

State of Assam Vs. KalamuddIn and anr.

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Court : Guwahati

Decided On : Dec-04-2003

Judge : P.G. Agarwal, J.

Acts : Indian Panel Code, 1860 - Sections 99; [Code of Criminal Procedure \(CrPC\)](#), [1973](#) - Sections 423(1)

Appeal No. : Criminal Appeal No. 241 of 1999

Appellant : State of Assam

Respondent : KalamuddIn and anr.

Advocate for Def. : None

Advocate for Pet/Ap. : P.P.

Disposition : Appeal dismissed

Prior history : P.G. Agarwal, J. 1. Heard the learned Public Prosecutor. 2. This appeal by the State is directed against the judgment and order dated 8.12.1998 passed by the Sessions Judge, Hailakandi in Sessions Case No. 25/98 whereby the accused persons were acquitted from charge under Section 302 read with Section 34 IPC. 3. On the night of 5.10.1996 Fakarul Islam was found lying dead in the house of Abdul Zabbar with multiple injuries on his person. On police being informed by the mother of the deceased,

Judgement :

P.G. Agarwal, J.

1. Heard the learned Public Prosecutor.

2. This appeal by the State is directed against the judgment and order dated 8.12.1998 passed by the Sessions Judge, Hailakandi in Sessions Case No. 25/98 whereby the accused persons were acquitted from charge under Section 302 read with Section 34 IPC.

3. On the night of 5.10.1996 Fakarul Islam was found lying dead in the house of Abdul Zabbar with multiple injuries on his person. On police being informed by the mother of the deceased, case was registered and investigated. PW-7 is the doctor Santosh Bhattacharjee who held the autopsy and found the following injuries on the persons of the deceased :-

(1) 'One share cut injury on the posterior region of the scalp 8 cm. x cm. fracturing the skull bone.

(2) One sharp cut injury on the middle of the scalp 6 cm. x 1 cm. and fracturing the skull.

(3) One sharp cut injury on the parietal region of the scalp 7 cm. x 2cm. x 2 cm. and fracturing the right parietal bone.

(4) One irregular cut injury on the face on his lower part extending from the right teeth and traversing towards the angle of the mouth up to the middle of the mentum fracturing the mendible bone, lower incisor teeth and lower gum of size 8 cm. x 6 cm. x 2 cm.

(5) One sharp cut injury on the lateral aspect of the right knee joint 5 cm. x 1 cm. x 5 cm.

(6) One sharp cut injury on the middle aspect of the right knee joint 6 cm. x 1 1/2 cm. x 5 cm.

(7) In the lower third of the right leg on his anterior aspect three numbers of sharp injury of size 1 cm. x 1 cm. and skin depth.

(8) One penetrating injury on the lower third of the left thigh on its medial aspect 3 cm. x 2 cm. x 11 cm.

(9) One sharp cut injury on the medial aspect of the left knee joint 6 cm. x 1 cm. x 1 cm.

(10) One sharp injury just above injury No. 9 9cm x 1 cm.

(11) One sharp cut injury on the medial aspect of the left leg on its lower third 5 cm. x 1 cm.

(12) One sharp cut injury on the left leg on its lateral aspect just below the knee joint 6 cm. x 1 cm. x 6 cm.

(13) One sharp cut injury on lateral aspect of the left leg on the middle third 5 cm. x 1 cm. x 1 cm.'

In the opinion of the doctor, the death was due to shock and haemorrhage resulting from the injuries.

4. In this case the death of the deceased as a result of the injuries is not disputed. There is also no eyewitness, that is, no one saw deceased being killed or assaulted. Prosecution has relied on the circumstance 'last seen together'. The motor and sister of the deceased PW 1, 2 and 3 have stated that at night the deceased was called by Abdul Kalam to his house and subsequently they got the information about lying of the dead body and when they went to the house of the accused, they saw the deceased lying dead with injuries on his person. The trial court did not accept the evidence of PW 1, 2 and 3 on this point and held that this was an after thought and the accused person never called the deceased to his house.

5. The case of the accused appellants is that the deceased was having some extra marital relationship with the wife of Abdul Zabbar and there was a village sitting wherein the deceased was found guilty and was awarded the punishment of 'durra'

which means beating by shoe. The deceased also went to the house of the accused on the ill-fated night and assaulted accused Abdul Zabbar and when the other accused Abdul Kalam came there he was also assaulted. In order to save the dignity of Zabbar's wife and for their protection, the accused persons assaulted the deceased and the accused persons thus claim the plea of private defence.

