(1998) 05 GAU CK 0010

Gauhati High Court

Case No: Criminal Appeal No. 90 of 1995

Ismail Ali and Others		APPELLANT
	Vs	
State of Assam		RESPONDENT

Date of Decision: May 29, 1998

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 313
- Penal Code, 1860 (IPC) - Section 141, 147, 148, 149, 302

Citation: (1998) 2 GLT 301

Hon'ble Judges: V.D. Gyani, Acting C.J.; N.C. Jain, J

Bench: Division Bench

Advocate: J.M. Choudhury, D. Talukdar and F. Ahmed, for the Appellant; None, for the Respondent

Final Decision: Dismissed

Judgement

V.D. Gyani, Actg. C.J.

1. This appeal arises out of judgment and order of conviction dated 19.4.95 as passed by Sessions Judge, Karimganj in Sessions Case No. 36/94, thereby holding the Appellants guilty of offences punishable under Sections 302, 323 read with Section 149 IPC.

2. The accused Appellants have been convicted under Sections 302/149/147 and 323 of the Indian Penal Code by the learned Sessions Judge, Karimganj in Sessions Case No. 36 of 1994 arising out of G.R. Case No. 1000/92, sentencing the accused-Appellants (1) and (2) to imprisonment for life and under Sections 302/149 IPC and u/s 148 of the IPC to rigorous imprisonment for one year and under Sections 323/149 IPC to rigorous imprisonment for 6 (six) months and the accused-Appellants Nos. (3), (4), (5) and (6) under Sections 302/149 IPC to imprisonment for life each and under Sections 147 and 323 read with Section 149 IPC to rigorous imprisonment for six months.

3. Briefly stated, prosecution case was that on 12.10.92, around 4.30 P.M. the Appellants along with six others since acquitted by the trial Court, armed with weapons like dao, ballam, spear and lathis, committed criminal trespass into the paddy field of the deceased Abdul Sattar, who was making an outlet for flow of accumulated rain water by breaking an "ali" (a slightly raised boundary level from even soil surface to prevent flow of water). It was objected to by accused Ismail, whose land is contiguously situated to the southern side of the paddy field of Abdul Sattar. Ismail abused Abdul Sattar and asked him to refrain from letting the rain water flow into his paddy field which is at a lower level and at the time of incident there was no crop standing in Ismail''s field as testified by P.W. 1, Abdul Hussain, son of the deceased.

4. What followed thereafter forms the core of the prosecution case. It would alford better appreciation if the incident as it occurred is quoted in the words of P.W. 1, Abdul Hussain.

My father was, at that time, near the southern "ali" of our said paddy land and Ismail was, at that time standing at a distance of about 4 nals on the east of my father and then, I also saw accused Aftabuddin, Farijuddin, Ijabuddin, Jalaluddin, Abdul Haque, Abdul Hamid, Samsuddin, Abdul Wahab, Jalamuddin alias Jul, Nurul Islam and Ajibuddin going towards accused Ismail armed with bangs, lathis, daos, hujas and sulphis.

At that time when accused Ismail was having altercation with my father, he had a sulphi in his hand and while I saw the accused Aftabuddin, Farijuddin, Ijabuddin, Jalaluddin, Abdul Haque, Abdul Hamid, Samsuddin, Abdul Wahab, Jalamuddin alias Jul, Nurul Islam and Ajibuddin going towards accused Ismail, accused Ismail came running towards my fether and gave a blow with his sulphi on the right leg of my father. When accused Ismail so assaulted my father, I, followed by my nephew, Islam, was proceeding on the said katcha path towards our paddy field. Ismail had given the said blow on my father''s right leg after entering into our paddy field.

On receiving the said blow given by Ismail with his sulphi, my father was about to fall, but he balanced himself and when he stood up, I saw that all the remaining accused persons had entered into our paddy land and accused Aftabuddin then, gave a blow with his dao on the head of my father and accused Farijuddirt gave a blow with his bang on my father''s head.

5. The injured Abdul Sattar was brought to Karimganj Police Station before being rushed to Civil Hospital situated at a distance hardly 1/2 a mile from the Police Station, where Ejahar Ext. 1 was lodged by P.W. 1 Abdul Sattar succumbed to the same night at the hospital.

6. On the basis of FIR, Ext. 1, a case was registered and taken under investigation. This FIR, Ext. 1 is preceded by a General Diary Entry,, Ext. 2, which does not contain the names of the accused Appellants, as rightly pointed out by Mr. J.M. Choudhury,

learned Counsel appearing for them.

