

GAHC010097342020



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

Case No. : CRL.A(J)/49/2020

NEPALI BORUAH
S/O. LEKHAN BORUAH, R/O. TULSHIBARI GAON, P.S. GOGAMUKH, DIST.
DHEMAJI, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MR H GUPTA, AMICUS CURIAE

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN
JUDGMENT

16.11.2023

Heard Mr. H.P. Gupta, assisted by Mr. R. Dhar, learned counsel. Also heard Mr. P. Borthakur, learned Addl. P.P., Assam, representing the State respondent.

2. This appeal is preferred by appellant, namely, Shri Nepali Baruah from District Jail, Dhemaji, challenging the correctness or otherwise of the

judgment and order, dated 04.09.2019, passed in Sessions Case No.106(DH)/2015, arising out of Gogamukh P.S. Case No.52/2015, under sections 324/326/307 IPC, by the learned Sessions Judge, Dhemaji. It is to be noted here that vide the impugned judgment and order, the learned Court below has convicted the appellant, under sections 324/326/307 IPC, and sentenced him to suffer rigorous imprisonment (R.I.) for 6 years and also to pay a fine of Rs.1,000/-, with default stipulation, under section 307 IPC and also sentenced him to suffer R.I. for 6 years and also to pay a fine of Rs.1,000/-, with default stipulation under section 324 IPC, also sentenced him to suffer R.I. for 6 years and also to pay a fine of Rs.1,000/-, with default stipulation under section 326 IPC, and further directed that the substantive sentence shall run concurrently.

3. The background facts, leading to filing of the present appeal, are adumbrated herein below:-

“On 14.03.2015, one Phuleswar Doley of No.2 Berbhanga Village, under Gogamukh Police Station, lodged an FIR with the Officer-in-Charge, Gogamukh P.S. to the effect that on 13.03.2015, in the evening, while his son namely, Babul Doley and one Purna Pegu, Babai Doley, Dibya Pegu and Dibya Doley have found one Nepali Baruah lying on the road in a drunken state and then they have lifted him to his house, then his family members chased them being armed with weapon and waylaid them, and thereafter, Nepali Baruah and his family members assaulted them with dao and caused serious injuries to Babul Doley and his brothers and thereafter left the place. Then hearing hue and cry the neighbours came out and sent the injured to Hospital.”

4. Upon the said FIR, the Officer-in-Charge, Gogamukh P.S., registered

a case, being Gogamukh P.S. Case No.52/2015, under Section 326/307/34 IPC, and he investigated the same. During the course of investigation, he had visited the place of occurrence, examined the witnesses and got the victims examined by the Doctor and collected the report and also he had arrested the accused and forwarded him to the Court and thereafter, on completion of investigation, he laid charge sheet against the appellant Nepali Baruah to stand trial, in the Court under Sections 324/326/307 IPC.

5. On commitment of the case to the Court of Sessions, the learned Sessions Judge, Dhemaji had framed charges against the appellant, after hearing learned Advocates of both sides, under sections 324/326/307 IPC and on being read and explained over the same to the appellant, he pleaded not guilty to the same and claimed to be tried. Thereafter, the learned Court below had examined as many as 10 witnesses, including the M.O. and the I.O. and thereafter, hearing argument of both sides, found that the prosecution side has succeeded in establishing the case against the appellant, under sections 324/326/307 IPC and thereafter, convicted him and sentenced him as aforesaid.

6. Being aggrieved, the appellant has preferred this appeal from the District Jail, Dhemaji on the ground that: he is not satisfied with the judgment and order of conviction and sentence, so passed by the learned Sessions Judge, Dhemaji. It is to be mentioned here that as the appeal is being preferred from jail, Mr. H. Gupta, learned Advocate is appointed as Amicus Curiae.

