

IN THE COURT OF THE SESSIONS JUDGE, DHUBRI

PRESENT : Shri A. Chakravarty, M.A., LL.M.,A.J.S.

Criminal Appeal No. 4 of 2016

(This appeal has been filed challenging the judgment dated 11-05-2016, passed by the learned Chief Judicial Magistrate, Dhubri, Smt. T. Hussain, in G.R. Case No. 01 of 2006, under Sections 326/34 IPC)

1. Innus Sk.,
 2. Usub Sk.,
 3. Nurudddin @ Pacha
- ...Appellants

-Versus -

State of Assam

...Respondent

Appeal filed on : 08-06-2016

Arguments heard on : 05-06-2017

Judgment Delivered on : 20-06-2017

ADVOCATES WHO APPEARED IN THIS CASE ARE:-

Shri Giasuddin Ahmed, Advocate for the appellants

Shri Maniruz Zaman, P.P. for the respondent

J U D G M E N T

1. This appeal arises out of the judgment and order dated 11-05-2016, passed by the learned Chief Judicial Magistrate, Dhubri, Smt. T. Hussain, in G.R. Case No. 01 of 2006, whereby the appellants were convicted for commission of an offence under Section 326, r/w Section 34 of the Indian Penal Code, 1860 ("the IPC", for short) and sentenced them to undergo rigorous imprisonment for six months each and to pay fine of Rs.2,000/- each, in default to undergo simple imprisonment for one month each.

2. The factual matrix of the case in which the appellants came to be prosecuted and convicted is that on 21-02-2006, at about 10:30 p.m., while the victim Aliul Hussain @ Niju was sleeping in his house, one Amirul Islam called him and while they were walking on the road at New Market, due to previous enmity, the appellants Innus Sk., Usub Sk., Nuruddin @ Pacha (hereinafter referred to as "the accused") and Yakub Sk., Anish Hussain, Taimur Rahman, Pintu and some unknown persons surrounded them and assaulted the victim Aliul Hussain @ Niju by means of a dagger (sharp cutting weapon) and gave a blow on his head from behind with intent to kill him. As a result, the victim Aliul Hussain @ Niju fell down on the ground. The accused then gave blows on his stomach and legs. Hearing the hue and cry, the nearby people came to the place of occurrence at which, the accused fled away. Otherwise, the accused would have killed him. Thereafter, the members of the family of the victim Aliul Hussain @ Niju shifted him to the Dhubri Civil Hospital. There from, he was shifted to Guwahati. Therefore, the informant filed the FIR of the instant case with the Dhubri Police Station on 23-02-2006. As the informant was busy with the treatment of the injured victim, he could not file the FIR immediately after the incident.

3. Based on the FIR, the Officer In-charge of the Dhubri Police Station registered the case No. 71/2006 for offences under Sections 147, 148, 448, 341, 326 IPC against the accused Innus Sk, Usub Sk., Yakub Sk., Anish Hussain, Taimur Rahman, Pintu and Pacha Sk. and investigated the case. After completion of investigation, the police filed charge sheet for offences under Sections 147, 148, 341, 326, 34 IPC against accused Nuruddin @ Pacha, Innus Sk and Yakub Sk. only, in the Court of the learned Chief Judicial Magistrate, Dhubri and they faced the trial.

4. During trial, the learned Chief Judicial Magistrate, Dhubri framed charges under Sections 147/34, 148, 341, 326/34 IPC against accused Nuruddin @ Pacha, Innus Sk. and Yakub Sk., which does not make any sense as charges cannot be framed under Sections 147, 148 IPC against three persons and cannot be framed simultaneously under Sections 147, 148 IPC and Section 34 IPC. When the contents of the charges were read over and explained to the accused, they pleaded not guilty and claimed to be tried.

5. The prosecution, in order to prove its case, examined seven witnesses. The accused did not examine any witness.

6. In their examination under section 313 Cr.P.C., the accused have denied the prosecution case and have stated that the allegations levelled against them are false and baseless.

7. The learned trial Court formulated the following point for determination:-

I. Whether the accused persons on 21-02-2006, at about 10:30 p.m., in New Market, in furtherance of their common intention, wrongfully restrained Aliul Hussain @ Niju and thereafter voluntarily caused grievous hurt to him by means of sharp cutting weapon and thereby committed the offence punishable u/s 341/326/34 IPC?

