

IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE No. 2,
SONITPUR, TEZPUR

Criminal Appeal No. 34 (S-4) of 2007

(Arising out of Judgment dated 14.9.2007
in G.R. Case No. 1395 of 2003)

Sri Puspa Kanta Bania ... Appellant/Accused

-vs-

State of Assam ... Respondent

Appearances :-

For the Appellant: Sri S.E. Alam, Sr. Advocate
Sri A. Bhuyan, Advocates.

For the Respondent: Sri. Khemraj Adhikari, Addl. PP.

Date of Hearing:- 18.12.2013, 25.3.2014

Date of Judgment:- 26.3.2014

J U D G M E N T

1. The instant appeal u/s 374 of Cr.P.C. has been preferred by Sri Puspa Bania @ Puspa Kanta Bania (hereinafter referred to as the 'appellant') against the judgment dated 14.9.2007 passed by the Learned Sub Divisional Judicial Magistrate (S), Sonitpur, Tezpur in G.R. Case No. 1395 of 2003 whereby the appellant has been convicted and sentenced to undergo R.I. for 1 (one) year and a fine of Rs. 2000/- (Rupees two thousand) only in default S.I. for 2 months u/s 326 IPC.

2. Facts of the case, as unfolded in the trial are that an FIR was lodged on 3.10.2003 by Sri Jiten Nath stating that a feast was arranged in the house of Tarun Nath on 2.10.2003. During the feast, suddenly some unknown persons started pelting stones at the house and when they came out to the entrance, they saw

Babul Bania in front of the entrance with stones in hand. On being asked as to the reason why he was pelting stones, Babul ran to his house and came with his brother, Pitou Bania (Appellant), armed with dao and axe and attacked them. As a result of the assault two fingers of the left hand of Tarun Nath was severed and he and Phatik Nath sustained injuries. It was further stated that Tarun was undergoing treatment at the hospital (at the time when the FIR was filed).

3. On the basis of the said FIR, Tezpur P.S Case No. 697/03 u/s 336/326/34 of the I.P.C was registered. On completion of the investigation, charge sheet was submitted against Bubu @ Dugdhanath Bania and Puspa Bania, that is, the present appellant. The appellant however, was shown as an absconder in the said charge sheet.

4. Learned Trial Court issued summons in respect of accused Bubu @ Dugdhanath Bania and NBWA against the present appellant. Subsequently P/A was issued against the appellant and on the same being proved, the case was filed in respect of the appellant until further orders. Charges were framed and trial proceeded against Bubu @ Dugdhanath Bania. After considering the materials on record, including the evidence of seven prosecution witnesses and two exhibited documents, the said Bubu @ Dugdhanath Bania was acquitted.

5. Subsequently, the appellant who was shown as an absconder came to be arrested and was produced before the Ld Trial Court on 19.4.2006. Copies were furnished to him and charges u/s 326/323/336 IPC were framed against the appellant on 17.5.2006 and the same was read over and explained to the appellant to which the appellant pleaded not guilty and claimed to be tried.

6. Summons were issued to the witnesses. Except Phatik (PW 5 in the trial held in respect of Bubu @Dugdhanath Bania) who expired during the intervening period, remaining six witnesses appeared and were duly cross examined by the Ld Defence Counsel for the appellant. It is pertinent to mention herein that the Investigating Officer who was earlier not called as prosecution witness when Bubu @ Dugdhanath Bania had been tried was also summoned, examined by the prosecution and cross examined by the Ld Defence Counsel. Upon conclusion of trial and hearing the parties, the Learned Sub Divisional Judicial Magistrate, Sonitpur, Tezpur passed the judgment impugned in the present appeal.

7. The grounds, inter alia, on which the appellant has assailed the impugned

judgment are that the evidences have not been considered in its entirety; the omissions and contradictions were totally ignored; witnesses had deviated from their statement given before the IO; medical report did not support the prosecution case and that charges in respect of the present appellant not having been framed along with Bubu @ Dugdhanath Bania, the examination in chief of the Prosecution witnesses in the trial of Bubu @ Dugdhanath Bania, could not have been used against the present appellant and there ought to have been a de-novo trial.

