

IN THE COURT OF ADDITIONAL SESSION JUDGE BILASIPARA
JUDGMENT IN CRIMINAL APPEAL NO 02 OF 2016

Present:- Smti S. Bhuyan, AJS
Additional Session Judge, Bilasipara

(Appeal against the judgment and order dated 29/12/2015 passed by M. Bhadani, Ld. SDJM(M), Bilasipara in GR case no- 01/1997(Chapar PS Case no. 106/97) u/s 148/447/325/149 IPC).

1. Md. Abdul Awal,
2. Md. Abdullah Sk,
Both S/O Lt. Hatem Ali
Vill- Sontoshpur
P.S.- Chapar, Dist- Dhubri, Assam Appellants

Vs

1. STATE of ASSAM
2. Md. Surat Jamal
S/O Late Nazim Ali,
Vill- Sontoshpur
P.S.- Chapar, Dist- Dhubri, Assam Respondents

APPEARENCES:-

For the appellant:- G. Ahmed, Advocate.

For the respondent:-Mr. T. Kr. Bhattacharya, Addl. PP

Date of Argument:-22-08-17 & 05-09-17

Date of Judgment:-11-09-17

JUDGMENT

1. This appeal has been filed against the Judgement and Order dated 29-12-2015 passed by M. Bhadani, Ld. SDJM(M), Bilasipara in GR case no-01/1997 (Chapar PS Case no. 106/97) u/s 148/447/325/149 IPC convicting and sentencing appellant accused petitioner Md. Abdul Awal to undergo R.I for 1 years u/s 148 I.P.C, R.I for 2 years with fine of Rs. 5,000/- i/d S.I for 6 months u/s 325/149 I.P.C and fine of Rs. 500/-i/d S.I for 15 days u/s 447/149 IPC and Md. Abdullah Sk. to undergo R.I. for 6 months u/s 147 I.P.C, R.I for 2 years with fine of Rs. 5000/- i.d S.I. for 6 months u/s 325 I.P.C R.W section 149 I.P.C and fine of Rs. 500/- i.d. S.I for 15 days u/s 447 r.w 149 I.P.C.

2. Being highly aggrieved and dissatisfied with the impugned Judgment and order dated 29-12-2015 of conviction prefer appeal on the ground that Ld. lower court grossly mis-read the FIR, evidences of the witnesses which were not lawfully brought in to the record and illegally convicted the accused appellants by not recollecting and re-examining the witnesses on framing of fresh charges against the accused as per direction of the appellate court dated 31-10-12 and at the time of incident accused Abdullah was minor, cross case of CPR PS case no 104/97 was not tried by same court thereby violated the settled principle of law and therefore, the judgment and order of conviction is bad in law and liable to be set aside.

3. The prosecution case in brief is that on 29-08-97 at about 10.00 am the accused persons namely Abdul Awal, Akher Ali, Abdul Aziz, Abdullah Seikh, Hatem Ali, Jafar Ali, Hamed Ali, Majer Ali and Jahar Ali initially encircled their house taking weapons like knife, stick, dao, spear and dagger in hands and attacked father of the informant in forecourt of his house causing grievous injuries on the neck, hand and back of his father. When his mother went to rescue his father hearing screams then the accused persons also caused grievous injuries to her. When neighbouring people gathered responding to shrieks, the accused persons fled away.

4. After completion of investigation I.O of the case submitted charge sheet against the accused Hatem Ali (since deceased), Abdul Aziz (since deceased), Akher Ali (since deceased), Abdul Awal and Abdullah Sk, (present appellant) u/s 147/148/149/447/323/324/325 of the IPC. During trial cognizance has been taken and after furnishing copies to the accused person

then Ld.SDJM framed charges U/s 148/149/447/325 IPC against the accused persons. When said charges read over and explained to the accused persons they pleaded not guilty and claimed to be tried. However no formal charge was framed by then Ld. SDJM (M) Bilasipara as revealed from the case record though one unwritten four head charge form with the signature of PO present on record.

