GAHC010172852008

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

Case No. : Crl.A./107/2008

DIGANTA BORA
-

2: TUTU BORA

3: RITU BORA
ALL ARE SONS OF LATE DEBA BORA
R/O OFFICE LINE
TIPONG
UNDER LEKHAPANI P.S.
DIST. TINSUKI

VERSUS

THE STATE OF ASSAM
-

Advocate for the Petitioner : MR. A K BHATTACHARYYA

Advocate for the Respondent : MR.R KALITA

BEFORE

THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellant	:Mr. AK Bhattacharyya, Sr. Advocate Mr. BM Choudhury, Advocate
For the Respondents	: Mr. B Sarma, Addl. PP, Assam : Mr. B.D. Konwar, Sr. Adv
Date of Hearing	: 12.03.2024
Date of Judgement	:22.04.2024

JUDGEMENT & ORDER (CAV)

Heard Mr. AK Bhattacharyya, learned Senior counsel assisted by Mr. BM Choudhury, learned counsel for the appellants. Also heard Mr. B Sarma, learned Additional Public Prosecutor, State of Assam and also heard Mr. B.D. Konwar, learned senior counsel appearing on behalf of the informant.

2. **The challenge**:

The present appeal is preferred under Section 374 (2) of the Cr.P.C., 1973 against the judgment and order dated 27.05.2008 passed by the learned Additional Sessions Judge (FTC) No. 1, Tinsukia in Sessions Case No. 131 (M)/2003 convicting the appellants under Sections 326/34, 323/34, 324/34 IPC and sentencing them to undergo RI for two years each with fine of Rs. 3000/- and in default RI for three months. The appellants were also convicted under Section 326/34 IPC to undergo RI for three years and RI for one year under Section 324/34 IPC. All the sentence were to run

concurrently.

It is important to note here that the accused appellant No. 2 has in the meantime expired on 01.03.2023 and accordingly, the appeal stands abeted against him in terms of Section 394 Cr.P.C.

3. The hearing was concluded on 20.09.2023 and case was adjourned for verdict. However, while dictating the judgment and going through the record, this Court found that as per the age declared by the accused/appellant No. 3 in his statement recorded under Section 313 of the Cr.P.C., he might be a juvenile on the date of commission of the offence. Accordingly, the case was listed once again and a direction was issued on 16.10.2023 to the learned Sessions Judge, Tinsukia to determine the age of the accused No.3, namely, Ritu Bora in terms of the provision of Rule 12(3)(b) of the Juvenile Justice Rule and thereafter, submit a report before this court.

4. Pursuant to such direction, the learned Additional District & Sessions Judge conducted an enquiry wherein the accused No.3 also participated. After such enquiry the learned Additional District and Sessions Judge concluded that the accused Ritu Bora was not a juvenile in conflict with law when the incident took place on 20.06.1994. Such determination is based on the following materials/principles.

a. The medical board opined that the accused is above 40 years and below 50 years on the date of examination i.e. on 21.01.2024.

b. Ossification test, after attaining age of 30 years, cannot be relied upon for age determination. Such conclusion was arrived at on the basis of determinations made by the Hon'ble Apex Court in **Mukarrab –Vs- Uttar Pradesh** reported in **2017 2 SCC 210.**

c. Though the accused, during the enquiry on juvenility, submitted a

photocopy of a certificate issued by School authority in support of his juvenility, however, even after grant of time, the accused could not produce the original document.

d. The Head Teacher of the School who issued such certificate was also examined during the enquiry and he deposed that records are not available as regards the accused.

e. The accused himself declared his age to be 48 years when he was examined by the Doctor for determination of age on 21.01.2024 and therefore, he was more than 18 years as on 20.06.1994.