8. After examining the evidence on record and hearing the arguments advanced by the learned counsels for both the sides, the learned trial Court decided the point in the affirmative and passed the impugned judgment dated 11-05-2016 convicting the accused as above. Aggrieved, the accused preferred this appeal on the following amongst other grounds: -

I. That the learned Court below has erred in law and in fact in passing the impugned judgment dated 11-05-2016 and hence, the impugned judgment is liable to be set aside and quashed.

II. That the learned Court below did not properly appreciate the evidence on record and arrived at an erroneous finding and hence, the impugned judgment is liable to be set aside and quashed.

III. That the learned Court below misinterpreted and misunderstood the evidence on record and illegally convicted the accused persons and hence, the impugned judgment is liable to be set aside and quashed.

IV. That though the alleged incident occurred in dark night and at the time of the incident, there was no electricity and the miscreant allegedly attacked the injured from behind, it was not possible for the injured or other prosecution witnesses to recognize the assailant. But, in spite of the same, the learned Court below erroneously held the accused guilty of committing the alleged offence and hence, the impugned judgment is liable to be set aside and quashed.

V. That though the Dhubri Police Station is situated at two/three minutes walking distance from the place of occurrence, the FIR was lodged after three days of the occurrence. Therefore, the FIR is the result of afterthought and the accused were falsely implicated with the commission of the alleged offence and hence, the impugned judgment is liable to be set aside and quashed.

9. Now the question that requires to be answered in this appeal is whether the impugned judgment dated 11-05-2016 is sustainable in the law and facts of the case?

10. I have carefully examined the impugned judgment dated 11-05-2016, the memorandum of appeal, the evidence and the documents on record and after hearing the arguments advanced by the learned counsels for both the sides, give my decision as follows:-

11. During hearing, the learned defence counsel Shri Giasuddin Ahmed vehemently argued that the learned Court below erred both in law and facts in passing the impugned judgment in as much as, the prosecution has failed to prove that the accused have caused the alleged injuries to the victim Aliul Hussain @ Niju. Therefore, he has submitted that the impugned judgment is liable to be set aside and quashed.

12. On the other hand, the learned Public Prosecutor argued that applying judicial mind and relying on the evidence on record, the learned trial Court has rightly passed the impugned judgment dated 11-05-2016. Therefore, the learned Public Prosecutor has submitted that the appeal may be dismissed and the impugned judgment and order may be upheld.

13. To understand the rival contentions, let us discuss the evidence on the record.

14. PW-2 Aliul Hussain, the injured person of the alleged offence has deposed that he knows the accused persons. The alleged incident occurred at around 10:30 p.m. As he obstructed the accused from demolishing a tea stall situated at New Market, the accused assaulted him from behind by means of a sword and he lost his consciousness. At that time, Amirul, Rajesh and Nazir Hussain were present with him. His wife was also present with him. After assaulting him, the accused fled away. Amirul called him to the place of occurrence. The said Tea stall belonged to his cousin. Thereafter, he was shifted to the hospital.

15. In the cross-examination, he has stated that the said tea stall belonged to his cousin Enamul. The tea stall did not belong to Ranjit Ghosh. At around 10:30 p.m., he was present in his house. The house of Amirul is situated near his house. Amirul told him that somebody had destroyed the tea stall of Ranjit Ghosh situated in the New Market. Along with Amirul, he then went to the said tea stall of Ranjit Ghosh and saw that the tea stall was destroyed. Thereafter, he returned to his house. After

sometime, he again went to the New Market with Amirul. When he reached New Market, the accused assaulted him and he lost his consciousness.

16. He has further stated that he and the accused persons are accused in two murder cases. The said cases are relating to the murder of Rose and Ramel. Yusuf, Yakub and Pacha Sheikh are not the accused of the said murder case. He is also the accused in a motor vehicle theft case. He was also arrested in connection with an incident that occurred at Panbari. He has further stated that due to mental illness, he stabbed his brother Zakir by means of a broken bottle. He has denied the suggestion that the accused did not assault him and that they have no connection with his injury.

17. PW-6 Amirul Hussain has deposed that at the time of the alleged incident, he was proceeding towards his home from the market. At New Market, seeing a gathering, he got down from the rickshaw and saw that the tea stall of Ranjit had been destroyed. Many people were present there. Thereafter, he went to his house as he was carrying a huge amount of money in his pocket.