5. During trial, to prove the charges against the accused persons, prosecution examined as many as 10 no of witnesses including three court witnesses and I.O of the case and exhibited ejahar, two injury report, seizure list and charge sheet. After closer of prosecution's evidence accused persons were examined U/s 313 Cr.P.C. Their plea is total denial however, not adduced defence evidence in support of their denial and after hearing the Ld. Counsel for both sides then Ld. SDJM(M) Bilasipara delivered judgement on 15-02-10 convicting appellant/accused Abdul Awal, Abdullah and Abdul Akher (since deceased) u/s 148/447/325 and sentenced to undergo each of the accused to suffer 3 years RI and to pay fine of Rs 1000 u/s 325 IPC and sentenced to pay fine of Rs 3000 i/d 3 month SI u/s 148 IPC and to pay fine of ₹ 500 each u/s 447 IPC i/d 3 month SI. Against which convicted accused persons preferred appeal which was registered as CA No-9 (1)/10 and appellate Court vide judgment and order dated 31-10-12 set aside the judgment and order of sentence passed by the trial court and remand back the case for fresh trial with direction to frame the charges properly and thereafter giving due opportunity to the parties of rehearing and to deliver the judgment afresh.

6. Thereafter, after receiving the case record, Ld. Trial court on 21-1-14 framed charge u/s 148/447/325/149 IPC against the accused person in three head formal charge form and same was read over and explained to the accused Abdul Awal, Hatem Ali Sarkar and Abdullah Sk and they have pleaded not guilty and claimed trial and fixed the case for hearing. It is seen vide order dated 21-1-14 and thereafter no order passed for issuance of summon to the witness for their re-examination. After that Ld. Trial court hearing the argument of learned counsel for both sides delivered the impugned judgment on 29-12-15 convicting the accused Abdullah u/s 147/325/447 r.w sec 149 IPC and accused Abdul Awal u/s 148/447/325 r.w sec 149 IPC and sentenced to

undergo imprisonment as mentioned above. Hence, the present appeal against the judgment of conviction and order of sentencing dated 29-12-15 by the convicted accused before this appellate court.

7. I have heard Ld. Counsel for both sides. It has been argued by the Ld. Addl. PP that Ld. Trial court rightly passed the judgment and order of convicting and there is no error committed by the learned trial court while passing the impugned judgment and order of conviction and sentence.

8. Ld. Appellant counsel Mr. G. Ahmed submitted that in this case earlier than SDJM, convicted accused Abdul Awal, Abdullah, Abdul Aker (since deceased) u/s 325/148/447 IPC and sentenced them to undergo 3 years RI u/s 325 IPC an fine of Rs. 1000 and for the offence u/s 148 sentenced to pay fine of ₹ 3000/ each and u/s 447 sentenced to pay fine of ₹500 each in default 3 months SI against which convicted accused preferred appeal which was registered as CA no. 09(1)/10 and the appellant court set aside the judgment dated 15-02-10 and remand for fresh trial with a direction to reframe the charges with a direction to frame charge properly in accordance with law and therefore given opportunity to the parties to re hearing and deliver the judgment afresh. But Ld. Trial court after receiving of the same did not comply with the direction given by the appellant court and delivered the judgment. Learned counsel further submitted that after re-framing of the charge trial court did not give any chance to the defence to re-cross the witnesses. He further contented that at the time of incident accused Abdullah was juvenile. He further contented that cross case tried by the same court and judgment is required to be deliver at the same time and benevolent provision of Probation of Offender Act not applied and therefore, impugned judgement and order is liable to be set aside. He further submitted that Ld. Trial court failed to appreciate the evidence on record in proper perspective in convicting and sentencing the appellant accused person and goes beyond the evidence on record and did not go through the medical report and evidence of the injured in convicting the accused Abdul Awal u/s 325 IPC and convicting the accused Abdullah u/s 147 IPC without framing proper charge against the accused and therefore, the judgment and order of conviction is bad in law and is liable to be set aside.

