



GAHC010003482012

Page No.# 1/21



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

Case No. : CrI.A./31/2012

KAMAL BARUAH
S/O LATE KON BARUAH @ GHANA BARUAH, R/O MALOW ALI, SANTIPUR,
JORHAT UNDER JORHAT POLICE STATION IN THE DIST. OF JORHAT,
ASSAM.

VERSUS

THE STATE OF ASSAM

Advocate for the Petitioner : MR.J M CHOUDHURY

Advocate for the Respondent : MR. D DAS(ADDL.PP, ASSAM)

BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

JUDGMENT

Date : 21-09-2023

1. Heard Mr. B.M Choudhury, learned counsel for the appellant.
Also heard Mr. D Das, learned Addl. PP, Assam.
2. The present appeal is directed against the judgment and order dated 21.01.2012 passed by the learned Additional Sessions Judge,

Jorhat in Sessions case No.80(J-J)/2005, convicting the accused appellant for offence under sections 307 IPC and sentencing him to suffer simple imprisonment for 5 (five) years and further directed to pay compensation of Rs.20,000 to be given to the victim and in default of payment of compensation to undergo further SI for another 6 months.

3. The prosecution case, in a nutshell is that the younger brother of the informant (the victim) had been residing in a rented house of accused appellant Kamal Baruah. On the previous night of the lodging of the FIR, the son of the accused informed him that the younger brother of the informant has been lying in their bathroom in an injured condition. On being informed, the informant rushed to the accused person's house and found that the said house is crowded by police officials and neighboring people. The informant further alleged that he also noticed the police personal shifting the injured lifting him in a vehicle to Civil Hospital, Jorhat. He saw the injured was shouting in pain and noticed burn injuries on different parts of his body. He also scented smell of kerosene oil from the body of his injured brother. According to the informant as narrated in the FIR that the victim brother had informed the informant that accused Kamal Baruah had poured kerosene oil on his body and set him ablaze. He further narrated in the FIR that he found the right hand of Joy Hazarika being tied with one plastic rope of red colour that got attached with the burnt portion.

4. On the basis of such FIR the investigation was launched and finally, after completion of the investigation charge sheet under

section 342/326/307 IPC was filed against the accused appellant and he was sent for trial. Thereafter, the committal court committed the matter to the learned Sessions Judge Jorhat who in turn entrusted the trial to the Additional Sessions Judge, Jorhat. Thereafter, by an order dated 22.09.2005 charges under section 342/307 IPC was framed. The same was read over and explained to the accused, to which the accused had pleaded not guilty and claimed to be tried.

5. To bring home the charges framed against the appellant, the prosecution has examined as many as 11 witnesses. After examination of the witnesses, the accused was examined under section 313 Cr.P.C., in which the accused denied the allegations and laid four defence witnesses.

6. PW-1 and PW-2, are the seizure witness of exhibit 1 whereby a piece of plastic rope, one gamosa and one match box were seized, PW-9, PW-10 are hospital staff and seizure witnesses who exhibit – 3 whereby the rope tied in the hand of the victim, his wearing pant and underwear were seized. PW-3 & the informant, elder brother of the victim, PW-4 is the injured victim, PW-5, PW-6 and PW-7 are the neighbouring people, PW-8 is the doctor who treated the injured victim. PW-11 is the Investigating Officer.

7. The vital witnesses for the prosecution were PW-4, the victim injured himself, the doctor PW-8 and the seizure witnesses. Before determining the correctness of the judgment impugned in the present appeal, let this court first look into the deposition of the witnesses.

I. PW-1 is a seizure witness of plastic rope one

gamosa and one match box. He deposed that he learnt that the tenant of Kamal Baruah got burnt and has been taken to hospital. Around 10 PM in the night the police visited the residence of the accused and asked the PW-1 to be witness and informed the PW-1 that one piece of plastic rope, one gamusa and one match box has been found in the residence of the accused appellant and were shown to the PW-1 and took signature in the seizure list. PW-1 proved his signature in the seizure list as exhibit-1(1) and the rope gamusa and match box as K(1), K(2), K(3). During cross-examination he deposed that police showed him the seized article in the drawing room of the accused. He further deposed during cross-examination that he has not seen that the seized items were recovered from the house of the accused.

