



THE GAUHATI HIGH COURT AT GUWAHATI

(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Appeal No.58/2011

1. SRI JOGEN BARUAH,
S/O LT. GANESH BARUAH.
2. NANDESWAR BARUAH,
S/O LT. GANESH BARUAH.
3. BASANTA BARUAH,
S/O JOGEN BARUAH.
4. KALPENDRA BARUAH,
S/O JOGEN BARUAH.
5. JYOTISH BARUAH,
S/O LT. BANAMALI BARUAH.
6. SOMESWAR BARUAH,
S/O LT. BANAMALI BARUAH.

ALL ARE RESIDENTS OF VILL. CHALCHALI
BARAHIGAON, P.S. SAMAGURI,
DIST. NAGAON, ASSAM.

..... Appellants.

VERSUS

THE STATE OF ASSAM,

..... Respondent.

**BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN**

Advocates for the Appellants : Ms. Debashree Saikia,
Amicus Curiae.

Advocate for the Respondent : Mr. D. Das, Addl. PP,
Assam.

Date of Hearing :- 05.10.2023

Date of Judgment :- 09.11.2023.

JUDGMENT AND ORDER (CAV)

Heard Ms. Debashree Saikia, learned Amicus Curiae and also heard Mr. D. Das, learned Additional Public Prosecutor, Assam, appearing for the State respondent.

2. This appeal, under section 374(2) Cr.P.C., six appellants namely, Shri Jogen Baruah, Nandeswar Baruah, Basanta Baruah, Kalpendra Baruah, Jyotish Baruah and Someswar Baruah, have put to challenge the correctness or otherwise of the judgment and order dated 05.02.2012, passed in Sessions Case No. 225 (N)/ 2000, arising out of Samaguri P.S. Case No. 50/1999, under sections 147/148/324/323 IPC added section 302 IPC, by the learned Sessions Judge, Nagaon.

3. It is to be noted here that vide the impugned judgment and order, dated 05.02.2012, the learned Court below had convicted the

appellants under section 323/34 IPC, and sentenced them to suffer rigorous imprisonment (R.I.) for 6 months and also to pay a fine of Rs.1,000/-, each, in default, to suffer simple imprisonment for another one month.

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

“On 05.04.1999, one Ananta Mohan Mahanta of Chalchali Birohi Gaon, under Samaguri Police Station, lodged an FIR with the Officer-in-Charge, Samaguri P.S. to the effect that on the same day, at about 8 am, in the morning, while accused Jogen Baruah, Basanta Baruah, and Kalpendra Baruah were carrying bamboo, after cutting the same from his land, measuring 01 Bigha 02 Katha 17 Lecha, covered by Dag No. 615 and Patta No. 76, in connection with which a case under section 145 Cr.P.C. is pending, then he prevented them in doing so and then accused Jogen Baruah, Nandeswar Baruah, Basanta Baruah, Kalpendra Baruah, Jyotish Baruah and Someswar Baruah, being armed with sticks and dao dealt cut blow on him as well as his son- Kunja Kishor Mahanta with a dao and they also attacked his another son namely, Shamendra Mahanta with dao and stick etc. They have also assaulted his wife - Smti. Lakhi Prabha Mahanta, while she went to the place of occurrence.”

5. Upon the said FIR, the Officer-in-Charge, Samaguri P.S., registered a case being Samaguri P.S. Case No.50/1999, under Section 147/148/323/324 IPC and endorsed ASI G. Das to take preliminary

step. During investigation, the ASI had visited the place of occurrence, examined the witnesses and got the victims examined by the Doctor and collected the report. After few days victim Kunja Kishor Mahanta suffered demise and then the I.O. held inquest on the dead body and sent the same for post-mortem examination and thereafter, he had added section 302 IPC with the previously added sections with permission from the learned court below. Thereafter, he had collected the report and then on completion of investigation, the I.O. laid charge sheet against the appellants to stand trial, in the Court under Sections 147/148/149/323/302 IPC.

6. On commitment of the case to the Court of Sessions, the learned Sessions Judge, Nagaon had framed charges against the appellants, after hearing learned Advocates of both sides, under sections 323/324/302/34 IPC and on being read and explained over the same to the appellants, they pleaded not guilty and claimed to be tried. Thereafter, the learned Court below has examined as many as 7 witnesses, including the M.O. and the I.O. and thereafter, found that the prosecution has succeeded in establishing the case against the appellant under sections 323/34 IPC and sentenced them as aforesaid.

