

(2019) 05 GAU CK 0008

In the Gauhati High Court

Case No : Criminal Appeal No. 275, 258 Of 2016

Sher Ali And Anr

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 04-05-2019

Acts Referred:

Indian Penal Code, 1860 — Section 148, 149, 302, 323, 325
Code Of Criminal Procedure, 1973 — Section 161

Citation : (2019) 05 GAU CK 0008

Hon'ble Judges : Achintya Malla Bujor Barua, J; Mir Alfaz Ali, J

Bench : Division Bench

Advocate : K M Sarma, A Ahmed

Final Decision : Allowed

Judgement

1. (AM Bujor Barua, J) Heard Mr. Mr. HRA Choudhury, learned senior counsel appearing for the appellant in Criminal Appeal No.258/2016 and Mr. K. Sarma, learned counsel appearing for the appellants in Criminal No.275/2016 as well as Mr. M Phukan, learned Additional Public Prosecutor appearing for the State of Assam.

2. Both the appeals are preferred against the judgment and order dated 03.10.2016 of the learned Additional Sessions Judge, Bilasipara, Assam passed in Sessions Case No.80/1999, whereby the accused/appellants were convicted and sentenced to undergo rigorous imprisonment for life and also to pay a fine of Rs.5000/- each and in default, rigorous imprisonment for another 06(six) months for committing the offence under Section 302/149 IPC.

3. The prosecution case in brief is that an ejahar dated 21.11.1997 was lodged by Nurul Hoque before the Officer-in-charge of Bilasipara police station inter-alia stating that on 21.11.1997 at around 6.30 a.m., the persons named therein, all armed with daos and lathis and in furtherance of a conspiracy had illegally entered into the land of his father Nausad Ali and forcefully started ploughing.

When Nausad went to prevent the accused persons from ploughing, they attacked him with a Beki Dao and the accused No.1 Sahjamal had brutally hacked him on the left side of his waist and both his hands and thereby grievously injuring him. The prosecution case is based upon the eye witness accounts of PWs-5, 6 and 7 respectively.

4. We have also gone through the evidence of the other witnesses and are of the view that none of the witnesses had actually witnessed the occurrence leading to the assault on the deceased.

5. PW-5 Nurul Hoque, who is also the informant, in his deposition stated that on 21.11.1997 in the morning when he was ploughing his land along with his sons Jamer Ali and Hakim Ali, which is located on the boundary land of the deceased Nausad, saw that accused Shah Jamal and accused Aminul had entered the land of Nausad and started ploughing over the sesame cultivation which already existed there and thereby damaging it. The witness deposed that on the sesame cultivation being found to be damaged, the deceased Nausad arrived on his plot of land and thereafter the accused Wahed and Mujibur caught hold of Nausad while the other accused Shah Jamal, Aminul, Badrul and Mojibur assaulted Nausad with weapons like dao etc. Having sustained the injuries, the deceased Nausad fell down on the ground, whereupon Shah Jamal had put his leg on his chest and pressed him against the ground. Thereafter, Jamer Ali and Hakim Ali went to the place of occurrence and pleaded with the accused persons with folded hands that they refrain from further assaulting the deceased Nausad. On seeing them pleading, Sher Ali, Amjad and Atowar assaulted Hakim and Jamer with lathis as a result, the hip bone of Hakim Ali got fractured and Jamer Ali's head got cracked. In response to a suggestion in cross-examination, PW-5 stated that it is not a fact that upon hearing a hue and cry being raised from the incident, people went running by raising alarm and that the witness also went running to the place of occurrence along with others and upon arriving saw that Nausad was lying on the ground with blood smeared all over his body and his sons Hakim and Jamer were shouting 'save us save us'.

6. PW-9 Paramananda Singha, the Investigating Officer in his cross examination stated that PW-5 had not stated before him that Nausad sustained injuries on his back and that PW-5 had stated before him that on reaching the place of occurrence he saw that Nausad was lying on the ground in a pool of blood and his two sons Hakim and Jamer were also injured and shouting 'save save'. PW-5 in his statement under Section 161 Cr.P.C stated that upon hearing a hue and cry regarding the quarrel going on, the witness had proceeded to the place of occurrence and upon arriving there, saw that the deceased Nausad was lying unconscious with blood all over his body and his sons Jamer Ali and Hakim Ali were nearby shouting 'save us save us'.

7. From the suggestion made in the cross examination as well as from the deposition of the PW-9 Investigating Officer as well as from the statement made by PW-5 under Section 161 Cr.P.C at the stage of investigation, it is discernible

that the said witness had reached the place of occurrence after the assault on the deceased had already taken place and in a situation where the deceased was lying unconscious on the ground with blood all over his body.

8. PW-6 Anawar Ali in his deposition had stated that on the day of occurrence, he was ploughing at the place of occurrence along with some other persons and Shahjamal, Sher Ali and Aminul were also ploughing over the land of Nausad. When Nausad came and prevented the accused persons from ploughing, the three accused persons had an altercation and on being ordered by Sher Ali, Shahjamal had assaulted Nausad on his leg with a dao and Aminul fell him down by assaulting with a lathi. Sher Ali also assaulted Nausad with a bamboo lathi and when he was lying on the ground, Shahjamal assaulted him on his waist with a dao and immediately the intestine of Nausad came out and the assailants did not pay any heed to the requests of Nausad not to assault him. In the resultant hue and cry, Hakim Ali and Jamer Ali arrived and Sher Ali and Aminul had assaulted Hakim and Jamer on their head as well as on their body with lathis.

