

(2007) 07 GAU CK 0017**Gauhati High Court****Case No:** Criminal Appeal No. 89 of 2002

Gulenoor Hussain Mazumdar
and Anr.

APPELLANT**Vs**

State of Assam

RESPONDENT**Date of Decision:** July 24, 2007**Acts Referred:**

- Penal Code, 1860 - Section 307, 34
- Penal Code, 1860 (IPC) - Section 307, 34

Citation: (2008) 2 GLR 241**Hon'ble Judges:** H.N.Sarma, J**Bench:** Single Bench**Advocate:** A.S.Choudhury, J.M.Choudhury, M.Barbhuyan, Advocates appearing for Parties

Judgement

1. Aggrieved and dissatisfied with the conviction and sentences imposed by the learned Session Judge, Hailakandi, in Session Case No. 4/2001 dated 26.2.2002 convicting the accused/appellant under section 307/34, IPC and sentencing them to under rigorous imprisonment for 5(five) years and to pay fine of Rs. 1,000, in default further rigorous imprisonment for three months, the present criminal appeal has been filed by them.
2. Heard J.M. Choudhury, learned senior counsel assisted by Mr. A.M. Barbhuiya, advocate for the appellants and Mr. D. Das, learned P.P., Assam.
3. As unfolded, the prosecution story in brief is that on 25.11.1998 at about 7 P.M. there was an altercation amongst the accused persons and the injured Ahmed Ali (PW 2) over sale of betel nut in the Bowarghat Market, village Bowarghat, P.S. Hailakandi and for nonrepayment of the alleged loan by the injured. During the altercation the accused persons dashed PW 1 and caused him to fall under a running truck, as a result of which his left leg was fractured. The in tired was immediately taken to the Hailakandi Civil Hospital and from there he was shifted to

Silchar Medical College Hospital. An FIR lodged by Sakat Ali (PW 1) on the next day, i.e., 26.11.1998, narrating the occurrences, on the basis of which Hailakandi P.S. Case No. 0365/98 under section 307/34, IPC was registered against the accuseds. Upon registering the case, the law of investigation was set into motion and the I.O. visited the place of occurrence, prepared Sketch Map of the place of occurrence and recorded statements of the witnesses and also collected the injury report from the Silchar Medical College Hospital. Upon completion of the investigation, there having found a *prima facie* case, the accuseds were chargesheeted under section 307/34, IPC.

4. The case being triable by the Court of Sessions, was committed by the learned Magistrate to the Court of Sessions Judge, Hailakandi for necessary disposal. The learned Sessions Judge upon perusal of the necessary police papers filed under section 173, Cr.P.C and upon hearing the prosecution in defense framed charges against the accused persons under section 307/34, IPC and on being explained to them, they pleaded not guilty and claimed to be tried.

5. During the course of trial prosecution examined as many as 9 witnesses inducing the I.O. and the Doctor, whereas defence examined none. The defense plea is of total denial. After completion of the examination of the prosecution witnesses, they were examined under section 113, Cr.PC, pointing out the circumstances that appeared against them during the course of trial to which they denied. Although both the accused took the plea that they have been implicated falsely due to existence of certain matrimonial differences between the elder brother of the injured and his wife who happens to be the sister of the accuseds.

The learned Sessions Judge, at the closer of the trial, held the accused persons guilty under section 307/34, IPC and accordingly, convicted and sentenced them in the aforesaid manner. Hence this appeal.

6. Supporting the appeal, Mr. J.M. Choudhury the learned senior counsel, referring to the statements of the various prosecution witnesses and other materials on record, submits that the impugned conviction and sentences imposed against the accused appellants is the result of total misappreciation of evidences and materials on record. The learned senior counsel further submits that none of the ingredients of section 307, IPC could be proved by the prosecution in the instant case nor section 34, IPC could be applied to secure their conviction.

7. Mr. D. Das, learned Public Prosecutor on the other hand submits that overwhelming corroborating evidences of the prosecution witnesses justify that the accused appellants are guilty under section 307/34, IPC and accordingly prayed for dismissal of the appeal.

8. As noted above, the prosecution examined as many as 9 witnesses to prove the case against the appellants. It is not disputed that the injured (PW 2) got fractured on his left leg on the date occurrence, being hit by a running truck near the place of

occurrence. The evidence of the Doctor (PW 9) who has deposed that the left leg of the injured suffered compound fracture and this is not denied by the accuseds.

In order to prove the case, prosecution heavily relied on the evidence of PW 1, the informant and PW 2, the injured.