7. The above narration of incident as given by P.W. 1 is substantially corroborated by P.W. 2, Islamuddin, who is the grand-nephew of the deceased and P.W. 5, Abdussubhan is the father of P.W. 2 Islamuddin and nephew of the deceased.

8. P.W. 3 is the Medical Officer who performed autopsy. He found the sole injury on the body of Abdul Sattar.

One incised wound over vertex extending from frontal to occipital bone. 6" in length and 11/2" in width with fracture of underlying frontal, parietal and occipital bone and laceration of underlying frontal and parietal lobes.

9. On completion of investigation, the accused Appellants were charge-sheeted and tried for the above offence. Their defence at the trial as can be gathered from the trend of cross-examination and statement of the accused as recorded u/s 313 Code of Criminal Procedure was at best a feeble attempt at claiming the right of defence of property, two of them had sustained injuries during the course of incident. P.W. 4 has testified to these injuries sustained by Abdul Hussain and Ismail Ali, who had also lodged a report but sixteen days after the incident.

10. The trial Court while acquitting as many as six accused (against whose acquittal no appeal is preferred by the State) convicted the accused Appellants as already noted above. Hence this appeal.

11. Mr. J.M. Choudhury, learned Counsel appearing for the Appellants has raised the following points:

1) that the FIR is silent about the vital facts. It is belated and the G.D. Entry Ext-2 is equally silent about the occurrence;

2) the prosecution evidence of P.Ws. 1, 2 and 5 suffer from inter-se inherent contradiction adversely affecting their credibility;

3) the prosecution has not established that the incident took place on the complainant''s land. Viewed from this angle the plea of right of private defence and defence of property has not been properly appreciated by the trial Court which has resulted in miscarriage of justice. In this connection it was also pointed out that no blood marks at the place of occurrence were found, much less proved by the Prosecution;

4) there is no inter se corroboration amongst P.Ws. the regarding the cause of injury to Abdul Sattar and as such conviction relying upon such testimony is not tenable in law and therefore conviction and sentence are liable to be set aside and quashed.

5) that the learned trial Court committed error of law as the prosecution has failed to explain the delay in lodging the first information report and the G.D. Entry which is marked as Ext. 2 is also silent about the occurrence of the incident and as such

conviction and sentence are liable to be set aside and quashed.

12. The medical evidence is not only wholly incompatible with the occular version as given out by P.Ws. 1 , 2 and 5, but also falsifies the prosecution case that twelve persons assaulted the deceased with weapons like dao, ballam, spear and lathis. The fact that only one injury was found on the body of Abdul Sattar totally belies the prosecution case that twelve accused in furtherance of their common object attacked Abdul Sattar. Section 149 is not at all attracted, the ingredients thereof are not at all proved.

13. Mr. Goswami, learned Public Prosecutor, on the other hand, argued that actual participation by all accused is not necessaiy, the right of defence of property has been rightly rejected by the trial Court, it was an afterthought, there is nothing wrong in the FIR. The G.D.E. Ext. 2 does not disclose any cognizable offence being committed, it cannot be treated as an FIR. The conviction as recorded is well supported by evidence and does not call for interference.

14. Now taking up the First Information Report, the law on the point is well settled by now. It is not a compendium of all facts. Its primary object being to set the investigating machinery in motion. Assuming for the sake of argument that there are certain omissions, it is not expected nor is it intended by catelogue of events as has been observed in several judgments that an FIR is not an encyclopendium of entire case. It is not even a substantive piece of evidence. Similarly, mere delay in lodging an FIR is not fatal in itself. The place of occurrence is about 8 Kms. from the Police Station. One can envisage the scene where the injured father lying in a precarious condition was first brought to the police station after travelling by bus. The police officer present was reported about the occurrence who wrote something on a piece of paper as testified by the P.W. 1, the infoimant and directed them to go immediately to the Civil Hospital. In this situation and state of mind if something is found to be missing, the informant who is the son of the deceased cannot be blamed for it. No doubt in his cross-examination he has admitted that he did not specifically state in his ejahar as to who inflicted a particular injury with what weapon. Now such precession really speaking while lodging an FIR is not expected of any informant, yet in the instant case P.W. 1 has given his explanation that he was under great anxiety and tension at that time as his father died and there was not even a vehicle to return home to inform others.

15. As for omission with reference to the FIR, there is hardly anything worthnoting. The only question that one finds in the whole of the cross-examination is about the particularisation of injury inflicted by a particular accused. This omission hardly detracts the FIR from veracity of its contents, the basic facts.