18. In the cross-examination, he has stated that he does not know who had demolished the tea stall of Ranjit. He did not call anybody to the New Market. He did not see who were present there.

19. Thus, the PW-6 has not corroborated the PW-2 at all. Therefore, the testimony of the PW-2 is not reliable. Because, though the PW-2 has deposed that the PW-6 called him from his house and when the accused assaulted him, the PW-6 was present with him, the PW-6 has categorically stated that he did not call any body and he was not accompanying the PW-2. Therefore, the testimony of the PW-2 is not reliable. Further, the PW-6 is also not an eye witness of the alleged incident.

20. PW-1 Rashidul Hoque has deposed that he knows both the parties. The alleged incident occurred about six/seven years ago. He has a recharge shop at New Market. He closes his shop at around 07:00 p.m. He does not know what happened in that night. Thus, the PW-1 also is not an eye witness of the alleged incident.

21. PW-3 Jahida Khatun, the wife of the injured Aliul Hussain has deposed that Amirul called her husband from their house and took him with him. She followed them and saw that Yunus, Yusub, Yakub and Pacha assaulted her husband. She then cried out at which, Yunus told her that if she goes forward, he will assault her. Hearing her cries, the nearby people came to the place of occurrence and the accused then fled away. Her husband was assaulted by means of a sword. With the

help of the nearby people, she shifted her husband to the Dhubri Civil Hospital. There from, he was shifted to the GMCH.

22. In the cross-examination, she has stated that the night of the incident was dark and there was no electricity. When she went out from their house, nobody accompanied her. Later on, the members of her family and the nearby people went to the place of occurrence. Accused are not their neighbours. They had no quarrel with the accused. Had Amirul not called her husband, no incident would have occurred. She told the police that her husband went with Aminul from their house and after sometime, came back to the house and again went to the New Market. She told the police that after sometime, hearing a hue and cry, she went to the New Market and saw that her husband was lying injured. She has further stated that the incident occurred before she reached the place of occurrence. When she cried, the nearby people arrived at the place of occurrence and shifted her husband to the hospital.

23. Thus, as the PW-3 has categorically stated in the cross-examination that before she reached the place of occurrence, the alleged occurrence has taken place and the alleged incident occurred in a dark night and there was no electricity at the time of the occurrence. Therefore, the question of the PW-3 witnessing the alleged incident or identifying the assailants does not arise. Therefore, her testimony is also not reliable.

24. PW-4 Mafuja Begum, the sister-in-law of the injured has deposed that hearing a noise, she went to the place of occurrence and saw that Niju @ Aliul Hussin was lying on the road and the accused Yunus, Yusuf, Yakub and Pacha were standing with sword in their hands. Niju was lying unconscious and they shifted him to the Dhubri Civil Hospital.

25. In the cross-examination, she has stated that at the time of the alleged incident, she was not accompanying Niju. The incident occurred in the month of February and the night was cold. There was also no street light. She did not see the accused assaulting Niju. Therefore, the PW-4 is also not an eye witness of the alleged incident and hence, based on her testimony; it cannot be held that accused assaulted Aliul Hussin @ Niju.

26. PW-5 Jakir Hussain, the brother of the injured has deposed that on 21-02-2006, at about 10:00/10:30 p.m., Amirul called him and Niju and told them that a

shop was destroyed. They then went to the place of occurrence and saw that a shop was lying destroyed. Nobody was present there. Thereafter, they return to their house. At about 10:30 p.m., while he was eating dinner, Amirul called Niju from their house to the New Market. After sometime, he heard a hue and cry and the public told him that Niju was killed. He then went to the place of occurrence and saw that Niju was lying with injuries and his wife was shouting for help. Seeing him, the accused Yusuf rushed towards him and attempted to assault him by means of a sword. He then retreated. Thereafter, the members of his family and the nearby people took Nirju to the Civil Hospital.

27. In the cross-examination, he has stated that Niju once assaulted him by means of a bottle. At that time, Niju was not mentally sound. Niju also assaulted his mother. He has further stated that he did not see the occurrence. Amirul was proceeding alone. Nobody was accompanying him. When they reached the place of occurrence, nobody was present there. Therefore, the question of the PW-5 witnessing the alleged occurrence does not arise.

