

Banizuddin and anr. Vs. State of Assam

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Court : Guwahati

Decided On : Nov-19-2007

Judge : Aftab Hussain Saikia and P.K. Musahary, JJ.

Appellant : Banizuddin and anr.

Respondent : State of Assam

Disposition : Appeal dismissed

Prior history : P.K. Musahary, J. 1. Heard Mr. J.M. Choudhury, learned Senior Counsel assisted by Mr. S. Choudhury for the appellants and Mr. K.C. Mahanta, learned Additional Public Prosecutor, for the Respondent State. This appeal is directed against the Judgment and Order dated 15.12.2003 passed by the learned Sessions Judge, Barpeta, in Sessions Case No. 54/2003, convicting the accused/appellants under Section 302/34 of the IPC and sentencing them to undergo rigorous imprisonment for life and to pay a fine

Judgement :

P.K. Musahary, J.

1. Heard Mr. J.M. Choudhury, learned Senior Counsel assisted by Mr. S. Choudhury for the appellants and Mr. K.C. Mahanta, learned Additional Public Prosecutor, for the Respondent State.

This appeal is directed against the Judgment and Order dated 15.12.2003 passed by the learned Sessions Judge, Barpeta, in Sessions Case No. 54/2003, convicting the accused/appellants under Section 302/34 of the IPC and sentencing them to undergo rigorous imprisonment for life and to pay a fine of Rs. 5,000/- (Rupees five thousand) only each and in default etc., to undergo rigorous imprisonment for 1 (one) year.

2. Briefly stated, the facts are as follows: On 18.04.2000 at around 8 A.M. both the accused persons and the deceased Lal Mahmud while they were busy demarcating their land, entered into an altercation and the accused Ashatulla started assaulting Lal Mahmud by lathi and while he fell down, accused Banizuddin stabbed Lal Mahmud by sharp weapon at his left chest and abdomen causing his death.

The FIR was lodged by Abdul Kashem before the in-charge, Koyakuchi Police Outpost on 18.04.2000 and the same was forwarded to the Officer-in-Charge, Barpeta Police Station and a Case being Barpeta Police Station Case No. 258/2000 was registered on the same date under Section 302/34 IPC. Investigation was made and completed by Sri Krishna Kanta Medhi, PW-8, in-charge, Koyakuchi Police Outpost, who submitted the charge sheet against the accused/appellants under Section 302/34 IPC. The Case being exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate, Barpeta, committed the same to the Court of learned Sessions Judge, Barpeta. During investigation the Investigating Officer Sri Krishna Kanta Medhi, visited the place of occurrence and prepared inquest of the deceased (Exhibit 3) in presence of witnesses. He also recovered some articles and prepared a seizure list in presence of the witnesses. The dead body of Lal Mahmud was sent to Barpeta Civil Hospital for post mortem examination and thereafter he recorded the statements of witnesses under Section 161 Cr.P.C, arrested the accused and sent them to the Court.

As many as 8 witnesses including a Doctor, who conducted the post mortem on the deceased, were examined by the prosecution. The accused persons adduced two defence witnesses during the trial.

PW-2, 3, 4, 5, 6 and 7 have deposed that they saw the occurrence and they are eye witnesses. All of them have deposed in the similar line corroborating the evidence of each other.

3. It may, however, be pertinent to note that PW-2 who lodged the FIR stated in the said FIR that the accused No. 1 Banizuddin stabbed his brother-in-law (Lal Mahmud) in the belly with a sharp iron weapon and killed him at the spot. On the other hand the said PW-2 Barek Ali @ Abdul Barek in his deposition stated that Banizuddin stabbed Lal Mahmud by dagger at his left chest and right abdomen. The other PW's No. 3 to 7 also deposed that Banizuddin stabbed Lal Mahmud by dagger at his chest and abdomen.

4. Mr. J.M. Choudhury, learned Senior Counsel appearing on behalf of the appellants, has raised a short question in support of this appeal. He has contended that the story projected by the informant (PW-2) in his FIR (Exhibit-2) being that accused No. 1 Banizuddin stabbed his brother-in-law in the belly with a sharp iron weapon and killed him at the spot and having deposed by him and other so called eye witnesses namely PW-3 to 7 during the trial to the effect that the accused Banizuddin stabbed Lal Mahmud by dagger at his left chest and right abdomen and in view of the fact that no dagger or sharp iron rod could be recovered or seized, as per seizure list (Exhibit-4), the prosecution has not only failed to present the true version of the case but also failed to prove the charges under Section 302/34 IPC beyond reasonable doubt and as such impugned conviction and sentence is liable to be set aside.