6. The fact that the deceased was awarded the punishment of 'durra' for having an extra marital relationship with the wife of Zabbar is admitted by the prosecution witnesses. PW-4 who is an independent witness has also stated that on being informed at 1 AM, he came to the house of the accused persons and found both the accused persons having injuries on their persons and the deceased lying dead with injuries. DW-1 Doctor Khuinjaman Chaudhary examined the two accused persons on the next date of the occurrence and found the following injuries on their persons :-

'Abdul Jabbal Mazumdar -

(1) A piece of size 3 cm. x 1 cm. of the upper part of the right ear is cut off by a sharp weapon causing a clean and clear cut edges on the wound.

(2) Incised wound of size 8 cm. x 3 cm. x 3 cm. extending from part of 2 cm lateral to the acromain process and extending backward over the shoulder on the left side.

(3) Incised wound of size 8 cm. x 4 cm. x 4 cm. over the outer aspect of the left arm about 12 cm. below the left acromian process.

(4) Incised wound of size 3 cm. x 3 cm. x 4 cm. over the left forearm about 18cm below the left acromian process.

(5) Incised wound of size 6 cm. x 1 cm. x cm. over the middle of the left side of the neck.

(6) A sharp abrasion of size 17 mm. x 1/3 mm. on the right side of the back.

No. 1 is grievous and others are simple and fresh and caused by sharp weapons.

Abdul Kalam Mazumdar

(1) Incised wound of size 3 cm. x 2 cm. x 2 cm. over the right cheeks about 2cm to the right of the right angle of the mouth.

(2) Incised wound of size 4 cm. x 3 cm. x 2 cm. over the lower. part of the left forearm just over the wrist.

(3) Incised wound of size 2 cm. x 1 cm. x 1 cm. over the back of the 2nd interphalangeal joint of the left index finger.

(4) Incised wound of size 2 cm. x 1 cm. x 1 cm. over the back of the 2nd interphalangeal joint of the left middle finger.

(5) Incised wound of size 2 cm. x 1 cm. x 1 cm. over the back of the 2nd interphalangeal joint of the left ring finger.

(6) Sharp abrasion of size 6 cm. x cm. over front of the chest.

Injury No. 1 is grievous in nature and others are simple and fresh and caused by sharp weapon.

7. The medical evidence of DW-1 has not been challenged. We thus find that the two accused persons had also sustained grievous injuries on their persons and the prosecution has not been able to explain the same as to how they sustained the above injuries. Considering the law laid down by the Apex Court in the case of Takhaji Hiraji v. Thakore Kubersing Chamansing (2001) 6 SCC 145, we hold that the trial court rightly extended the benefit of doubt to the accused persons. We also find no force in the prosecution story that the accused Kalam had invited the deceased to their house at night. The deceased was awarded punishment on a complaint made by the accused persons for having extra marital relationship, and as such there was no occasion on their part to invite the accused to their house at night. It seems to be an after thought or fabrication by the prosecution as they failed to explain the presence of the deceased in the house of the accused at dead of night. The trial court also held that the accused persons have the right of private defence and accordingly acquitted the accused persons.

8. The law regarding appeal against acquittal has been laid down by the Apex Court in a catena of decisions and has restated the principles in a recent case of Sambasivan v. State of Kerala, (1998) 5 SCC 412 and the decision of this court in the case of State of Assam v. Radha Oil Industries, (1987) 1 GLR 134 wherein this court has held :-

'The power conferred by Section 423(1)(a) of the 'Code' which deals with an appeal from an order of acquittal is as large and wide as the power conferred by Clause (b) thereof, which deals with an order of conviction. It is thus obvious that the High Court's power in dealing with criminal appeals are equally wide whether the appeal is one against acquittal or conviction. In an appeal against an order of acquittal the High Court has the full power to review at large the evidence upon which the order of acquittal is based and to reach the conclusions on the evidence as to whether the order of acquittal should be reversed or not. 'The Code' places no special limitation on the appellate Court to appraise the evidence distinct and separate from the manner in which it should be appreciated in an appeal against conviction. Indeed the appellate court dealing with an appeal against the order of acquittal has full power to review the evidence on which the order of acquittal is based and to reach a conclusion either to set aside the order or not but while exercising the function. It has been ruled by the Supreme Court in a catena of cases, the High Court should give appropriate weight and consideration to the following aspects:

- (i) The views of the trial court as to the credibility of the witnesses should be properly weighed and considered;
- (ii) The presumption of innocence in favour of the accused is never weakened by the fact that he has been acquitted at the trial;
- (iii) The right of the acquitted persons to the benefit of reasonable doubt should not be denied on the score that they have been acquitted and are no longer accused;
- (iv) The appellate court should be slow in disturbing the findings of fact reached by the trial Judge who had the advantage of personally seeing the witnesses; and,

(v) When the court does not agree with the view of the trial court yet reaches the conclusion that the view expressed by the trial court is reasonably possible, the same should not be disturbed.'

9. In view of the settled provisions of law as regards appeal against acquittal, we find no merit in this appeal and the appeal is accordingly dismissed.

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