

District : Sonitpur.

BEFORE THE COURT OF THE ADDITIONAL SESSIONS JUDGE, FTC, BISWANATH CHARIALI.

CRIMINAL APPEAL NO.52(S-4)/2012

1. Sri Thaneswar Borah and
2. Sri Someswar Borah Appellants/Accuseds.
- VS -
State of Assam Respondent.

PRESENT

SRI S. KHOUND
Addl. District & Sessions Judge,
Biswanath Chariali.

For the appellants :- Mr. J. Bordoloi
Advocate, Biswanath-Chariali.
For the respondent :- Shri H. Hazarika, Addl. P.P.
Biswanath Chariali.
Date of final hearing :- 12.05.14.
Date of Judgment :- 26.05.14

J U D G M E N T

1. This appeal is directed against the Judgment and Order dated 11.10.12 passed by the learned Judicial Magistrate, First Class (in short J.M.F.C.), Biswanath-Chariali, in G.R. Case No.661/2006 whereby the appellants were sentenced to undergo rigorous imprisonment for 2 (two) months and a fine of Rs.100/- each, in default R.I. for 7 (seven) days U/S-448, IPC and Rigorous Imprisonment for 1(one) month and fine of Rs.100/- each, in default R.I. for 7 days U/S-341, IPC and R.I. for 2 years and a fine of Rs.1,000/-, in default R.I. for one month U/S-325/34, IPC.

2. Being highly aggrieved and dissatisfied with the Judgment of conviction and sentence the convicted person as appellants has come up with this appeal challenging the correctness or otherwise of his conviction and sentence.

3. I have heard learned Counsel for the appellant Mr. R. Bordoloi and learned Addl. P.P. Mr. H. Hazarika.

Contd.....P/2

4. The fact of the prosecution case in a nutshell as projected in the First Information Report (in short the 'FIR') and the evidence led by the prosecution can be stated as hereunder :-

On 20.12.06 at about 9-30 p.m. the accused/appellants committed house trespass into the house of the informant and assaulted informant Balin Borah's son Sri Babul Borah by giving blow with 'rod' and 'lathi' causing severe injuries on person of the injured.

5. During investigation police visited the place of occurrence, examined the witnesses.

6. After completion of investigation, police submitted charge-sheet against the accused/appellants for the offences U/S-448/341/325/34 of the IPC.

7. Learned Judicial Magistrate, First Class, Biswanath-Chariali, after furnishing copy explained particulars of offence U/S-448/341/325/34 of the IPC, to which the accused/appellants pleaded not guilty and claimed to be tried.

8. In order to prove their case, prosecution examined as many as 8 (eight) prosecution witnesses including the Investigating Officer.

9. At the close of the prosecution evidence the accused persons were examined U/S-313 of the Cr. P.C. and they denied the allegations levelled against them. Considering the evidence on record, the learned court of JMFC convicted the accused/appellants U/S-448/341/325/34, IPC and sentenced the accused/appellants as indicated above.

10. I have heard learned Counsel for the appellant Mr. J. Bordoloi and Mr. H. Hazarika, learned Addl. Public Prosecutor.

11. Learned Counsel for the appellant has submitted that the learned trial lower court has erred both in law and in fact in convicting the accused/appellants U/S-448/341/325/34 of the IPC. It is further submitted that the learned trial court has convicted the accused/appellants relying on evidence of interested witnesses and statement of the accused/appellants are not recorded properly. Moreover, medical report does not disclose any injury of the injured which make constitute an offence punishable U/S-325, IPC. It is further argued that the learned trial court without finding materials on record convicted the accused/appellants to suffer sentences as mentioned above.

12. Refuting the said argument advanced by the learned Counsel for the appellants, learned Addl. P.P. has submitted that there is sufficient evidence in support of the prosecution and the guilt of the accuseds/appellants is well established.

13. In order to appreciate the counter argument advanced by the learned Counsel appearing for both the parties, I feel it appropriate to briefly scrutinise the evidence on record.

14. PW-1 is Sri Balin Borah who deposed that on the day of occurrence at about 7 p.m. the accuseds/appellants had an altercation with PW-1's son Babul Borah regarding money and they took signature in a blank paper and after a while the accused entered into the house of PW-1 and assaulted Babul Borah and when he ran away, then accused/appellant chased him and again assaulted on the road. Thereafter, injured was shifted to Behali hospital and on the very next morning PW-1 lodged ejahar which is Ext.1 where Ext.1(1) is the signature of PW-1. Later on police seized one 'rod' and 'lathi' vide seizure list which is Ext.2 where Ext.2(1) is the signature of PW-1. Material Ext.1 is one iron rod and material Ext.2 is one 'lathi'. He further deposed that the injured sustained injury on his head, eye and hand.

In cross-examination, PW-1 deposed that injured Babul Borah is his son who very often creates nuisance by consuming liquor and when he asked for money from the injured then altercation took place. PW-1 denied defence suggestion that the injured demanded money from PW-1 to purchase wine and when refused then the injured assaulted PW-1 for which the public gathered at the place of occurrence. PW-1 further deposed that when his son came out of his house then by whom he was assaulted that he does not know. He also deposed that at the time of occurrence except PW-1 and his younger brother Gobin Borah, no other person was present there. He also deposed that police seized 'lathi' and rod on being shown by PW-1 and he does not know by whom those weapons were left at the place of occurrence.

