

GAHC010009232011



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.A./193/2011

THE STATE OF ASSAM

VERSUS

KHAIRUL ISLAM CHOUDHURY @ FAKRUL ISLAM,
FATHER NAME NOT KNOWN, TEACHER OF MADUL L.P. SCHOL, MADULI,
P.S. BADARPUR, DIST. KARIMGANJ, ASSAM.

Advocate for the Petitioner : MR. D DAS(ADDL.PP, ASSAM)

Advocate for the Respondent : MR.A CHOUDHURY

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGMENT

Date : 04-10-2023

1. Heard Mr. D. Das, learned Addl. P.P. for State of Assam-Appellant herein and Mr. A. Choudhury, learned counsel for the Respondent.
2. This appeal is preferred u/s 378 of the Code of Criminal Procedure, 1973 (Cr.PC for short) challenging the judgment and order dated 08.10.2007 passed by the learned Sessions Judge, Karimganj in Criminal Appeal No. 9(2)/2017 setting aside the judgment and order dated 11.04.2007 passed by the learned Additional Chief Judicial Magistrate, Karimganj in G.R. Case No. 813/2002. The accused-respondent herein was convicted by the trial Court u/s 457 of the Indian Penal Code (IPC for short) and sentenced to Rigorous Imprisonment for 6 months and fine of Rs. 500/- with default clause, and u/s 324

IPC and sentenced to Rigorous Imprisonment for 3 months and fine of Rs. 500/- with default clause.

3. The brief facts leading to this case are that Aftar Ali lodged an FIR at Badarpur P.S. to the effect that on 03.09.2022 at about 1 AM midnight the accused Fakrul Islam @ Khairul Islam Choudhury (hereinafter referred to as the respondent) along with seven others broke into the grocery shop of the complainant and assaulted his son Md. Riazuddin @ Raju.

4. The FIR was registered as Badarpur P.S. Case No. 137/2002 and investigation commenced. The Investigating Officer (IO in short) embarked upon the investigation and recorded the statements of the witnesses and on finding prima facie materials submitted charge sheet u/s 457/324 IPC against the appellant. On appearance of the respondent, a formal charge u/s 457/324 of IPC was framed and read over and explained to the respondent to which he pleaded not guilty and claimed to be tried. The prosecution adduced the evidence of seven (7) witnesses whereas the respondent examined three (3) witnesses to refute the charges. On the incriminating materials arising against him, the statement of the appellant was recorded u/s 313 Cr.PC.

5. It was held by the learned trial Court that although the complainant was not an eye-witness, his evidence is relevant. He saw the broken door of the grocery shop and also noticed the injuries on his son. The injured victim who was the occupant of the shop was the complainant's son. The victim's evidence was found to be reliable. His evidence was found to be trustworthy. It was held by the learned trial Court that the respondent had nurtured grudge against the victim owing to an acrimonious relationship. The defence witnesses failed to rebut the evidence. The evidence of the respondent as DW-1 does not substantiate his statement u/s 313 Cr.PC. It was held that the accused-respondent failed to prove any alibi on the date of the incident. The trial Court then held the respondent guilty of offence u/s 457/324 IPC. Against the judgment and order of the trial Court an appeal was preferred by the respondent-accused.

6. It was held by the learned appellate Court that:-

"It thus appears that PW-1 along with his father (PW-5) made a drama for trapping the appellant who has developed strained relation with them over land dispute.

Evidence on record neither proved the offence U/S 457 IPC nor it could prove charge framed U/S 324 IPC.

The learned Trial Court did not go deep into the record and unnecessarily went to discuss the defence version of the case.

It is to be remembered that prosecution is to stand on its own leg, when the prosecution is able to prove its case, the turn comes for the defence to explain its view.

The serious material contradiction regarding the injuries and the vague medical report are sufficient to doubt the version of the prosecution.

I thus conclude that the learned Trial Court most illegally convicted judgment and order dt. 11/04/2007 passed by the learned Trial Court is hereby set aside and the appellant is acquitted. The fine, if paid, shall be refunded back."

7. It is submitted on behalf of the respondent that this case has come up for appeal after 16 long years. The alleged incident occurred about 21 years back. Much water has flowed under the bridge. The learned Sessions Judge has rightly passed the order. I have also considered the submissions on behalf of

the appellant State.

8. In this case at hand Riazuddin is the victim and he testified as PW-1. His evidence depicts that about a year ago, one night at about 1 AM while he was sleeping inside his grocery near the Kalibari road, he was jolted out of his slumber by noises of discussions between two persons and he heard Khairul Islam's voice. Thereafter the miscreants broke into his shop with a 'Shabol' and PW-1 ran away from his shop as he was terrified. The respondent followed him and assaulted him with a dragger and he sustained injuries on his left hand and on his back. He then went to the nearby Kalibari and called Pradip who came out of his house and offered him a loin cloth as he was naked.

9. Pradip Chakraborty testified as PW-3 that he provided PW-1 with loin cloth to cover himself, as PW-1 was naked. PW-3 also noticed bleeding injuries. He also saw the broken door of PW-1's shop and blood oozing out from PW-1's neck.