II. PW-2 is another seizure witness who deposed that he came to learn that the tenant of the accused got burnt and was taken to hospital and thereafter, police asked him to come to the place of occurrence and the police seized one plastic rope, one half burnt bed sheet, one gamosa and a match box in front of him from the place of occurrence. He proved the seizure list as exhibit-1 and his signature as exhibit 1(2). He also proved the material exhibit, rope, the gamosa, the match box and the bed sheet as exhibit-Ka(1), Ka(2), Ka(3) & Ka(4). The defence declined to cross-examine this witness.

III. PW-3 is the informant and the elder brother of the injured victim who deposed that during the time of the incident he was staying at Maloali, Jorhat in a rented premise and the injured victim was staying as tenant in the house of the accused. On 02.01.2004, while the informant was sleeping after having his lunch, the son of the accused Kamal Baruah came to his rented house and informed that Joy got burnt. Accordingly, he went to the house of the accused. When he reached the house of the accused the police were preparing to take Joy to hospital and accordingly, he accompanied the police along with his injured brother to hospital. He saw that his brother was burnt and also saw that when police were shifting him to the vehicle both his hand were tied with a plastic rope. His injured brother was not in a position to talk and on the next date he filed the FIR in the police station. He proved the ejahar as exhibit-2 and his signature in the ejahar as exhibit-2(1). After three days only, his injured brother informed him that Kamal Baruah put fire on his body. During cross examination he deposed that he has not seen the incident at the time of the incident he was not maintaining good relation with his brother and he never visited the house of the accused during his brothers stay in the house of the accused and he visited the house of the accused for the first time on the date of the incident. During cross examination he reaffirmed that

three days after the incident he asked his brother for the asked first time as to who had burnt him. The police has registered the FIR. He has not seen what was written in the FIR. He also deposed that he has not informed the police that his injured brother informed about the incident after three days.

IV. PW-4 is the vital witness for the prosecution and he is the injured victim. According to him, since last one year from the date of the incident he was staying as a tenant in the house of accused and used to do private tuitions. On the date of the incident i.e., 02.01.2004 after returning from his tuition at around 7.30 pm the accused called him to his residence and accordingly, the victim went to his place. According to him he was called to the bedroom of the accused and the victim found therein the wife of the accused, his son and another person namely Dulal Hazarika (DW-4). According to the victim, the aforesaid four persons demanded Rs.2,00,000/- (two lakhs rupees) from him or handover his LIC policies, and thereafter, the victim informed them that he has no money. Then, Sri Dulal Hazarika forced him to have a tablet, which the victim refused and tried to come out from the room, however, he failed to do so as the door was closed. According to the victim thereafter the accused person took him to the bathroom and tied his hands and legs and thereafter beaten him, poured oil on

his body and put fire on him. According to the victim he raised hue and cry but thereafter he became senseless and could find himself at Jorhat civil hospital and regained his sense after four five days. According to him he learnt that police rescued him. He also deposed that he was treated as indoor patient for a month in the civil hospital. During cross examination he deposed that after 5-6 days of the alleged incident his statement was recorded by police. The said Dulal Hazarika who was present on the date of incident is the brother in law of his wife and he is an employee of ONGC and he is serving outside Jorhat though the victim does not know his actual place of posting. During cross-examination, he deposed that in the year 2001 his wife lodged an FIR alleging that he has demanded money from his wife and he was also arrested by police and was sent to jail. According to the victim, the aforesaid case was lodged by his wife at the insistence of Dulal Hazarika. During cross examination he further deposed that he was having no separate bathroom in the rented premises and therefore used the bathroom of his landlord. He also deposed that said Dulal Hazarika used to visit the place of the accused sometimes and he had some altercation in one or two occasion with Dulal Hazarika while said Dulal Hazarika visited the house of the accused. He denied the suggestion that his hands and legs were not tied up and he was not burnt. He further

deposed that as the light was switched off he could not identify as to who crushed him, kicked him, poured oil and put fire on his body.