7. Being aggrieved, the appellants have preferred this appeal on the following grounds:-

- (i) That, the evidence relied upon by the learned Court below have not conclusively proved that the appellants were the perpetrator of the alleged crime and that they have shared common intention in committing the crime.

- (ii) That, the prosecution side has failed to conclusively prove that the injuries sustained by the victims were caused by the seized weapon of offence and that the Doctor (P.W.4), found that the injuries sustained by the victims were caused by blunt object.
- (iii) That, there is no evidence to suggest that the appellants were the aggressor, rather it appears that P.W.1, the informant, was the aggressor and that the plot of land, where the bamboos were cut, was a disputed plot of land.
- (iv) That, the independent witnesses have not supported the prosecution case and in fact they have not seen the occurrence.
- (v) That the learned Court below had failed to appreciate that there was a cross-case filed by the appellants against the informant.

8. Ms. Debashree Saikia, learned Amicus Curiae 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 are material contradictions in the version of the P.W.1 and 2 and on such count their evidences are not at all reliable;
- ii) Secondly, it is pointed out that the informant was the aggressor and that the appellants have exercised their right of private defence.

- iii) Thirdly, it is pointed out that cross-case was pending between the appellant and the informant and the learned Court below had failed to consider this aspect.
- iv) Fourthly, it is submitted that appellant Jogen Borah is 79 years old and Nandeswar Baruah is 59 years old and Jyotish Baruah is 61 years old and that the accused persons have no criminal antecedent and on such counts the accused persons deserve some leniency, at least the benefit of probation. To bolster such submission the learned Amicus Curie has referred two case laws **(i) Om Praksh and Ors. Vs. State of Madhya Pradesh** reported in **(1982) 3 SCC 224** and **(ii) Jagat Pal Singh and Ors. Vs. State of Haryana**, reported in **AIR 2000 SC 3622**.

9. On the other hand, Mr. D. Das, learned Addl. P.P., Assam submits that the witnesses examined by the prosecution side have clearly implicated the appellants with the charge under section 323/34 IPC. Mr. Das further submits that the contradictions, so pointed out by the learned Amicus Curie are minor contradictions and the same failed to cast any doubt about the veracity of the prosecution case. Mr. Das further submits that the learned Court below has rightly convicted the appellantsu/s 323/34 IPC and the same warrant no interference of this Court and therefore, it is contended to maintain the same.

10. Having heard the submission of learned Advocates of both sides, I have carefully gone through the appeal and the documents placed

on record and also perused the record of the learned Court below and the impugned judgment and order.

11. It appears from the FIR-Exhibit-1, and also from the evidence of the prosecution witnesses that the occurrence took place on 05.04.1999, at about 8 am at Chalchali Birohi Gaon, under Samaguri P.S. It is to be mentioned here that the appellant side has not disputed the date, time and place of occurrence.

12. It also appears that while the occurrence took place on 05.04.1999, at about 05.04.1999, the informant had lodged the FIR with the Officer-in-Charge of the Samaguri P.S. on the same day, at about 11.30 am, and as such there is delay of few hours in lodging the FIR. It also appears that the place of occurrence is located at a distance of 10 km from the P.S. Moreover, there is evidence that the informant and his two sons' sustained injuries and they took first aid at Puranigudam Govt. Dispensary. In view of above the delay of few hours in lodging the FIR seems to be immaterial and the same also fails to spell inveracity to the prosecution version.

13. Now, let it be seen whether the victims have sustained any injury and if so, whether the same are simple or grievous in nature and if so, whether caused by blunt or sharp object. To establish the same the prosecution side has examined the informant Ananta Mohan Goswami as P.W.1. His evidence reveals that on the date of occurrence at about 8 am, accused Jugen Baruah, Basanta Baruah, Kalpendra Baruah, Nandeswar Baruah, Jyotish Baruah, Someswar Baruah came to a plot of land belonging to him and in respect of

which a case under section 145 Cr.P.C., lodged by him was pending against them, for cutting bamboo. His evidence also reveals that while the accused were carrying away bamboo, after cutting 30-40 numbers of the same, he got up from sleep and prevented them in doing so. Then the accused persons chased to assault him and then he caught hold of the dao. Then the accused persons assaulted him with lathi, dao, and handle of axe and as result he fell down and fainted and then some one had carried him. His evidence also reveals that his son Kunja Bihari Mahanta came forward to rescue him and then the six accused persons assaulted him and hacked him with a dao and then his son fell down. When his elder son came forward with barehand then the accused persons assaulted him also. Then he lodged the FIR- Exhibit-1. Thereafter, on 27.04.1999, his son Kunja Mahanta suffered demise. The FIR - Exhibit-1, is also consistent with his version.