28. PW-7 Dr. Kochir Ali Ahmed, the Medical Officer who had examined the injured Aliul Hussain at the Dhubri Civil Hospital has deposed the he had examined Aliul Hussain in connection with the Dhubri P.S. G.D. Entry No.876, dated 22-02-2006. The Ext-1 is the report prepared by him. Exhibit-1 injury report shows that the Aliul Hussain sustained: (1) Incised wounds on the left parietal region, size- was 6 inch X 2 inch X 2 inch, vertex of head, size- 6 inch X 2 inch X 1 ½ inch, right parietal region, size- 3 inch X ½ inch X 1/5 inch with exposure of brain material and fracture of skull bones in the incised wound and bleeding. (2) Incised wound on right front, size- 3 inch X 2 inch X ½ inch, right calf, size- 3 inch X 2 ½ inch x 2 inch and left foot, size-3 inch X 2 inch X ½ inch with bleeding. (3) Incised wound on the right side of abdomen, size- 3 inch X 1/5 inch X 1/5 inch. The patient was resuscitated and necessary dressing etc. were done. After recovery from shock like state, he was referred to the GMCH, Guwahati for needful.

29. In the cross-examination, he has stated that the injury Nos.2 and 3 are simple injuries and injury No.1 is grievous injury, caused by sharp cutting instrument. Therefore, the Medical Officer has proved that the victim Aliul Hussain @ Niju had sustained the alleged injuries.

30. As can be seen from the above discussion, none of the prosecution witnesses has seen the accused assaulting the victim Aliul Hussain @ Niju. Further, as the

victim person has deposed that the alleged incident occurred in a dark night, and there was no electricity and the assailants gave blow on his head by means of a sword from behind, it is simply unbelievable that he has seen the assailants. If the assailants had assaulted the victim Aliul Hussain @ Niju from behind and he lost his consciousness, the question of his seeing the assailants does not arise. Further, though the victim Aliul Hussain @ Niju has deposed that the PW-6 was allegedly him at the time of alleged occurrence, the PW-6 has deposed that he was not accompanying the victim person at the time of alleged occurrence and also did not see the alleged occurrence. Therefore, the testimony of the victim person is not at all believable and hence, based on his uncorroborated testimony, the accused cannot be held guilty of committing the alleged offences.

31. Further, admittedly, the victim Aliul Hussain @ Niju is a notorious criminal as he has stated in the cross-examination that two murder cases, one theft case and another case were pending against him. Further, though he has deposed that the accused are co-accused in the said murder cases, in the same breath he has stated that the accused are not connected with the said murder cases and he has no enmity with the accused. Therefore, it is simply unbelievable that the accused had assaulted him for nothing. As the victim Aliul Hussain @ Niju is a notorious criminal, anybody may assault him due to previous enmity and caused the alleged injuries. But, for the same and in the facts and circumstances of the case, the accused cannot be held guilty of assaulting him and causing the alleged injuries to him. Therefore, though the victim Aliul Hussain @ Niju sustained the incised wounds as deposed by him, in view of the discussion made above, it cannot be held that the accused had caused the said incised wounds to him.

32. In view of the above discussion, as there is no direct evidence within the meaning of Section 60 of the Evidence Act to come to the conclusion that the accused had assaulted the victim Aliul Hussain @ Niju and caused the alleged injuries to him and as the prosecution has tried to establish its case based on direct evidence, the impugned judgment dated 11-05-2016, passed by the learned Chief Judicial Magistrate, Dhubri Smt. T. Hussain in G.R. Case No. 01 of 2006, under Sections 326/34 IPC is not sustainable in the law and facts of the case and as the prosecution has also failed to prove the motive behind the commission of the alleged crime by the accused, the impugned judgment is liable to be set aside.

O R D E R

33. In the result, considering the entire facts and circumstances of the case, the criminal appeal is allowed on contest.

34. The impugned judgment dated 11-05-2016, passed by the learned Chief Judicial Magistrate, Dhubri Smt. T. Hussain in G.R. Case No. 01 of 2006, under Sections 326/34 IPC) is hereby set aside. The accused/appellants are set at liberty.

35. Return the LCR along with a copy of this judgment to the learned court below immediately.

36. Signed, sealed and delivered in the open Court on this the 20th day of June, 2017 at Dhubri.

(A. Chakravarty)

Sessions Judge, Dhubri

Dictated & corrected by me.

(A. Chakravarty)

Sessions judge, Dhubri