

GAHC010154882022



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

Case No. : CRL.A(J)/85/2022

SALON THAUSEN
KARBI ANGLONG, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

B E F O R E
HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

Advocate for the appellant : Shri A. Tiwari, Amicus Curiae
Advocate for the respondents : Shri K.K. Das, Addl. PP, Assam.

Date of hearing : 07.11.2024

Date of judgment : 25.11.2024

JUDGMENT & ORDER

(S.K. Medhi, J)

The instant appeal has been preferred from Jail against the judgment dated 17.06.2022 passed by the Sessions Judge, Karbi Anglong, Diphu in Sessions Case No. 309/2017 (New) / Sessions Case No. 97/2010 (Old). By the impugned judgment, the appellant has been convicted u/s 323/302 of the IPC with R.I. for life and a fine of Rs. 10,000/-, in default, R.I. for 1 year and further a fine of Rs. 1000/- u/s 323 IPC in default, R.I. for 3 months.

2. The criminal law was set into motion by lodging of an *Ejaha*r on 15.12.2009 by the PW4. It was stated that on the previous night at about 11.30 PM when the informant along with the deceased who was his maternal uncle were going to his house at Kheroni, the appellant had suddenly punched him on the right eye and thereafter assaulted the deceased with sharp weapon causing grievous injuries, as a result of which the deceased had expired in the Diphu Civil Hospital. Based on the *Ejaha*r, an F.I.R. was registered and after completion of the investigation, formal charge sheet was filed. The charges were accordingly framed and on denial thereof the trial had begun.

3. In the trial, the prosecution had adduced evidence through 8 nos. of PWs and the informant was the PW4. The PW1 and PW2 are co-villagers who are hearsay witnesses. PW3 had stated that his house was near the place of occurrence and hearing a commotion, he had gone to the place of occurrence which was about 200 metres and found the deceased, who was his brother-in-law lying on the ground beside the kaccha road in a critical condition. Then the

PW3 had called the people residing nearby and brought the deceased to his house and whereafter by means of an ambulance, the PW3 along with 3 boys of the village had taken the deceased to the Diphu Hospital. The deceased had succumbed to his injuries at about 3 am. Meanwhile, the matter was informed to the police who had come in the morning and got the postmortem done. He has deposed that later he had heard from the people of the village that it was the appellant who had assaulted the deceased to his death. In his cross-examination, he clarifies that he was not a witness to the incident and the accused and the deceased had cordial relationship and there was no quarrel.

4. PW4 is the informant is the nephew of the deceased. He deposed that while coming with the deceased at about 11 PM on that day the appellant had punched him on his right eye and thereafter had assaulted the deceased with a lathi on his head. He had deposed that thereafter he came to his uncle's house when his uncle had come out and heard the incident. Thereafter he with his uncle and aunt had come to the place of occurrence with an earthen lamp. Thereafter, the deceased was taken to the Diphu Government hospital by a 108 Ambulance which was called by the villagers. He deposed that he had also come to the hospital as he has sustained an injury and at about 3 am, the deceased who was his maternal uncle had expired and postmortem was done. He had identified the appellant in the Court. In his cross-examination, PW 4 however clarifies that there was no quarrel with the appellant and that there was darkness at the place of occurrence.

5. It may be mentioned that on 21.12.2009, the informant who had deposed as PW4 had got his statement recorded under Section 164 of the Cr.P.C. In the said statement he had stated that the appellant had assaulted the deceased with a *dao* several times whereafter he had come to his uncle's house, namely,

Fanilal Difusa (PW3) when his aunt had woke him up and all of them had gone out looking for the deceased who was found grievously injured in his face and head with cuts of *dao*. Some of his teeth were also found lying on the ground whereafter he was taken to the Diphu Civil Hospital by a 108 Ambulance.

PW 5 is the brother of the deceased and is a hearsay witness which is clarified in his cross examination. In the said cross-examination he had also deposed that the deceased and the appellant had alcohol in the same evening.

6. PW6 is the Doctor who had conducted the post-mortem on 15.12.2009. In his opinion, the death was due to multiple lacerated wounds leading to shock and hemorrhage and in the cross-examination, he had stated that the injuries sustained were due to sharp cutting weapon. PW7 is the I.O. who had deposed that the appellant was apprehended from the forest area. He however states that the *dao*, which was the weapon used was not seized.