8. I have perused the records, the memorandum of appeal and heard the Learned Counsel for the appellant and the Learned Public Prosecutor. Whereas the Learned Counsel for the Appellant reiterated the grounds urged in the Memorandum of appeal, more particularly with regard non permissibility of relying on the earlier examination in chief of prosecution witnesses, the Learned Addl Public Prosecutor supported the judgment and submitted that the same does not call for any interference.

9. In order to appreciate the contentions raised, let us first discuss the evidences on record.

10. PW1, Jiten Nath, the informant deposed that on 2.10.2003, a dinner/feast was arranged in the house of Tarun Nath. On the said day at about 6 PM when PW- 1 along with Phatik, Babul@ Tarun Nath and Jhulan were having discussions in the house of Tarun Nath, they heard noises of pelting of stones in the verandah. Tarun and Jhulan went to check towards the entrance of the house. On hearing voices, PW 1 and Phatik came out of the house. He stated that Dugdhanath Bania and the appellant chased them with sharp weapon and they assaulted him with it but he resisted as a result of which he did not sustain much injuries. However being frightened, he returned back. He stated that the appellant/ Puspa Bania cut little and ring fingers of Babul@ Tarun Nath and fled away. PW-1 further stated that he tied Babul@ Tarun Nath's hand and took him to the Police station from where they were sent to the Civil Hospital, Tezpur. PW 1 stated that he filed the FIR. In his cross examination he stated that he had earlier also come to depose with regard to the same occurrence. He denied that PW 2 had not told him about any incident.

11. PW 2, Babul@ Tarun Nath, deposed that on 2.10.2003 at about 6 PM, he along with Phatik, Jiten and Jhulan were having discussions in his house where dinner was arranged. When they heard sound of pelting of stones from his

verandah, he along with Jhulen came out and saw Dugdhanath and Keshab standing outside. On being asked, both of them abused them in a foul language and went away. They too returned back. After some time, they heard the family members of Dugdhanath raise hue and cry. They also heard Dugdhanath abusing in foul language. This time, Jiten and Phatik also came out of the house and were standing in front of PW 2. He stated that the appellant/Puspa Bania assaulted Phatik and Jiten. Thereafter the appellant attacked PW 2 with a dao and PW 2 caught the dao with his left hand whereupon two of his fingers got slashed. PW 2 stated that thereafter he immediately ran towards his house, Jiten tied a cloth and they went to the Police station from where he was sent to the Civil Hospital. In his cross examination PW-2 denied the suggestion that they had taken alcohol; that he had stated before the police that the appellant/ Puspa and Bubu Bania had chased *them at the back of their house*; that the appellant had not cut his fingers.

12. PW 3, Jhulan Nath, deposed that on 2.10.2003 there was a dinner arranged in the house of Babul and at about 6 PM while they were having discussions, they heard noises of stones falling upon the CI sheet of the verandah whereupon he and Babul Nath came out and saw Dugdhanath and Keshab at the entrance. On being asked as to why they were pelting stones, they went away. Dugdhanath went to his house, shouted in foul language and came out armed with dao and lathi. PW -3 stated that then all four of them came out. Puspa/the appellant boxed/punched Phatik on his head and Jiten on his left hand. Thereafter the appellant attacked Babul with a dao and when Babul tried to save himself, his little and ring finger of left hand got cut. Babul ran towards his house, they tied his hand with cloth, took him to Police Station and thereafter he was taken to Civil Hospital. In his cross examination PW -3 denied that he had earlier deposed that on hearing Babul scream, he came out of the house; that he was not there when Babul's fingers were cut and that he had not seen Babul's finger being cut.

13. PW 4, Dhruva Kr Nath, stated that on 2.10.2003, at about 8 PM he was at home. Hearing voices, he came out and heard that the accused person had cut Babul's finger. In his cross examination he stated that he had once earlier deposed in the instant case.

