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FAZAR ALI & ORS.

v

STATE OF ASSAM

(Criminal Appeal No.1062 of 2007)

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APRIL 21, 2017

[A. K. SIKRI AND ASHOK BHUSHAN, JJ.]

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Penal Code, 1860 – s.302 r/w s.149 – Murder – Prosecution case that the accused persons armed with various weapons attacked complainant, his father, brother and mother-in-law and after inflicting injuries, did not allow the injured to be taken to hospital for about 3 hours – Consequently, complainant's brother died – Trial court convicted accused-appellants u/ss. 302 r/w. 149 and sentenced them to life imprisonment – Appeal dismissed by High Court – Appellants contended that complainant had mentioned name of only five accused persons in FIR, whereas charge sheet was submitted against twelve accused and further, there were contradictions in evidence of eye-witnesses – Held: FIR from the beginning itself mentions that the number of accused persons were twelve, although mentions name of five persons only – During investigation, names of seven others had surfaced and charge sheet was submitted against twelve accused – Informant clearly mentioned in his cross- examination that he had told the name of other seven accused as well to the writer of FIR as he is illiterate – No substance in the plea that since other accused were not mentioned in the FIR except five, others could not have been convicted – Further, all the eye-witnesses, in their statements had assigned the role of all the accused of causing injuries – Two independent witnesses also proved the incident and role of accused – Mere fact that, there are certain inconsistencies with regard to the manner of causing injuries, cannot shake the entire evidence or make the statement of witnesses unreliable – It is unreasonable to expect from a witness to give picture perfect report of the incident – Thus, the findings of trial court are based on correct appreciation of evidence.

Dismissing the appeal, the Court

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HELD: 1. From the facts and circumstances of this case, it is clear: Firstly, FIR although mentions name of only five accused

but FIR clearly mentions that seven more accused persons were there. Thus, FIR clearly mentions that the number of accused persons were twelve. Thus present is not a case where only those five persons who were named, were accused, but FIR from the very beginning is claiming that apart from those five, seven others are also accused. In the investigation, when names of seven others had surfaced, the charge-sheet was submitted against twelve accused. The submission that since in the FIR, names of seven other accused were not disclosed, they could not have been charge-sheeted, can not be accepted. Secondly, in his cross-examination informant clearly mentioned that he had told the names of other seven accused persons also to the person who had written the FIR but, informant being illiterate had put only thumb impression on the FIR. Not naming other seven accused although, number of seven other accused were mentioned in the FIR is inconsequential and on this ground, there is no substance in the submission of the appellants that since names of other accused were not mentioned in the FIR except five names, others could not have been convicted. [Para 15] [652-D-G]

2. All the eye-witnesses have assigned the role of all the accused of causing injuries in their statements. PW.1 and PW.4 are two independent witnesses who have also proved the incident and role of the accused. The mere fact that, there are certain inconsistencies with regard to the manner of causing injuries to father and brother of complainant by the witnesses as deposed in the court and as noted in the statement under Section 161 Cr.P.C., can in no manner shake the entire evidence or make the statement of witnesses unreliable. [Para 20] [654-C]

3.1 There are two reasons for not accepting the arguments of appellants; firstly, before the Police also the role of accused was mentioned by eye-witnesses. In their statements under Section 161 Cr.P C and before the Court also eye-witnesses proved the role of the accused and presence of the accused. Hence, the eye-witness account of witnesses proves the presence of the accused. They have been rightly convicted under Section 302 read with 49 IPC. [Para 21] [654-D-E]

3.2 Secondly, there is clear evidence of eye-witnesses that

A accused persons did not allow the injured to come out from their house for about three hours. In spite of the request being made by neighbours and other persons present on the spot, accused have almost seized the house and did not permit injured persons to come out or to go for treatment. Finding to this effect has been recorded both by trial court and High Court. Each person being a member of unlawful assembly is guilty of offence being committed in prosecution of common object, has been held both by trial court and High Court. [Para 22] [654-F-H]

