
(1982) 01 GAU CK 0001
In the Gauhati High Court

Sahamat Ali and Others

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 04-01-1982

Acts Referred:

Penal Code, 1860 (IPC) — Section 141, 142, 148, 149, 302

Citation : (1982) CriLJ 1789

Hon'ble Judges : K. Lahiri, J;B.L. Hansaria, J

Bench : Division Bench

Judgement

B.L. Hansaria, J.—We are confronted in this appeal with conviction of the three appellants under Sections 302/149, 324/149 and 148 of the Penal Code. As the minimum sentence for offence u/s 302 is in carceration for life behind iron bars and stone walls, we have to be extremely cautious to see if the guilt has been brought home beyond reasonable doubt, more so, when aid of Section 149 has been taken to fasten guilt on the appellants.

2. The occurrence which had seen the death of Jahar Ali and injuries on the person of P. W. 2 Murmui Ali had taken place on 5-1-1969. According to prosecution on that day these two persons had gone to Dalahat at about 8/9 a. m. to sell cows in the Sunday Bazar. When they reached near the house of P. W. 3 Lodha Munda, it is alleged that two persons named Hara and Bhuyan alias Hasan Ali armed with dao prevented them from proceeding further, 10/12 persons were also seen nearby. Out of fear Jahar and Murmuj ran towards the house of p. W. 3 and after entering inside the house closed the door, p, W. 3 was then there but left soon after. The chasers cut the wall of the house and entered inside, whereafter Jahar and Murmuj were assaulted, part of the assault on Jahar was also in the courtyard where he had been dragged, P. W. 3 who had left his house with his wife and children reported the matter first to the panchayat President then to the S. D.O., North Lakhimpur, who came along with police to the place of occurrence. On arrival at the scene at about 11 a. m. the offence having taken place at about 10 a. m., the police found three injured persons -

the third being P. W, 11 Isamuddin. Steps were taken to send the injured for treatment whereafter the ejahar was lodged. Jahar succumbed to the injury in the hospital, whereas P. W. 2 had to remain confined according to him for 5/6 days. In the ejahar lodged at about 5 p. m. 16 persons were specifically named and it was added that there were three others. Names of three appellants before us are to be found in the ejahar. After completion of investigation, 17 persons were booked for trial of whom the learned Sessions Judge acquitted fourteen and convicted the three appellants as aforesaid. The defence of all the accused was one of complete denial, to which a plea of alibi was added by appellant Alimuddin alias Alou.

3. The conviction is based on the evidence of P. W. 2 Murmuj. P. W. 3 Lodha, P. W. 5 Hafizuddin and p. W. 7 Talu alias Tale Hussain. Though P.W. 11 Isamuddin was also found in injured condition on the arrival of the police at the place of occurrence at about 11 a. m., his evidence is that he had received the injuries at the hands of the accused not in the transaction which had seen death of Jahar and injuries on Murmuj, but subsequently when he had met the accused persons on way back. The learned trial Court has not believed this part of the prosecution case because of exaggeration on the part of p. W. 11, to support whom there is none. As to the assault on Jahar and Murmuj, the evidence of P. W. 11 is that he had known ;the same from Tale. Thus he is not a witness" to the real occurrence and we are accordingly left with the evidence of p. Ws. 2, 3, 5 and 7.

4. The last two witnesses are chance witnesses. According to P. W. 5 while going to bazar he saw appellant Samad and many others surrounding the house of Lodha. He also saw appellant Bhuyan and one Hara cutting the wall of the house whereafter Samad was seen giving jathi blow on the stomach of Jahar when the victim shouted "Momai", Thereafter Alo alias Alimuddin also gave a jathi blow and this time Jahar cried out "I am done to death" Jahar was: thereafter dragged to the courtyard where he was given dao blows. Murmui was also assaulted by these people, A glance at the sketch map (Ext. 7) shows that the path by which p. w. 5 must have been travelling lies to the West of Lodha's house and the wall which was fully damaged is to the east of the house, and the two partially damage ed walls are to the north. As such, if assaults on Jahar had taken place inside the house of Lodha Munda, this witness could not have seen them. From the evidence of p, W-2 it transpires that the assaults both on Jahar and himself were mainly inside the house, p. W-5 therefore could not have seen the actual assaults. The witness is brother-in-law of deceased Jahar and Murmui is his uncle. The bad blood between the parties, to which reference shall be made when dealing with evidence of PW 2, and the fact that PW 5 is a chance witness and showed anxiety to testify about matters which he could not have seen go to make him an unreliable witness. Had his presence been testified by any other witness the matter would have been perhaps different. Even the Investigating Officer examined him for the first time on 18-1-1969 for which delay there is no explanation. Because of all these we have to exclude his evidence in determining the culpability of the appellants. P. W. 7 stands almost on the same footing. He

