(2008) 01 GAU CK 0019

Gauhati High Court

Case No: Criminal Appeal No. 132 of 2006

Md.Gousuddin		APPELLANT
	Vs	
State of Assam		RESPONDENT

Date of Decision: Jan. 22, 2008

Acts Referred:

- Penal Code, 1860 - Section 307
- Penal Code, 1860 (IPC) - Section 307

Citation: (2008) 4 GLR 523

Hon'ble Judges: H.Baruah, J

Bench: Single Bench

Advocate: B.M.Choudhury, B.S.Sinha, J.M.Choudhury, N.Baruah, S.Choudhury, Advocates appearing for Parties

Judgement

1. Heard Mr. J.M. Choudhury, learned senior counsel for and on behalf of the appellant, and also heard Mr. B.S. Sinha, learned Additional Public Prosecutor, Assam, for and on behalf of the state respondent.

2. Appellant, Md. Gousuddin along with two others namely Abdul Gaffar and Guljar Khan stood charged under Section 307/34, IPC before the learned Sessions Judge, Cachar, Silchar. At the conclusion of the trial, learned sessions Judge, Cachar, Silchar, found the appellant Md. Gousuddin guilty under section. 326 of the Indian Penal Code, and accordingly convicted and sentence him to suffer 4 years R.I and pay a fine of Rs. 5,000. In default of payment of such fine to suffer further imprisonment for six months R.I. Learned trial court, however, failed to record a conviction against other two accused persons, who also faced the charge under section 307/34 of the IPC.

3. Feeling aggrieved by and dissatisfied with the impugned judgment and order of conviction so rendered by the learned Sessions Judge, Cachar, Silchar, Md. Gousuddin filed this present appeal challenging its legality and correctness.

4. The case as it appears in the face of the record is that on 10.03.2001, at Babur Bazar, the present appellant along with two other accused persons were engaged in gambling. Injured Abdul Khadir came there and protested. As a result, there had been an altercation between them. The protest was not attended to by the appellant including two others and they went on playing and ultimately when the injured Abdul Khadir was on his way home, he was suddenly attacked by the appellant Gousuddin and Guljar Khan with the help of lathi and dao resulting injuries to his head and in the eye lid. Abdul Sukkur, the brother of the injured set the criminal law in motion by filing an FIR (Ext1) with police. The Station House Officer (SHO) of Katigorah Police Station accordingly registered a case under section 307/34 of the IPC.and commenced investigation. A charge sheet was laid thereafter after completion of the investigation. Trial commenced. Before the learned trial court altogether 10 witnesses were examined including two official witnesses, namely, the doctor and the I.O. At the conclusion of the trial, learned Sessions Judge convicted the appellant as above.

5. In this present appeal, Shri J.M. Choudhury, learned senior counsel raises two principal issues for determination by this court. First, whether the injury allegedly sustained can be caused by the weapon allegedly used and secondly whether on the basis of the evidence of PW3, PW4 and PW 5 multiplied by the evidence of PW 2, conviction can be awarded against the appellant under section 326 of the Indian Penal Code. Referring to the evidence of PW 3, PW 4 and PW 5, Mr. Choudhury learned senior counsel submitted that there appears paramount contradiction in between the evidence of PW 2, PW 3, PW 4 and PW 5, marshalling of which no definite conclusion can be arrived at that it was the appellant, who had caused the fracture injury on the head of the injured (PW2). It is further argued by Shri Choudhury that the learned trial court committed error in scrutiny of the evidence of the witnesses with reference to the evidence of PW10, the doctor. Doctor (PW 10) found injuries (1) 6 incheslong stitched wound over right parietal and frontal region with discharging cerebrespinal fluid through the stitched wound with fracture of the skull bone, (2) cut injuries over the right upper eyelid, (3) and (4) tenderness over the right ankle and neck.

6. PW 10 opined that the injury No. 1 was grievous in nature and it was caused by blunt weapon while injury No. 2 was simple and caused by sharp cutting weapon and the other two injuries which were found on the person of injured were of simple in nature and caused by blunt object.

7. PW2, the injured himself categorically stated in his evidence that it was the appellant, who dealt a dao blow on his head causing injury to it. PW3 is found to have corroborated the evidence of PW2 in totality. He also in one and same voice stated that appellant Gousuddin dealt a dao blow on the head of PW 2, the injured, resulting injury thereon. PW5 in the same way also corroborated the evidence of PW 2 and PW 3 but PW4 depicted a different version different from the evidence of PW2,

PW3 and PW5 and stated that it was Guljar, who dealt dao blow on the head of PW 2 while the appellant dealt lathi blow on his head. So, apparently, there appears no consistency in between the evidence of the above noted witnesses regarding the use of weapon by the appellant. Minus PW4, all three witnesses inclusive PW2 categorically stated that it was the appellant, who dealt dao blow on the head of the injured (PW2).

8. From the evidence of PW10, we have found the description of the injury No. 1. He found 6 inches long stitched wound over right parietal and frontal region with discharging cerebrespinal fluid through the stitched wound with fracture of the skull bone. He also found cut injury of 3 cms x 2 cms x 1 cm. over the right upper eyelid. So, apparently, from his evidence it is found that the injured was produced before him after some treatment received at different place. The fact of finding a stitched wound over right parietal and frontal region would go to show that he was treated somewhere else before his production.