7. The PW-7-I.O. had also deposed of preparing of sketch maps. PW 8 is the Doctor who had examined PW4 - informant on 15.12.2009 and the report was exhibited as Exhibit-P6 wherein injuries were found which were simple and caused by blunt weapons. It may be mentioned that the date of examination has however been written as 15.12.2010. However, the PW8 in his cross examination had clarified that it was an error.

After completion of the evidence of the prosecution, the appellant was examined under Section 313 of Cr.P.C. It may be mentioned that in his statement he had stated that he was arrested from his home. Based on the aforesaid depositions and the other materials before the learned Court, the impugned judgment has been passed which is the subject matter of appeal.

8. We have heard Shri A. Tiwari, learned Amicus Curiae for the appellant. We

have also heard Shri K.K. Das, learned Addl. Public Prosecutor, Assam.

9. Shri Tiwari, the learned Amicus Curiae has submitted that though the projection has been made that the instant case is based upon the deposition of an eye witness, the said eye witness is not trustworthy at all as there are apparent inconsistencies in his own version as well as the other materials on record. He has submitted that the deposition of PW 4 – informant is inconsistent with his statement made in the FIR as well as the statements recorded under Section 164 of the Cr.P.C. He submits that it is only the evidence made as a witness which is a substantive piece of evidence wherein the assault has been said to be made by use of a lathi. On the other hand, he submits that the medical evidence would show that there were cut injuries and the PW6, i.e., the Doctor who had conducted the postmortem had clarified in the cross examination that the injuries were caused by sharp cutting weapon.

10. Coming to the deposition of PW3, who is the uncle of the informant, he did not even refer to the presence of the informant when he had gone out of his house and found the deceased in a critical condition. Though PW4 had stated that he had gone to the house of PW3 and woke up the PW3 and his wife, the version of PW3 is not consistent with the deposition of PW4. PW3 submits that hearing some commotion, his wife had woken up PW3 whereafter he had gone out of the house and found the deceased in a critical condition whereafter he had called the nearby villagers. The deceased who was in critical condition was said to be taken to his residence and only thereafter an ambulance was called and from the house of PW- 3, the deceased was taken to the Diphu Civil Hospital. It is submitted that there is a major contradiction with regard to the description of the weapon alleged to have been used. He has also submitted that not to talk about the *dao*, no weapon at all was seized. He has also

submitted that from the materials on record, no animosity could be proved to be existing between the deceased and the appellant and vital persons, namely, the wife of the PW3 and the residents of the nearby houses were not examined. He accordingly submits that relying upon the version of the PW-4, it would be a travesty of justice to hold the appellant guilty. The learned Amicus Curiae accordingly submits that the appeal is liable to be allowed and the appellant be acquitted.

11. *Per contra*, Shri K.K. Das, learned Additional Public Prosecutor, Assam has submitted that the depositions and the materials on record are sufficient to come to a conclusion of guilt of the appellant. It is submitted that the present case is one wherein there is direct evidence namely an eye witness in the form of PW4. It is submitted that PW4 had described the assault and when he was himself injured by the appellant the credence which is liable to be given to him stands on a higher footing. He submits that the deposition of an injured witness who had suffered injuries in the same transaction stands on a higher footing and should be given greater significance. The learned Addl. Public Prosecutor, by relying upon the statement of the PW4 made under Section 164 of the Cr.P.C. has submitted that the injuries described matches with the FIR as well as the post-mortem report and the deposition of the Doctor as PW6. It is also submitted that the injuries on the body of the deceased are also corroborated by the deposition of PW5 who is the brother of the deceased and had come to the place of occurrence and saw the injuries. It is submitted that when there is an eye witness, there is no reason to disbelief this evidence. It is accordingly submitted that the present appeal does not have any merits and is liable to be dismissed.

12. The rival submissions have been duly considered and the materials placed

before this Court including the LCR have been carefully perused.