10. The Medical Officer (MO in short) Dr. A.S. Borbhuiyan, PW-6 who examined PW-1 stated that on 03.09.2002 at about 3:30 AM, he examined Riazuddin and found the following injuries:-

"One linear cut injury below the lower end of the left scapula at the back extending upto the middle of axilla and towards the middle of the lateral aspect of the upper arm about 3" from the left shoulder joint;

injury was at the lateral border of the back;

the sizes of the injuries were 3" x ½" x ¼";

injury on arm of size 4" x ½" x ½"

no bony lesions could be detected;

tenderness present."

According to the opinion of the doctor, the injuries were fresh and caused by sharp weapon and were simple in nature. The doctor proved his Medico Legal Report as Ext.-2 and his signature as Ext-2(1).

The MO, PW-6, examined the victim immediately after the incident which allegedly occurred at around 1:00 AM midnight on 03.09.2002.

11. Except PW-1 and PW-5 the other witnesses have not incriminated the respondent. The evidence of PW-1 depicts that there were four miscreants who broke into his shop, but he identified only Khairul and alleged that Khairul had physically attacked him with a dagger.

12. PW-2 Burhan Uddin stated that he along with his friend Abdul Salam were fishing and hearing cries emanating from Riaju's grocery, he rushed towards his shop and saw four persons including the respondent running towards the place of occurrence. He also noticed that Riaju sustained injuries on his back.

13. Abdul Salam, PW-4 who was with PW-2 stated that at that time he saw four persons including the respondent running towards Riazuddin's shop.

14. The complainant PW-5 met his son at Kalibari road with Pradip and he noticed the slashes on his son's back and neck and his son told him that Khairul Islam broke into his shop with the other miscreants and assaulted him. He, PW-5, immediately informed the Badarpur PS about the incident over phone at around 2 AM. The police came and took his son to Srigouri C.H.C. and on the following day, he lodged the FIR. He proved the FIR as Ext.1 and Ext.1(1) as his signature.

15. It is apparent from the evidence of PW-4 that the FIR was lodged on the same day. The MO also examined the victim on the same day. The victim, PW-1 deposed that the respondent followed him and assaulted him with a dagger and he sustained injuries on his left hand and on his back. The evidence of the injured victim was substantiated by findings of the Medical Officer who detected a linear cut injury on his back. In his cross-examination, the MO, PW-6, however opined that such kind of injuries could be caused by dashing against hard substance.

16. The cross-examination of the PW-5 vis-à-vis the cross-examination of the IO Sri K.K. Deb (PW-7) is relevant. The IO admitted in his cross-examination that PW-5 had not specifically stated in his initial statement that the accused assaulted his son. He (PW-5) had also not specifically stated in his initial statement that he asked his son (PW-1) about the incident. The IO (PW-7) also affirmed that PW-5 had not mentioned in his initial statement that his son informed him about the incident. This casts a shadow of doubt over the veracity of the evidence of PW-5. He is the informant and major contradictions could be elicited through the cross-examination of PW-5 vis-à-vis the cross-examination of the IO.

17. Although the evidence of PW-1 is substantiated by the evidence of the MO, but contradictions could be elicited by the defence on cross-examination of PW-1. The IO (PW-7) affirmed that PW-1 had not specifically mentioned in his initial statement that the accused Khairul assaulted him. This is a major contradiction and this casts a shadow of doubt over the veracity of PW-1's evidence. The other major contradiction which could be elicited through the cross-examination of PW-1 is that he did not mention in his initial statement before the IO that the accused accompanied by four other miscreants attacked him. The PW-1 also admitted in his cross-examination that it was dark at the time of the incident and he could not recognize the other assailants, but he could recognize only the accused.

18. In the wake of my foregoing discussions, it is thereby held that the contradictions which could be elicited through cross-examination of PW-1 and PW-5 vis-à-vis the cross-examination of the IO are major contradictions and these contradictions casts a shadow of doubt over the veracity of PW-1 and PW-5's evidence. It is also mentioned in the FIR (Ext-1) that the incident is the result of a previous acrimonious relationship. The trial Court relied heavily on the previous acrimonious relationship to convict the accused-respondent despite the contradictions elicited through the cross-examination of the witnesses. The learned Sessions Judge spelt out sound reasonings while setting aside the judgment and order of the trial Court. The defence witnesses are DW-1- accused, DW-2 Aatur Rahman and Dr. S.K. Sen, DW-3. The learned trial Court did not accept the evidence of the accused as DW-1. The trial Court in a piecemeal manner did not accept the evidence of Aatur Rahman who deposed as DW-2, but accepted and relied on the evidence of Dr. S.K. Sen, DW-3 who deposed that he was not aware if the accused was not well on 01.09.2002, 02.09.2002 and 03.09.2002. This cannot be a ground for conviction. The trial Court then went ahead and convicted the appellant. I however record my concurrence to the decision of the learned Sessions Judge, Karimganj. The major contradictions elicited through the cross-examination of PW-1 and PW-5 vis-à-vis the cross-examination of PW-7 casts a shadow of doubt over the veracity of the evidence of PW-1 and PW-5.

19. In view of my foregoing discussions, it is thereby held that this appeal is devoid of merits and the judgment and order dated 11.04.2007 passed by the learned Sessions Judge, Karimganj in Criminal Appeal No. 9(2) of 2007 is upheld.

20. Appeal is hereby dismissed.

21. Send back the LCR.

JUDGE

Comparing Assistant