14. PW 5, Phatik Ch Nath expired during the intervening period. His evidence recorded during trial of Bubu @ Dugdhanath Bania was not used in the trial of the present appellant.

15. PW 6, Hiteswar Nath deposed that they were in Babul's house and on hearing noises of pelting of stones, at about 8 PM, Babul and Jhulan went out to ascertain the cause. Outside, they saw Dugdhanath Bania with another man and suspected them to have thrown stones. Thereafter they returned back. Later on, hearing voices of the family members of Dugdhanath, Jhulen and Babul again went out to calm them. Dugdhoi attacked Babul with a dao and when Babul tried to save, his two fingers got cut. In his cross examination he stated that at the time of occurrence he was not in the house of PW 2; he came to the place of occurrence later on hearing screaming voices.

16. PW 7, Dr. Teg Bahadur Chetri stated that on 2.10.2003 he was at Kanaklata Civil Hospital as Sr Medical and Health Officer and on the said day he examined (A) Bubul Nath and found that his ring and little finger of left hand were completely cut right from the base of the finger (ii) cut wound on the palm of the left hand. He opined that the injuries were greivous, fresh and caused by sharp weapon. He further deposed that on examination of (B) Phatik /Fatik Nath he found there was swelling on the right eye brow. He opined that the nature of the injury was simple, fresh and caused by blunt weapon. On examination of (C) Jiten Nath PW – 7 deposed that he found tenderness and abrasion over the left forearm, which he opined was fresh, simple and caused by blunt weapon.

17. PW 8, Deben Ch Nath is the Investigating officer of the case who submitted the charge sheet wherein the appellatant was shown as an absconder. In his cross examination he admitted that in the GDE it was not written in whose hand the 'kuthar' and the "dao" where nor was it recorded as to because of whose blow, Tarun's fingers were severed.

18. At the very outset Ld Senior Counsel submitted that the entire trial in respect of the present appellatant is vitiated, in as much as, the provisions of section 299 CrPc could not have been brought into play in the instant case. Ld Counsel submits that the evidence adduced in the trial of co-accused Dugdhanath Bania, could have been used against the appellatant and there ought to have been a de novo trial.

19. While considering the objection raised by the learned Senior Counsel with regard to the trial court having used the Examination- in-chief of the witnesses examined during the trial of Dugdhanath Bania in the trial of the appellatant, it is to be noted that all the witnesses (except PW 5 : Phatik who had

expired during the intervening period) were re-summoned and appeared before the Court and were duly cross examined by the Ld Counsel for the Appellant. The evidence of PW 5 who had died in the intervening period was not taken into consideration by the Learned trial court while holding trial in respect of the Appellant.

20. It is well settled that a de novo trial should be the last resort and that too only when such a course becomes so desperately indispensable and that the same should be limited to the extreme exigency to avert "a failure of justice". Any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for directing a de novo trial. In the case at hand, there is nothing on record to show that the appellant raised any objection before cross examining the witness who were re-summoned. The plea that non recording of Examination-in-chief afresh in respect of those witnesses who appeared again on receipt of summons of the instant case would *occasion in a failure justice* was not taken by the Appellant before the trial court. Nor has the latter been demonstrated before this Court. The appellant has thought of raising such a contention only when the judgment has been pronounced against him. Thus the objection sought to be raised in the Appeal not having been raised at the first point of time and the appellant having duly cross examined all the witnesses, this Court is of the considered view that no prejudice has been caused to the Appellant nor has there been any failure of justice and, therefore, the said plea cannot be entertained in view of the provision of Section 465 of the Code of Criminal Procedure, 1973.

21. Learned Senior Counsel for the Appellant has strenuously argued that the evidence of the witnesses is inconsistent and none of witnesses in fact saw the occurrence. He further stated that since in the GDE it was not recorded as to who was carrying the weapon of assault, it cannot be said that the appellant was the one who grievously injured Tarun Nath. In view of the latter, submits the Learned Senior Counsel the Appellant is entitled to the benefit of doubt. It has been further submitted that no independent witnesses have been examined and the witnesses examined are interested witnesses.