9. Now, the most pertinent question, which arises in this appeal is whether the fracture over right parietal and frontal region can be caused by use of a dao. In this context, we do not find any evidence on record. But the learned trial court while appreciating this fact came to a finding that once a wound is stitched some time before its sufferance by the injured, his production before a doctor after a considerable laps of time, it would, perhaps, not be possible on the part of the doctor before whom the injured is produced to ascertain the nature of injuries when there is possibility of healing. There is no dispute in regard to the evidence of PW10 with reference to injury No. 1. PW10 was, however, not cross examined by the defence on this point and therefore, no other view can be taken or arrived at that the injury was not caused by sharp weapon nor it received any support in favour of the defence. Defence ought to have crossexamined this witness with reference to the nature of injury and weapon used. From the text of the evidence of PW 2, PW3, PW 4 and PW 5, it is found no such attempt was made by the defence to rebut the evidence of PW 2, PW 3 and PW 5.

10. Learned Additional Public Prosecutor, Mr. B.S. Sinha, while advancing his argument submitted that the evidence of a doctor cannot play a pivotal role. Minus the evidence of all other witnesses in respect of the injury sustained by the injured person except the contradiction, which flows from the evidence of PW4, no other contradiction surfaced in record to the use of the weapon by the appellant. It appears from the evidence of witnesses, more particularly, PW 3, PW4 and PW5, they were all eyewitnesses to the occurrence. It is according to him (Additional Public Prosecutor), if the evidence of PW2, PW 3, PW4 and PW5 are taken together in combination of evidence of PW10, an unassailable decision can be arrived at that it was the appellant and appellant alone, who did resort to assault on PW 2 with the help of dao causing injury on his head.

11. There is no evidence on record to show about the size, weight and shape of the dao that was allegedly used by the appellant. Dao is admittedly a sharp cutting weapon, its sharpness and weight may differ from dao to dao. The material used in preparation of dao is undoubtedly ''iron'', which is a heavy object. When there is no evidence on record to show about the size, shape and weight of the weapon of assault, i.e., dao, we cannot, naturally, discard the evidence of PW10 and his opinion so offered. PW2 sustained fracture injury on his right parietal and frontal region as discovered by PW10, the said fracture can be caused by use of dao, which is made of iron apparently a heavy object. So, fracture was possible on the head of the injured when it is stated that the appellant used a dao.

12. The argument advanced by Mr. Choudhury, learned senior counsel that no fracture injury can be caused with the help of dao is apparently cannot be accepted. Unless something otherwise shown by rebutting the evidence of acceptable evidence, simply because PW4 depicted a different story in the context of use of the weapon of offence, the evidence of PW 2, PW 3 and PW5 cannot be discarded with reference to the factum of use of weapon of offence. When a fracture is possible by use of a dao, the evidence of PW2, PW3 and PW5 cannot, however, be disbelieved.

13. Shri B.S. Sinha, learned Additional Public Prosecutor also submitted that the evidence of doctor always cannot fetch a true picture of the occurrence and therefore, the evidence of doctor cannot play a pivotal role in arriving at a decision. When there is ocular evidence available in the record to show that the appellant used dao, evidence of PW4 cannot be resorted to override the positive evidence of the eye witnesses. It is in the evidence on record that the appellant and Guljar both came together with dao and lathi and intercepted PW2 on the road and started assault on him. In that situation, perhaps, PW4 failed to notice properly. The use of weapon by each of the assailant when PW 2, PW 3 and PW5 unequivocally stated that appellants assaulted PW2 on his head with the help of a dao, the evidence of PW4 cannot make the evidence of PW2, PW3 and PW5 unacceptable.

14. We have already discussed hereinbefore that a fracture injury can be caused with the help of a dao. Fracture of injury found on the head of PW 2 by PW10 cannot be said that it was not caused by the appellant by using a dao. Emphasis was put by the learned senior counsel for the appellant that the fracture injury to head was not possible by use of a dao is not acceptable.

15. Learned trial court while rendering the judgment and order of conviction discussed the evidence on record in its proper perspective and arrived at a finding that it was the appellant Gousuddin, who caused fracture injury on the head of PW2 by giving a dao blow on it. Learned trial Court also discussed the impossibility of ascertaining the character of wound after it is stitched. Charge has framed under sections 307/34 of the IPC against the appellant and two others, except the appellant others two were not found guilty. Learned trial court while convicting the appellant under section 326 of the IPC discussed that the evidence appearing in the

face of the record are totally insufficient to arrive at a conclusion that appellant had the intention to cause the death and accordingly attempted as such. Learned trial court having found no such injury on record found it appropriate to convict the appellant under section 326 of the IPC instead of section 307 of the IPC.

16. On close scrutiny of the entire judgment and order of conviction so rendered by the learned trial court, this court finds no illegality or error committed by the learned trial court. The judgment and order of conviction appears to be sustainable and no interference is called for.

17. Mr. Choudhury, learned senior counsel for the appellant also argued that if the court does not find the appeal to be upheld, punishment so rendered by the learned trial court may be reduced substantially in view of the facts and circumstances of the case and the evidence appearing. Due weightage is given in the submission of the learned senior counsel for the appellant, but no plausible ground can be searched out for reduction of the sentence as prayed for. The prayer so made cannot be entertained.

18. In the result, the appeal dismissed. Impugned judgment and order of conviction is upheld.

19. Send back the LCRs.