9. PW-6 was re-cross examined wherein he deposed that at the time of the occurrence it was winter season and there was heavy fog at that time and that he was ploughing his land at a distance of about 300 to 400 yards from the place of occurrence. When he heard a hue and cry and seeing that the other people were rushing towards the place of occurrence, he also followed. When he reached the place of occurrence, he saw PWs-1, 2 and 3 and also found Nurul, Dhusu Bewa, Hakim Fakir, Jel Haque and many other people. PW-6 deposed that he saw Nausad Ali lying on the field and he could not say how Nausad was injured or killed. PW-6 also deposed that he did not ask how Nausad had received the injury and that he did not see Rabia and Nurul at the place of occurrence.

10. From the deposition upon re-examination of Pw-6, it is clearly discernible that PW-6 had also reached the place of occurrence after the assault on the deceased Nausad had taken place and upon reaching he saw Nausad lying on the ground in an injured condition.

11. PW-7 Rabia Bibi in her deposition had stated that after her husband went out, she also followed him after some time and upon reaching the place of occurrence, had seen that Shahjamal and Aminul were assaulting her husband with dao and his intestine came out. Thereafter on seeing blood she felt dizzy and fell down and could regain sense only after her two daughters had called her. In cross examination, a suggestion was made to the witness in response where of she stated that it is not a fact that she stated before the police that upon hearing the hue and cry after the incident she had gone to the place of occurrence and found her husband lying in the field with blood all over his body.

12. The Investigating Officer PW-9 in respect of PW-7 stated that PW-7 did not state before him that after the occurrence and upon hearing hullah, she found her husband in a pool of blood in a field and had heard about the occurrence

from Jamer and Hakim Ali. PW-9 deposed that PW-7 did not state before him that she went to the place of occurrence behind her husband and that Shahjamal and Aminul had assaulted her husband with a dao.

13. PW-7 in her statement under Section 161 Cr.P.C stated that after hearing the hue and cry, she went to the place of occurrence and upon reaching she saw that her husband was lying with blood all over his body. From the suggestion made in the cross examination and the deposition of the Investigating Officer as well as from the statement under Section 161 Cr.P.C, it is also discernible that even PW-7 had reached the place of occurrence after the assault on the deceased had taken place and saw him lying in an injured condition with blood all over his body. To that extent, we also look into the evidence of PW-6, who had stated that when he reached the place of occurrence, he neither seen PW-5 nor had seen PW-7. From the evidence of PW-6, it is discernible that PW-5 and PW-7 had arrived at the place of occurrence after PW-6. When we have already concluded that PW-6 arrived at the place of occurrence after the assault had taken place and PW-5 and PW-7 having reached the place of occurrence after PW-6, it is further discernible that both PW-6 and PW-7 had reached the place of occurrence after the assault on the deceased had taken place.

14. In view of the above, we cannot but conclude that neither the PW-5 nor the PW-6 and PW-7 are eye witnesses to the occurrence leading to the assault on the deceased because of which he died. Further, the medical evidence also reveals that the injuries on the deceased were not caused in the manner as stated by PWs-5, 6 and 7.

15. Further, from the evidence of the witnesses, it can be inferred that CW-1 and CW-2 were present at the place of occurrence when the assault had taken place. But again CW-1 Hakim Ali in his deposition had stated that when he went to the place of occurrence and tried to save the deceased, the people who were present also attacked him from behind and caused injuries to him as a result of which he fell down and could not recognize any one.

16. CW-2 in his deposition stated that when he reached the place of occurrence he was hit from behind by somebody on his head and he fell down on the ground and became senseless and he also could not say as to who had hit him from behind.

17. In a resultant situation, we are to conclude that neither CW-1 nor CW-2 had deposed before the Court that they had seen the incident as to in what manner and by whom the deceased was assaulted. Apart from the above, neither any contention has been raised nor we find any material on record to arrive at any conclusion that circumstantially the chain of events is complete so as to arrive at a conclusion that it is the accused persons who had committed the offence of assault on the deceased thereby causing his death.

18. Accordingly, we are of the view that the prosecution had failed to prove beyond all reasonable doubt that it is the accused appellants who had caused the

assault on the deceased, which had resulted in his death. Accordingly, the judgment dated 03.10.2016 of the learned Additional Sessions Judge, Bilasipara in Sessions Case No.80/1999 under Sections 148/149/323/325/302 IPC convicting the accused appellants in both Criminal Appeal No.275/2016 and Criminal Appeal No.258/2016 under Sections 302/149 IPC thereby sentencing them to rigorous imprisonment for life as well as to pay a fine of Rs.5000/- each, in default thereof further rigorous imprisonment of six months is set aside.

19. It is stated that the accused Shahjamal is presently in jail whereas accused Mozibur Rahman and Sher Ali are on bail. Accordingly, the accused Shahjamal be set at liberty forthwith, if not required for any other offence and in respect of accused Mozibur Rahman and Sher Ali, their bail bonds stand discharged.

20. Both the appeals stand allowed.

21. Send back the LCR along with a copy of this judgment immediately.