5. It is true that right of a juvenile under the JJ Act, 2015, is precious and such right can be ascertained at any stage of the proceeding, however, for determination of juvenility, the parameters as mandated are required to be fulfilled to grant such benefit. It is equally well settled that ossification test for determination of age generally donot yield trustworthy and reliable result beyond the age of 30 years when such ossification test is conducted and such test cannot be conclusive to declare a person to be juvenile. Therefore, the other materials which shall be relevant for determination of the age shall be the matriculation certificate which is not available in this case. Therefore, the age recoded in the School record at the initial stage of admission into School shall be relevant in absence of any birth certificate, however, the petitioner has not only failed to produce the original certificate purportedly issued by the School authority but the Head Teacher of the School in question has also deposed that there were no record in the School so far the same relates to the petitioner. That being the position, this Court concurs with the determination made by the learned trial Court.

6. **The prosecution case**:

I. The prosecution case was initiated on the basis of an FIR, wherein it was alleged that on 20.06.1994 at about 3.30 p.m. the accused persons, namely, Tapan Bora (appellant No. 2), Ritu Bora (appellant No. 3) and Diganta Bora @ Tutu (appellant No. 1) with intention of causing death attacked the informant's elder brother and younger brother namely, Rajat Bharali and Mahendra Bharali by means of khukuri and iron rod and as a result both the brothers of the informant sustained grievous injuries on their person. On the basis of the said FIR, the police registered a case being Lekhapani PS case No. 34/1994 under Section 325/326/307/34 IPC and after completion of the investigation laid charges under Sections 325/326/307/34 IPC and sent them for trial. Subsequently, the injured Mahendra Bharali expired and taking permission of the court investigating officer submitted supplementary chargesheet under Section 302/34 IPC.

II. The committal court committed the case to the jurisdictional Sessions Judge, the offences being exclusively triable by the court of Sessions. The session case being Session Case No. 131(M)/2003 was registered and same was transferred by the Session Judge to the court of learned Additional Sessions Judge (FTC) No. 1, Tinsukia for trial.

III. The learned trial court framed charges under Section 302/307/326/34 IPC, read over and explained the same to the

accused, to which they pleaded not guilty and claimed to be tried. Accordingly, the trial commenced.

IV. It is worth mentioning that victim Mahendra died almost after one year of the incident and as his cause of death was stated by the doctor to be for the reason of bedsore, the accused were acquitted from the charge under Section 302 IPC and therefore, this court will not deal with the evidence regarding the offence under Section 302 IPC inasmuch as no appeal has been preferred against such determination either by the State or by the informant.

7. **The prosecution witnesses**:

I. To bring home charges against the accused persons, the prosecution examined as many as 13 witnesses and exhibited 14 exhibits including seizure list, medical report etc.

II. Out of the total witnesses the PW7, PW9 and PW11 turned hostile and they were cross-examined by the prosecution and their statement recorded under Section 161 Cr.P.C. by the investigating officer were exhibited as Ext. 12, 13 and 14 respectively.

III. PW1 is the sister of the injured and deceased victim. She deposed that on 20.06.1994 at about 3.45 p.m. when she was at her residence, she heard hue and cry and came out of her residence and she saw the accused Tapan and Tutu were running. The accused Ritu coming in front of her gate rebuked her by using slang language and also told her that your brothers are chopped. At that time, her daughter came running and informed that her maternal

uncles have been beaten up and accordingly PW1 rushed to the place of occurrence and then she rushed to the hospital and she saw elder and younger brothers at hospital. She further deposed that her younger brother told her that Tapan and Tutu etc. had beaten him up. Thereafter, while she looked at her elder brother, she saw that his little finger of the right hand was missing and he was also having injury on his head. Thereafter, two victims were taken to Margherita Coal India Hospital and they were hospitalized there for almost 17 days. The elder brother continued to suffer and was taken to Vellore. However, there was no improvement in health condition and thereafter, after three months of coming from Vellore he expired.

During her cross-examination, she deposed that she has been informed by her daughter regarding the incident as narrated in the FIR that her both brothers were beaten up by the accused. Nothing material favourable to the defence case was disclosed by this witness during cross-examination nor her testimony was dislodged.