9. I have scrutinized the record of GR case no. 106/97. On careful scrutiny of the record it has been seen that with regard to the minority plea of accused Abdullah then Ld. SDJM (M) Bilasipara Mr Y. Azaz conducted an enquiry when accused Abdullah raised point of minority before the trial court. At that time the appellant accused Abdullah produced one school certificate issued by headmaster of No. 2254 Santoshpur L.P School and in the said school certificate date of birth of Abdullah is mentioned as 02-05-1978 and same is exhibited as ext-B (proved in original copy). In this connection then SDJM(M) Bilasipara recorded statement of the headmaster Sri Sopior Rahman of No. 2254 Santoshpur L.P School and according to the headmaster, Abdulla s/o Hatem Ali took admission in his school on 02-05-1984 and at that time he was 6 years as per school admission register. Accordingly he issued certificate in the name of Abdullah showing his date of birth as 02-05-1978 counting six years from the date of admission on 02-05-1984 and then Ld. SDJM, Bilasipara hold that at the time of incident on 29-08-1997 Abdulla was aged about 19 years. Date of birth of appellant accused Abdullah is 02-05-78 and incident was took place on 29-08-97, therefore, at the time of incident accused Abdullah was about 19 years according to his own certificate and claim. Thus, the record of the GR case no. 106/97 make it crystal clear that at the time of incident accused appellant Abdulla Sk. was not a child in conflict with law at the time of incident he was a major.

9. Now, let me look into the other aspect, the evidence and material on record to find out whether impugned judgment and order of conviction passed by the Ld. Trial court is sustainable under the law and is based on evidence and material on record.

10. I have scrutinized the impugned judgement and order dated 29-12-15 in GR Case No. 1/97. and evidence and material on record

11. Ld. Trial court hold that accused Abdul Awal carried deadly weapon i.e Khukri and therefore he is guilty of commission of offence u/s 148 IPC and accused Abdullah only carried a stick which is not a deadly weapon and therefore, hold him guilty u/s 147 IPC. At the same time Id. Trial court holds that accused Abdul Awal caused injury on Nizam Ali Fakir by means of a sharp cutting weapon and he is guilty of commission of offence u/s 325 IPC and

convicted him u/s 325 r. w sec 149 IPC and accused Abdullah is convicted u/s 325 IPC read with sec 149 IPC.

12. According to injured Nizam Ali Fakir, accused Abdul Awal hit him on the back side of his neck (right) with Khukri (dagger). He further deposed accused Abdullah hit on his left hand with a stick and accused Akher (since deceased) hit him on left arm with a khukri dagger, accused Abdul Aziz (since deceased) hit his back near waist with a dao. No statement against accused Hatem Ali (since deceased). According to PW-6 MO he examined injured Nizam Ali Fakir at Dhubri Civil Hospital and found i) stitched injury on the neck of 3 cm in length, ii) stitch injury on the left deltoid region of 1 cm in length, iii) stitch injury in the left elbow of 1 cm in length, iv) fracture supra condylar, v) fracture neck in left side. According to him injury i to iii are simple in nature and iv and v were grievous caused by blunt object. In his medical report he has mentioned that nature of weapon of injury no. i to iii sustained by injured can be taken from the doctor Chapar Hospital who has stitched the patient. There is one medical report of injured Nizam Ali Fakir issued by Dr Rajani Kanta Sarma, Senior Medical and Health Officer present with the record. I have perused it. According to the said medical report on 29-08-97 at about 11.45 am at Chapar 30 bedded Rural Hospital he examined Nizam Ali Fakir 50 year old and found cut injury over the neck back of the right ear, cut injury over the right elbow, sharp cut injuries over the left deltoid region, cut injury on the back near to intrascapin region and according to him all the injury are simple in nature caused by light sharp cut weapon and caused within 24 hours and patient was referred to Dhubri Civil Hospital. This medical report of the injured Nizam Ali fakir was not exhibited.

