

THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, ARUNACHAL PRADESH AND MIZORAM)

Criminal Appeal No. 2 of 2016

Appellant/Accused ... Idrish Ali & others.

Respondent State of Assam

BEFORE

**HON'BLE THE CHIEF JUSTICE MR. AJIT SINGH
HON'BLE MR. JUSTICE MANOJIT BHUYAN**

For the Appellant/Accused ... Mr. HRA Choudhury,
learned senior counsel assisted by
Mr. A Roshid, learned counsel
For the Respondent ... Mr. M Phukan, learned
Additional Public Prosecutor, Assam
Date of hearing & judgment... 04.01.2017

JUDGMENT AND ORDER

(Ajit Singh, C.J.)

Six appellants, namely, Idrish Ali, Jiarul Hoque, Raham Ali, Siddique Ali, Surjat Ali and Jasu Mia have been convicted under Sections 302/149 of the Indian Penal Code and sentenced to imprisonment for life and fine of Rs.5000/- with default stipulation. They have also been convicted under Section 148 of the Indian Penal Code and sentenced to rigorous imprisonment for one year and fine of Rs.1000/- with default stipulation. They have further been convicted under Section 323 of the Indian Penal Code and sentenced to simple imprisonment for six months and fine of Rs.500/- with default stipulation. Their jail sentences have, however, been ordered to run concurrently.

One co-accused Md. Jabed Ali died during the trial. He was also father of appellant Nos. 1 to 4 (Idrish Ali, Jiarul Hoque, Rahman Ali and Siddique Ali).

2. According to the prosecution case, on 13.1.2010, in a weekly market held at Batowa, a quarrel took place between the family

members of appellants, on one side, and that of complainant party, on the other side. The quarrel was over some issue pertaining to a sheep. And because of the quarrel, around 9 a.m., the appellants, in furtherance of their common object, armed with weapons like bamboo lathis, daggers etc. assaulted and caused injuries to Maijuddin, Aijuddin (PW-1) and Taijuddin (PW-2). The appellants then also assaulted Rahman Ali (PW-6) and set fire to the kitchen of Taijuddin's house. Aijuddin made ejahar exhibit 5 at Sarupeta Police Out-post, wherein he named as many as ten persons, including the appellants, as assailants. The ejahar was later recorded as First Information Report at Police Station Patacharkuchi, District Barpeta.

3. Injured Maijuddin, Taijuddin and Aijuddin were brothers, whereas Rahman Ali is their nephew. They were all examined on the same day and virtually at the same time by Dr. Kamaleswar Das (PW-16) and Dr. Debendra Nath Kalita (PW-17) at Sarupeta Mini Primary Health Centre. The doctors found simple injuries on the forehead and right arm of Aijuddin, which were caused by blunt object. The injury report in this regard is exhibit 7. They also found simple injuries on the forehead of Taijuddin, which too were caused by blunt object. The injury report of Taijuddin is exhibit 8. No injury was however found on the person of Rahman Ali. The injury report in this regard is exhibit 8.

4. Dr. Kamaleswar Das and Dr. Debendra Nath Kalita reportedly found grievous injury on the head and leg of Maijuddin. Their injury report is exhibit 6. The doctors therefore referred him to Pathsala Civil Hospital from where he was further referred to Guwahati Medical College & Hospital for better treatment. But Maijuddin succumbed to his injuries on 16.1.2010. Dr. Manoj Kumar Sinha (PW-18) conducted the post mortem examination. He found fracture on right temporal and parietal bone. The doctor in his post mortem examination report exhibit 9 opined that Maijuddin died due to head injuries, which were ante mortem and caused by blunt force impact. In the post mortem

examination report, but for head injuries, no injury on any other part of the body of Maijuddin is reported.

5. Investigating Officer-Purna Kanta Borah (PW-19) after investigation, charge-sheeted the appellants and Md. Javed Ali for offences under Sections 147/148/325/302/149/447/436 of the Indian Penal Code. And since no evidence was found against co-accused persons namely Karam Ali, Toimuddin and Rahim Ali, despite they being named as assailants in the ejahar by Aijuddin, Investigating Officer did not file charge-sheet against them. As already mentioned above, Javed Ali, who was also the father of appellant Nos.1 to 4, died during the trial.