15. PW-2 is Sri Babul Borah who deposed that who is the injured deposed that on 20-12-06 at about 7-30 p.m. he had an altercation with his father PW-1 for Rs.50/- and hearing hue and cry accused came there and took signature in a paper from PW-1 and thereafter, accused Thaneswar Borah gave blow with a rod on person of PW-2. Thereafter, he came out of his house on running and accused chased him and accused Thaneswar Borah gave blow with a rod

on the left eye of PW-2 and remaining accused also assaulted him as a result he fell unconscious. Thereafter, PW-1 was shifted to Behali hospital and therefrom he was referred to Biswanath-Chariali hospital and Tezpur hospital for better treatment. It is also deposed by PW-2 that doctor gave him 4 (four) stitches near his right eye.

In cross-examination PW-2 deposed that at the time of occurrence he was assaulted by accused Thaneswar Borah in front of the house of Bhola Borah causing injury on his left hand, back, eye and neck. It is also deposed that at the time of occurrence it was dark night as such he does not know who gathered at the place of occurrence.

16. PW-3 is Sri Bhola Borah who deposed that 20-12-06 at about 9-30 p.m. he heard hue and cry and saw that PW-2 Babul Borah lying with bleeding injury near his eye. He also saw Thaneswar Borah and Sonmoni at a distance from the place of occurrence. Later on injured was shifted to hospital. Ext.2 is the seizure list where Ext.2(2) is a signature of PW-3.

In-cross-examination PW-3 deposed that at the time of occurrence no other villagers were present there and he did not see by whom PW-2 Babul Borah was assaulted. He also deposed that Dipak Bordoloi was not present at the time of occurrence.

17. PW-4 is Sri Gobin Borah who simply deposed that on the day of occurrence at about 7-30 p.m. he saw the injured Babul Borah lying with bleeding injury in front of the house of Bhola Borah and he was shifted to Behali hospital. PW-4 is declared hostile and he was cross-examined by prosecution and suggestions were put to him which were denied by PW-4.

In cross-examination PW-4 deposed that the informant is his younger brother and police seized one 'lathi' from the house of PW-1 and wherefrom said seized 'lathi' was recovered that PW-4 does not know. He also deposed that who assaulted Babul Borah that he does not know.

18. PW-5 is Sri Dijen Borah who deposed that informant is his paternal uncle. On the day of occurrence at about 7-30 p.m. he saw lying Babul Borah on the road in front of the house of PW-5 and near that place accused Thaneswar and Sonmoni were seen with 'lathi' in their hands.

In cross-examination, PW-5 deposed that who assaulted Babul Borah that he does not know since the occurrence took place in dark night.

19. PW-6 is Sri Ranjit Das who simply deposed that he wrote the ejahar Ext.1 where Ext.1(1) is his signature. PW-6 does not know regarding the occurrence.

20. PW-7 is Sri Lakhinath Sonowal who is the investigating Officer deposed that on 21-12-06 on receipt of ejahar by O/C, Behali P.S. PW-7 was entrusted for preliminary investigation. Ext.1 is the ejahar and Ext.1(3) is the signature of O/C, Seniram Saikia. During investigation PW-7 prepared sketch-map which is Ext.3 where Ext.3(1) is his signature. Vide Ext.2 he seized one 'lathi' where Ext.2(4) is his signature. During investigation PW-7 visited place of occurrence collected injury report and submitted charge-sheet. Ext.4 is the charge-sheet where Ext.4(1) is the signature of O/C, Seniram Saikia.

In cross-examination PW-7 deposed that on being produced by the informant he seized weapon of assault. He also deposed that as per Ext.3 there is no road near the place of occurrence. He denied defence suggestion that the case is properly investigated.

21. PW-8 is Dr. Bhagaban Sarmah who deposed that on 20-12-06 at about 11-40 p.m. he examined Babul Borah and found the following :-

1. Lacerated wound over upper orbital margin about 2 cm X 1 cm. X 1 cm in size.
2. Haematoma of irregular size around right eye and right maxillary area of face. colour-red.
3. Sub-conjunctival haemorrhage and abrasion of sclera over right eye.
4. Sub-mucosal bleeding from nostril on right side seen.
5. Lacerated wound of about 2 cm. X 0.5 cm X 0.5 cm. Over left wrist joint.

Injuries caused by blunt object. Injuries are fresh.

Opinion reserved. The patient is referred to Biswanath-Chariali Civil Hospital. Ext.5 is the Medical Report where Ext.5(1) is the signature of PW-8. The report of investigation in Biswanath-Chariali Civil Hospital of injured Babul Borah dtd. 13-12-06 reveals following injuries.

X-ray report dtd. 28-12-06 shows fracture lying in relation to right lateral orbital plate.

Injury is grievous in nature, caused by blunt weapon.