13. Ld. Trial court in para 19 of the judgement hold that *Khukri* is a sharp cutting deadly weapon. Accused Abdul Awal hit neck (right side) of the injured Nizam Ali Fakir with khukri and said injury is simple in nature. Injury no v fracture neck left side is grievous in nature caused by blunt object. Nature of weapon used by accused Abdul Awal according to Ld. Trial Court is sharp cutting deadly weapon.

14. In this case I/O has submitted charge sheet against the accused persons u/s 147/148/149/323/324/325 IPC along with three copies of medical report of injured. Ld. Trial Court framed charge against the appellants accused

person u/s 148/447/325 read with section 149 IPC and convicted the appellant accused Abdul Awal and Abdullah with the aid of section 149 IPC. Section 149 IPC is a specific and distinct offence and it has two essential ingredients, i) commission of an offence by any member of an unlawful assembly and ii) such offence must have been committed in prosecution of the common object of that assembly or must be such as the member of that assembly knew to be likely to be committed and therefore, distinct charge has to be framed u/s 149 IPC. Apparently from the record it is seen that trial court has not framed the charge properly under proper provision of penal section and convicted the accused Abdu Awal u/s 148/447/325 read with section 149 IPC and accused Abdullah u/s 147/447/325 read with section 149 IPC on defective framing of charge and without applying the proper provision of law.

15. On perusal of the trial Court record, it is revealed that Ld. Trial court after remand of the case by the appellant court on 02-01-14 framed charge u/s 148/447/325 r.w. sec 149 IPC and fixed the case for hearing without issuing the summon to the witnesses for examination as directed by the appellate court vide its judgment and order dated 31-10-12.

16. I have also perused the statement of accused recorded by the Ld. Magistrate u/s 313 Cr.P.C. It has been seen that before the accused person Ld. Trial court has not placed all the incriminating material which has been arisen against them from the evidence of the prosecution and court witnesses. Accused have a right to know each and every incriminating material that has been appeared against him from the evidence on record and he is to be given fair chance to give his reply on each incriminating material that has been appeared against him but this principle is not followed by the Ld. Trial court.

17. On meticulous scrutiny of the impugned judgment it is revealed that only engaged counsel for accused heard on the question of sentence and not accused persons as required u/s 248 (2) Cr.P.C and sentence hearing statement of accused u/s 248(2) Cr.P.C not found on record and that shows that accused persons are not heard on the sentence as required under the law.

18. In view of the aforesaid discussion made, I hold that impugned judgment and order of Ld. Trial court is based on defective charge, accused person were not given fair chance to put answer to the every incriminating

material appeared against them and after first remand of the case by the appellate court, Ld. Trial court has not framed proper charge against the accused person based on the material on record and therefore, impugned judgment and order of conviction dated 29-12-15 is bad in law and therefore, same is liable to be set aside and accordingly impugned judgment and order passed by the learned trial court dated 29-12-15 in GR 1/97 is hereby set aside and case is remand back for fresh trial with direction to frame the proper charge against the accused as per material on record submitted by the I/O at the time of submission of charge sheet u/s 173 Cr.P.C and then to give due opportunity to both sides for examination of the witnesses and after recording statement of the accused persons shall delivered afresh judgment.

19. With the above direction this appeal is allowed, accused person are directed to appear before the Ld. Trial court on 06-10-17. Ld. Counsel for appellant will produced the accused person before the Ld. Trial court. As this is a case of 1997, accused shall not take adjournment. Ld. Trial Court will fixed day to day hearing of the case. Send the LCR with a copy of judgment immediately. Office to transmit the record forthwith.

20. Judgement delivered under hand and seal of this court on this 11th day of September, 2017.

(Smti S. Bhuyan)

Addl. Session Judge, Bilasipara

Dictated and corrected by me.

(S. Bhuyan)

Addl. Sessions Judge, Bilasipara

Typed by,

Swmkhwr Brahma, Stenographer Gr. III