7. Mr. H. Gupta, learned Amicus Curiae, assisted by Mr. R. Dhar, learned counsel, raised following points, for consideration of this court and contended to allow the appeal, by setting aside the impugned judgment and order:-

- (i) That, there is material contradictions in the version of the prosecution witnesses regarding the place of occurrence and in other aspects and on such count their evidences are not at all reliable;
- (ii) That, the weapon of offence could not be recovered and seized by the I.O. and as such it cannot said with certainty that the charges are proved;
- (iii) That, a cross cases was pending between the appellant and some of the prosecution witnesses and the present case is the counterblast of the case lodged by the appellant against the prosecution witnesses;
- (iv) That, the appellant is behind the bar for more than 4 years and therefore it is contended to take a lenient view in respect of sentence.

8. On the other hand, Mr. P. Borthakur, learned Addl. P.P., Assam submits that the witnesses examined by the prosecution side have clearly implicated the appellant with the offence charged. Mr. Borthakur further submits that the contradictions, so pointed out by the Mr. Dhar are minor contradictions and the same failed to cast any doubt about the veracity of the prosecution case. Mr. Borthakur further submits that non recovery of the weapon of offence is no consequence as the medical evidence has clearly established that the injuries were caused by sharp object. Further, Mr. Borthakur also submits that injuries, so caused upon one of the victims, was on the vital part of the body and knowing the same fully well, the appellant had administered the blows, and as such, it is a clear case under sections 324/326/307 IPC against the appellant

and that the learned Court below has rightly convicted the appellant and the same warrants no interference of this Court and therefore, it is contended to maintain the same.

9. Having heard the submission of learned Advocates of both sides, I have carefully gone through the petition and documents placed on record and also perused the record of the learned Court below and the impugned judgment and order.

10. It appears that the occurrence took place on 13.03.2015, at about 9 pm, at Berbhanga Village on the road near the house of the appellant Nepali Baruah. The FIR – Exhibit-1 and the evidence of the informant and other prosecution witnesses, clearly established the same. Though P.W. 4 has stated that the occurrence took place in his court yard, yet, the Sketch Map and the evidence of other prosecution witnesses, specially the victim, in no uncertain terms stated that it took place on the road near the house of appellant Nepali Baruah. It is to be noted here that the appellant had not disputed the date time and place of occurrence during trial, though the learned Amicus Curie has pointed this out during argument. Moreover, the contradictions so pointed out, is found to be insignificant and the same had failed to spell inveracity to the prosecution version, as rightly pointed this out by Mr. Borthakur.

11. That, while the occurrence took place on 13.03.2015, the informant had lodged the FIR with the Officer-in-Charge of the Gogamukh P.S. on 14.03.2015, at about 3 pm. It appears that the place of occurrence is located at a distance of 8 km from the P.S. Moreover, there is evidence that the informant's son had sustained serious injuries and he had taken his son to Gogamukh Hospital and from there to North Lakhimpur Civil Hospital, after the occurrence. Though no explanation for delay is forthcoming from the prosecution side, yet,

in the given facts and circumstances the delay stands explained though not expressly, but impliedly. Therefore, the delay could not spell inveracity to the prosecution version.

12. Now, let it be seen whether the victims have sustained any injury, and if so, whether the same were simple or grievous in nature and if so, whether caused by blunt/sharp object. To establish the same the prosecution side has examined victim Babul Doley as P.W.10. His evidence reveals that in the year 2015, on one day at about 9.30 pm, at No.2 Berbhanga village, he came out of his house after taking his meal. Then he had seen Nepali Baruah lying on the road, under the influence of liquor. He then lifted Nepali Baruah and taken him to his house as he regards him as his elder brother. When he was returning, he found someone attacking him on the road from behind with a dao. Then turning back, he found accused Nepali Baruah was the assailant and he was holding a dao in his hand. His evidence also reveals that he sustained cut injury on the head extending up to his cheek, left shoulder and back. Then he raised alarm and the neighbours arrived at there and taken him to Gogamukh Hospital and from there he was taken to Lakhimpur Civil Hospital. Nothing tangible could be elicited in his cross-examination, except however, that the appellant had also filed a case against him alleging that he had assaulted him and caused damage to his motor cycle.

