

Md. Alimuddin and ors. Vs. State of Assam

Md. Alimuddin and ors. Vs. State of Assam

SooperKanoon Citation : sooperkanoon.com/132437

Court : Guwahati

Decided On : Feb-04-1992

Judge : J.M. Srivastava and S. Barman Roy, JJ.

Acts : Indian Penal Code (IPC) - Sections 34, 156, 157, 302 and 324

Appeal No. : Criminal Appeal No. 75 of 1990

Appellant : Md. Alimuddin and ors.

Respondent : State of Assam

Advocate for Def. : A. Ahmed, Public Prosecutor

Advocate for Pet/Ap. : A.S. Choudhury and N.D. Choudhury, Advs.

Disposition : Appeal allowed

Judgement :

S. Barman Roy, J.

1. This appeal is directed against the judgment and order of conviction and sentence dated 30-7-90 passed by the learned Sessions Judge, Nagaon in Sessions case No. 48(N-H)/87.

2. By the said judgment, appellant No. 1 Md. Alimuddin was convicted under Section 302, IPC and sentenced thereunder to suffer imprisonment for life and to

pay a fine of Rs. 2000/- and in default of payment to undergo rigorous imprisonment for a further period of 6 months. Appellant No. 2 Md, Samsuddin was convicted under Section 324 read with Section 34, IPC and sentenced thereunder to suffer imprisonment for 6 months. However, though appellant Nos. 3 and 4, namely, Md. Ajimuddin and Mr. Fakaruddin were convicted under Section 324 read with Section 34, IPC, they were ultimately released on probation of good conduct.

3. On 6-9-85 at or. about 9 a.m. Smt. Meherunnesa (P.W. 1) wife of deceased Task Ali, lodged a written complaint at Hojai Police Station alleging, inter alia, that on 5-9-85 at or about 9 p.m. present appellants and one Sri Md. Imamuddin being armed with lathi, spear etc. trespassed into the compound of the house of the complainant and injured her husband (deceased) with spear and one Smt Kutubjan bibi with dao. It has further been alleged in the said complaint that when Abdul Kalam (P.W. 3) and Abdul Bank intervened after seeing the assault, they were also assaulted and injured with lathis. On the basis of the said complaint, an FIR was registered at Hojai Police Station on 6-9-85 at 9 a.m.

4. Some days thereafter, injured Tasir Ali succumbed to his injuries at Gauhati Medical College Hospital.

5. After completion of investigation, present appellants and Anr., namely, Md. Imamuddin were chargesheeted. But Md; Imamuddin absconded and fled to Bangladesh. Accordingly, the trial had to be proceeded with against the present 4 appellants only.

6. In course of the trial, prosecution examined 7 Pws in all, including some eye witnesses. Defence examined only one DW, namely, Dr. I. B. Dey. For proper appreciation of evidence, we consider it necessary first to deal with the injuries sustained by the deceased and some his men on the one hand and the appellants and some of their women on the other.

7. P.W. 7 Dr. Homeswar Sharma held post mortem examination on the deadbody of deceased. In course of his examination, P.W. 7 found 4 injuries, injury Nos. 1 & 2 were the results of surgical interference and therefore, we may overlook the

same. So, for our present purpose, we are concerned with injury Nos. 3 and 4. Statement of P.W. 7 in respect of injury Nos. 3 & 4 in the trial court is quoted hereunder :--

3. A stitched wound placed obliquely (4 stitches) in the left side of the chest anterior part, 5 cm below the nipple, the medial and is slightly higher, lateral and is lower, after removing stiches found margins clean cut. Wound spindle shaped and of size of 7 cm x 2 cm x abdominal cavity deep and placed over the 7th and 8th ribs which are not obliquely and injured the underlying left dome of diaphragm. The diaphragm incised and stitched with catgut.

4. A stitched wound placed horizontally on the left lateral aspect of thorax in anterior axillary line over the 5th intercostal space with 2 stiches of silk, after removing stiches examined and sound is found spindle shaped measuring 3 cm x 1.5 cm x pleural cavity deep, margins clean cut and gaping at the centre.

P.W. 7 ultimately gave the following opinion:--

In my opinion, the cause of death was shock resulting from the injuries sustained. The injuries were antemortem of which injury Nos. 1 and 2 were surginally made and injury Nos. 3 and 4 were made by pointed double edged sharp cutting weapons which was homicidal in nature. Time past since death till post mortem examination was approximately within 12 to 20 hours. The injury No. 3 is more fatal and it alone can cause death. The oval shaped flat fathi may cause injury Nos. 3 and 4.