5. For the sake of better appreciation of facts on record it is pertinent to quote the FIR (Exhibit 2), seizure list, and the post mortem report below:

Humble submission is that around 8 A.M. today (18.4.2000) my older sister's husband Lal Mahmud had an altercation with the above named accused persons over boundaries of their land in the field when accused No. 2 Asatullah started beating him up with lathi. During that time accused No. 1 Banizuddin stabbed my brother-in-law in the belly with a sharp iron weapon and killed him on the spot. The said occurrence took place on the boundary of the two parties land at Kamalpur village.

You are, therefore, requested to investigate the matter and do the needful.

SEIZURE LIST:

Ref: Kayakuchi O.P.G.D.E.No.178Dtd. 18.4.2000

I, S.I. K.K. Medhi of Kayakuchi O.P. do hereby seize the following articles on being shown by the wits at the P.O. The seizure is made in Con with the above reference case in presence of the following wits today dt 18.4.2000 from the P.O.

Description of articles:

(1) One piece of wood, about 3 feet long. It is flat.

(2) ONE spade with a wooden handle.

POSTMORTEM

...IV. ABDOMEN

I. Walls : Two incised wound on both side nil of the abdomen. Described in more detailed column.

ii. Peritonoum: (Illegible) Blood or (sic.)

iii. Mouth, Pharynx, Oesophagus: Blood stain present.

iv. Stomach and its contents: healthy.

v. Small intestine and its contents: Cut into two pieces.

vi. Large intestine and its content: Into two pieces.

vii. Liver: Healthy.

viii. Spleen : Healthy.

ix. Kidneys : Healthy. x. Bladder : Healthy & Empty.

xi. Organs of generation, external and Internal: Normal.

V. MUSCLES, BONES AND JOINTS

i. injury: Described in more detail column.

ii. Disease Order/formity: Nil.

iii. Fracture: Nil.

iv. Dislocation: Nil.

More Detailed Description of injury or disease: In Caps.

i. One incised wound about 2' x 2' x 4' on the upper part of the Abdomen Rt side parts of Intestine come out.

Small & large intestine cut with two pieces.

ii. One incised wound about 2' x 1' x 2' on the left side of the abdomen. Part of omentum comes out.

iii. One incised wound about 2' x 1' x 1' on the upper part of the chest left side of Empty of the left lung & pleurae.

iv. One incised wound about 1 x 1/4 x 1/4 on the occipital region of the skull & left thumb finger.

All injuries are caused by sharp weapons. All injuries are grievous and No. 4 is simple. All are ante mortem in nature.

OPINION OF ASSISTANT SURGEON/SUB-ASSISTANT SURGEON AS TO CAUSE OF DEATH.

In my opinion death is due to shock haemorrhage as a result of above mentioned injuries.

6. It is an admitted fact that the occurrence took place in a paddy field in the broad day-light at around 8 A.M. while the villagers were working in the field. It is not disputed that the accused appellants were present in and around the place of

occurrence at the relevant time. It is not in dispute that Lal Mahmud was assaulted and succumbed to his injuries at the spot.

7. The learned Senior Counsel, Mr. J.M. Choudhury has been pursuing the Court that the articles seized on being shown by the witnesses at the place of occurrence, as described therein, are only a piece of flat wood about 3' feet long and one spade with a wooden handle and such articles would not cause any incised injury as described in the post mortem report by the Doctor. Therefore, Mr. Choudhury submits that the allegations to the effect that the accused persons caused injury to the deceased by dagger or sharp iron rod or sharp weapon has not been proved by any standard, not to speak of proving it beyond reasonable doubt as required under the law.

8. The PW-2, informant deposed that he was busy working in the paddy field of his brother-in-law Lal Mahmud on the date and at the time of occurrence. His brother-in-law was demarcating the boundary of his paddy field and at that time both the accused Banizuddin and Ashatulla entered into altercations regarding the demarcation of boundary of the paddy field. PW-2 categorically stated that Ashatulla assaulted Lal Mahmud at his head by a lathi and when he fell down the other accused Banizuddin stabbed him by dagger at the left chest and right-abdomen of Lal Mahmud. This witness PW-2 is a natural witness as he was working at the paddy field. His evidence could not be demolished by the defence Counsel in the cross-examination. No suggestion was put on this witness that he was not present at the time of occurrence and he did not see that his brother-in-law was assaulted by the accused persons. It was also not suggested during cross-examination that he filed a false FIR against the accused persons.