14. Nothing tangible could be elicited in cross-examination of this witness. He categorically stated that the disputed land is belonging to his father and in connection with the incident accused Jugen Baruah also lodged one case. It is also elicited that Kunja got incised wound over his head and after consulting Doctor, he brought him back to home on the same day.

15. The evidence of P.W. 1 finds support from the evidence of another victim, namely, Shamendra Mahanta- P.W. 2 also. His evidence reveals that on 05.04.1999, while he was having tea then he heard the shouting of his brother Kunja Mahanta and then he came out and followed him. Then at a distance of 20 feet before reaching

the place of occurrence, he saw the accused person assaulting his father with lathis, as a result of which his father fell on the ground. He also saw accused Jugen Baruah administering dao blow on his person of his brother Kunja, who was ahead of 10 feet from him, but the said blow missed his brother and then Jugen Baruah had administered second blow over the head of his brother. Then accused Nandeswar Baruah assaulted Kunja over his chest by blunt side of an axe. And thereafter, Jugen Baruah and Nandeswar Baruah started punching him and rest of the accused also started beating him with lathis. As he tried to interfere, accused Joytish Baruah had administered lathi blow over his head and when he resisted, he sustained injury over his hand and elbow and then all the accused persons assaulted him and then he became unconscious. From that day onward the health of his brother deteriorated and after 23 days, he suffered demise. It is elicited in cross-examination that the accused persons don't have any land near his land and that and that there was nothing in his and his father's and brother's hand.

16. Thus, it appears that the evidence of both the victims lends unstinting support to the prosecution version that the accused persons have assaulted both of them and also assaulted Kunja Mahanta, who suffered demise after 23 days of the occurrence. No material contradiction in their versions is brought on record and proved so as to spell inveracity to their version. That being so, the submission of the learned Amicus Curie, in this regard, is found to be devoid of any force.

17. The medical evidence also lends support to their versions. Doctor-Krishna Borah, (P.W.-4) of Nagaon Civil Hospital, testified that on 05.04.99, he had examined Ananta Mahanta and found cut injury over the mid skull, measuring 8 cm x bone deep, and cut injury over the lower and left thumb and the injuries were simple in nature and caused by sharp edge of blunt weapon.

18. His evidence also reveals that on the same day he also examined Kunja Mahanta and found cut injury over his forehead, measuring 6 cm x bone deep. The injury was simple in nature and caused by blunt weapon. Further, his evidence reveals that on the same day, he also examined one Samendra Mahanta and found:-

- (i) A cut injury over forehead (right side) measuring 3 cm x bone deep;
- (ii) A cut injury over the left hand measuring 5 cm x bone deep and both the injuries were simple in nature and caused by blunt weapon.

It is, however, elicited in his cross-examination that the injuries sustained by the victims, may be caused by falling over cut/split bamboo. But no such suggestion was given to the P.W.1 and 2 in their cross-examination by the appellant side.

19. P.W. 5 - Kalimuddin also testified that about 5 years back, he came to cut bamboo and then he met the youngest son of the informant who told him that Jugen and Kalpendra were cutting bamboo from the bamboo grooves of their land. Then arriving at

there, he saw the father and son were cutting bamboo and he also saw fighting between both the parties and Jugen and Kalpendra had cut and carried away bamboo. He had also seen injury over the head of Kunja and Shamendra and on the head of informant Ananta, but, he did not notice who caused the same. But, he saw the accused persons at the place of fighting. It is elicited in cross-examination that he did not see wounds on the persons of Jugendra, Kalpendra and Jyotish Baruah. It is also elicited that he disengaged them from quarrelling. Thus, this witness also supported the prosecution version to the extent that he had seen both the parties fighting at the place of occurrence and that he had seen injuries on the persons of the victim.