too is a chance witness and closely related to the complainant side. His evidence is of omnibus nature and he was not in a position to say as to who had assaulted whom, where and with what weapon. The investigating agency examined him as well for the first time on 18-1-1969.

5. Before advertng to the evidence of P. W. 2, we may note what has been testified by P. W. 3. According to him he was at his house on the day of occurrence, when at about 8/9 a. m. Jahar and Murmuj entered his house out of fear as some people were chasing them. They closed the door of the house and he found many people in the courtyard. The people who had come chasing were armed with daos, lathis and jathis. Among the people who came chasing, this witness could recognise the three appellants, and none else. Apprehending trouble, p. W. 3 left his house with his wife and children and took steps as already narrated. He admitted in cross-examination that marpit had not been started while he was at the spot, and he could not see who was armed with what weapon.

6. A question of some importance has been presented by the evidence of this witness. The same is whether from what had been stated by P. W. 3 could it be held that the three appellants were members of the unlawful assembly which had chased the victims, surrounded them and had afterwards assaulted them. Baladin and Others Vs. State of Uttar Pradesh, saw the Supreme Court holding in para 19 that:

Mere presence of a person in an unlawful assembly will not make him a member of the assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls u/s 142, Indian penal Code.

(Emphasis supplied).

Attention was, therefore, paid by the Court to the case of each appellant before it to satisfy itself that mere spectators who were unaware of the motive of the assembly had not been branded as members of the unlawful assembly. The necessity of examining overt act was, however, felt because of the peculiar surrounding in which the dastardly crime which had resulted in the death of six persons was committed. The place of occurrence was surrounded on all sides by the houses of the accused, and so the Court felt, in view of clear inimical disposition of one faction towards the other, that members of the family of the accused and residents of the village who had assembled there could not be condemned ipso facto as members of the unlawful assembly. So, necessity of evidence about commission of overt act was emphasised, whereas the evidence was in general terms to the effect that the appellants and many more were miscreants and were armed with deadly weapons, like guns, spears etc. It was therefore stated that this kind of omnibus evidence has to be very closely scrutinised in order to eliminate all chances of false or mistaken implication.

7. The Supreme Court had an occasion in Masalti Vs. State of U.P., to explain

Baladin. It was stated that the aforesaid observation in Baladin has to be read in the context of its facts, as in law.

It would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly.

It was, however, accepted that while determining the question whether the person forming the assembly had entertained one or more of the common objects specified in Section 141, it has to be considered whether some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without being animated by the common object of the assembly are not roped in. It was then observed that the requirement of Section 149 which has created a vicarious liability does not proceed on the basis that the offence had been actually committed by every member of the assembly, if the offence was committed in prosecution of the common object of that assembly, or was such as the members of that assembly knew to be likely to be committed in prosecution of that common object.

8. Masalti was referred to with approval in Bishambher Bhagat and Others Vs. State of Bihar, wherein the court was satisfied that the appellants before it along with others, had assembled together armed with lathis and were parties to the assault, even though it was not possible to find out actual overt acts on their part. It was nonetheless agreed that (para 3):

Mere presence of a person at the place where members of an unlawful assembly have gathered for carrying out their illegal common object, does not incriminate him. But the question is one of fact in each case as to whether a person happens to be innocently present at the place of occurrence or was actually a member of the unlawful assembly.