IV. PW2 is Rajat Bharali, who is the star witness for the prosecution inasmuch as he is the injured victim. He deposed that on the fateful day i.e. on 20.06.1994 around 3.30 p.m. while he was coming out from his residence at around 15 meter from his residence accused Tapan Bora, Diganta Bora @Tutu and accused Ritu Bora gheraoed him. Accused Tutu Bora tried to chop his neck a deggar, which was hidden behind his back however, as the PW2 resisted such blow with his right hand, his little finger got chopped and he fell down at the place of occurrence. At that point of time, his brother Mahendra Bharali was returning from his work and faced with such a situation

he started raising hue and cry. Then, accused Tutu Bora gave a blow on his head and then the accused Ritu Bora who was in the nearby shop came to the place of occurrence and joined Tapan Bora and inflicted deggar blow upon Mahendra and then accused Ritu Bora threw an iron bolt to Mahendra and ran away. He further deposed that when Tapan Bora tried to kill him with deggar, PW2 protected himself with his left hand and got cut injury in between his middle finger and index finger and then one Hemen Bora raised hue and cry. Thereafter, accused Ritu and Diganta gave Degar blow in the right hand of PW2 and simultaneously accused Ritu Bora inflicted injury in his head with a sharp weapon and immediately he fell down. Thereafter he and his deceased brother were taken to Tipong Hospital by one Thaneswar Kalita and Rajen Gogoi and after giving first aid there, both the injured were taken to Coal India Central Hospital. PW2 was hospitalized for around 8 days and his brother was there for almost 20 days. Thereafter, his brother was taken to Assam Medical College Hospital in the month of December, 1994 and thereafter he was referred to All India Institute of Medical Science and after treatment of 11 days while his condition did not improve he was taken back home and thereafter he was again taken to Vellore however, when it was intimated that he will not recover and he will have to move only with the help of wheelchair, he was returned back home and thereafter, he was treated at home and on 29.11.1996, his elder brother expired at 2.10 p.m. Autopsy and postmortem was conducted upon the dead body.

During the cross-examination, the defence though tried to dislodge

his evidence, he reaffirmed that at the time of incident, victim Mahendra was coming towards their residence, the accused first inflicted injury upon him thereafter, upon Mahendra, when he was beaten up by the accused, Mahendra was shouting and when Mahendra was beaten up, the PW2 was shouting and hearing his hue and cry one Hem Bora and Champa Sharma came to the place. He denied the suggestion that he has not stated before the police what he has testified before the court. During cross, he admitted that prior to the incident in the night on 19.06.1994, there was a quarrel between one Jyoti Bora, brother of the accused as said brother in an inebriated condition entered the house of the victim by breaking the door open. The other suggestion made by the defence that he and his brother were the aggressor and tried to kill the accused and got the injury while running and hitting on wooden bridge.

V. PW3 deposed that on the fateful day he saw accused Tutu Bora and Tapan Bora going by riding a cycle and witnessed blood stain in their clothes. After crossing them, some other persons told him that the accused persons inflicted cut injury upon the body of the victim Rajat Bharali and Mahendra Bharali. Accordingly, the PW3 went to the house and in the place of occurrence he witnessed blood and a chopped finger and he saw both the injured victim at Tipong Hospital. The victim on being asked informed him that accused Tapan, Tutu and two others committed the offence. He further deposed that he witnessed that the little finger of Rajat Bharali was missing and also witnessed injury in his head and blood was oozing

from the injury. He also deposed that after two years of the incident, victim Mahendra expired. He proved autopsy report as Ext. 1 and his signature as Ext. 1 (2).

During cross-examination, he deposed that victim Rajat is his son-in-law and he had not seen any other person at the place of occurrence, however, later on he deposed that he met one Satya Gogoi, Nityananda Saud, Hem Bora, Jogeswar Bora etc. During cross, he further deposed that he has not witnessed the incident and he heard it from others.