13. The evidence of P.W. 10 finds support from the evidence of another victim, namely, Dibya Kumar Pegu, P.W. 5. His evidence reveals that on the date of occurrence, at about 8-9 pm while he was in the house of Kanteswar Mili, he heard hue and cry in the house of Nepali and then he went there and then he had seen Nepali had cut Babul Doley and Babul Doley sustained injuries over his head and near ear also, and while he tried to interfere the same Nepali attack

him also and caused injuries over his hand. Then both of them took treatment. Nothing tangible could be elicited in cross-examination of this witness also.

14. The medical evidence also lends support to the version of P.W.10 and P.W.5. The prosecution side has examined Doctor- Mukesh Patir as P.W.8. His evidence reveals that on 13.03.2015, on police requisition, he had examined one Babul Doley of No.2 Berbhanga at Gogamukh BPHC and found following injuries:-

- (i) A Chop wound of size- 15 cm x 1 cm x .5 cm (approx.) over left temporo parietal region (extending up to left temporo-mandibular region), fresh injury, caused by heavy sharp cutting weapon and grievous in nature;
- (ii) A Chop wound of size -10 cm x 3 cm x 02 cm (approx.) over left shoulder joint (posterior side) fresh injury, caused by heavy sharp cutting weapon and simple in nature;
- (iii) A Chop wound with underlying fracture at the lateral aspect of left fifth rib, of size 10 cm x 01 cm x 01 cm (approx.) over left scapular region, fresh injury, caused by heavy sharp cutting weapon and grievous in nature;
- (iv) A Chop wound of size 05 cm x 01 cm x .5 cm (approx.) over supra-clavicular region, fresh injury, caused by heavy sharp cutting weapon and simple in nature;

15. His evidence also reveals that on the same day he also examined one Dibya Pegu and found following injury:-

- (i) An incised wound of size- 07 cm x 0.5 cm x 0.5 cm, over left forearm (ante surface), fresh injury, caused by sharp cutting

weapon and simple in nature;

Further, his evidence reveals that the injury was caused within 12 hours of examination. His report -Exhibit-2 is also consistent with the evidence.

16. The other prosecution witnesses, P.W.1- Nomal Mili, P.W.2 Phuleswar Doley, P.W.3, Birason Doley also lends support to the version of the victim. These three witnesses, of course are not the eye witness to the occurrence. But P.W.1 had arrived at the place of occurrence immediately after the occurrence hearing hue and cry and he saw injury over the head and back of Babul Doley and Babul Doley told him that Nepali Baruah had caused the same. P.W.2 is the first informant. His evidence reveals that on the day of occurrence he was attending a ceremony in the house of a person. Then one boy informed him that Nepali Baruah had inflicted cut injury to his son Babul Doley, he then rushed to the place of occurrence and found his son Babul in an injured condition and on being asked Babul told him that the accused caused cut injury to him. He then took his son to Gogamukh Hospital and from there he was referred to Lakhimpur Hospital and he was under treatment for 15 days. Nothing could be elicited in cross-examination of these two witnesses to discredit their version, except, however, that Nepali Baruah also lodged a case against his son on the same day. Thus, the evidence of these two witnesses, are admissible as res-gestae. P.W.3, Shri Birason Doley, however, heard from public that Nepali Baruah had caused cut injury to Babul and Dibya but he could not state from whom he had heard about the same.

17. P.W.4 is Shri Purna Kanta Baruah, in whose courtyard the occurrence took place. His evidence reveals that Nepali Baruah had caused cut injuries on the ear, cheek and back of Babul with dao. It is elicited in cross-examination that he had heard that there was a fight between Nepali and Babul at tini-ali,

regarding a bike. The material part of his evidence, that Nepali Baruah had caused cut injury to Babul, remain un-rebutted in cross-examination and the said piece of evidence lends support to the version of the victim.