9. Thus in each case it has to be seen whether the concerned person was a member of the unlawful assembly. Any overt act by such a person will undoubtedly establish the same, and would lend full assurance to his membership of the assembly. The Court may perhaps look for overt acts where the persons involved are very large in number, as in Baladin, where as many as 57 persons were put up for trial of whom even 37 were convicted. Besides this, if the occurrence be between two known inimical factions and witnesses be members of the victim faction, or be closely related to the members of such a group, a judicial mind may search for overt acts of commission or omission before roping in persons with the aid of Section 149. In other situations, some other facts like surrounding the house of the victim, covering a long distance to attack, keeping concealed to way-lay, arming oneself; hot pursuit etc. may be enough to establish the animation of the concerned person by the common object shared by others.

10. Now let us analyse the evidence of p. W. 3 in this background. He is not a

relation of the complainant side. Of all the non-official witnesses he alone is really disinterested. He has not: exaggerated facts as he fairly admitted that he had not seen the actual assault. The number of persons involved is rather small. The occurrence had taken place far away from the houses of the accused. They were seen coming in a group and surrounding the house. Though P. W. 3 did not specifically state if the three appellants were armed with any weapon, it is not necessary in law that every member of an unlawful assembly must be armed. Despite all these what has weakened his testimony is the fact that though he met p, Ws. 9 and 12 soon after the occurrence he had not named the appellants, really nobody, to be among those who had entered or surrounded his house. What he had stated to P. W. 9 was about some dacoity. To P. W. 12 Lodha he had only said that two persons had entered his house and a few others surrounded it. Thus his evidence in the court that he had recognised the three appellants has to be taken with a pinch of salt and as an act of embellishment.

11. This leaves for consideration the evidence of P. W. 2, who would have otherwise inspired confidence in our mind, as he is one of the injured but we do not regard him as well a fully credible witness for these reasons : (1) From his examination-in-chief it is not very clear as to who between Jahar and him was assaulted first. In cross-examination he, however, clearly stated that he had not been attacked till Jahar was dragged out. We find it difficult to accept that P. W. 2 would have been left just to watch as a witness - while Jahar was being belaboured. Normally, assaults on small number of victims (here are two) by a large mob (the culprits were about 20 as per the ejahar) are known to be simultaneous, because that takes care of any unguarded retaliatory actions by the other (s), (2) Though P. W. 2 deposed as to which, of the accused had done what to Jahar and had caused injury where, as regards attack on him he only said that "Amsar, Samad"s son Afazuddin (identified) and others assaulted me with lathi and the blunt edge of the...dao.", He is, not... specific as to who among them had assaulted him with what and where. This is against probabilities, as ordinarily a person gets better chance to see one"s own. assailants, than that of his companion (s). (3) His evidence that he had regained consciousness only in the Civil Hospital. Of North Lakhimpur is not corroborated by others, specially by P. W. 13, the police officer who had caused the injured to be sent to North Lakhimpur. This aspect has its importance, as if he was not unconscious by the time when P. W. 13 had met him he ought to have been interrogated on that day itself, but that was not done, (4) There is nothing before us to satisfy as to why this important material witness was examined by the police only on 18-1-1969, when even according to the testimony of this witness he was in the hospital for 5/6 days only. (5) Animus of this witness against the appellants is another weakening factor. It has been admitted by P. W. 2 that he was accused in a murder case relating to the death of the brother-in-law of appellant Samad alias Sahamat. Not only this, Sahamat had handed over this witness to village Defence Party in a theft case. Appellant Alimuddin had given evidence against him in an assault case and. had also himself filed a" criminal

case against him. There was still another arson case between-the appellants and P.W. 2. (6) Uncorroborated testimony of such a witness cannot form the sole basis of conviction of serious offence like Section 302.

12. This being the state of affairs of the evidence led by the prosecution to bring home the guilt of the appellants, we are not in a position to affirm the conviction. The appeal is, therefore, allowed and the appellants stand acquitted. The little delay in rendering the judgment has happened because soon after the hearing one of us had to leave Gauhati, whereafter the X-Mas holidays intervened.

K. Lahiri, J.

13. I agree.