VI. The evidence of PW5 is not relevance inasmuch as he is the doctor who conducted the postmortem upon the dead body of the deceased Mahendra Bharali inasmuch as the accused were acquitted from the charges of Section 302 IPC. However, this court cannot be oblivious of the evidence of the PW5 that he found an old healed circular scar medial to the right scapula. He opined that the death is due to exhortion of the bedsores measuring 25X12 c.m.

VII. The evidence of PW6 is also not important as he investigated the case relating to death of Mahendra Bharali.

VIII. PW7, who was a witness to seizure of an iron rod and one khukuri. Though he admitted his signature as Ext. 6(1), however, deposed that his signature was taken in the Ext. 6 seizure list in a blank paper. This witness was declared as hostile and cross-examined both by the prosecution and defence. The prosecution confronted his statement made before the I/O under Section 161Cr.P.C. which he denied to be stated before the police.

During cross-examination by the defence, he deposed that he cannot read and write Assamese and English and he is not aware what was written in the Ext. 6 as the police has not read out the same before him.

IX. PW8, is the doctor who immediately treated the victim persons at Central Hospital Coal India Limited after the alleged incident. So far relating to the injury inflicted upon Rajat Bharali following was his finding:

1) Lacerated cut injury on left parietal region, size- 5" X 1" X ½ ",

2) Lacerated cut injury below right elbow joint, size-3" X ½ " X ½ ",

3) Lacerated cut injury above right elbow joint, size- 2"X ½ " X ½ ",

4) Self amputation right little finger at the base,

5) Lacerated cut injury over right middle finger, &

6. Lacerated curt injury over left index, middle and ring finger palmeraspect.

So far the injury relating to Mahendra following was his findings:

1) Lacerated injury over vertex of scalp, 8" X ½" X full scalp deep, covered by bandage,

2) Penetrated injury over posterior fold of right axilla 5 ½" X ½" X full skin deep, penetration upto thoracic spine, active bleeding- present.

3) Patient is paraplegic. Loss of sensation from 3" above the umbilical level.

Repair of the wound & treatment was given by:-

1) Dr. UC Das, &

2) Dr. B K Das. (Central Hospital, Margherita)

Type of injury- Grievous.

During cross, she deposed that she has not mentioned the age of injury in her report. From the injury report it cannot be determined. However, during cross she deposed that the injury No. 4 relating to Rajat Bharali is grievous in nature.

X. PW9 was a seizure witness, however, as he deposed that his signature Ext. 6 (2) was taken on a blank piece of paper i.e. Ext. 6 and that he put his signature as requested by the police he was declared hostile and he was confronted by the prosecution with his statement recorded under Section 161 Cr.P.C. during investigation and he denied of giving statement before the police. He was not cross-examined by the defence.

XI. PW10 is the scribe of the FIR and he deposed that he has written the FIR as per instruction of PW1. He proved the ejahar as Ext. 9 and his signature as Ext. 9 (1).

During cross, he deposed that he has not witnessed the actual incident.

XII. PW11 is also a seizure witness. Though he proved his signature in Ext. 6 as Ext. 6(3), he testified that while he was going to his office

police took his signature. This witness was also declared as hostile.He was confronted by the prosecution with his statement recorded under Section 161 Cr.P.C. during investigation and he denied of giving statement before the police. During cross he deposed he put his signature in Ext. 6 near the Coal India Office.

XIII. PW12 is one police officer, who was the officer-in-charge of the concerned police station. He testified receiving Ext. 9, FIR lodged by PW1 in the police station and also deposed that the case was registered and that he asked one ASI to start the investigation. Subsequently, he had taken the investigation and could find out that the investigation was almost completed and accordingly filed charge-sheet.

During cross, he deposed that he did not conduct the investigation but filed the chargesheet.

