Medical College and Hospital.

17. PW1, in his statement, has not stated anything relating to inflicting of any blows either by Rahmat Ali or by Hiramoni on the person of PW4. So also PW4 has not stated anything relating to inflicting of any blow by Moni Mia Mazumdar on the person of PW1 though both PW1 and PW4, according to the prosecution, were present at the place of occurrence at the same time. That apart, a suggestion was put to PW4, during the cross-examination that he has stated before the police that he received the injuries when he fell down while running away from the place of occurrence and injuries were not caused by any of the accused persons, which has, however, been denied by him.

18. The defence, during cross-examination of the Investigating Officer (PW9), could prove that PW4, in his previous statement stated that while he was running away from the place of occurrence, he fell down and received injuries and he was

not assaulted by anyone. It appears from the deposition of PW4 that he has improved his version in the Court and implicated Rahmat and Hiramoni for causing injuries on his person by a spade. The evidence of PW4, in that regard, i.e., in regard to causing of injuries by Rahmat and Hiramoni, cannot be accepted. That apart, PW5 and PW6, who also claimed to be the witnesses to the occurrence and who reached the place of occurrence, as the incident was going on, have also not stated anything relating to causing of any injury by Rahmat and Hiramoni on the person of either PW1 or PW4.

19. In view of the aforesaid discussion, we are of the view that the prosecution has failed to prove that Rahmat Ali and Hiramoni Mazumdar has caused any injury on the person of PW1 and PW4 and, hence, their conviction under Sections 323/34 and 324/34 is set aside.

Criminal Appeal No. 62 of 2011

20. We shall, now, proceed to decide the Criminal Appeal No. 62 of 2011, based on the evidence adduced by the prosecution.

21. PW1, in his statement has stated that in the morning of the day of occurrence, Abdul Haque (PW4) was ploughing in the field and when PW1 went to the field carrying the breakfast for his brother, Abdul Haque, and he reached the field, he heard the accused Rahmat Ali abusing his brother Abdul Haque, who told PW1 that since morning, Rahmat was abusing him with slang language. He has further deposed that when he enquired about the reason of such behaviour, Rahmat threatened him and also abused him with filthy language. This witness further said that on hearing hue and cry, his elder brother, Moinul Hoque (since deceased) rushed towards the field and on his way near the pond, Rahmat Ali caught Moinul Hoque and accused Moni Mia Mazumdar dealt a blow with Ballam on the neck of his brother Moinul Hoque and as a result Moinul Hoque fell down on the ground. It appears from the statement made by this witness, during cross-examination, that there was a dispute relating to the land over which the incident occurred, as according to the accused, the land was purchased by them, which, however, this witness has denied. It has, however, been admitted that the accused party as well as the informant party are closely related. The suggestion put to this witness that it was Hiramoni, who was ploughing the land, when the informant party asked him to leave the paddy field and thereafter, a scuffle took place and in the process, Moinul Hoque sustained injuries by falling on the pit, resulted to his injuries has, however, been denied by this witness.

22. PW2 has been declared as hostile. PW4, in his evidence, has stated that Rahmat started to abuse him regarding the boundary of a fishing pond within their land. This witness has also supported the version of PW1 relating to inflicting of Ballam blow on the neck of the deceased Moinul Hoque by Moni Mia Mazumdar. During cross-examination, this witness, however, has admitted that the dispute arose for the boundary of the fishing pit and a mutual marpit took place for abusing Abdul Haque by Rahmat in the land of Chanak Ali, who is

cousin of PW4. It has also been stated that the land of the accused persons is adjacent to the land of PW4 on the north side and the land of Chanak Ali is adjacent to the north side of the land of the accused persons. This witness has also admitted that there was no boundary demarcation between the land of accused party and land of the informant party.

23. PW5 is the wife of PW4 and PW6 is the wife the deceased. These witnesses have admitted, during cross-examination, that the dispute took place due to the demarcation of boundary of both the parties. PW5, during cross-examination, has also stated that on that day, suddenly, the incident took place.

24. PW9, the Investigating Officer, who has proved the sketch map, marked as Ext. 6, during his cross-examination, has stated that the dispute between the informant party and the accused party started regarding a fishing pit, which is marked as "K" in the sketch map. He has also deposed that the said fishing pit falls both in the land of the informant party, which is marked as "B" and the land of the accused, Moni Mia Mazumdar, which is marked as "C". It is evident from the deposition as well as the sketch map prepared that the plots of land belonging to the accused party as well as the informant party are contiguous.

25. From the evidence of the aforesaid prosecution witnesses, it, therefore, appears that the occurrence took place because of the boundary dispute of the land and while the accused party claimed that the land belong to them, the informant party claimed that the land is their land. It also appears that the dispute was also relating to the fishing pit, which falls in both the land, i.e., the land belonging to the accused party as well as the land belonging to the informant party. It also appears that the incident occurred suddenly, as has been deposed to by PW5 during her cross-examination, over the possession of the land in dispute.

26. As discussed above, the evidence adduced by the prosecution further reveals that the accused, namely, Moni Mia Mazumdar, who claims to be the owner of the disputed land, tried to protect his property as Abdul Hoque tried to cultivate the same and also the informant party tried to fish in the fishing pit. The evidence adduced by the prosecution also reveals the exercising of the right of private defence of property by the accused party.

27. It, however, reveals from the prosecution evidence that the appellant, Moni Mia Mazumdar, has exceeded the right of private defence of property by inflicting the Ballam blow on the vital part of the deceased, Moinul Hoque.

28. Exception 2 to Section 300 IPC provides that the culpable homicide is not murder if the offender, in the exercise of good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of private defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

29. In the instant case, there was no premeditation of killing of Moinul Hoque by Moni Mia Mazumdar. The incident occurred on the spur of the moment and suddenly, while trying to protect his property. The appellant Moni Mia Mazumdar has, however, exceeded his right of private defence. The case, therefore, comes under the Exception 2 to Section 300 IPC.

30. There being evidence on record, as discussed above and also having regard to the nature of weapon used and the vital part of body, where such injury was caused, it cannot be said that the appellant, Moni Mia Mazumdar, did not inflict the injuries without intention of causing death or such bodily injury as is likely to cause death and, hence, he has to be convicted under Part I of Section 304 IPC.

31. Having regard to the totality of the facts and circumstances proved by the prosecution, as discussed above, we convict the accused-appellant, Moni Mia Mazumdar, under Part I of Section 304 IPC by setting aside his conviction u/s 302 IPC and sentence him to undergo rigorous imprisonment for 10(ten) years and to pay a fine of Rs. 10,000/-, in default of payment of fine, to suffer rigorous imprisonment for a further period of 6(six) months. The fine, if realized, shall be paid to the widow of Moinul Hoque.

32. The State of Assam, in view of the provisions contained in Section 357A Cr.P.C. and also the scheme as has already been formulated in that regard, is directed to pay a compensation of Rs. 2,00,000/- to the widow of Moinul Hoque, PW6, within a period of two months from today.

33. Criminal Appeal No. 60 of 2011 is allowed. The accused-appellant Rahmat Ali and Hiramoni Mazumdar are discharged from their bail bonds. Criminal Appeal No. 62 of 2011 is partly allowed by altering the conviction as noted above.

34. The Registry is directed to send down the records.