PW 1 (Sakat Ali) in his deposition stated, inter alia, that on the date of occurrence at about 7 P.M. there was an altercation between his brother Ahmed Ali (injured) and the accused persons, during the course of which the accused persons assaulted his brother and at that time a truck was coming from the northern side towards the southern side and both the accuseds pushed his brother in front of the truck, as a result of which his left leg was fractured. Seeing the occurrence, he came running to the place, but the accused persons had already left the place after assaulting him. PW 1 took his injured brother to Hailakandi Civil Hospital. He lodged the FIR, i.e., Ext1. He further stated that his brother was treated in the Silchar Medical Hospital for about 6 to 7 months. During his lengthy crossexamination, he stated, inter alia, that the date of occurrence there was a bazar day and there were so many people on the road. He further denied the suggestion that there was some loan transaction between the injured and the accused persons.

PW 2 is the injured Akmat Ali. In his deposition he stated, inter alia, that on the date of occurrence, there was a bazaar and he himself and the accused persons were engaged in the business of selling betel nut and while he was selling his betel nut the accused persons demanded money which was due to them and he having stated that he had no money at that time, the accused persons pushed him and threw him in front of the truck. Due to hit by a truck his leg was broken.

PW 3 is one Jainul Islam, who is not an eye witness. He heard about the occurrence from other people. This witness was declared hostile by the prosecution and he was cross examined by the prosecution. The statements of this witness is not of much help for the prosecution.

PW 4 Mrs. Rajia Begum is the wife of the injured. In her deposition she stated, inter alia, that about 2♦ years ago about 7 PM at night when she was coming through the PWD Road, people told her that a truck hit her husband as a result of which one of his legs was broken. People tried to stop the truck but they could not. She did not find her husband in the place of occurrence. In her cross she stated, inter alia, that her husband got injury due to the accident.

PW 5 is the Advocate's Clerk, who drafted FIR Ext1.

PW 6 is Nazrul Islam who stated, inter alia, in his deposition that he had a pan shop near the place of occurrence and during the time of occurrence he was in his shop. At that time some people told that an accident took place and the injured was hit by a truck and the injured dealt with the business of betel nut.

PW 7 is the Doctor S.K. Roy who was attached to Hailakandi Civil Hospital on the date of occurrence and treated Azihur Rehman Majumdar and found abrasion near his left eye, no injury report has been produced, in support of the above statement.

PW 8 Sri Nirmalendu Das, ASI Police was the investigating officer of the case who stated inter alia, that after investigation he submitted charge sheet exhibited as Ext3. He also proved Ext 2, the Sketch Map prepared by him.

PW 9 is the Doctor Harmen Frank, Assistant Professor (Junior) in the Department of Orthopaedics, Silchar Medical College Hospital treated the injured on 26.11.1998. He proved the injury report on exhibit 4. The injury found on the leg of PW 2 has not been denied by the defence.

9. On the basis of the evidences of prosecution witnesses as scanned above, the learned Session Judge convicted and sentenced the appellants under section 307/34, IPC.

In order to prove section 307, IPC, the prosecution is to prove

(i) That the accused did the alleged overt act.

(ii) The said act was done

(a) with the intention of causing death, or

(b) with the intention of,

(i) causing such bodily injury as the accused knew to be likely to cause the death of the person to whom the harm was attempted to be caused, or

(ii) causing bodily injury to a person and the bodily injury intended to be caused would have been sufficient in the ordinary course of nature to cause death, or

(iii) the act, if committed, would have been so imminently dangerous that it would have in all probability caused death and the act was attempted without any justification for incurring the risk of causing death as aforesaid.

Again to rope the accuseds under section 34, IPC, the necessary ingredients to be proved are

(i) That a criminal act is done by the actual participation of more than one person.

(ii) That the said act is done in furtherance of common intention of all engaged at a prior concert.

(iii) That in furtherance of common object the criminal act was done.

10. In the instant case, the proved facts disclose that the injured had borrowed some money from the accused persons, when the same was demanded, the injured was unable to repay the same, the occurrence took place as a result thereof.

From the statement of the injured (PW 2), we do not find that the accused persons assaulted him. His statement is to the effect that on being unable to repay the dues, he was pushed in front of the truck. There are vital discrepancies between this part of the evidences of the injured and with the statement of PW 1, the informant. That apart, the wife of the victim (PW 4) has specifically stated that the legs of the injured was broken due to vehicular accident.

There is no evidences regarding the prior concert between both the accuseds to cause the alleged criminal act.

Thus neither the ingredients of section 34, IPC nor that of section 307 could be proved by the prosecution.

11. On meticulous scrutiny of the statements of prosecution witnesses, I find it difficult to rule out the submission of Mr. Choudhury, that there might be some scuffle between the accuseds and the victim, as a result of which the injured falls down on the street and at that time the running truck having passed through, PW 2, was injured, but there was no intention to kill the injured.

The solitary statement of PW 2, showing the intention to cause death is not sufficient enough to convict the accused appellants on the charges levelled against them.

12. In view of the above discussions, this criminal appeal stands allowed and the impugned conviction and sentence stands set aside and quashed. The accused appellants are discharged from the bail bond.

13. Let the LCR, be sent back forthwith.