

(2001) 07 GAU CK 0003

Gauhati High Court

Case No: Criminal Appeal No. 215 of 1999

Nandeswar Sonowal
and Others

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: July 31, 2001

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 148, 149, 302

Citation: (2001) 2 GLT 366

Hon'ble Judges: J.N. Sharma, J; D. Biswas, J

Bench: Division Bench

Advocate: A. Thakur and K.D. Chetri, for the Appellant; B. Choudhury, Public Prosecutor, for the Respondent

Judgement

D. Biswas, J.

The appeal is from jail. On conclusion of trial in Sessions Case No. 86(J-J)/1995, the learned Sessions Judge, Jorhat convicted the accused persons u/s 302/149/148 IPC. Consequently, they were sentenced to imprisonment for life and to pay a fine of Rs. 500/- u/s 302/149 IPC and further rigorous imprisonment for two years each u/s 148 IPC.

2. The police initiated investigation on receipt of an ejahar on 2.11.1992 to the effect that on 1.11.1992 at around 6 p.m. Sri Linus Lagun, father of the complainant was assaulted by the accused Tanu Sonowal while he was returning home from the house of Rontu Baruah. Linus sustained grievous injury and was left at the road. Paulus, brother of the complainant, came home and reported about the matter. Thereafter, the complainant along with Paulus, Nihal Muguri and Urbanush Kashyap went to the place of occurrence. On their Arrival they were attacked by Bagi Sonowal and other named accused persons with lathi, iron pipe etc. They sustained injuries and Urbanusbh Kashyap succumbed to the injuries. On conclusion of investigation, the police submitted charge sheet against all

the Appellants, seven in number. Eventually charge was framed by the learned Sessions Judge and , on conclusion of trial convicted and sentenced them as aforesaid.

3. We have heard Mr A. Thakur, learned Counsel for the Appellant and also Mr B. Choudhury, learned Public Prosecutor, Assam.

4. The prosecution altogether examined 10 witnesses including the I.O. and the Medical Officer. The defence did not adduce any evidence: From the tread of cross examination as well as the answers given to the questions put u/s 313 Code of Criminal Procedure the defence case appears to be of denial.

5. It appears that the genesis of the prosecution case rests on two incidents. Firstly, it was Linus Lagun, father of P.W. 1, who was assaulted by Tanu Sonowal (A2). Second occurrence took place at the residence of the accused persons when P.W. 1 along with the deceased and Ors. went there immediately after the first occurrence. The charges framed by the learned Sessions Judge on two heads do not incorporate anything about the first occurrence. The prosecution evidence will, therefore, have to be appreciated only with reference to the second charge. This vital omission on the part of the learned Sessions Judge cannot be cured at this belated stage.

6. The first charge has been framed u/s 148 of the Indian Penal Code indicating that each of the seven accused persons were a member of an unlawful assembly and in prosecution of the common object of such assembly, namely, to assault Shri Johen Lagun, Shri Paulus Lagun and Ors. committed the offence of rioting. We would, therefore, first like to discuss the evidence with reference to charge u/s 148 IPC.

7. P.W. 1 Shri Johen Logun, the maker of the FIR stated that after getting information from his brother Paulus that their father has been assaulted, he along with Paulus rushed to the place of occurrence and on their way saw their mother helping his injured father back to home. His father told him that Tanu Sonowal had assaulted him. This witness further stated that he along with their uncle Urbanush, since deceased and Ors. went to the house of the accused persons to ascertain about the cause of assault on their father. On arrival, they were attacked and Urbanush was killed. P.W. 2, Sri Paulus Lagun, also said that they went to the house of the accused Tanu Sonowal where they were assaulted. The statement of these two witnesses clearly show that the second incident occurred in the residence of accused Tanu Sonowal. P.W. 3, Shri Stephen Kashyap, stated that hearing that his "Barduta" (father's elder brother) was assaulted, he went to the place of occurrence and saw Nandeswar Sonowal (A1) hitting his father on the head with an axe. P.W. 4, Ananda Hasa, said nothing about the second incident in which Urbanush was attacked and killed. P.W. 5, Smti Koroline Tiru said nothing incriminating against the accused persons. P.W. 6 is Linus Lagun the victim of the first occurrence. He was obviously not present when Urbanush was assaulted. P.W. 7, Shri Sunil Bhugra is not an eye witness and said nothing worth noticing. This is the evidence available on record. No charge has been framed on the first occurrence. The evidence on record also

do not suggest all the accused persons were present when Linus Lagun was assaulted. The first charge that the accused persons were member of an unlawful assembly formed with the object of assaulting John Lagun and Ors. is of no significance. No charge has been framed u/s 326 or any other section of lesser degree for the assault committed on Linus Lagun. The second charge u/s 302 read with Section 149 of IPC relates to be subsequent offence in which Urmanush was killed. This, obviously, took place in the residence of Tanu Sonowal (A2) as stated by P.W. 1 and 2. The conviction of the accused persons u/s 148 of IPC is based on no-evidence and hence it cannot be sustained.