9. PW-3, Mustt. Jainad Begum, wife of the deceased deposed that she was busy working in the kitchen and hearing alarm came to the place of occurrence and saw the accused Ashatulla striking her husband with a lathi at his head for which he fell down on the field and then accused Banizuddin stabbed with a dagger at his chest as well as at his abdomen. In the cross-examination she stated that on the day of the incident PW-2, Barek Ali @ Abdul Barek was also present with her husband, so also her daughter Helima Khatun, PW-4 and son Iqbal Hussain, PW-5 were

present at the place of occurrence. She also denied the suggestion of the defence Counsel that she did not state before the Police regarding stabbing of her husband by Banizuddin by a dagger at his chest and abdomen. No attempt was, however, made by the defence Counsel to demolish her evidence by putting any suggestion to her during cross-examination that she was not present at the place of occurrence and she did not see that her husband was assaulted by the accused persons.

10. Helmina Khatun, PW-4, daughter of Lal Mahmud, categorically deposed that she was busy helping her father, Lal Mahmud in the paddy field and suddenly both the accused appeared in the spot and started quarrelling with her father. She stated that suddenly accused Ashatulla struck her father with a lathi at his head and the accused Banizuddin stabbed her father at chest and abdomen by dagger, as a result of which her father died at the spot. PW-5, Iqbal Hussain, son of the deceased, stated that he was sitting by the side of the place of occurrence and saw that while his father was busy demarcating boundary of the paddy field suddenly appeared at the spot and started altercation with his father. He also stated that accused Ashatulla suddenly struck his father with a lathi at his head and while he fell down accused Banizuddin stabbed his father at his chest and abdomen by dagger, as a result of which he died instantaneously. In the cross-examination no suggestion was put to these two witnesses regarding their presence and witnessing of the occurrence.

11. PW-6, Mizanur Rahman, stated that he was ploughing over his land nearby the place of occurrence and hearing the alarm he came out to the spot and saw accused Ashatulla assaulting Lal Mahmud with a lathi at his head and when he fell down on the ground accused Banizuddin immediately struck Lal Mahmud at his left chest and abdomen with a dagger. At the time of occurrence, as stated by PW-6, Helmina Khatun and Iqbal Hussain aforesaid were also present and were crying around the dead body of Lal Mahmud. These witnesses also denied the suggestion put by the defence Counsel that he did not state before the Investigating Officer that accused Banizuddin struck Lal Mahmud by dagger at his left chest and abdomen. All the witnesses, namely, PWs 2 to 7 are natural witnesses who were present and saw the entire incident.

12. PW-7, Nabab Ali, is the cousin brother of accused Banizuddin and brother-in-law of accused Ashatulla by relation. This witness was ploughing over his land nearby the place of occurrence who after hearing 'halla' came to the spot along with Mizanur Rahman, PW-6 and they saw accused Ashatulla assaulting Lal Mahmud by a lathi at his head for which he fell down on the ground and thus the other accused Banizuddin struck Lal Mahmud by a dagger at his left chest and abdomen. He further stated that when he raised protest accused Banizuddin struck him also by a lathi at his left hand. He also denied the suggestion of the defence Counsel that he defaulted from stating before the Investigating Officer that accused Banizuddin did not struck Lal Mahmud by a dagger at his left chest and abdomen.

13. The appellant's Counsel has submitted that the prosecution story regarding use of weapon for causing injury by accused Banizuddin to deceased cannot be believed inasmuch as it has been described as 'sharp iron weapon' in the FIR and 'dagger' in the deposition of PWs 2 to 7 and no such sharp iron weapon or dagger was seized by the Police at the place of occurrence. In the same context he argued that in absence of recovery of any sharp iron weapon or dagger at the place of occurrence the possibility of causing injury by the accused by any weapon of aforesaid description cannot arise and the prosecution has miserably failed to prove its case beyond reasonable doubt.

14. There was no doubt an omission on the part of the informant, PW-2 in naming the sharp iron weapon as dagger in the FIR (Exhibit 2), but there was no omission in describing the nature of weapon used by the accused Banizuddin. The description of sharp iron weapon as given in the FIR fits in a dagger made of iron, sharp in its shape. Thus non-recovery of any sharp iron weapon or dagger at the place of occurrence would not belie the evidence of the eyewitnesses, who have clearly described the weapon used by the accused Banizuddin as dagger unless they are found un-trustworthy and impeachable.