8. P.W. 5, Dr. A. K. Dey of Hojai Primary Health Centre examined one Arabian Bibi on 5-9-85 at 11 p.m. and found a sharp cut injury on the right lateral side of her forearm extending from near the elbow joint measuring 7.5 cm x 1.25 cm x 1.25 cm and one lacerated injury on the posterior surface of the right index finger and the injuries were stated to be fresh and simple in nature. She was admitted to the hospital on 5-9-85 and discharged on 6-9-85.

9. P.W. 5, Dr. A. K. Dey also examined Abdul Kalam (P.W. 3) on 5-9-85 and found a sharp cut injury on the frontal head measuring 2,5 cm x deep to the skull. The

injury was stated to be fresh and simple. Patient was admitted to hospital on 5-9-85 and discharged on 6-9-85.

On the same day P.W. 5, Dr. A. K. Dey also examined Abdul Barik and found one sharp cut injury on the left side of frontal head measuring 2.5 cm x deep to skull and same was found to be fresh and simple. However, it needs to be mentioned here that the prosecution has not examined this man though the prosecution claims that in course of the same occurrence Abdul Barik was also assaulted and injured by the appellants.

9A. Therefore, it is the case of the prosecution that the aforesaid persons and/or witnesses along with deceased were assaulted and injured by the appellants.

10. During cross-examination of P.W. 5 Dr. A. K. Dey, defence elicited the following statment from him :--

On 5-9-85 at 11.30 a.m. I had examined the following persons on police requisition :--

(1) Md. Samsuddin, (2) Halima Khatun (3) Sajida Khatun, (4) Fakanuddin, (5) Md. Alimuddin.

injuries:--

Samsuddin: --(1) Sharp cut injury of right scapular when patients' trapege only muscles is fully cut. Size 7.5 c.m. x 2.5 c.m.

(2) Sharp cut injury on right parietal region. Size 5 c.m. x deep to skull.

Suspected fracture at the base of left middle finger. All the injuries are fresh caused by sharp weapon and grievous in nature. Admitted on 5-9-85 and discharged on 27-9-85.

2. Halima Khatoon : Sharp cut injury on right suprascapular region. Size 7.5 c.m. x 1.25 c.m. x 1.25 c.m. Sharp cut injury on right parietal region. Size 2.5 c.m. x deep to the skull. Injury caused by sharp weapon. All the injuries are fresh, simple in nature. Admitted at Hojai P.H.C. on 5-9-85 and discharged on 12-9-85.

3. Sajida Khatoon: -- Sharp cut injury on right arm and on right scapular region. Injuries are caused by sharp weapon. All the injuries are fresh and simple in nature. Admitted at Hojai P.H.C. on 5-9-85 and discharged on 6-9-85.

4. Fakruddin : -- Sharp cut injury on the posterior surface of the left palm extending from the base of little finger up to the base of left finger where the metacarpel bones of both fingers cut. Size 5 c.m. x 1.25 c.m. caused by sharp weapon. All the injuries are fresh and grievous in nature. Admitted on 5-9-85 and discharged on 27-9-85.

5. Md. Alimuddin : Sharp cut injury at the base of right finger size -- 2.5 c.m. x deep to bone. Sharp cut injury on the lateral side of left arm. Size 2.5 c.m. x 1.25 c.m. All the injuries are fresh and simple in nature and caused by sharp weapon. Admitted on 5-9-85 and discharged on 6-9-85.

11. All the aforesaid injured persons and the appellants are closely related to each other. Injuries sustained by the appellants Samsuddin and Fakaruddin are grivous in nature. Injuries sustained by others on the side of the appellants may be simple in nature in the strict legal sense of the term. But at the same time, it would be too much to brush aside such injuries, as simple and superficial, particularly when the injuries sustained by Halima Khatun are quite serious in nature though they may be simple in the strict legal sense of the term. The fact that injured Halima Khatun remained in the Hospital as indoor patient from 5-9-85 to 12-9-85 cannot be overlooked and therefore, her injuries cannot be said to be superficial.