8. P.W. 1, Shri John Lagun, who lodged the FIR stated that he went to the house of the accused with Paulus and Urmanush where they were attacked and assaulted with hands and lathis. He specifically stated that accused Nandeswar (A1) had beaten Urmanush with lathi while Ors. assaulted him with hands. P.W. 2, Paulus Lagun, also went to the house of accused Tanu Sonowal along with P.W. 1 and the deceased. He evinced that the accused persons in a body assaulted Urmanush with lathi who died on the spot. He also stated that he was beaten by Nripen and Tanu Sonowal with a lathi. This witness did not name any accused person specifically as the assailant of Urmanush. P.W. 3, Stephen, deposed that he followed the prosecution party to the house of accused where Nandeswar Sonowal (A1) struck his father with an axe. PWs 4, 5 and 6 are not witness to the second occurrence. It has to be considered whether the evidence of P.W. 1 and 3 is adequate enough to bring home the charge u/s 302 read with Section 149.

9. It is apparent from the evidence on record that when the second incident took place, the accused persons were in the house of Tanu Sonowal. They had no prior information that Urmanush along with Ors. would be visiting their house. Therefore, it would be just hypothesis to bring in the element of common object so far the second incident is concerned. Urmanush along with Ors. came to the house of Tanu Sonowal where accused persons already present attacked them and Urmanush was killed. The common object of murdering Urmanush Kashyap is not discernible on the evidence on record. The accused persons were inside the house of accused Tanu Sonowal and the circumstance do not suggest that they were waiting for Urmanush, the deceased to come there. Therefore, conviction of the accused persons in aid of Section 149 IPC cannot be sustained. There is also no independent charge against the for assaulting Urmanush Kashyap and Ors. . Therefore, conviction of any of them for assaulting Urmanush and Ors. is not permissible for want of specific charge.

10. On the above background, it will have to be considered whether conviction of Nandeswar Sonowal as recorded by the learned Sessions Judge could be sustained on the evidence of P.W. 1 and P.W. 3.

11. There is clinching evidence that the deceased along with Ors. went to the residence of Tanu Sonowal where he was killed. P.W. 1 stated that Nandeswar Sonowal (A1) had assaulted Urmanush with a lathi. P.W. 3, Stephen, also deposed that it, was Nandeswar

Sonowal who had assaulted his father with an axe on the back of his head. The defence could not shake the credibility of P.W. 1 and 3 during the course of cross examination. There is contradiction between P.W. 1 and 3 with regard to the weapon used. The occurrence took place in the evening. The assailants were 7 in numbers. P.W. 1 was also under attack. So it might not have been possible on his part to notice the weapon used. The P.W. 3, Stephen, did not go along with P.W. 1 and 2, but he followed them to the house of Tanu Sonowal. The moment he reached there, he saw Nandeswar Sonowal (A1) assaulting his father with an axe. There cannot be any reason to disbelieve him. Had there any design on his part to embellish the - prosecution story, the witness could have named other accused persons attributing specific role to each of the. The injuries found on the person of deceased also lend support to the evidence of P.W. 3.

12. P.W. 8. Dr. Anadhar Neog who had performed the post-mortem examination and prove the report Exhibit-3. His evidence is as follows:

External Appearance:

Cranium and Spinal Canal:

Clotted blood found in venital scalp. The whole membrane is confested. Membrane is lacerated at the side of injury No. 2. Whole occiparietal region of the brain is covered by clotted blood, and the brain is congested.

Opinion:

In my opinion die cause of death is due to comma as result of injuries sustained by the inured. The injury No. 1 and 2 cap be caused by heavy sharp weapon. Injury No. 2 is sufficient to cause instantaneous death.

13. It would appear that the deceased has sustained one incised wound in the upper part of the neck and Anr. incised and fracture injury on the occipital region. According to the Doctor, both the injuries could be caused by heavy sharp weapon and injury No 2 is sufficient to cause instantaneous death.

14. The defence, in fact, did not cross examine the Doctor. An toe is a heavy she weapon and both the injuries are capable of being caused by an axe. P.W. 3 had testified that his father was assaulted with an axe. P.W. 1 stated about the assault by hand and lathis. In the process, the deceased sustained two injuries. The totality of the circumstances and the nature of injury and the weapon used as evinced by the witnesses clearly establish that Urmanush died immediately out of injury No. 2 caused by a heavy sharp weapon. An axe has been used by Nandeswar Sonowal (A1) as evinced by P.W. 3 and, therefore, there cannot be any reason to have any doubt about the complicity of the accused Appellant Nandeswar Sonowal (A1) who had given the fatal blow.

15. The fatal injury was caused on the head of the deceased and he died instantaneously. The intention to cause death is apparent from the weapon used and the placement of the injury. Hence, the Appellant Nandeswar Sonowal (A1) committed the offence of murder punishable u/s 302 IPC. This is independent of the charge u/s 149.

16. In the result, this appeal from jail is partly allowed. The conviction and sentence of Nandeswar Sonowal (A1) u/s 302 are affirmed. He is, however, acquitted of charge u/s 148 and 149 of the IPC. The conviction of the other accused persons under Sections 302/149/148 IPC are set aside. They be released from jail forthwith.

Registry is directed to issue release order.