Chandrappa and Others v. State of Karnataka (2008)

11 SCC 328 – relied on.

3.3 It is also relevant to notice that accused party has also filed a cross-case against the complainant, his father and brother under Section 325 IPC which resulted in acquittal by the trial court. The accused were found aggressor and after accused being found present and having caused injuries which resulted in death of complainant's brother both the Courts below did not commit any error in convicting the accused under Section 302 read with 149 IPC. [Para 23] [655-G-H]

4. The finding of guilt recorded by trial court is based on correct appreciation of evidence. Minor contradictions and inconsistencies as pointed out by the learned counsel for the appellants rightly have been ignored by the courts below. [Para 24] [656-B]

Case Law Reference

(2008) 11 SCC 328 relied on Para 22

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1062 of 2007.

From the Order dated 21.12.2005 of the High Court of Gauhati in Criminal Appeal No. 420 of 2002.

Ms. Smita Hazarika, Adv. for the appellants.

Debojit Borkakati and Shuvodeep Roy, Advs. for the respondent.

The Judgment of the Court was delivered by

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ASHOK BHUSHAN, J. 1. This appeal has been filed by eight accused who have been convicted under Section 302 read with Section 149 IPC and sentenced to under go life imprisonment by trial court as well as by High Court. The prosecution case is that on 12.11.1993 in the morning at about 8.00 AM twelve accused persons have attacked complainant, his father Samsuddin, his brother Abdul Rahman and his mother-in-law. Accused were armed with dao, lathi, jathi, dagger etc. After injuring Samsuddin and Abdul Rahman the accused did not allow the injured to be taken to hospital for about three hours and it was only when large number of villagers assembled and impressed upon the accused to let the injured to be taken to hospital, Samsuddin and Abdul Rahman could be taken to hospital. Both Samsuddin and Abdul Rahman were referred to Nagaon Civil Hospital where Abdul Rahman died on the same day at 4.00 PM.

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2. A written complaint was submitted by Afazuddin son of Samsuddin and brother of Abdul Rahman, which had the thumb impression of Afazuddin whereunder names of five accused Sekendar Ali, Abu Taher, Abdul Sattar, Fazar Ali and Akkash Ali were mentioned with seven other accused. Complaint was initially registered under Section 147, 148, 149 and 326 IPC in which Section 302 IPC was added subsequent to death of Abdul Rahman.

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3. I.O. on the same day of incident examined Rustam Ali, Afazuddin, Muslemuddin, Abdul Sattar (Son of Mafizuddin), Samsuddin, Jakir Hussain, Giasuddin, Jahura Khatoon and Fatema Khatoon.

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4. After investigation of the appellants, the charge sheet was submitted against eleven accused, one of the accused named Abu Taher had died on 01.03.1999. Prosecution produced thirteen witnesses to prove the charge which included two Investigating Officers and two Medical Officers. The trial court, after considering the entire evidence on record by judgment dated 08.10.2002 (Session Case No.20 of 99, GR No.979/93) held all the accused guilty and convicted them to the following effect:

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"15. So, in view of discussion above, I convict and sentence accused Sattar, Rafiqul, Akkash Ali, Fakaruddin, Nuruddin, Sekander, Motin, Idrish Ali and Fazar to undergo rigorous imprisonment for one year each for their offence punishable under Section 148 IPC and also I convict and sentence all these accused persons to undergo their rigorous life

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A *imprisonment with a fine of Rs. 1000/- each in default rigorous*
imprisonment for two months for their offence. Offence
punishable U/s 302/149 IPC. I also convict and sentence
B *accused Sattar, Rafiqul, Akkash Ali, Fakaruddin, Nuruddin*
with an imprisonment for a period of six months for their
offence punishable U/s. 323/149 IPC. The prosecution failed
to establish case punishable U/s. 148/302/323/149 IPC against
accused Islamuddin and Jakir Hussain for which they are
acquitted forthwith. The bail bonds of all accused persons
stand cancelled. The sentence of all 9 convicts as stated above
will run concurrently.”