12. The prosecution as well as defence versions are to be evaluated in the context of the injuries sustained by both sides. Out of the 7 PWs. PWs 1 and 2 and 3 are said to be eye witnesses. We have read the evidence of these witnesses. We do not find any explanation given by them as to how the appellants and some of their women came to sustain the injuries in question. The learned trial court in the impugned judgment accepted that the appellants and their women sustain the said injuries in course of the same transaction. P.W. 1 Smt. Meharunnesa in course of cross examination admitted that on the night of the incident she saw injuries in the person of appelants Alimuddin, Fakaruddin and their women, namely, Sajida and Halima. But she did not state anywhere in her evidence as to how these people

came to sustain the injuries in question. P.W. 2 Sri Aftab Ali stated in course of his cross examination that during the occurrence P.W. 3 Abdul Kalam, Abdul Barik and Johab Ali all were assaulted by accused persons. He also saw injuries on the person of the accused. He further stated that when both the parties started struggling with one another, he could not see who assaulted whom. Therefore it is not in dispute that the appellants and some of their women also sustained injuries caused by sharp cutting weapon in course of the same transaction in which the deceased and some of his men received injuries. Now the versions of both sides are to be evaluated in the context of these injuries and failure on the part of the prosecution to explain the injuries inflicted upon the appellants and some of their women. The learned trial court in Paragraph 31 of the impugned Judgment has made the following observation:--

31. In the instant case, the injured were taken to the hospital simultaneously. This shows that both the parties sustained the injuries in the same transaction. The defence case is that Tasir Ali and others attacked Alimuddin first. But this story could not be probabalised. The injuries on Alimuddin are simple. This negatives their plea. The injuries on accused Samsuddin and Fakaruddin are stated to be grievous. In a skirmish that followed the attack launched by them, such injuries are likely to occur. The accused persons, therefore, cannot get any benefit out of this decision.

It is not the case of the prosecution or of the defence that after the appellant's attack on the deceased and his men was over, a skirmish followed and in that skirmish the appellants and some of their women sustained injuries. The learned trial court has gone beyond the evidence on record and built up a third story on behalf of prosecution, and in support of his conclusion, quoted above, has relied upon a decision of the Hon'ble Supreme Court of India in Jagdish v. State of Rajasthan, AIR 1979 SC 1010 : (1979 Cri LJ 888) which is not attracted on the facts of the present case, in the absence of evidence to support the view taken.

13. Another suspicious feature of the case, which cannot be overlooked, is that the FIR was lodged about 12.00 hrs. after the occurrence. The incident in question took place on 5-9-85 at 9 p.m. It appears from Ext. 6 that the officer-in-charge of

Hojai Police Station issued a letter on 5-9-85 itself to Medical Officer of Hojai Hospital. By the said letter he forwarded the deceased Md. Tasir Ali and other persons who received injuries in the said occurrence, namely, Smt. Arabjan Bibi, P.W. 3 Abdul Kalam, Abdul Barik for their medical examination and treatment. It again appears from the letter dated 5-9-85 (Ext. 7) issued by the Officer-in-charge of Hojai Police Station that by the said letter he requested the Medical Officer in charge of Hojai Hospital to record the dying declaration of deceased Md. Tasir Ali. P.W. 6 who is the author of aforesaid Exts. 6 & 7, stated in his examination in chief that the officer-in-charge Jadab Bhuyan endorsed the case to P.W. 6 for investigation and accordingly P.W. 6 took up investigation, visited the place of occurrence and sent the injured vide Ext. 6 dated 5-9-85 to Hospital for their treatment. He further admitted that Ext. 7 dated 5-9-85 is requisition issued by him for recording dying declaration. It further appears from the evidence of P.W. 5 Dr. A. K. Dey that Ext. 6 was the requisition issued to him by the Police to examine injured person in question. It further appears from his statement in course of the cross examination that he recorded the dying declaration of the deceased at 11 p.m. on 5-9-85 pursuant to the aforesaid requisition. He also admitted in his evidence that on 5-9-85 at 11 p.m. he had examined Arabjan Bibi P.W. 3 Abdul Kalam and Abdul Barik. From these facts it is apparent that the deceased Tasir Ali, P.W. 3 Abdul Kalam Abdul Barik and Smt. Arabjan Bibi, who sustained injuries in course of the occurrence, went to the Police Station and met the officer-in-charge of the said Police Station and P.W. 6 (Investigation Officer) before 11 p.m. on 5-8-85 i.e. on the date of occurrence itself. They must have given some information about the occurrence to Police but the same has been suppressed by the Police. From these circumstances, no other conclusion can be deduced. It further appears from the evidence of P.W. 1 that she also accompanied her husband Md. Tasir Ali when her husband was taken to Hospital. Therefore, all these persons including the informant and the deceased must have met the officer in charge of Hojai Police Station before 11 p.m. on 5-8-85, yet for about 12 hrs. no FIR was registered. This prominent fact cannot be ignored in the context of the fact that number of appellants including some of thier women sustained serious incised wounds. Any one of P.W. 1 Smt. Meharunnessa or deceased Md. Tasir Ali or injured Smt. Arabjan Bibi P.W. 3 Abdul Kalam or Abdul Barik could have lodged

