

(2004) 10 GAU CK 0006

In the Gauhati High Court

Case No : Criminal Appeal No's. 35 and 48 of 1998

Sadat Ali and Others

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 05-10-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 247
Penal Code, 1860 (IPC) — Section 300, 313

Citation : (2005) CriLJ 635 : (2005) 1 GLT 132

Hon'ble Judges : T. Vaiphei, J;I.A. Ansari, J

Bench : Division Bench

Advocate : M. Kar Bhowmik, S. Kar Bhowmik, S. Sutradhar, P. Saha, A.C. Bhowmik, D.C. Roy, R. Dutta, P. Sarkar and J.K. Saha, for the Appellant; D. Sarkar, Public Prosecutor and R.C. Debnath, for the Respondent

Judgement

I.A. Ansari, J.—By this common judgment and order, we propose to dispose of the two Criminal Appeals, namely, Cri. Appl. No. 35 of 1998 and Cri. Appl. No. 48 of 1998, which have been heard together on account of the fact that they arise out of a common judgment and order, dated 21-5-1998, passed by the learned Sessions Judge, North Tripura, Kailashahar, in Case No. Sessions Trial 15 (NT/K) of 1993.

2. By the impugned judgment and order, dated 21-5-1998, aforementioned, the accused-appellants stand convicted u/s 302 read with Section 149 of the Indian Penal Code and also u/s 323 read with Section 149 of the Indian Penal Code and sentenced to suffer, for their conviction u/s 302 read with Section 149 of the Indian Penal Code, life imprisonment and pay a fine of Rs. 1,000/-each and, in default, to suffer R.I. for six months and to suffer, for their conviction u/s 323 read with Section 149 of the Indian Penal Code, R.I. for six months, both the sentences having been directed to run concurrently.

3. The case of the prosecution, as unfolded at the trial, may, in brief, be stated as follows :-

On 24-6-1990 at about 10 P.M. Masuk Ali, while purchasing bidi from the shop of one Maya Miah, at Irani Market, heard cries of his brother, Manjir Ali, raised from the southern lane of the market asking for help. On the cries so heard, Masuk Ali rushed towards the place from where the cries were being raised and saw Yeamich Ali, Taimuj Ali and Usman Ali assaulting Manjir Ali by lathi and dao. Masuk Ali, with the help of his nephew, Suleman Hossain (since deceased) and one Sultan Ali, tried to save Manjir Ali, but the remaining accused-appellants along with their other associates joined Yeamich Ali, Taimuj Ali and Usman Ali and started assaulting Suleman Hossain, Sultan Ali, Masuk Ali and Manjir Ali by daos, lathis, jhata, etc. As a result of the assaults on him, Suleman Hossain succumbed to his injuries at the very place of occurrence and the other three persons, namely, Sultan Ali, Masuk Ali and Manjir Ali also sustained injuries. Some persons, who were witnessing World Cup Football Match on T. V. in nearby shop of the said market, also rushed to the place of occurrence and, upon witnessing those persons arrive at the place of occurrence, the accused-appellants along with their associates took to their heels. Injured Masuk Ali, then, lodged an F.I.R. at Kailashahar Police Station and Kailashahar P.S. Case No. 21 (6) 90 under Sections 148/ 149/326/302, I.P.C. read with Section 25(1)(a) of the Arms Act was accordingly registered against the present accused-appellants and some others. During investigation, inquest was held over the dead body of Suleman Hossain and the other three victims of assault, namely, Sultan Ali, Masuk Ali and Manjir Ali were treated at the hospital. On completion of investigation, police laid charge-sheet against the accused-appellants and six others under Sections 148/ 149/324/326/323/302, I.P.C. In course of time, the case was committed to the Court of Sessions and Session Case No. 15(NT/K) of 1993 aforementioned came to be registered.

4. During trial charges under Sections 302, 326 and 323 read with Section 149, I.P.C. were framed against the accused-appellants and some others. To the charges so framed, the accused-appellants and others pleaded not guilty. Upon conclusion of the trial, the learned trial Court held the present accused-appellants guilty of the charges framed against them under Sections 302 and 323, I.P.C. read with Section 149 thereof and convicted them accordingly and passed sentences against them as hereinabove mentioned.