C 5. It is also relevant to note that with regard to the incident on
12.11.1993 a cross-case was also registered being Case No. 978/93 in
which Samsuddin and three others were accused. In the cross-case, it
was alleged that injury was inflicted by Samsuddin and his sons in which
Abdul Sattar received injuries.

D 6. On cross-case Sessions Case No. 41/99 (G R Case No.978/
93) was registered under Section 325 IPC. Accused Samsuddin and
others by judgment dated 8.10.2002 were given clean acquittal in the
cross-case.

E 7. Accused aggrieved by the judgment, against the conviction have
filed a Criminal Appeal No. 420/2002. The High Court after hearing the
learned counsel for the parties vide its judgment and order dated
21.12.2005 dismissed the criminal appeal, aggrieved by which judgment
the eight appellants have filed this appeal.

F 8. Learned counsel for the appellant in support of the appeal
contends that in First Information Report which was lodged by Afazuddin
son of Samsuddin and brother of Abdul Rahman(deceased) had mentioned
only five names of the accused whereas charge sheet was submitted
against twelve accused. It is submitted that Afazuddin claims to be eye-
witness, hence, there was no reason for not mentioning the names of all
G the accused in the FIR and non-mention of other accused in the FIR
naturally indicates that others have been roped in subsequently.

9. It is further submitted that there was a lot of contradiction in
the statement of witnesses recorded before the Court and that of recorded
by Police under Section 161 Cr. P.C. The contradiction in evidence of

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eye-witnesses makes their evidence untrustworthy. The trial court ought to have taken note of such contradiction and discarded the evidence of eye-witnesses. A

10. Learned counsel for the State refuting the submission of the learned counsel for the appellants contends that mere non-mention of other accused in the FIR cannot mean that other accused could not have been charge-sheeted after investigation. It is submitted that contradiction pointed out in the statement of witnesses does not in any manner shake their evidence. The incident took place in the courtyard/joining pathway of house of Afazuddin. All the accused being armed with different weapons have caused injuries. Injured witnesses were not allowed to come out from their houses for about three hours. All the witnesses in their statements have proved the specific role of accused in causing injury to Samsuddin and deceased Abdul Rahman. Both trial court and the High Court have correctly appreciated the evidence and relying on the evidence have rightly convicted the accused. B
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11. We have considered submissions of learned counsel for the parties and perused the record. D

12. The first submission of learned counsel for the appellants is that their being only five accused named in the FIR others have been wrongly roped in the FIR. He has submitted that Afazuddin, the informant being son of the Samsuddin and being an eye-witness ought to have mentioned the names of all the accused who had participated in the incident. E

13. To appreciate this submission, few facts need to be noted. The translated copy of the First Information Report is in the record of the High Court, in the column of name and residence of accused following is mentioned: F

“Name and residence of accused:-

- 1) Sekandar Ali, S/O Amiruddin,
- 2) Abu Taher, S/O Do.
- 3) A. Sattar, S/O Eman Ali
- 4) Tazor Ali, S/O Do.
- 5) Akkash Ali, S/O. Amiruddin
and 7 others.

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A All are Vill. Durabandhi Gaon,
P. S. Moirabari,
Dist. Morigaon (Assam).”

B 14. Further, FIR mentions written report received from complainant Afazuddin. The written report indicates that Afazuddin has put his thumb impression on the FIR. The Afazuddin was examined as PW. 2. In the cross-examination, when he was put the question why names of other accused were not mentioned in the FIR, he stated the following:-

C *“Cross Examination: Giasuddin is my younger brother. I had had the ejahar written at a hotel in Mairabari bus syndicate premises. From that place the police station is about 100/150 yards away. I had not gone to the police station before having had the ejahar written. I had had five accused named in the ejahar. I had told Karim the names of seven others. Karim had advised me to add those names only later. He had said that I should go to the police station with him later and add those seven names.”*