XIV. PW13 is the investigating officer, who conducted the investigation. According to him he met both the injured victims at Coal India Hospital, Margherita, recorded their statement, inspected the place of occurrence and prepared the sketch map thereof and exhibited the same as Ext. 11. According to him, he seized the weapon used in the offence as shown by the accused from a nearby area. He put his signature in Ext. 6 as Ext. 6(4). He arrested the accused. He has also collected the injury report and also exhibited statement of PW7, PW9 and PW11 recorded under Section 161 Cr.P.C. as Ext. 12,13 and 14, respectively. He reaffirmed during his cross-examination regarding the Ext. 12,13 and 14, the statements recorded are of the PW7, PW9 and PW11.

XV. PW14, who is a neighbor deposed that after returning from Dumduma, he was informed that there was a fight between the victim and the accused and the on next date he visited Coal India Hospital and witnessed injury on the hand of victim Rajat and head injury with bandage in Mahendra's head. According to him he did not ask anything.

During cross-examination, he stated that he was not aware how the injuries were inflicted.

8. **Case of the defence**:

I. The accused were examined under Section 313 Cr.P.C. and were confronted with the testimonies of the prosecution witnesses, which the accused denied.

II. The case of the defence, which is discernible from the cross-examination is a case of denial and there is suggestion in cross-examination of Rajat Bharali (PW3)that there was fight between the parties and the injuries are result of falling down from wooden bridge. However, the defence had not laid any evidence to substantiate their defence as well as such defence was also not taken during their examination under Section 313 Cr.P.C. rather in the 313 statement, the accused took a stand that they were not at all involved in the case.

9. **Argument on behalf of the appellants**:

Mr. AK Bhattacharyya, learned Senior Counsel argues the following:

I. That the doctor's evidence clearly establishes that the amputation of right little finger of the victim Rajat Bharali at base

is a self amputation.

II. During cross-examination of Rajat Bharali it is proved that prior to the alleged date of incident on 20.06.1994, there was a fight between another brother of the accused and the victim, therefore, from the aforesaid evidence it is clearly established that the injuries are self-inflicted injuries to frame the accused persons. Therefore, the learned Sessions Judge had committed serious illegality and perversity by convicting the appellants ignoring such evidence.

III. From the evidence of alleged victim PW2, it is seen that according to him one Hem Bora raised hue and cry and the victim was taken to hospital by one Rajeswar Kalita and Rajen Gogoi and also deposed during cross-examination that hearing the hue and cry raised by the victim one Hem Bora and Smt. Champa Sarma reached the place of occurrence. However, such persons were not examined as prosecution witness, who could otherwise had been able to disclose the actual fact. Withdrawal of such evidence by the prosecution is fatal to the prosecution case and therefore, a doubt has been created regarding the actual occurrence and therefore, the accused appellants are entitled for benefit of doubt.

IV. The prosecution has miserably failed to prove recovery / seizure of the weapon used in the alleged crime and on this count also the appellants are entitled for benefit of doubt inasmuch as the age of the injury was also not proved by the prosecution through the evidence of the doctor.

V. As the injured victim is not trustworthy in view of the evidence of the PW8, doctor that the amputation of the little finger is self-inflicted amputation, the learned trial court could not have convicted the appellants in absence of any corroborative evidence including eye witness and in fact the alleged eye witness has not been examined by the prosecution for reason other than bonafide. Accordingly, the appellants are entitled for acquittal as the prosecution has failed to prove the case beyond reasonable doubt.

10. **Argument of the learned Addl. PP**.

Per contra Mr. B. Sharma, learned APP while defending the impugned judgement submits the followings:

I. The learned trial court after proper appreciation of the evidence available on record has passed the impugned conviction and sentence.

II. There is nothing available on record to dislodge the testimony of the injured witness inasmuch as evidence of injured witness are always put in a high pedestal and in the case in hand there is nothing available on record to disbelieve and doubt the testimony of the injured victim.

III. The testimony of the injured victim has been corroborated by the testimony of the doctor and therefore, there was due corroboration of evidence of the injured victim.