5. With regard to the occurrence, which had given rise to Case No. Sessions Trial 15(NT/K) of 1993 aforementioned, Haji Abdul Moakhir lodged an F.I.R. at the same police station, i.e. Kailashahar Police Station, on 25-6-1990, at about 0045 A.M., alleging, inter alia, in brief, as under :-

"Today on 24-6-90 getting you at Irani Bazar and knowing you as Darogababu of Kailashahar P.S. I am lodging this FIR that today 24-6-90 at 10 O'clock night Sri Osman Ali, Son of late Mobarak Ali, Manjir Ali, Jahir Ali, Suleman, son of Mouj Ali, Suleman Ali, Sultan Ali, son of late Sayed Ali and 20/25 others assembled unlawfully and armed with dao, lathi, jhata etc. proceeded towards western side of Irani Bazar and entered into my baithak khana room (meeting hall) and

dragged out my son Jamshed from the room and inflicted deep cut bleeding injury on his stomach. They also struck my brother Osman Ali, S/O. Late Raich Ali with daos and caused bleeding injury on his fingers."

6. Based on the F.I.R. lodged by Haji Abdul Moakhir aforementioned, Kailashahar P.S. Case No. 22(6)90 under Sections 148/ 149/326, I.P.C. was registered against Sadat Ali and others and, on completion of investigation, police laid charge-sheet against the accused, namely, Usman Ali, Sultan Ali and Makaddaj Ali under Sections 148/149/323/324, I.P.C. As this case was a counter case, the same was treated as a cross case to the Sessions Trial Case No. 15(NT/K) of 1993 and the same was also committed to the Court of Session and came to be registered as Sessions Trial Case No. 25(NT/K) of 1994. By judgment and order, dated 21-5-1998, passed in Sessions Trial Case No. 25(NT/K) of 1994, the learned trial Court held the accused named therein not guilty of the charges framed against them and acquitted them accordingly.

7. Aggrieved by their conviction and the sentences passed against them, the accused-appellants have preferred the present appeals.

8. We have heard Mr. S. Kar Bhowmik, learned counsel for the appellants in Criminal Appeal No. 35 of 1998, and Mr. D. C. Roy, learned counsel for the appellants in Criminal Appeal No. 48 of 1998. We have also heard Mr. D. Sarkar, learned Public Prosecutor, for the respondents in both the appeals.

9. During the course of hearing of the present appeals, it transpires that after the Sessions Trial Case No. 15 (NT/K) of 1993, which has, eventually, given rise to the present appeals, was fixed for arguments, the defence filed a petition, the learned trial Court, seeking permission to adduce evidence. The prayer, so made, was turned down by the learned trial Court by its order, dated 28-4-1998, which reads as follows :-

"Today is fixed for argument. Ld. Spl. P.P. is present for the prosecution. Out of 15 aps 14 aps on bail are present and accused Ramij is reported to be expired.

The defence moved 3 petitions today. In one petition they prayed.....to examine accused Jamshed Ali as witness though he stated during his examination u/s 313, Cr.P.C. that he would not adduce any evidence. In another prayer they have sought liberty to file certified copy of FIR. Hand sketch map with Index report of the victims and the charge-sheet of Kailashahar P.S. Case No. 22 (6) 90 u/s 148/ 149/326, IPC which is now pending before this Court as counter case and numbered as ST 25(NT/K) 94. Prayer is allowed subject to condition that if there are evidence in counter case release cannot be placed on them. However, the matter shall be decided at the time of argument as to admissibility of the document. But these cannot be exhibited at the present moment as obviously these are paper relating to the counter case.

By the 3rd petition the defence prayed for examining the Dr. R. Bhattacharjee who examined accused Jamshed Ali Chowdhury and is a witness in the counter

case.

It appears that the defence has been trying to bring into record the evidence of the counter case though law does not permit. This is a part of the accused persons were examined u/s 313, Cr.P.C. on 26-6-97 and thereafter they were asked to enter into defence but they declined to adduce any evidence. Thereafter the case was fixed for argument on several dates during last 10 months but on no occasions the defence has submitted any prayer to adduce any evidence."

10. Referring to the contents of the order, dated 28-4-1998, aforementioned, it has been submitted, on behalf of the accused-appellants, that the denial of permission to allow the defence to adduce evidence in terms of their prayer, made on 28-4-1998, was illegal and unjust and thereby the defence was precluded from effectively projecting their case in the learned trial Court. As this aspect of the appeals goes to the very root of the appeal, we have heard both sides elaborately on this aspect of the matter.