the F.I.R. The offences as alleged, are all cognizable offences. Any one could have lodged the FIR. In these circumstances it is very difficult on our part to accept the prosecution theory that they did not narrate the occurrence to Police or that the FIR was lodged promptly. Another aspect of the case, is that the FIR, though allegedly registered at 9 a.m. on 6-9-85, was despatched to the Magistrate on 7-9-85. The FIR could have been despatched to the Judicial Magistrate in the very morning of 6-9-85 after its registration. We have examined the original FIR and found that it was received and/or seen by the learned Judicial Magistrate on 12-9-85 for the first time. So, it seems that the FIR was not at all despatched on 7-9-85. There was inordinate delay of about 6 days in sending the FIR to the learned Judicial Magistrate. In these circumstances it may be legitimate to suspect that the FIR in question was not at all registered on 6-9-85 as claimed by the prosecution. In all probability the FIR in question was drawn on 12-9-85 before it was put up before the learned Judicial Magistrate. The scribe of the FIR was one Sri Gajin Kalita. Said scribe has not been examined in this case. Therefore, non-examination of the scribe Sri Gajin Kalita further strengthens our suspicion about authenticity of the FIR in question.

14. Section 157 clearly enjoins that if, from information received or otherwise, an officer-in-charge of a Police Station has reason to suspect the commission of a cognizable offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person or shall depute one of his subordinate officer to the spot to investigate the facts and circumstances of the case. There are series of decisions in this respect by the Hon'ble Supreme Court of India as well as various High Courts that the FIR registered at the Police Station shall be sent to the Magistrate forthwith.

15. Prosecution story as stated by the 3 'alleged eye witnesses in short is that the occurrence took place at about 9 p.m. on 5-9-85. At that time deceased was standing on the eastern side of his tank situated within his house compound. Suddenly, present appellants along with Md. Imamuddin being armed with lathi, jathi, (spear like weapon) and dao also attacked the deceased. First accused Immuddin struggled with the deceased for about 10 minutes. Thereafter, when

deceased fell down on the ground, appellant Alimuddin dealt a 'jathi' blow on the chest or abdomen of the deceased. During the course of this incident, appellant Samsuddin gave a blow to Kutubjan Bibi with dao on her hand. Appellants Ajumuddin and Fakaruddin assaulted P.W. 3 Abdul Kalam and Abdul Barik with a dao and lathi.

16. All the P.Ws., who witnessed the occurrence gave more or less the same version as aforesaid, though there were series of serious contradictions.

17. To bolster up the aforesaid theory, prosecution also relied upon Ext. 8. Ext. 8 purports to be the dying declaration of the deceased recorded by P.W. 5 Dr. A. K. Dey on 5-9-85 at 11 p.m. Dying declaration is quoted hereunder:--

My name is Tasir Ali, S/o. Imam Ali. Resident of Islamnagar. At about 7 p.m. I was walking in my courtyard. Thunder noise was heard in the sky. According to our Muslim religion we must chant 'dua' (prayer) as soon as thunder noise is heard. So, I was doing that. While I was chanting the hymn Alimuddin (son of Samsuddin), resident of Islamnagar was rebuking me. They had been planning to assault me collusively by forming an assembly since some days back. I asked him not to abuse me. About then 15/20 numbers of people came to my house and assaulted us. Alimuddin assaulted me with spear. His father Samsuddin assaulted my mother with dao.

18. It would be evident from the aforesaid statement of the deceased that about 15/20 persons assaulted him. Whereas the alleged eye witnesses specifically stated that only 5 persons including the present 4 appellants had assaulted the deceased and others. It is not claimed by the eye witnesses that any other person, known or unknown, was party to the assault. After all it is not the case of the prosecution that area was dark. It is clear case of the prosecution that the alleged eye witnesses focussed 3/4 torch lights. There was also a hurricane. So there was no difficulty to identify the assailants. Declarant further stated that appellant Samsuddin assaulted his mother with a dao. Name of the mother of the deceased is Kutubjan Bibi. We have also taken note of the fact that the deceased did not give even the barest hint in his statement that some of the appellants and their women also sustained serious injuries. It also appears from evidence that the

injured Arabjan bibi, P.W.3 Abdul Kalam, Abdul Barik along P.W.1 Meharunnessa also accompanied the deceased. All of them were in hospital throughout the whole night. Injured persons namely, Arabajan Bibi, P.W. 3, Abdul Kalam and Abdul Barik along with deceased were admitted to the hospital as indoor patient on 5-9-85 itself and discharged on 6-9-85 except the deceased. So, during that night deceased was surrounded by his relatives who were all inimical towards the appellants in view of litigation between them. So, in view of the peculiar facts and circumstances of this case, possibility of the deceased being tutored by his relatives before his dying declaration was recorded should not be ruled out.