IV. Even if it is considered that seizure of the weapon was not properly done, such defect cannot absolve the accused from the

guilt in view of the testimony of the victim and the doctor and other witnesses who witnessed the injuries inflicted upon the victim.

11. **Argument on behalf of the informant**:

Mr. B. D. Konwar, learned Senior Counsel for the informant/ victim endorsed and adopted the argument advanced by the learned Addl. P.P, Assam.

12. **Decision and determination**.

On perusal of the evidence, this court can safely conclude that the prosecution has been able to prove beyond reasonable doubt the following facts:

I. That on 20.06.1994, the two victims got injured in different parts of their body and the right hand little finger of victim was amputated at the base. Such facts are established through the testimonies of the evidence of PW1, PW2, PW3 and PW8 (the doctor).

II. The injured witnesses' evidence (PW2) regarding the assault upon him and his brother remained unshaken and he had described the role of each of the accused in commission of the offence. Such testimony not only remained unshaken but also was reaffirmed during cross-examination.

III. Through the evidence of PW3 it was established that at that relevant point of time he saw the accused in a bicycle with blood stain in their clothes. His deposition and statement that he witnessed blunt and severed finger at the place of occurrence

remained unshaken during the cross-examination. Such fact corroborates the evidence of the injured victim of severing his little finger and place of occurrence and also that the accused persons were seen near the place of occurrence on the date of occurrence with blood stain in their cloths. Thus, in the considered opinion of this court the prosecution has been able to prove beyond reasonable doubt that injuries upon the victim were inflicted by none other than the accused /appellants.

IV. The Hon'ble Apex court in the case of ***State of MP vs. Mansingh*** reported in ***(2003) 10 SCC 414*** has held that the evidence of an injured eye witness has great evidentiary value and unless compelling reason exist, their statements are not to be discarded lightly.

V. This court after close scrutiny of the testimony of the injured victim does not find anything to discard his testimony and to disbelieve the same inasmuch as the nature of injury described by him and of his brother has been corroborated by the evidence of the doctor.

VI. Now coming to the argument of self-amputation, this court is of the view that such point has been raised for the first time at the appellate stage inasmuch as there is no suggestion by the defence to any of the witnesses including the injured victim that the severance of the little finger is self-inflicted. The fact also remains that to believe such self-inflicting injury, the same must be preceded by an evidence of serious enmity between the quarreling parties, which is not available on record except one

fact that one of the brother of the appellants broke open the door of the house of the victim in an intoxicated condition. Further, the PW2 had explained in his testimony how the little finger got severed and such testimony remained firm and unshaken during the cross-examination. Therefore, in view of the aforesaid settled propositions of law and in absence of such compelling evidence and existence of unshaken testimony of the injured victim, this court is not inclined to disbelieve the role of the accused in the commission of the offence only on the ground that the medical report reflects that amputation was self-inflicted.

VII. Even if it is assumed to be self-inflicted injury the testimony of the injured victim as discussed hereinabove regarding role of the accused in commission of the offence remained unshaken.

VIII. It is well settled that when there is direct eye witness account which is found credible, non examination of the witness who had reached the place of occurrence and had taken the victim to the hospital may not be fatal to the prosecution case more particularly, when the evidence rendered including that of the eye witness inspire confidence and donot suffer from glaring inconsistencies. Therefore, the argument of Mr. Bhattacharyya, learned Senior Counsel in this regard do not find favour of this Court.

IX. Similarly, it is also equally well settled that recovery of the weapon used in the commission of the offence is not a sine qua non to convict the accused. When there is a direct evidence in the form of eye witness, which is trustworthy, absence of

recovery of weapon cannot be fatal to the prosecution case.

13. In view of the aforesaid discussion, reason and decision, this court finds no merit in this appeal and is of the view that the learned trial court has rightly convicted the appellants. Accordingly, the appeal stands dismissed.

14. Registry to send back the LCR to the learned trial Court below and on receipt of such record, the learned trial Court shall proceed in accordance with law.

JUDGE

Comparing Assistant