V. PW-5 is one of the neighbor of the accused Kamal Baruah. According to him on the date of the incident while he was talking with his neighbor Dilip Chakraborty and his wife he heard hue and cry coming from the house of the accused Kamal Baruah. Many people gathered there however, as the grill of the verandah of the accused Kamal Baruah was closed nobody could enter inside the house. He further deposed that he saw fire coming out from the bathroom of Kamal Baruah. After raising hue and cry, the son of Kamal Baruah opened the grill. He further deposed that the neighbours entered into the house and the victim was found inside the bathroom with both the hand and legs tied with a rope in his neck tied with the shower pipe and two legs were tied in the backside of the body and Joy was lying down. They saw the victim was burnt already. Some of the neighbours informed the police and police recovered the victim from the bathroom and took him to the hospital. He deposed that he do not know any person named Dulal Hazarika and also not aware whether any other person were in the house on that day.

VI. PW-6 is another neighbor. She is the wife of PW-5 and also deposed exactly in the similar line as that

of her husband. She further deposed that the victim could not speak and also deposed that the SI Dilip Sarma reached the place and he cut the rope and took the victim to the hospital. During cross she reaffirmed that she saw Joy tied in the bathroom however she deposed that she was not aware as to how Joy got the injuries and she did not witness the incident. She denied the suggestion that as she is not maintaining good relation with the family of the accused she has deposed against them.

VII. PW-7 is another neighbor however he deposed that he did not enter inside the house of the accused and he came back. This witness was declared hostile and the prosecution cross examined him, wherein he deposed that though he entered inside the house he did not went near the bathroom.

VIII. PW-8 is the doctor. He deposed that at the relevant point of time he was working as Medical and Health Officer-I, Jorhat Civil Hospital. At around 9.00 PM, he had examined the victim as produced by Jorhat police. On examination he found smell of kerosene oil from the body of the victim. He found the following injury:

- a. Burn on both hands (scattered)
- b. Burn on both legs (scattered)
- c. Burn on upper part.
- d. Burn in face over right cheek.

In the opinion of the doctor all the burn injuries were

superficial having 30% burn and fresh in nature.

The defence declined to cross examine the doctor.

IX. PW-9 is a Grade-IV employee of Jorhat Civil Hospital. According to him on the date of incident, he was doing his night duty at Jorhat Civil Hospital and then a boy was brought to the hospital in a burnt condition. He saw that the lower part from the knee and the hand of the boy was tied with a plastic rope and that was stucked to the burn injury. He removed the said stucked plastic rope by a scissor. He further deposed that with him PW-10 was also there who assisted him. He further deposed that he removed the trouser worn by the victim and cleaned the injury and then they admitted the victim in the ward. Police seized the trouser, the rope and the underpant. He proved the seizure list as exhibit-3 and his signature as exhibit-3(1). The defence did not cross examine him.

X. PW-10 was another grade-IV employee of the civil hospital who assisted the PW-9. He also deposed exactly as deposed by the PW-9. He proved his signature in the seizure memo as exhibit-3(2) and also the seizure memo as exhibit-3(3). The defence declined to cross examine this witness too.