15. PW-1, Dr. Golap Hussain, who conducted the post mortem on the dead body of the deceased Lal Mahmud deposed that he detected as many as four incised wounds described herein below:

- 1). Incised wound, size 2x2x4 on the upper part of the abdomen right side. I got the small intestine come out and the large intestine was found cut into pieces.
- 2). Incised injury 2x1x2 on the left side of the abdomen. Part of momentum comes out.
- 3). Incised wound 2x1x1 on the upper part of the chest left side and rupture of the left lung and pleurae was also detected by me on the deceased.
- 4). One incised wound 1x1/4 x 1/4 on the occipital region of the skull and in left thumb finger.

All the above injuries are caused by sharp weapon and ante mortem in nature. There was, therefore, no real contradiction or omission in the description of weapon used by the accused in the FIR and the deposition of the PWs including the informant PW-2, who have unequivocally and corroboratively stated that it was a dagger and the deceased succumbed to the injuries caused by it. The Doctor's evidence is consistent with the post mortem report (Exhibit 1). These injuries fit in the injury that might be caused by a dagger. In view of the above post mortem report and also the oral evidence of PWs it would lead one to a conclusion that the above named PWs 2 to 7, in fact stated the truth as they witnessed the incident.

16. Learned Senior Counsel Mr. Choudhury, also made a submission that the PWs 2 to 7 failed to mention before the Police while making the statement under Section 161 Cr.PC that accused Banizuddin stabbed Lal Mahmud by a dagger at his chest and abdomen and this omission on a vital point is a serious contradiction and the evidence of these witnesses should not be believed for convicting the accused appellants. In support of his submission, Mr. Choudhury, has relied on a decision of this Court in *Dulal Sonowal v. State of Assam* reported in 1996 (1) GLT 295 : (1996) 2 GLR 79, which held inter alia that omission to make statement on a vital point ought to be held as contradiction. In the aforesaid cited case one PW made a statement that he saw accused appellant giving dao blow on the neck of the deceased but he omitted to make statement on this very important aspect before the Police under Section 161 Cr.PC and the trial Court viewed the evidence of the said witness with suspicion resulting into setting aside the conviction and

sentence. But in the present case, no such omission was made by the PWs 2 to 7. We have gone through the statements recorded under Section 161 Cr.PC. It is on record that the PWs 2 to 7 while making their statements before the Police under Section 161 Cr.PC clearly stated that the accused Banizuddin stabbed the deceased Lal Mahmud at his left chest and abdomen by a dagger. The said PWs consistently deposed the same while being examined during the trial. That being the position, there is no force in the submission of learned Senior Counsel Mr. Choudhury.

17. The defence Counsel during cross-examination at the trial made abortive attempt to impeach the corroborative evidence of PWs 2 to 7 by putting suggestion to them that they defaulted from stating before the Investigating Officer that accused Banizuddin stabbed Lal Mahmud at his chest and abdomen. All the above PWs emphatically denied the said suggestion. We have, as stated earlier, gone through the statements recorded under Section 161 Cr.PC from the records and found that all the above witnesses did, in fact, state before the Investigating Officer that they saw deceased Lal Mahmud was being stabbed at his chest and abdomen with a dagger by accused Banizuddin. There is, therefore, no omission or contradiction or inconsistency in the statements made before the Police and the evidence given before the trial Court. The evidence of PWs 2 to 7, thus stands unshaken, consistent, trustworthy, reliable and unimpeachable on the basis of which conviction and sentence can safely be recorded, which the learned trial Court did in this case correctly.

18. From the trend of cross-examination on these PWs namely 2 to 7 by the defence Counsel at the trial, it is not found that any allegation was made to the effect that the prosecution introduced a false story of causing injury by dagger on the deceased as an afterthought and set out to fit in the injuries described in the post mortem report and the oral evidence of the Doctor who conducted the autopsy.

19. Another aspect which must be noticed for disposal of this appeal is that at no point of time, the defence cast any doubt on the presence of PWs 2, 4, 5, 6 and 7 in the paddy field i.e., the place of occurrence. There is, infact, no good reason to

doubt their presence as those PWs were working in the paddy field at the time of occurrence and nothing has been brought about in the cross -examination which would create any doubt regarding veracity of their evidence.