11. While considering the question as to whether the defence ought to have been allowed to adduce evidence in terms of their prayer made by them, it is important to bear in mind that while the case of the prosecution was that the accused-appellants, accompanied by their other associates, were the aggressors and it was on the attack launched by them that four persons, namely, Suleman Hossain, Sultan Ali, Masuk Ali and Manjir Ali sustained injuries and Suleman Hossain succumbed to his injuries, the case of the defence was that it was Suleman (since deceased) and his associates, who were the aggressors and had attacked the accused-appellants and as a result of the attack, accused-appellants Jamshed Ali, Sadat Ali and Usman Ali sustained injuries. The injury reports, which have not formed part of the evidence on record and which the defence sought to bring on the record, read as follows :-

Nature of injury	Size of each injury	On which	Slight,	By what	Remarks i.e.
whether a	in inches i.e.	part of the	severe or	kind of cut,	a bruise or
length,	breadth	body	Dangerous.	weapon	a burn injury
and depth	inflicted	-----			

-----	1	2	3	4	5
6	-----				

---- Incised wound. 5" x 1" x cutting Back of the Sharp The wound tangentially the body (midline weapon was fresh and skin,sub-cutaneous thoracis bleeding tissue, deep lumbar profusely one fascia and muscles region bottle of blood of the back (mid transfused. line) obliquely The condition directed of the patient was poor and referred to G. B. Hospital on 25-6-90 at about 1.30P.M. (1) Lacerated 2 1/2 x 14" bone Right Simple Blunt Fresh Injury injury deep Oblique Occipital Parietal region (2) Diffuse swelling The Middle and patient Adv. X-ray (R) upper part was forearm requisi- of lower discharged with tion handed over to 1/3rd of (R) advice on police but X-ray forearm 11-7-90 plate not received ----

12. Pointing out to the two injury reports aforementioned, it has been submitted before us that had these injury reports been allowed to be introduced in the

evidence on record by the defence, the same would have revealed that incised wound had been sustained by the accused-appellant, Jamshed Ali, on his back and the accused-appellant, Usman Ali, sustained lacerated injury on his right occipital parietal region indicating thereby that these two persons also sustained serious injuries and the injury found on the person of the accused-appellant, Jamshed, reflects that he had been assaulted from behind and had these aspects of the defence case been allowed to be brought on record, this would have belied the prosecution's case that the accused-appellants were the aggressors.

13. We are not inclined to answer, at this stage, as to whether the accused-appellants were the aggressors or not. What has attracted our eyes, most prominently, is that the learned trial Court has declined to allow the defence to adduce evidence on two counts, namely (I) that it was impermissible under the law to allow the law to allow evidence of a counter case to be introduced and (II) that the prayer for adducing additional evidence was made belatedly inasmuch as after being examined u/s 313 Cr. P. C, the accused appellants had, on query made by the Court, declined to adduce evidence in their defence and the case kept on being adjourned for arguments.

14. While considering the above aspect of the matter, it is imperative to note that though the Code of Criminal Procedure does not lay down any specific procedure regarding trial of counter cases, it is the practice adopted, in the interest of justice, by the Courts that if a case is committed to the Court of Session, the Counter Case, arising out of the same incident should also be, ordinarily, committed to the same Court of Session even if the latter is not exclusively triable by a Court of Session. We have cautiously used the word ordinarily, for, in an appropriate case, the Magistrate, instead of committing the case to a Court of Session, may have to discharge an accused in terms of Section 245 of the Code of Criminal Procedure, particularly, when the case is not exclusively triable by the Court of Session. Undoubtedly, however, the case and the counter case should be tried by the same Presiding Officer in quick succession. The first case should be tried to a conclusion, but the judgment should be reserved till the second case is concluded and, thereafter, the judgment of the two cases should be pronounced separately. (See *Girijananda Bhattacharyya and Another Vs. The State of Assam and Others*,

15. In *Kewal Krishan Vs. Suraj Bhan and Another*, the Apex Court has held that simultaneous trials of both the cases, which are exclusively triable by Court of Session, before two different Courts over one and the same occurrence, are undesirable and both the cases should be tried by one Presiding Officer one after the other, for, there is a risk of two different Courts coming to conflicting findings.

16. While pronouncing the judgment on the guilt or otherwise of the accused facing the two trials, the judgment of each case shall be kept confined to the discussion of the evidence adduced in that particular case and a Court shall not make use of the evidence of one case for the purpose of enabling it to pronounce the judgment in the other case or allow its findings in one case to be influenced

in any manner whatsoever to the prejudice of the accused by the views, which it may have formed in the other case.

17. In other words, while considering the guilt or otherwise of an accused in a case, the evidence from the counter or cross case, as it is commonly called, cannot be imported into the case and based on the evidence adduced in a cross case, the guilt or otherwise of the accused cannot be determined. This, however, does not mean that a person, who is an accused in the cross case, cannot give evidence in the case launched against him even if the evidence, which he seeks to give, has some bearing or may have some bearing in the cross case.