18. Babai Doley, P.W.6 is another victim and eye witness to the occurrence. His evidence reveals that on the day of occurrence he heard hue and cry on the road and then rushed to the place of occurrence and saw Babul Doley in an injured condition and he was cut by Nepali Baruah over his head, neck and back. And Nepali also cut him over his elbow and palm, just below the wrist. Then he was taken to Gogamukh Hospital and Purna, Dipak Pegu also got cut injury. It is elicited in cross-examination that Dibya Pegu was with him at the time of occurrence.

19. P.W. 7, - Shri Dibya Doley is another eye witness to the occurrence and he also supported the versions of the victims. His evidence reveals that on the day of occurrence at about 9 pm he was at Tiniali and there Nepali and Babul had a fight and then he tried to interfere the same, but, could not and then he left for home and then both of them fought again and then the family members of Nepali Baruah, namely, Mantri Baruah, Lekhon Baruah, all came chasing and Nepali Baruah assaulted Babul with a dao over his head and arms. And they also assaulted Purna Pegu and Dibya Pegu. Nothing tangible could be elicited in cross-examination to discredit this witness.

20. P.W.9 is the I.O., who had investigated the case and filed charge sheet-Exhibit-5, against the appellant. The appellant side, however, proves some contradictions in the versions of P.W.1- Numal Mili, P.W.2- Phuleswar Doley, but, the same are found to be not on material point, and therefore, failed to spell inveracity to the prosecution versions.

21. Thus, from the evidence discussed herein above, it becomes well established that victim Babul Doley suffered two simple injuries caused by sharp weapon and two grievous injuries, caused by sharp weapon. Further, it becomes established that victim Dibya Kumar Pegu also got one simple injury over his left forearm caused by sharp weapon. Also, it is established that P.W. 6 Babai Doley also got injuries over his hand and elbow respectively. And all these injuries were caused by appellant Nepali Baruah without grave and sudden provocation. There is ample corroboration in the version of the prosecution witnesses and the probative value of their evidence could not be demolished in cross-examination.

22. Thus, the prosecution side has succeeded in establishing the charge under sections 324 IPC against the appellant beyond all reasonable doubt. Since there was fracture on the lateral aspect of left fifth rib, the injury No.(iii) falls in seventh kind of hurt which are designated as grievous hurt under section 320 IPC. But, though the Doctor had described injury No. (i), as grievous, yet, it appears that the same does not fall in the category of hurt designated as grievous in section 320 IPC. Though it was on the head there is no material to suggest that it caused disfiguration of head. And it also appears that the appellant did so voluntarily, without any grave and sudden provocation. And that being so, the charge under section 326 IPC also stands established clearly. The learned court below, thus, rightly arrived at such a finding and convicted the appellant u/s 324/326 IPC accordingly. And the same warrants no interference of this court.

23. It also appears that the learned court below had convicted the appellant under section 307 IPC also, inferring the intention of the appellant to cause injuries to the victim Babul Doley from (i) the nature of weapon used (ii) the place over which the injuries were caused, (iii) nature of injuries caused, (iv)

the opportunity available with the appellant. Now, let it be seen whether the prosecution side had succeeded in bringing home the charge u/s 307 IPC against the appellant.

24. The essentials, to prove an offence under Section 307 (Attempt to Murder) of the Indian Penal Code are:-

- (1) That the accused did an act -
- (2) That it was done –
 - (i) with the intent, or
 - (ii) with the knowledge-
 - (a) of causing death,
 - (b) of causing such bodily injury as the accused, knew to be likely to cause the death of the person to whom the harm was attempted to be caused ; or
 - (c) of causing bodily injury to a person, and the bodily injury intended to be inflicted would have been sufficient in the ordinary course of nature to cause death ; or
 - (d) the act if completed would have been so imminently dangerous that it would have in all probability caused death, or such bodily injury as is likely to cause death; and the act attempted was committed without any excuse for incurring the risk of causing death or such injury as aforesaid.