16. As for inter se contradictions in the testimony of prosecution witnesses P.Ws. 1, 2 and 5 the trial Court has rightly observed that so far as P.W. 5 is concerned he is not an eyewitness. Therefore, not much turns on his testimony.

17. As for P.Ws. 1 and 2, no doubt they are closely related, being son and grand nephew of the deceased, but their testimony cannot be discarded on the ground of mere relationship. Their presence on the spot cannot be doubted, being injured witnesses. The evidence of two witnesses cannot be a video cassetted version or carbon impression of one another. There is bound to be some difference in the statements of two witnesses, if they are natural truthful witness. Thus, if there is some difference, it adds to truthfulness of the statement rather than detracting them from truth. While nothing the prosecution case, the substance of evidence of P.W. 1 have already been reproduced and P.W. 2 has substantially corroborated the P.W. 1.

18. There are certain discrepancies as rightly pointed out by the learned Counsel for the Appellants, no blood marks on the spot were seen. We could have appreciated that the I.O. could have done well if he had taken note of this aspect, it would have helped in clinchingly establishing the place of occurrence, but this lapse on the part of the investigating agency is not such as to rob the prosecution case of its truth. Salim Ahmed, P.W. 6 is the I.O. Now coming to his cross-examination except for certain omissions in the statement of witness as recorded by him u/s 161 Code of Criminal Procedure there is no cross-examination about the place of occurrence or about the absence of blood marks. Therefore, nothing material turns on this point.

19. Now taking up the last point as raised by the learned Counsel for the Appellants, true it is, that the doctor performing post-mortem examination P.W. 3 had found only one incised wound over the vertex of Abdul Sattar. As already noted above, it was extending from frontal to occipital bone, 6" in length and 1 1/2" width with fracture of underlying frontal, Parietal and occipital bone an laceration of underlying frontal and parietal lobes. Only two questions on the nature of the injury have been attracted in cross-examination to this witness. Firstly, about the direction of the injury, the witness frankly admitted that he was not able to say about the direction of the injury and about clean cut injury. He opined that when sharp cutting weapon like "Dao" is yielded with great force, it may not result in clean cut injury. Similarly, he cannot say whether the edges of the injury were eberted. This is all about the injury.

20. The argument advanced by the learned Counsel is that 12 persons armed with lethal weapons and the injury caused is only one. This argument appears to be quite impressive in its first blush. The trial Court has acquitted 6 persons mainly on the ground that they had not even entered the, complainant''s paddy field, they were on the other side. May be that they were spectators, but we are not concerned with those acquitted as there is no appeal against their acquittal. But, before the evidence on the point is dealt with, it would be in the fitness of things that the legal position as regards Section 149 IPC is clarified as one of the points raised by the learned Counsel is that Section 149 is not attracted when ingredients are not made out.

21. Section 141 IPC defines unlawful assembly and common object. It is reproduced with a view to provide a right reference.

141. An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is

First- To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or

Second - To resist the execution of any law, or any legal process; or

Third- To commit any mischief or criminal trespass, or other offence; or

Fourth- By means of criminal force, or show of criminal force, ot any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth- By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

22. The essential ingredients of Section 149 are- (1) Commission of an offence by any member of an unlawful assembly and (2) such offence must have been committed in prosecution of the common object of the assembly, or must be such as the members of the assembly knew to be likely to be committed.

23. Section 147 prescribes punishment for rioting and to make out a case of riqting the prosecution must prove (i) that there were five or more persons; (ii) that they had a common purpose ; (iii) that they had begun to execute such purpose; (iv) that they intended to help one anoAer by force, if necessary; and (v) that they had shown, such degree of violence which would alarm at least one person of reasonable courage.

24. Now coming to evidence, there are in all three witnesses, P.Ws. 1, 2 and 5. Out of them p.W. 5 on his own showing, when he came out of his house on hearing "hullah", he saw Abdul Sattar being carried in an injured condition by his cousin Abdul Hussain, his son Islam Uddin and one Bashir Ali (not examined). It is clear from his admission that he is not an eye witness but his evidence has corroborative value as res-gestae evidence. He had seen bleedmg injury on the head of Abdus Sattar. He was informed by Abdul Hussain that Ismail Ali had given a blow with "Jatha" on the leg of Abdus Sattar. Buddin dealt a dao blow on Abdus Sattar''s head while Jalal gave blow on his head with "bung".

25. P.W. 1 who is examined as an eye witness has also stated that Ismail Ali gave a blow with a "Sulphi" on right leg of Abdus Sattar. He has also testified to the dealing of a dao blow on head of his father Abdus Sattar by Aftabuddin who has been

described by P.W. 5 as "Budin", P.W. 1 also saw Farijuddin giving a "Bang" blow on his father''s head.