18. In the case at hand, though it is true that the two accused-appellants, namely, Jamshed Ali and Usman Ali were witnesses in the cross case and the evidence, which these two accused-appellants had given in the cross case, could not have been considered in the case against them, yet nothing in law precluded these two accused-appellants from giving evidence, at the trial held against them, to show that they were, in fact, injured in the occurrence in which Suleman is said to have died and three others are said to have sustained injuries and/or that it is not these accused-appellants, but Suleman (since deceased) and his associates, who were the real aggressors. The observations made by the learned trial Court to the effect that the evidence of the cross case cannot be brought into the case against the present appellants is correct, but the observations of the learned trial Court that the accused-appellants could not have given evidence on any of the aspects, which had any bearing on the cross case, was not correct inasmuch as the prayer of the defence was not to consider the evidence of the cross case in their favour, but to allow them to adduce evidence independent of what existed in the cross case. In such a situation, it was not impermissible in law to allow the accused-appellants to adduce evidence if the evidence, so sought to be adduced, were through persons, who were witnesses in the cross case.

19. The question, now, is as to whether on account of the belated prayer, which was made by the defence, the defence could have been justifiably denied the permission to adduce evidence. In this regard, we need to bear in mind that graver the offence stricter shall be the proof and graver the offence, wider shall be latitude granted to the defence. Merely on the ground that the defence plea for adducing evidence is belated, the prayer for adducing evidence could not have been rejected if the evidence, which was sought to be adduced by the defence, would have been material for the purpose of determining the guilt or otherwise of the accused appellants. The purpose of a criminal trial is not to convict any accused facing trial, but to do justice. The prayer made by the defence to adduce evidence ought to have been considered by the learned trial Court on its own merit. It, however, appears to us that the learned trial Court did not at all consider the merit of the prayer made by the defence and rejected the prayer on the ground that the prayer was impermissible under the law and belatedly made. No observation was made with regard to the merit of the prayer

made by the defence.

20. Coupled with the above, it is also pertinent to note that even on the failure of the prosecution or the defence to adduce evidence, the Court, if it considers that any evidence is essential for a just decision of the case, may bring such evidence on record even after the arguments are concluded, but before the judgment is pronounced.

21. The intention of a criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better. In the case of Shailendra Kumar Vs. State of Bihar and Others, the Apex Court, while recalling the observations made in the case of Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi, observed, in this regard as follows :-

"11. Bare reading of the aforesaid section reveals that it is of a very wide amplitude and if there is any negligence, laches or mistakes by not examining material witnesses, the Court's function to render just decision by examining such witnesses at any stage is not, in any way impaired. This Court in Rajendra Prasad v. Narcotic Cell observed (SCC p. 113 para 8) : (Para 7 Cri LJ) :

"After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

22. In the case at hand, we are, in the face of the facts and attending circumstances of the present case, satisfied that it was necessary for a just decision of the case to allow the defence to bring the evidence on record as had been sought for by them and the denial of the permission, which the defence had so sought for, was illegal and improper. Such a course of action adopted by the learned trial Court, if allowed to stand good on record, may cause, we are afraid, serious miscarriage of justice.

23. We are, therefore, firmly of the view that in the face of the illegal, unjust and improper denial by the learned trial Court to adduce evidence, which the defence had sought to adduce, the conviction of the accused-appellants and the sentences passed against them cannot be sustained and the matter needs to be remanded to the learned trial Court for allowing the defence to adduce evidence in terms of their prayer.

24. In the result and for the reasons discussed above, we partly allow these appeals, set aside the conviction and sentence passed against the accused appellants and remand the case to the learned trial Court with direction to allow the accused appellants to adduce evidence in terms of their prayer, which was not acceded to by the order, dated 28-4-1998, aforementioned.

25. Before parting with these appeals, we must hasten to add that we have consciously avoided discussing the merit of the appeals and/or the credibility or otherwise of the evidence adduced by the prosecution in the learned trial Court

so as to keep the learned trial Court absolutely free to come to its own independent finding after allowing the defence to adduce evidence in terms of the directions given hereinabove.

26. Considering the fact that the case against the accused appellants has been pending for long, we direct the learned trial Court to dispose of the case expeditiously and, preferably, within a period of three months from the date of appearance of the accused appellants. The accused appellants are on bail. They are directed to appear in the learned trial Court on 1st November, 2004.

Send back the L. C. record immediately along with a copy of this judgment and order.