6. All the appellants abjured their guilt and pleaded false implication. But the trial court, relying upon the evidence brought on record by the prosecution, convicted and sentenced the appellants, as aforesaid. The trial court, however, acquitted them of the charges under Sections 325/447/436 of the Indian Penal Code.

7. It is argued on behalf of the appellants that the trial court committed an illegality in holding that they after forming an unlawful assembly, committed the murder of Maijuddin in furtherance of their common object. It has also been argued that the prosecution failed to prove its case against the appellants beyond all reasonable doubt and, therefore, the trial court ought to have acquitted them. In reply, the learned Additional Public Prosecutor defended the conviction and sentence of the appellants, as passed by the trial court.

8. Aijuddin is an injured witness and also brother of deceased Maijuddin. He says that his house is at a distance of one furlong from Batuwa market. According to him, on the date of incident, he and Maijuddin went to find work but they returned home around 9.30 a.m. because they could not get work. Aijuddin has testified that while returning he and Maijuddin were confronted by 10-15 persons who

also assaulted them but he could not recognize the assailants. Regarding making ejahar he says that he had simply put his thumb impression at the Police Station. His evidence therefore does not help the prosecution in any manner. Taijuddin is also younger brother of Maijuddin and Aijuddin. He too is an injured witness. According to him, on the date of incident, around 10.00 a.m., a quarrel took place between them and accused persons over some issue pertaining to sheep at Betuwa market and when an altercation was going on someone hit him with a dao from behind and he could not see who assaulted him. He says that after being hit he ran away from the market to his house and could not also see who assaulted Aijuddin. He however says that accused persons had assaulted Moijuddin, who sustained injury on the right side of head and also on right eye. In the cross examination, this witness has admitted that as soon as he was chased and assaulted from behind, he ran away to his house and could not see who assaulted him. He has also admitted that he could not see who assaulted Aijuddin. As seen above, it has come in the evidence of Aijuddin that Maijuddin was assaulted when both of them were returning home. Aijuddin has categorically admitted that he could not recognize the persons, who had assaulted them. Taijuddin has not named any specific accused/appellant for causing injury to Maijuddin. His statement is omnibus and general. According to his own admission, he ran away from the place of occurrence to his house, the moment he was hit on his head by someone. In this situation, it is difficult to believe that he actually saw the accused persons assaulting Maijuddin. His evidence also, therefore, does not help the prosecution case.

9. Mohabbat Ali (PW-3), though related to Maijuddin, denied having seen the incident. Siddique Ali (PW-4) says that around 200-300 people had assembled at the place of occurrence with lathis and spears and he could not see who assaulted whom. Abdul Latif (PW-5), though also related to Maijuddin, denied having seen the incident. These witnesses, thus, add nothing in support of the prosecution case.

10. As stated above, Rahman Ali is nephew of Maijuddin and so also of Aijuddin and Taijuddin. According to this witness, the accused persons had assaulted him with bamboo lathis at Batuwa market and when Taijuddin intervened, they assaulted him also. Rahman Ali has testified that accused persons assaulted Maijuddin with bamboo lathis when he was about to enter his house. According to him, Maijuddin had sustained grievous injury on his chest and an injury was also caused on his knee with a dagger. He then says that the accused persons after assaulting Maijuddin had also set fire to the kitchen of Taijuddin's house. We have carefully scanned his evidence and we do not find him to be reliable and truthful witness. This we say so because had he really been assaulted with bamboo lathis by the accused persons (seven in number) some injury would surely have been caused to him but on his medical examination on the same day, not one injury was found on his body. Also no injury was found on the chest of Maijuddin. Likewise, no injury which could be caused by dagger was found on the knee of Maijuddin. Not only this, setting fire to the kitchen, as stated by him, has not been proved by the prosecution. We are, therefore, convinced that Rahman Ali did not really see the incident and has narrated the incident by sheer imagination.