26. If at all there is any deference in the testimony of the two witnesses it is with regard to weapon used by Ismail Ali, while P.W. 5 has described it as "Jatha'', P.W. 1 has named it as "sulphi". These are all local colloquial terms, and does not really make any difference in the sense that one witness referring to a firearm being used while the other refers to sharp cutting weapon so as to discard the testimony of both or at any rate discredit their testimony.

27. P.W. 2 Islamuddin has fully corroborated P.W. 1, he has testified to the fact that Ismail Ali had given a sulphi blow on the right leg of Abdus Sattar. The dealing of blow of by Aftabuddin and Farijuddin on the head of Abdus Sattar, has also been deposed to by this witness.

28. At this stage, it would be pertinent to note that according to P.W. 5 the second blow on Abdus Sattar''s head was given by Jalal (who has been acquitted by the trial Court). He does not refer to Farijuddin but P.Ws. 1 and 2 are categorical about him, after all P.W. 5 was not an eye witness, he was reported about the incident by Abdul Hussain. This discrepancy is not such as to render the testimony of P.W. 1 and 2 unreliable more so when Jalal is not before us as one of the Appellants.

29. It would be clear from the above analysis of eye witness account that so far as deceased Abdus Sattar is concerned, the participation of three (1) Ismail Ali, (2) Aftabuddin and (3) Farijuddin is amply established. I will presently deal with the medical evidence, particularly the only injury, incised wound, a found by P.W. 3, who performed autopsy.

30. It is amply established that P.W. 1, the son and P.W. 2 the cousin of the deceased on hearing hullah rushed to the rescue of Abdus Sattar. Were they allowed to proceed freely? They were not only obstructed but assaulted as well, and those who obstruct or assault, a person rushing to the rescue of another being surrounded and attacked are not such persons sharing the same intention and pursuing the same common object ? While it is true that mere presence at the scene of occurrence by itself would not render any person liable, but Ae case at hand, is not a case of mere presence, they are actively participating in achieving the common object.

31. As Islamuddin and Abdul Hussain came running to the place of occurrence, it was Ajibuddin who dealt a btow with a "Bung" on the head of Islamuddin. Abdul Wahab gave yet another blow with the result he sustained injury on his right thumb, might be in warding off the blow. Samsuddin and Farijuddin attacked Abdul Hussain. Both these witnesses have stated with one voice, about the participation of the above named accused in assaulting them. So far as injury sustained by P.W. 1 is concerned the same stands further corroborated by medical evidence of P.W. 4 who on examination found an abrasion on neck and swelling of the left thumb.

Section 149 of Indian Penal Code creates a specific offence and makes every member of unlawful assembly vicariously liable. But in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed.

Since Section 149 of Indian Penal Code imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the conunon object and the offence committed.

(See Aflauddin Mian v. State of Bihar AIR 1989 SC 1456.)

32. The only point that still remains to be considered is the medical evidence and the singular injury found on the head of Abdus Sattar.

33. Let us have a fresh look at the injury as noted by P.W. 3:

One incised wound over vertex extending from frontal to occipital bone, 6" in length and 1 1/2" in width with fracture of underlying frontal, parietal and occipital bone and laceration of underlying frontal and parietal lobes.

34. Note the width of the injury 1 1/2" and the underlying laceration.

35. Now turning to the occular evidence both P.Ws. 1 and 2 have testified that first dao blow was given by Aflabuddin, followed by a blow with a "bang" given by Farijuddin.

36. It was argued by the learned Counsel for the Appellant that no injury on the leg of the deceased was found by P.W. 3, that does not necessarily obliterate the evidence of P.W. 1, who stated, to quote his own words:

The accused came running towards my father and gave a blow with the "sulphi" on the right leg of my father.

May be, because of the clothing there is no mark of injuries seen on the leg. P.W. 2 has also made a similar statement supporting P.W. 1 and has fiuther added that Sattar was about to fall but he balanced himself. In these circumstances, mere absence of a mark of injuiy would not be enough to discard the testimony of these eye witnesses.

37. As for defence stand taken by the accused Appellant, except for the injury of a very trivial nature sustained by one of the accused whose subsequent conduct in absconding from the hospital further belies the stand. The trial Court was right in rejecting the same. It may be noted that none of the witnesses examined by the prosecution, the defence story has been suggested or put in cross-examination.

38. In view of the foregoing discussion, this appeal fails, it is accordingly dismissed. The conviction and sentence as recorded by the trial Court is maintained.