XI. PW-11 is the investigating officer. According to him, on the fateful day he was working as SI of police at Jorhat PS. On the date of incident while he was on

patrolling duty, he was informed from the Jorhat PS that something is going on in the house of the accused and he was asked to proceed to that house. Accordingly he arrived at the house of accused at around 8.30 am and found large number of people gathering therein. From the said persons he came to learn that the victim is lying in a burnt condition inside the bathroom of the accused. Accordingly he proceeded to that bathroom and found the hand and legs of the said victim being kept tied up by rope. He further deposed that the rope by which the hands and feet of the victim was tied was fixed with a water pipe of that bathroom. He found a gamosa loosely tied on the neck of the victim. One match box and plastic carry bag were found lying inside the bathroom. He also found the smell of kerosene there. He removed the rope of the feet and cut the rope of the hands. However a small piece of rope remained in the hand. He found burn injuries on the cheeks of the victim and in both the hands near the wrist joint and also found the pant worn by the victim in a burnt condition near the knee joint of both the legs. He further deposed that due to the burn the rope from the hand could not be removed. According to him, the victim was in a conscious state at that time and was able to speak and he had stated to the PW-11 that it was Kamal Baruah who did all these things to him. After admitting the victim in the hospital he came back to the

place of occurrence and seized the rope, a plastic bag one gamosa and one cloth in burnt condition and a match box. He proved exhibit-1, the seizure list. He further deposed that he also seized the rope by which the right hand of the victim was tied. The burnt longpant and the inner garments from the body of the victim and he proved exhibit-3 as seizure list. He prepared sketch map, recorded statement of the witnesses and also recorded the statement of the victim on 03.01.2004 at Civil Hospital. According to him, though the victim in his statement recorded under section 161 Cr.P.C named one Dulal Hazarika and accused Kamal Baruah of burning him inside the bathroom by tying his hands and feet, however, Dulal Hazarika was not sent for trial as no material against him was found as said Dulal Hazrika had shown some document to him that on the day of the incident he was at Gelaky being an ONGC employee from 06 AM to 06 PM. During cross he deposed that he had recorded the statement of the victim twice first on 03.01.2004 and again on 04.01.2004. He denied the suggestion during cross examination that the victim had not stated before him that the accused had demanded money and in the event of failure of payment had asked him to handover the LIC policy to him. During cross examination he also deposed that he verified that whether Dulal Hazarika was on duty and he had recorded the statement of one

superintending engineer where the said engineer stated that on the date of incident Dulal Hazarika was on duty and at about 6.45 pm Dulal left for Sivasagar where he was residing.

10. As discussed hereinabove, the accused Kamal Baruah denied the allegations made against him by the witness during his examination under the provision of section 313 Cr.P.C and also laid defence witnesses. Before going to the defence witnesses, let this court first decide whether by the aforesaid evidence the prosecution has been able to prove the charges against the accused appellant beyond reasonable doubt. The Hon'ble Apex court in a recent judgment of **Balu Sudam Khalade and Anr. Vs. State of Maharashtra** reported in **AIR 2023 SC 1736** delivered on **March 29, 2023 in Crl. A No.1910/2010** at paragraph 26 & 27 laid certain principles for appreciation of an injured eye witness which is quoted herein below:

26. When the evidence of an injured eye-witness is to be appreciated, the under- noted legal principles enunciated by the Courts are required to be kept in mind:

(a) The presence of an injured eye-witness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.

(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to

be discarded lightly.

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.

(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.

(f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded.

27. In assessing the value of the evidence of the eyewitnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence. Although in cases where the plea of the accused is a mere denial, the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raise a definite plea or put forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the value of the prosecution evidence.

11. In the case in hand, the injured victim deposed and made accusations against four persons, the appellant, his wife, his son and one Dulal Hazarika. Except him, there is no eye witness to the incident. According to the evidence of PW-11, the investigating

officer, the victim stated before him that it is the accused Kamal Baruah who has done all the things to him. Though the victim specifically alleged demand of money by the aforesaid four persons however, except the appellant no one was sent for trial. The victim though specifically stated that these four persons took him to the bathroom, however, due to absence of the light he could not identify the individual role of each of the aforesaid four persons. In view of such testimony the learned Sessions Judge ought to have exercised its power under section 319 Cr.P.C unfortunately, same was not done.

12. According to the prosecution itself, Dulal Hazarika was not present in the house of the accused appellant rather, he was in duty in a far off place at Geleki and therefore, he was not sent for trial.