11. Witnesses – Aizuddin (PW-7), Munna Ali (PW-8), Ibrahim Ali (PW-9), Jahrul Ali (PW-10) and Md. Sahjahan Ali (PW-13) have not testified anything against the accused persons in their evidence. The prosecution, therefore, does not get any help from their evidence. In fact, Aizuddin (PW-7) denied the very presence of Rahman Ali (PW-6) at the scene of occurrence, whose evidence, we have disbelieved in the above paragraph. According to Jahrul Ali, he saw one person setting fire, but he could not identify that person. Md. Haidor Ali (PW-15) is witness to the seizure of two pieces of half-burned bamboos. His evidence is also of no relevance. Even the trial court has considered the evidence of these witnesses as irrelevant and of no consequence.

12. Musstt. Noor Bhanu (PW-11) is sister of Maijuddin and as such, she is also the sister of Aijuddin (PW-1) and Taijuddin (PW-2). She admits that prior to the incident, there was a quarrel between her brother (Taijuddin) and the accused persons over one sheep and the accused persons had assaulted Taijuddin causing fracture on his head whereafter he was taken to Sarupeta Primary Health Centre and from there to Guwahati Medical College & Hospital. Noor Bhanu has testified that after about one hour of the assault on Taijuddin, when Maijuddin asked co-accused Javed Ali as to what had happened, Javed Ali dealt a blow on his chest with a bamboo lathi. According to her, Siddique Ali then dealt a lathi blow on the right side of his head and thereafter Idrish Ali stabbed him on the leg with a spear. This witness also, in our considered opinion, is not truthful and trustworthy because according to the prosecution case itself, all the three victims (Maijuddin, Aijuddin and Taijuddin) were assaulted virtually at the same time whereafter they reached Primary Health Centre together and there also they were examined by the doctors at the same time. Thus, there was absolutely no time gap between the assault by accused persons on Maijuddin, Aijuddin and Taijuddin. Moreover, no injury on the chest of Maijuddin and also no injury of stabbing on his leg was found. Apart from this, she says that after the incident and prior to recording of her statement, the police had visited her house on 6/7 occasions and yet she did not make any statement to police. Why the police did not record her statement under Section 161 of the Code of Criminal Procedure if she had seen the incident is a mystery. Her statement was, however, recorded by the Magistrate after 16 days from the date of incident and that too at the instance of police. In the cross examination, she admits to be married having four children. In normal circumstance, she should, therefore, live in her matrimonial house. Why on the date of incident she was in the house of her brother Maijuddin is also not clear from her evidence. She being highly interested witness, her evidence has failed to pass the test of scrutiny and does not inspire confidence.

13. Musstt. Chan Khatun (PW-12) is widow of Maijuddin. The prosecution has examined her as an eye witness. She has testified that the accused persons had first assaulted Taijuddin causing fracture on his head and thereafter Javed Ali dealt a blow with a dagger and bamboo lathi on the head of Maijuddin. According to her evidence, there was bleeding from the mouth of Maijuddin. She also says that Maijuddin had sustained injuries on his legs, eyes and chest. This witness, in her entire evidence has not attributed any specific overt act against any of the appellants for causing injury to Maijuddin. Also from the post mortem examination report, it is clear that Maijuddin died only on account of head injury. In the post mortem examination report, but for head injury, no other injury has been reported by Dr. Manoj Kumar Sinha. It is, therefore, clear that Maijuddin died due to solitary head injury, which was caused by Javed Ali and none else. As already seen above, Aijuddin and Taijuddin have denied having seen any of the appellants causing injuries to them. There is also no iota of evidence to indicate that the appellants armed with weapons came together to assault Maijuddin and left together after causing injury to him. Even not a single weapon is seized from any of the appellants. Therefore, the possibility of their being roped in, merely because they happen to be sons and close relations of Javed Ali, cannot be ruled out.

14. Javed Ali died during the trial. The trial against him, therefore, stood abated.

15. For these reasons, we are unable to sustain the conviction and sentences of the appellants. They are acquitted of the charges. They be released from jail, if not wanted in any other cases.

JUDGE

CHIEF JUSTICE

skd