20. P.W.6 – Ibrahim Ali is also an eye witness to the occurrence. His evidence reveals that in the year 1999, on one day, at about 8 am in the morning, while he came to the field for tethering buffalo, he saw the incident of fighting, but he did not see who beat whom. He had seen the accused persons assaulting with lathi. His evidence also reveals that Moina was bleeding due to crack over his head and the accused persons have dealt cut blow on the head of Shamendra and Ananta. At this stage the prosecution side had declared this witness hostile and brought on record his statement made before the police and confirmed the same through the I.O. - P.W. 7 that 'he saw from a distance Jogen Baruah, Jyotish Baruah, Nandeswar Baruah and Someswar Baruah, being armed with dao and axe and lathi assaulting three persons including Moina @ Kunja and Samendra. It is elicited in cross-examination by defence that he had not seen any injury on the person of Jugen, Nandeswar, Jyotish and Kalpendra. Though this

witness declared hostile yet, the unhostile part of his evidence also lends corroboration to the prosecution version.

21. P.W.7 is the I.O. Shri Gupeswar Das, who had conducted preliminary investigation. His evidence reveals that he had visited the place of occurrence, examined the witnesses and drawn up sketch map of the place of occurrence and he took statement of witness Kunja Mahanta and Exhibit-2 is the said statement and that Kunja @ Mahanta died and then he made a prayer for addition of section 302 IPC and the same was allowed and then he held inquest on the dead body and sent the same for autopsy and then collected the report and on completion of investigation the Officer -In -Charge laid charge sheet, Exhibit-3 in the court. It is elicited in his cross-examination that he had received Exhibit- 'Ka' an FIR lodged by accused Jugen Baruah at about 10.45 am, 05.04.1999, and he had investigated the said case also.

22. Thus, it becomes apparent that the injuries sustained by the three victims, namely, Ananta, Kunja and Samendra were simple in nature and caused by blunt weapon. Further it appears that the injuries upon the said three victims were caused by none other than accused Jugen Baruah, Nandeswar Baruah, Jyotish Baruah, Basanta Baruah, Kalpendra Baruah and Someswar Baruah. Thus, this is clear case under section 323 IPC. Further, the way the accused persons arrived at the place of occurrence together and the way they have mounted attack upon the victims and the way they have cut bamboo from the land of the informant, in respect of which a case under

section 145 Cr.P.C. was pending, goes a long way to establish that they have shared common intention.

23. Further, it appears that though one of the victims, namely, Kunja Mahanta suffered demise, yet, the medical evidence reveals that he suffered demise due to myocardial infraction and rupture of ventricle, not because of the injury caused by the appellants. The prosecution side has examined the Doctor Briz Mohan Rai Khederia, who had conducted autopsy on the dead body of Kunja Mahanta as P.W. 3. He categorically stated that on examination of the thorax he found that pericardium contained blood. Coronary vessels over the left ventricle found to be occluded with blood clot. Muscles of left ventricle near apex were found to be infracted and ruptured. The infracted muscle area was pale. He also found healed wound over the right parietal area of scalp measuring 5 cm. This healed wound has no connection with myocardial infraction. Thus, the learned court below has rightly acquitted the appellants of the charge under section 302 IPC.

24. Thus, no infirmity or illegality is found to have been committed by the learned court below while recording the finding of guilt of the appellants and convicting them under section 323/34 IPC and it requires no interference of this court.

25. Though the learned Amicus Curie had submitted that the informant was the aggressor and that the appellants have exercised their right of private defence, yet, the evidence on the record speaks otherwise. It is evident from the materials available on the record that the appellants were armed with weapons and they were the aggressor

and the victims were unarmed. That being so, the right of private defence is not available to the appellants and the learned court below also aptly deals with such a plea in the impugned judgment. It is, however, a fact that a cross case was pending between the appellant and the informant. But, it is a settled proposition of law that each case has to be decided on its own merit. This being the position, the submission of learned Amicus Curie is found to be devoid of substance.

26. The learned court below, having convicted the appellants under section 323/34 IPC, declined to extend the benefit of the Probation of the Offenders Act to them having regards to the manner of committing the offence and assaulting the unarmed persons and causing the injuries to them. Thereafter, the learned court below had sentenced them to suffer rigorous imprisonment (R.I.) for 6 months and also to pay a fine of Rs.1,000/-, each, in default to suffer simple imprisonment for another one month.

27. I have considered the submission of learned Amicus Curie, in respect of extending the benefits of probation to the accused persons. According to the learned Amicus Curie, accused Jugen Baruah is 79 years old and accused Jyotish Baruah is 61 years old and accused Nandeswar Baruah is 59 years old, the factum of which is not disputed by the state respondent. Further, it appears that they have no criminal antecedent. Besides, the case is pending for more than 24 years, being the same registered in the year 1999. These are some of the circumstances, favourable to the appellants. I have gone through the

case laws **Om Praksh** (supra) and **Jagat Pal Singh** (supra), referred by the learned Amicus Curie and find that the same also embolden her submissions. Notably, in the said cases Hon'ble Supreme Court has extended the benefit of probation to the appellants who were convicted under section 323 IPC and also under sections 452/506 IPC respectively. However, in the instant case the learned court below had considered the provision but, refused to extend the benefit, which was not considered in the case of Jagat **Pal Singh** (supra).