13. From the evidence of the victim PW-4 and the neighbors PW-5 and PW-6 and also from the evidence of PW-11 and the victim himself, it is established beyond reasonable doubt that the alleged incident occurred in between 8-8.30 PM in the house of the accused appellant and the victim was found in a burnt condition and he was also found with both his hands and legs tied with rope.

14. It was also established from the evidence of the doctor, the investigating officer, PW-5 and PW-6 that smell of kerosene was found in the body of the victim and that the victim suffered burn injuries.

15. The fact that the hands of the victim was tied with plastic rope, was also corroborated through the evidence of PW-9 and PW-10. Therefore, the prosecution was able to establish beyond reasonable doubt that victim was found in an injured/burnt condition inside the bathroom of the appellant and was recovered by the PW-11

from the said bathroom.

16. It is well settled that evidence of an injured witness has greater evidentiary value and until compelling reason exists, their statements/testimonies are not to be discarded lightly and evidence of such witness cannot be doubted on account of embellishment in natural conduct or minor contradictions.

17. In the case in hand, admittedly the accused was in a burnt condition and he was rushed to the hospital and his statement was recorded in the hospital on the next two dates i.e., 03.01.2004 and 04.01.2004.

18. Having taken note of such settled propositions of law now let this court examine the evidence of injured victim to see whether it was proved beyond reasonable doubt that it is the appellant who committed the offence.

19. The informant, brother of the victim deposed that his brother was not in a position to talk when he first met him in the injured condition at the house of the appellant. According to him, after three days only his injured brother informed him that appellant Kamal Baruah put fire on his body.

20. The FIR was filed on 03.01.2004 and in the FIR also it was alleged that it is Kamal Baruah/appellant who poured kerosene on the body of the victim and set him ablaze. According to the informant brother, his brother intimated him in the hospital after three days of the incident that Kamal Baruah set fire on his body. He further deposed that the FIR was lodged as written by one of the police personnel and the informant put his signature in it only. During cross-

examination he also deposed that he has not stated before police that victim intimated him after three days that the appellant set his brother on fire. Thus, it is seen that the informant has not described the incident as narrated in the FIR not from his own knowledge rather it was on the basis of information from the police inasmuch as the informant reached the place of occurrence subsequent to reaching of the IO to the place of occurrence.

21. The IO in his evidence deposed that the victim informed him that it is the appellant who set him ablaze, however, the victim himself in his testimony before the court deposed that he has not seen the individual role of the four persons who beat him up and poured kerosene and set fire on him. He also implicated the four persons in his testimony before the court other than the appellant. From the evidence of the PW-5 and 6, it is also established that at the time of rescue the victim was not in a position to talk. The evidence of the informant discloses that the injured victim intimated him that it is the appellant who set fire on him.

22. In the FIR the allegation in commission of the crime is against the appellant hereinabove. The statement of the informant brother of the victim discloses that his brother intimated him after three days that it is the appellant who committed the offence. The statement recorded by the accused under section 161 also reflects that the allegation is made against the appellant. However, the victim testified before the court that it is not only the appellant but also the wife and son of the appellant and another person namely, Dulal Hazarika jointly committed the offence. Though as stated hereinabove according to

his brother and the I.O he disclosed the name of Kamal, however, during cross examination he deposed that he could not see/did not see the individual role of all these persons including the appellant as there was no light inside the bathroom. Thus, from the testimony of the injured victim itself a doubt has been created actually who is the culprit though, it was established beyond reasonable doubt that the injured victim was found inside the bathroom of the accused appellant and such doubt has been created by the testimony of the injured victim himself inasmuch as, the I.O in his deposition explained that the other person namely Dulal Hazarika was not even present in the place of occurrence and he was performing his duty in another place on the fateful date. He further testified that he ascertained such fact from the superior officer under whom said Dulal Hazarika used to work. Thus, a doubt on the trustworthiness of the testimony of the injured victim has itself been created.