25. The prosecution side has to prove all the (i) act (*actus*) and (ii) intention (*mensrea*) to bring home the charge u/s 307 IPC. Here in this case, we already find and hold that the prosecution side has been succeeded in bringing

home the charge u/s 324/326 IPC.

26. The evidence of the Doctor, P.W.8 and his report- Exhibit-2, reveals that Babul Doley had sustained four injuries and for ready reference, the same are reproduced herein below, even at the cost of repetition :-

- (i) A Chop wound of size- 15 cm x 1 cm x .5 cm (approx.) over left temporo parietal region (extending up to left temporo-mandibular region), fresh injury, caused by heavy sharp cutting weapon and grievous in nature;
- (ii) A Chop wound of size -10 cm x 3 cm x 02 cm (approx.) over left shoulder joint (posterior side) fresh injury, caused by heavy sharp cutting weapon and simple in nature;
- (iii) A Chop wound with underlying fracture at the lateral aspect of left fifth rib, of size 10 cm x 01 cm x 01 cm (approx.) over left scapular region, fresh injury, caused by heavy sharp cutting weapon and grievous in nature;
- (iv) A Chop wound of size 05 cm x 01 cm x .5 cm (approx.) over supra-clavicular region, fresh injury, caused by heavy sharp cutting weapon and simple in nature;

26.1. And another victim Dibya Pegu had sustained following injury:- (i) An incised wound of size- 07 cm x 0.5 cm x 0.5 cm, over left forearm (ante surface), fresh injury, caused by sharp cutting weapon and simple in nature;

27. It may be mentioned here that injury No. (i), of the victim Babul Doley was on vital part of the body, and the same, though described as grievous in nature by the Doctor and caused by sharp cutting weapon, yet, the same

does not fall in the category of hurt described as grievous hurt, in section 320 IPC. Rest of the injuries were not on vital part of body. But, injury No.(iii) was caused by heavy sharp cutting weapon and grievous in nature. And the injury sustained by victim Babul Pegu was fresh injury, caused by sharp cutting weapon and simple in nature.

28. Thus, from the nature and place of the injuries, sustained by victim Babul Doley, and also from the way the appellant had mounted attack upon him with sharp cutting weapon, it can be well inferred that the appellant had both the intention and knowledge that the injuries would likely to cause the death of the victim; or the bodily injury so inflicted would have been sufficient in the ordinary course of nature to cause death or it was so imminently dangerous that it would have in all probability, sufficient in the ordinary course of nature to cause death. And the learned court below had rightly done the same.

29. Thus, it appears that the prosecution side has succeeded in establishing the intention and also the knowledge of the accused to death of the victim, while inflicting the injuries upon him. And thus, succeeded in bringing home the charge u/s 307 IPC against the accused.

30. The learned Court below, having convicted the appellant, under sections 324/326/307 IPC, sentenced him to suffer rigorous imprisonment (R.I.) for 6 years and also to pay a fine of Rs.1,000/-, with default stipulation, under section 307 IPC and also sentenced him to suffer R.I. for 6 years and also to pay a fine of Rs.1,000/-, with default stipulation, under section 324 IPC, and also sentenced him to suffer R.I. for 6 years and also to pay a fine of Rs.1,000/-, with default stipulation under section 326 IPC, and further directed that the substantive sentence will run concurrently. Having adjudged the

aggravating and mitigating factors, the sentence so handed down, appears to be justified and to the considered opinion of this court, the same warrants no interference of this court.

31. In the result, I find no merit in this appeal and accordingly, the same stands dismissed. Send down the record of the learned court below immediately with a copy of this judgment and order. The parties have to bear their own costs.

32. Before parting with the record, this court is inclined to acknowledge the invaluable service, rendered by Mr. H. Gupta, the Amicus Curie, in disposing of this appeal. The Registry shall pay the requisite fee to him to as per entitlement, on furnishing a certified copy of this judgment

JUDGE

Comparing Assistant