19. Defence version on the other hand is that when on the day of occurrence, appellant was going to his house along the road, deceased Tasir Ali, Khalik, Abdul Sabur, Jonab Ali, Moinuddin and Abdul Kalam chased him up to the courtyard of his house and deceased assaulted him with dao. As a result, fingers of his hand were cut off. Thereafter, when mother, father, paternal grand mother of appellant Alimuddin came out to his rescue, they were also assaulted by the deceased and his party with dao etc. and caused serious injuries. They also assaulted Ajimuddin and Fakruddin with dao etc. and caused incised wounds. Soon after that at or about 10.30 p.m. on 5-9-85 itself appellant Alimuddin lodged a complaint at Hojai Police Station.

20. On the basis of the said complaint lodged by the appellant Alimuddin an FIR was registered at Hojai Police Station under Section 147/324/325, I.P.C.

21. The defence version also does not inspire much confidence inasmuch as it does not explain the injuries sustained by the deceased and some of his men and women. Therefore, it is apparent that the defence has also come up with a distorted version of the actual incident in disclosing only half truth and half untruth. Equally the prosecution has also come up with half truth only suppressing the assault on the appellants and their women. The defence version and the prosecution version differ on the most crucial questions as to the exact place of occurrence and as to who were the initial aggressors. In these circumstances truth and falsehood have become inextricably mixed up with each other. As a result it has become an impossible task for us to disengage truth from falsehood.

22. Prosecution evidence is that immediately before the incident, deceased was standing on the eastern bank of his tank. It was 9 p.m. then. Prosecution evidence further disclosed that there is a road in the immediate eastern side of the tank and this road leads to the house of the appellants which is situated in the adjacent north of the said tank. Now, the learned trial court relied upon the sketch map and index of the alleged place of occurrence. Said sketch map and index disclose that the point marked 'B' is 'the place of occurrence where marpit took place. It is about 8 x 10 cubits area. There are sufficient marks of violence found'. But neither the sketch map nor the index disclose as to what were those marks of violence. Unless such marks of violence are elaborated, we are unable to come to a definite finding that it was in fact the place of occurrence. The investigating officer was certainly not an eye witness of the occurrence and should have indicated what marks were found. Therefore sketch map and index do not help us much in our effort to determine the actual place of occurrence. Nor can we place much reliance upon the mouthful evidence of P.Ws. who are found to be unreliable in many respects as already stated.

23. In view of the nature of evidence adduced in this case and various infirmities in the prosecution and the defence versions, as already pointed out, we are unable to accept the prosecution version of the place of occurrence. Equally, we are unable to accept the prosecution version of assault by the appellants. Both the versions seem to be highly doubtful in material particulars. It is a case where the gran is inseparably mixed up with chaff.

24. It is one of the fundamental tenets of criminal jurisprudence that the burden of proving the prosecution case squarely lies on the prosecution. This general burden never shifts. Defence is not bound to open its mouth so long as prosecution does not discharge its general burden of proving its case beyond reasonable doubt. Defence version may even be false, because a falsely instituted prosecution may compel the accused to adopt a false defence. So, prosecution cannot derive any advantage from the falsity or other infirmities of the defence version, so long as it does not discharge its initial burden of proving its case beyond all reasonable doubt.

25. Keeping in our mind aforesaid principles of Criminal Jurisprudence and after taking the entire evidence into our consideration, we are constrained to observe that we are unable to accept the prosecution case without entertaining serious doubt in our mind. In that view of the matter, we are unable to uphold the conviction of the present appellants. Undue delay in the matter of registration of the FIR in this case despite meeting of a number of eye witnesses including deceased and the informant with police at the Police Station itself soon after the occurrence, six days delay of despatch of the FIR to the learned Judicial Magistrate after its purported registration at the police station and failure of the prosecution to explain the serious injuries sustained by the 3 appellants and some of their women are some of the prominent circumstances in this case for which we are unable to accept the prosecution story as true without entertaining serious doubt in our mind.

26. For the aforesaid reason, we are, constrained to hold that the prosecution has failed to prove its case beyond reasonable doubt and therefore, the impugned judgment and order of conviction and sentence has to be set aside.

27. Accordingly, the appeal is allowed. The impugned judgment and order of conviction and sentence is set aside. We direct that the appellants shall be set at liberty forthwith.