23. Yet another fact which is having relevance is that the appellant during his examination under section 313 Cr.P.C took a stand that at the time of the occurrence he was doing his marketing at Malow Ali and at that point of time one person named Dilip Baruah informed him that there are some hue and cry in his house. Accordingly, he rushed to his house and saw the victim in a burnt condition and he also saw the burnt injury of the victim. He further deposed that the police after recovering the victim from the bathroom took the victim to the drawing room of the appellant and thereafter he was taken to the hospital. He further stated that when the police

examined him during the investigation he deposed that at the time of incident he was in a shop. He also deposed that he did not know any Dulal Hazarika. According to him his wife intimated him that at the time of the incident she was cooking in the kitchen and after listening hue and cry raised by Joy she rushed to the bathroom and saw that Joy was burning and she doused the fire by pouring water over the body of Joy.

24. From the aforesaid, more particularly from the statements recorded under section 313 Cr.P.C, it is seen that the case of the appellant is not a mere denial. The accused has raised a definite plea that at the time when the victim was rescued from the bathroom of the appellant, the appellant himself was not present at his residence, rather he went for marketing and was present in a shop belonging to DW- 1 for his regular marketing. And as such, the case projected by the defence is not inconsistent with the prosecution. Therefore, we will have to consider the evidence of DW-1.

25. A doubt of presence of the accused Kamal Baruah in his residence is also seen from the evidence laid by the prosecution inasmuch as, none of the persons who reached the place of occurrence after listening to hue and cry and the smoke from the house of the appellant, nobody has alleged presence of the accused Kamal Baruah rather it was stated that it is the son of the accused who opened the grill of the house which was otherwise locked from inside. The evidence of the wife of Kamal Baruah that she was cooking inside the kitchen and the bathroom which is in the other part of the house also remained unshaken and the sketch map prepared

by the I.O also corroborated the position of the kitchen and the bathroom as described by the wife of the appellant.

26. The DW-1 is the shop owner, according to the appellant in whose shop he was present at the time of the incident. Said DW-1 deposed that on the date of the incident around 7.30 PM the appellant was in his shop for a period of around ½ an hour and at the point of time one Dilip Baruah intimated him that somebody has committed suicide in his house and after knowing about such fact the appellant rushed to his house leaving his purchased goods at the shop. During cross examination by prosecution the DW-1 deposed that the appellant was his regular customer.

27. DW-2 also ascertained about the existence of the shop of Pradip Baruah and she also deposed that she witnessed the appellant sitting in the said shop on the fateful day at around 7-7.30 PM and a boy came and informed him something then, appellant Kamal Baruah rushed from his shop, such evidence also corroborates the statement of the accused appellant made under section 313 Cr.P.C. Therefore, in the considered opinion of this court, in the totality of the matter, though it is established beyond reasonable doubt that the victim was found in a burnt condition and both his hands and legs tied up with rope to a water pipe, however the prosecution has failed to establish beyond reasonable doubt as to who is/are the actual culprits and who committed the offence. This court is also surprised to know that even after deposition of the injured victim regarding involvement of the other three persons in the commission of the



offence, the learned Trial Court has miserably failed to apply its mind and failed to exercise its power under section 319 Cr.P.C. In view of the aforesaid, this court is of the view that the accused appellant is entitled to the benefit of doubt, more particularly for the reason that the victim himself has stated that he could not identify the individual role of the accused and that beyond the accused, there are other three persons involved in the offence whereas, neither in the FIR nor in any other statement of the victim such fact of presence and involvement of the other persons except the appellant was discernible. Accordingly, the appellant is acquitted from the charges giving him the benefit of doubt by setting aside and quashing the impugned judgment and sentence dated 21.01.2012, passed by the learned Additional Sessions Judge, Jorhat in Sessions case No.80(J-J)/2005. The appellant is set at liberty forthwith. The bail bond stands released.

28. A copy of this judgment and order be sent to the learned trial court along with the LCR.

JUDGE

Comparing Assistant