Ext.6 is the report of PW-8 where Ext.6(1) is his signature.

In cross-examination PW-8 deposed that all the aforesaid injuries may occur due to falling over hard substance.

22. Above are the evidence led by prosecution in support of their case.

23. To prove a charge U/S-448 of the IPC, the prosecution is to prove

(i) The accused committed criminal trespass.

(ii) That he trespassed by unlawfully entering into or by remaining on the property unlawfully after initial lawful entry.

(iii) That such trespass was in respect of a building, tent or vessel.

(iv) That such building, tent or vessel was used as a human dwelling or as a place of worship or as a place for storing property.

24. To prove a charge U/S-325 of the IPC, the prosecution is to prove :-

(a) That the accused has caused bodily pain, disease or infirmity to the victim (b) this hurt has been caused voluntarily (c) and this hurt has been caused without being provoked by anyone. (d) that the hurt that has been caused answers any of the hurts described in Section 320, IPC.

25. To prove a charge U/S-341 of the IPC, the prosecution is to prove

(a) That the wronged person had a right to proceed on a particular way over land or water (b) That the accused obstructed or prevented the wronged persons from proceeding along the particular way (c) That the accused caused such obstruction voluntarily (d) lastly the obstructor must not have reason to believe in good faith that he had a lawful right to obstruct.

26. From the evidence on record it is seen that PW-2 Babul Borah who is the injured deposed that on 20-12-06 in the evening he had an altercation with his father PW-1 regarding Rs.50/- and hearing hue and cry the accused came and took one signature in a blank paper from PW-1 and accused Thaneswar Borah gave one blow with a rod on person of PW-2 and thereafter PW-2 ran out of his house and accused person chased him and in front of the house of Bhola Borah accused Thaneswar gave blow with a rod on the eye of PW-2 as a result, he fell down and thereafter, all accused assaulted him. In cross-examination PW-2 deposed that his paternal uncle Gobin Borah i.e. PW-4 interfered during the quarrel of PW-1 & 2 and at that time no other villager was present. PW-2 also deposed that at the time of occurrence it was dark as such he could identify the villagers present at the time of occurrence but only could identify the accused Thaneswar Borah. He also deposed that when accused

assaulted him, then many villagers were present at the place of occurrence but it is seen from the evidence on record that there is not a single eye witness of the alleged occurrence. PW-2 being the father of the injured though in evidence deposed that the accused assaulted his son in the house of PW-1 but in-cross-examination he deposed that the occurrence took place in the house of PW-2 who resides separately with family. So, I find the place of alleged occurrence is contradictory. Apart from that PW-1 & 2 both admitted that prior to the alleged occurrence they had a quarrel between them. PW-1 also deposed that who assaulted PW-2 on the road that he did not see. Regarding seizure of weapons it is seen that police seized rod and 'lathi' on being produced by PW-1 and PW-1 himself deposed that who had left those weapons at the place of occurrence that he does not know. In my view seizure of weapon of assault is also doubtful on the point that whether those were the weapons or not used by the accused at the time of alleged occurrence. Though PW-2 in examination-in-chief deposed that in front of the house of Bhola Borah he was assaulted all the accused persons but during cross-examination he himself contradicted his own statement by deposing that in front of the house of Bhola Borah he was assaulted only by the accused. PW-3 is the Bhola Borah who deposed that who assaulted PW-2 that he does not know and injured Babul Borah had very often quarreled with his father by consuming liquor. PW-4 Gobin Borah who is the own paternal uncle of the injured failed to corroborate the evidence of PW-2. Rather he has deposed that who assaulted PW-2 Babul Borah at the time of occurrence that he does not know. PW-5 also deposed that same that at the time of occurrence it was dark night as such he does not know who assaulted whom at the time of occurrence. PW-6 also knows nothing regarding the occurrence. PW-7 being the investigating officer deposed that there is no road connected with the place of occurrence which reveals from the sketch-map. Though PW-1 & 2 deposed that accused Thaneswar assaulted Babul Borah on the rod but PW-7 clearly stated that there is no road available connecting the place of occurrence. It also transpires from the evidence of PW-4 that the injured had the habit of consuming liquor as such, defence plea that the injured himself sustained injury by falling himself by consuming liquor at the time of alleged occurrence can not be ruled out.

27. On the other hand there is no circumstantial evidence available on record pointing towards the guilt of the accuseds/appellants.

28. In the backdrop of foregoing discussions and in the light of aforesaid decisions, I am of the view that the prosecution has failed to prove its case against the accuseds/appellants beyond all shadow of doubts.

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29. In the result, the appeal is allowed and impugned Judgment and Order convicting and sentencing the accused/appellant is hereby set aside.

30. Return the lower court's Case Record.
31. The instant Criminal Appeal No.52(S-4)/2012 is disposed of accordingly.
32. Given under my hand and seal of the Court on this the 26th day of May,2014 at Biswanath Chariali.

(Sri S. Khound.)
Addl. District & Sessions Judge,
Biswanath Chariali.

Dictated & Corrected by me

(Sri S. Khound.)
Addl. District & Sessions Judge,
Biswanath Chariali.