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E 15. From the above, three facts are clear:- Firstly, FIR although mentions name of only five accused but FIR clearly mentions that seven more accused persons were there. Thus, FIR clearly mentions that the number of accused persons were twelve. Thus present is not a case where only those five persons who were named, were accused, but FIR from the very beginning is claiming that apart from those five, seven others are also accused. In the investigation, when names of seven others had surfaced the charge-sheet was submitted against twelve accused. The submission that since in the FIR names of seven other accused were not disclosed, they could not have been charge-sheeted, can not be accepted. Secondly, in his cross-examination informant clearly mentioned that he had told the names of other seven accused persons also to writer Karim, who had written the FIR but, informant being illiterate had put only thumb impression on the FIR. Not naming other seven accused although, number of seven other accused were mentioned

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G in the FIR is inconsequential and on this ground, there is no substance in the submission of the learned counsel for the appellants that since names of other accused were not mentioned in the FIR except five names, others could not have been convicted.

H 16. Now, we come to the next submission of the learned counsel for the appellant that there are contradiction in the statements made by

witnesses before the Court as compared to the statements made before the Police under Section 161 Cr. P.C. A

17. The present is a case where incident took place in adjoining way/courtyard of the residential house of informant in the morning at about 8.00 AM. The presence of the family members in the house at Courtyard of informant was natural. Three injured witnesses were examined by Dr. Rafiqul Islam who had appeared, as PW.11 and proved the injuries. The injuries were noted by Rafiqul Islam PW.11 inflicted on Samsuddin, Jahura Khatun and Afazuddin. Dr. Rafiqul Islam PW.11 stated the following in his evidence: B

"On 12.11.1993, I was M&HO-I at Moirabari C.H.C. On that day, I examined (1) Abdul Rahman, (2) Samsuddin, (3) Jahura Khatun, and (4) Afazuddin on police requisition and found the following:- C

(1) Abdul Rahman, son of Md. Samsuddin of Village Dorabandi. The patient was referred to Nagaon Civil Hospital for further investigation and treatment. D

*(2) Samsuddin, son of Late Sudhir Seikh -
Lacerated injury on scalp, size 1½" X ½" X ½". Multiple abrasion over the forehead. Fresh and simple wounds caused by blunt object. Patient was referred to Nagaon Civil Hospital." E*

*(3) Jahura Khatun, wife of Ismat Ali
Swelling over the right arm, size 1½" X ½" X ½".
Laceration over the left thumb, size 1" X ½" X ½"
Fresh and simple wounds caused by blunt object. F*

*(4) Afazuddin, son of Samsuddin -
Swelling over the right thumb. Swelling over the back.
Fresh and simple wounds caused by blunt object." G*

18. Both Samsuddin and Afazuddin have examined themselves in the Court. Samsuddin examined himself as PW.5 and Afazuddin the informant has examined himself as PW.2. Jahura Khatun has been examined as PW. 9. All eye-witnesses have corroborated the incident and have proved the role of accused persons in causing injuries to Samsuddin, Abdul Rahman(deceased) and others. H

A 19. PW.5 Samsuddin has proved the incident and the role of the
different accused in his eye-witness account. Much emphasis has been
laid down by the learned counsel for the appellants that there are
contradictions in the statement of eye-witnesses recorded before the
Court as compared to one which was recorded by the Police, it is submitted
B that several eye-witnesses who appeared before the Court and assigned
the role to different accused had not so assigned to the different accused
before the Police when their statement under Section 161 Cr.P.C. was
recorded.

C 20. All the eye-witnesses have assigned the role of all the accused
of causing injuries in their statements. PW.1 and PW.4 are two
independent witnesses who have also proved the incident and role of the
accused. The mere fact that, there are certain inconsistencies with
regard to the manner of causing injuries to Samsuddin and Abdul Rahman
by the witnesses as deposed in the court and as noted in the statement
under Section 161 Cr.P.C., can in no manner shake the entire evidence
D or make the statement of witnesses unreliable.