28. While dealing with the point of desirability of extending the benefit of Probation of the Offenders Act to the accused, Hon'ble Supreme Court in **Sitaram Paswan and Anr. v. State of Bihar**, reported in **AIR 2005 SC 3534** has held as under:-

"For exercising the power which is discretionary, the Court has to consider circumstances of the case, the nature of the offence and the character of the offender. While considering the nature of the offence, the Court must take a realistic view of the gravity of the offence, the impact which the offence had on the victim. The benefit available to the accused under [Section 4](#) of the Probation of Offenders Act is subject to the limitation embodied in the provisions and the word "may" clearly indicates that the discretion vests with the Court whether to release the offender in exercise of the powers under [Section 3](#) or 4 of the [Probation of Offenders Act](#), having regard to the nature of the offence and the character of the offender and overall circumstances of the case. The powers under [Section 4](#) of the Probation of Offenders Act vest with the Court when any person is found guilty of the offence committed, not punishable with death or imprisonment for life. This power can be exercised by the Courts while finding the person guilty and if the Court thinks that having regard to the

circumstances of the case, including the nature of the offence and the character of the offender, benefit should be extended to the accused, the power can be exercised by the Court even at the appellate or revisional stage and also by this Court while hearing appeal under [Article 136](#) of the Constitution of India."

29. In **Mohd. Hashim v. State of U.P and Ors. AIR 2017 SC page 660**, Hon'ble Supreme Court has opined as under:-

"20-.....[In Rattan Lal v. State of Punjab](#) AIR 1965 SC 444. Subba Rao, J., speaking for the majority, opined thus:-

"[The Act](#) is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him. Broadly stated, the Act distinguishes offenders below 21 years of age and those above that age, and offenders who are guilty of having committed an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. While in the case of offenders who are above the age of 21 years absolute discretion is given to the court to release them after admonition or on probation of good conduct, subject to the conditions laid down in the appropriate provisions of the Act, in the case of offenders below the age of 21 years an injunction is issued to the court not to sentence them to imprisonment unless it is satisfied that having regard to the circumstances of the case; including the nature of the offence and the character of the offenders, it is not desirable to deal with them under [Sections 3](#) and [4](#) of the Act."

30. As stated in the foregoing paragraph, the incident took place way back in the year 1999. The accused-appellants have suffered in

the matter for past 24 years and there is no any criminal antecedent of the appellants also.

31. Having regards to above, and also bearing in mind the principles laid down by the Hon'ble Supreme Court in the cases discussed above, this court is of the considered opinion that this is a fit case where the benefit of section 4 of the Probation of the Offenders Act can be extended to the appellants. Though the learned court below had refused to extend the benefit of probation to the appellants, yet, the ground assigned is, while examined in the light of the principles discussed in the cases herein above, found to be not in conformity with the spirit and object of the said Act.

32. In the result, the appeal is partly allowed with following modifications:-

- (i) The conviction of the accused/appellants, by the learned court below is upheld.
- (ii) The sentence of appellants/accused is modified to the extent that they are provided the benefit of Section 4 of the Probation of Offenders Act and they are released on probation on the condition that they will keep peace and good conduct for two years from today and shall file two sureties to the tune of Rs.50,000/- along with their personal bond before the learned court below and also an undertaking to the effect that they shall maintain peace

and good behavior during the period of two years from today.

- (iii) It is further directed that each of the accused/appellants shall deposit a sum of Rs.25,000/-, being the compensation, in view of the provision of section 5 of the Probation of the Offenders Act, before the learned court below, within a period of two months from today and the learned court below shall release the said amount in favour of the two victims, i.e. P.W.-1 and P.W.-2.
- (iv) In case of breach of any of the conditions, mentioned above, is proved, the appellants will be subjected to undergo the sentence as directed by the court below.
- (v) The bonds aforesaid will be filed by the appellants-accused within two months from today, before the learned court below.

33. In the result, this appeal is partly allowed to the extent indicated above. 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.

JUDGE

Comparing Assistant