22. Analysing the materials on record, it is seen that evidence of PW 1, PW 3 and PW 4 cannot be discarded as evidence of interested witnesses, in as much as, all of them were together present in the house of PW 2. Thus they are the most natural and probable witnesses. The evidence of the PW 1, PW 2, PW 3 and PW 4, so far as it relates to the manner in which the incident took place is consistent and

cogent and does not suffer from any infirmity.

23. Except PW 6, all the others, that is, PW 1, PW 2 and PW 4 have corroborated each other and stated that Appellant attacked Babul (@Tarun) with a dao. They corroborated each other as in, (i) On the first occasion, Tarun and Jhulen went out of the house of Tarun (ii) On the second occasion all four of them went out (iii) Appellant attacked Babul (@Tarun) with a dao and when he tried to save himself, his fingers got slashed (iv) Jiten tied Babul's wound (v) they went to the police station and where thereafter taken to the Hospital (vi) Injury Report of Babul @ Tarun Nath (Ext-2) supports the nature of injury which was caused to PW -2. From the evidence there remains no doubt as to the fact that it was the Appellant and not his brother (Dugdhanath Bania) who inflicted the blow on PW-2.

24. Ld Sr. Counsel submits that PW 1 having left the place of occurrence, could not have seen the incident. Coming to the evidence on record, PW 1 has stated that he was present at the time of occurrence. From the injuries sustained by PW1 (Jiten Nath) it leaves no room for doubt that he was present when the incident took place. However, even if the evidence of PW 1 is discarded, then too evidences of PW 2, PW3 and PW 4 is found to be consistent and un-demolished. On the contrary, their evidence also stands corroborated by the evidence of PW 7 who examined the injured persons.

25. Even if the evidences of other witnesses are discarded, as argued by the Ld Counsel for the Appellant, the evidence of PW 2 remains intact. In the instant case PW 2 was grievously injured. With regard to injured witnesses, it has been held by the Hon'ble Supreme Court in, amongst others, Abdul Sayeed v. State of M.P. reported in (2010) 10 SCC 259, that "28. *The question of the weight to be attached to the evidence of a witness that was himself injured in the course of occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his assailant(s) in order to falsely implicate someone.* " It was further held that *convincing evidence is required to discredit an injured witness.*

26. In the case as hand no such convincing evidence to discredit the injured witness PW-2, is present on record. On the contrary, the evidence taken in its

entirety leads only to one conclusion, that is, to the guilt of the Appellant.

27. As rightly held by the Ld trial Court, the defence side has indeed failed to prove any major contradictions in the evidence of the prosecution. The evidence discussed above does establish beyond any shadow of doubt that the appellant assaulted the victim with a dao as a result of which two fingers of the victim (PW 2) was severed which amounts to grievous hurt within the meaning of section 320 of IPC.

28. In view of the discussions aforesaid, this Court is of the considered opinion that the learned trial Court has rightly held that the prosecution has been able to prove the case u/s 326 of IPC. Further, the learned trial Court while sentencing the accused/appellant has recorded the reasons for not extending the benefit as provided by the provisions of Probation of Offenders Act, considering the nature and circumstances of the case. The learned trial Court has dealt with the accused/appellant very leniently. Therefore, I find no reason to reduce the sentence as awarded by the learned trial Court.

29. In the result, I find that the appeal to be devoid of merit and accordingly, the appeal is dismissed.

30. The accused/appellant is directed to surrender before the learned trial Court to serve out the sentence as imposed by the learned trial Court u/s 326 of IPC.

31. Stay order shall stand vacated.

32. Send back the case record of G.R. Case 1395/03 to the learned trial Court along with a copy of this judgment for taking necessary steps.

Given under my hand and seal of the Court on this the 26th day of March, 2014.

Additional Sessions Judge No. 2,
Sonitpur, Tezpur.