13. The incident had occurred on 14.12.2009 at about 11 PM. PW4, who is the informant and the nephew of the deceased had deposed that he was coming with the deceased when the appellant suddenly had punched on his right eye and thereafter assaulted the deceased and from the injuries sustained, the deceased had succumbed on the following day. It is however required to be noted that there is a major inconsistency with regard to the weapon. Whereas in the FIR the description is a sharp weapon and in the statement recorded under Section 164 of the Cr.P.C., the PW4 had stated that the injuries were made by cuts by *dao* on the face, tongue and head, in his evidence as PW4 the description of the weapon is *lathi* (stick). It is a settled principle of law that it is the evidence made as a witness on the dock in the Court is to be regarded as a substantive piece of evidence and therefore it is required to be examined as to whether the inconsistencies with the description of the weapon is a major one. As noted above, in the FIR, no weapon as such was mentioned and it was only stated that it was a sharp weapon. On the other hand, in the statement under Section 164 Cr.P.C. the weapon has been specified as the *dao*. Though there may not be much inconsistencies with a sharp weapon and a *dao*, the inconsistencies with the depositions of PW4 with regard to the description of the weapon is however a major one wherein the weapon has been described as a stick. There is a significant difference between a stick and a *dao* or for that matter any other sharp cutting weapon. If assuming that instead of a stick any other sharp cutting weapon other than a *dao* was mentioned, the matter would have perhaps been different. However, in the instant case, the description is wholly different.

14. We are of the considered view that when the description of the weapon

made by the so called eye witness as PW4 is wholly inconsistent with the nature of the injuries and the medical evidence, it would not be prudent to rely solely upon such evidence and therefore the aspect of corroboration would be necessary.

15. On the aspect of corroboration of the evidence of PW4, we have seen that apart from the gross inconsistency of the description of the weapon made by the PW4, his version is also not consistent with that of the version of PW3. PW4 had deposed that he had run away from the place of occurrence and come to the place of house of PW3 and along with him and few others had again gone to the place of occurrence. However, there is not even a passing reference in the deposition of PW3 regarding the presence of PW4 in the entire scenario. Rather, PW3 has deposed that he was awoken by his wife hearing some commotion whereafter he had gone out and found the deceased in a critical condition and on his calling, certain villagers had come and taken the deceased to the house of PW3 and only thereafter an ambulance was called whereafter the deceased was taken to the Diphu Civil Hospital where he had succumbed. The presence of the PW4 who is the so called star witness has not even been remotely mentioned by the PW3. As noted above, PW1, PW2 and PW5 are hearsay witnesses and they had deposed on the basis of the information they had received.

16. In various judicial precedence, including the case of ***Maula Bux vs. State of Rajasthan*** reported in ***(1983) 1 SCC 379***, it has been laid down that in case of inconsistencies of medical evidence, the benefit should go to the accused person. In the said case, there was inconsistency noted between the inquest report and the medical evidence and the Hon'ble Supreme Court had highlighted the aspect of maintaining a judicial caution in such circumstances.

17. There is another aspect of the matter. No weapon of any nature whether a *lathi* or a *dao* was seized. In the deposition of the I.O. as PW7, he has first gone to the Diphu Civil Hospital wherein he had done an inquest and had sent the body of the deceased for post-mortem whereafter he had come to the place of occurrence and had prepared a sketch map. No seizure of any articles were made from the place of occurrence in spite of the other depositions that some teeth of the deceased were found to be lying near him when he was found. No blood stains were noted or seized for forensic examination. Though certain statements have been made regarding the search made for the *dao* in question, it was not found. The version of the I.O. that the accused was found in the forest area is also not supported by any other witness whereas the accused in his explanation made under Section 313 of the Cr.P.C. had stated that he was apprehended from his house.

18. The materials on record have also revealed that there was no animosity between the appellant and the deceased. We have also noted that the wife of PW3 who would have been a vital witness was not examined. Similarly none of the residents of the nearby houses who had allegedly come to the place of occurrence on the calling of PW 3 were examined.

19. The aforesaid discussions and the materials on record would, in our considered opinion not be sufficient to come to the conclusion of the involvement of the appellant and none else in the offence in question. That being the position, the benefit of doubt has to go to the appellant as the materials before the Court would not conclusively lead to holding the appellant guilty of the offence.

20. Accordingly, the appeal stands allowed and the appellant is acquitted.

21. The appellant is accordingly directed to be released forthwith unless he is wanted in any other case.

22. Send back the LCR.

23. Before parting we would like to record out appreciation for the assistance rendered by the learned Amicus Curiae and he would be entitled to the prescribed fee.

JUDGE

JUDGE

Comparing Assistant