20. The defence side examined DW-1, Lal Mia, as a independent eye witness to establish its case that the place where the incident took place belonged to accused Banizuddin and the deceased Lal Mahmud was preparing the said place for raising crops and when the accused persons objected to it, a scuffle ensued and the deceased Lal Mahmud criminally intimidated the accused persons by a spade which hit Lal Mahmud himself accidentally and he succumbed to grievous injuries received due to his suicidal act. DW-1 further stated in his examination-in-chief that he was ploughing over his land situated at a distance of 5 bighas from the place of occurrence but in his cross-examination he contradicted the same by saying that he does not have land nearby the place of occurrence. Presence of DW-1 at the place of occurrence at the relevant time found doubtful and thus his evidence rendered unworthy and unreliable.

21. The defence side also examined DW-2, Aiton Nessa, mother-in-law of accused Ashatulla and mother of accused Banizuddin. She deposed that she filed a complaint case in the Court of Chief Judicial Magistrate, Barpeta, being CR Case No. 967/2000 against PW-6, Mizanur, PW-7 Nabab Ali, Afaz, Tamez and Samad. She deposed that the case was sent to Police by the Court but the Police did nothing. A photostat copy of her said complaint petition dated 25.04.2000 was laid before the trial Court and was marked as Exhibit Ka (under objection). On being cross-examined, she deposed that the said complaint case was filed after 8 days of the incident and she cannot assign the reason for such delay. She also stated that the said complaint case was filed in consultation with some of her relatives and she knows nothing about the subject matter of the Sessions Case No. 54/2003. She further deposed that she cannot say what was written in her aforesaid complaint petition (Exhibit Ka) and admitted that she filed the same as advised by some of her relatives to save her son-in-law accused Ashatulla. This DW-2 is not an eye witness of the occurrence and her evidence is of no significance. The learned trial Court rightly held that the oral testimony of both DW-1 and DW-2 totally demolished the defence plea of aggression and their plea that

their case should be covered and put under Section 304 Part II IPC cannot be pressed into service for their defence.

22. Significantly it may be noticed that in his oral evidence PW-2 stated that there was a quarrel between the parties 4/5 days prior to the incident and there was an altercation between the accused persons and Lal Mahmud just before the incident regarding the demarcation of boundary of the paddy field.

23. The evidence on record discloses that there was an enmity between the parties. But the incident did not take place suddenly, rather it was a result of a brief altercation with the deceased over demarcation of boundary. There is sufficient evidence to the effect that both the accused appellants were present on the spot and engaged themselves in assaulting Lal Mahmud by lathi and dagger, as a result of which Lal Mahmud received serious injuries and succumbed to such injuries. Direct proof of common intention of both the accused persons in this case could be seen or atleast could be inferred from their overt act of joint physical assault on the deceased attracting offence under Section 34 IPC, and the distinctive feature of Section 34 IPC is an element of participation in action. The established principle of law is that the liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 IPC, if such criminal act is done in furtherance of a common intension of the persons who join in committing the crime, the said principle is restated in *Dani Singh v. State of Bihar* reported in (2002) 13 SCC 203, relevant portion being para 19, which is quoted below:

19. ...Where parties go with a common purpose to execute the common object, each I and every person becomes responsible for the act of each and every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility. All are guilty of the principal offence, not of abetment only. In a combination of this kind a mortal stroke, though given by one of the parties, is deemed in the eye of the law to have been given by every individual present and abetting. But a party not cognizant of the intention of his companion to commit murder is not liable, though he has joined his companion to do an unlawful act. The leading feature of this Section is the element of participation in action.

The essence of liability under this Section is the existence of a common intention animating the offenders and the participation in a criminal act in furtherance of the common intention. The essence is simultaneous, consensus of the minds of persons participating in the criminal action to bring about a particular result....

24. Looking at the ground situation of the case more particularly the fact that there was a scuffle between the accused appellants and the deceased, and the injuries being inflicted in a pre-arranged manner and above all, applying the above settled legal position, the trial Court was justified in holding that offence committed was under Section 302 read with Section 34 IPC.

25. Having perused the entire evidence on record and having discussed all aspects of the case we see no reason to interfere with the impugned Judgment and Order. The conviction and sentence dated 15.12.2003, as recorded by the trial Court are found legal and the same are, therefore, affirmed.

26. The appeal is accordingly, dismissed.

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