E 21. There are two reasons for not accepting the above arguments;
firstly, before the Police also the role of accused was mentioned by eye-
witnesses. In their statements under Section 161 Cr.P.C. and before the
Court also eye-witnesses proved the role of the accused and presence
of the accused. Hence, the eye-witness account of witnesses proves
the presence of the accused. They have been rightly convicted under
Section 302 read with 49 IPC.

F 22. Secondly, there is clear evidence of eye-witnesses that accused
persons did not allow the injured to come out from their house for about
three hours. In spite of the request being made by neighbours and other
persons present on the spot, accused have almost seized the house and
did not permit injured Afazuddin, Abdul Rahman and Samsuddin to come
out or to go for treatment. Finding to this effect has been recorded both
by trial court and High Court. Each person being a member of unlawful
assembly is guilty of offence being committed in prosecution of common
G object, has been held both by trial court and High Court. This Court in
Chandrappa and Others versus State of Karnataka, (2008) 11 SCC
328 has laid down that it is unreasonable to expect from a witness to
give a picture perfect report of the incident and minor discrepancies in
their statement have to be ignored. Para 17 and 18 of the judgment is
H extracted as below:-

“17. It has been contended by the learned Counsel for the appellants that the discrepancies between the statements of the eyewitnesses inter se would go to show that they had not seen the incident and no reliance could thus be placed on their testimony. It has been pointed out that their statements were discrepant as to the actual manner of assault and as to the injuries caused by each of the accused to the deceased and to PW3, the injured eyewitness. We are of the opinion that in such matters it would be unreasonable to expect a witness to give a picture perfect report of the injuries caused by each accused to the deceased or the injured more particularly where it has been proved on record that the injuries had been caused by several accused armed with different kinds of weapons.

18. We also find that with the passage of time the memory of an eyewitness tends to dim and it is perhaps difficult for a witness to recall events with precision. We have gone through the record and find that the evidence had been recorded more than five years after the incident and if the memory had partly failed the eye witnesses and if they had not been able to give an exact description of the injuries, it would not detract from the substratum of their evidence. It is however very significant that PW 2 is the sister of the four appellants, the deceased and PW 3 Devendrappa and in the dispute between the brothers she had continued to reside with her father Navilapa who was residing with the appellants, but she has nevertheless still supported the prosecution. We are of the opinion that in normal circumstances she would not have given evidence against the appellants but she has come forth as an eyewitness and supported the prosecution in all material particulars.”

23. It is also relevant to notice that accused party has also filed a cross-case in which Samsuddin and his sons were charge-sheeted under Section 325 IPC which resulted in acquittal by the trial court by judgment and order dated 08.10.2002. The accused were found aggressor and after accused being found present and having caused injuries which resulted in death of Abdul Rahman both the Courts below did not commit any error in convicting the accused under Section 302 read with 149 IPC.

A 24. We have gone through the oral evidence recorded before the trial court. A translated copy of such statement in English is being available on the record of the High court. We are of the view that finding of guilt recorded by trial court is based on correct appreciation of evidence. Minor contradictions and inconsistencies as pointed out by the learned counsel for the appellants rightly have been ignored by the courts below.

B 25. The High Court in para 10 of its judgment has stated:-

C *“10. In this case, we find from the evidence on record that the intention/object of the unlawful assembly was to assault and teach the victims a lesson and for that purpose they came armed with weapons in the early hours of the day and they also did not remain satisfied by assaulting the accused persons and causing injuries on them. Despite of all pleas for mercy, they did not allow the injured persons to be taken to hospital, detained them in the house for long three hours and as a consequent, they were deprived of their medical treatment and when they were taken to the hospital, it was too late for Abdul Rahman, who succumbed to his injuries at the hospital. Hence, the common object and the intention of the accused persons is apparent.”*

D 26. We do not find any merit in the appeal. The appeal stands
E dismissed.

Ankit Gyan

Appeal dismissed.