

GAHC010009522013



2024:GAU-AS:12308

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

Case No. : Crl.A./225/2013

JADUMANI SARKAR
S/O SRI DHARMESWAR SARKAR, VILL. BARMAN GAON UZANPARA, P.O.
MULAGAON, DIST. BONGAIGAON, ASSAM.

VERSUS

THE STATE OF ASSAM,

Advocates for the petitioner : Mr. M.U. Mahmud

Advocate for the respondent : Mr. R.R. Kaushik
Addl. PP., Assam

BEFORE

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of Hearing : 06.08.2024.

Date of Judgment : 04.12.2024.

JUDGEMENT AND ORDER (ORAL)

Heard Mr. M.U. Mahmud, learned counsel for the appellant and Mr. R.R. Kaushik, learned Additional Public Prosecutor, Assam for the respondent.

2. Jadumani Sarkar (hereinafter also referred to as the appellant) has filed this

appeal challenging the judgment and order dated 06.07.2013 passed by the learned Sessions Judge, Bongaigaon in Sessions Case No. 74 (BGN)/2012 convicting the appellant under Section 324 of the Indian Penal Code, 1860 (IPC for short) and sentencing him to undergo rigorous imprisonment for two years and also to pay a fine of Rs.1000/- (Rupees One Thousand) with default clause and convicting and sentencing him under Section 448 IPC to pay a fine of Rs. 1000/-, with default clause. The period of detention of the appellant was also ordered to be set off with the custodial sentence.

3. Prosecution case in brief is that Sri Pabitra Sarkar (hereinafter also referred to as the informant) lodged an FIR with the police at Bongaigaon Police Station with allegation that his sister-in-law Mamoni Baruah used to stay in his house. On 18.09.2009 at about 8:40 PM, while she was cooking in the kitchen the appellant barged into the kitchen and attacked his sister-in-law from behind with a kukri causing injuries on her person. When she raised alarm, his wife Dalimi Sarkar and the neighbouring people came to the spot and the appellant fled, leaving behind his kukri. His sister-in-law sustained grievous injuries on her head and left finger and she was taken to the Bongaigaon Lower Assam Hospital for treatment.

4. On receipt of the FIR, the Investigating Officer (IO for short) embarked upon the investigation. On completion of investigation, charge sheet was laid against the appellant. On appearance of the appellant, this case was committed for trial. At the commencement of trial, a formal charge under Section 448/326/307 of IPC was framed and read over and explained

to the appellant, to which he pleaded not guilty. To substantiate its stance, the prosecution adduced the evidence of eight witnesses and the defence cross examined the witnesses to refute the charges. On the incriminating evidence projected by the prosecution, several questions were asked to the appellant and his answers were evasive in nature.

5. Learned Trial Court delineated the following points to decide this case :-

“Points for determination:

1. *Whether the accused person on 18.09.2009 at about 8.40 PM at Barsongaon under Bongaigaon P.S. trespassed into the house of the complainant with an intention to commit an offence and thereby committed an offence U/S 448 IPC?*
 2. *Whether the accused person on the same date, time and place voluntarily caused grievous hurt to Mamani Barua by means of a sharp cutting weapon and thereby committed an offence U/S 326 IPC?*
 3. *Whether the accused person on the same date, time and place did an act with such intention and such circumstances that if by that act the accused had caused the death of Mamani Baruah, he would have been guilty of murder and that thereby caused hurt to said Mamani Baruah and thereby committed an offence U/S 307 IPC?”*
6. Now the question that falls for consideration is that whether the learned Trial Court has erroneously convicted the appellant under Section 448/324 of IPC.
7. To decide this case in its proper perspective, it is necessary to re-appreciate the evidence.
8. PW-1 is the informant and he deposed that the incident occurred about three years back

i.e. on 18.09.2009 at about 8.30 PM. He was not at home and was returning from Guwahati. At about 9.00 PM, when he reached home, he noticed a gathering in his house. His wife Dalimi Sarkar informed him that at about 8.30 PM, the appellant entered into his house and inflicted injuries on his sister-in-law Mamani Baruah with a dao. He noticed the injuries on her head and left hand finger. Blood was oozing out from her injuries. On being asked, Mamani informed him that while she was cooking in the kitchen, the appellant attacked her from behind with a dao.

9. At this juncture, learned counsel for the appellant laid stress in his argument that the FIR unfolds that the appellant attacked with kukri whereas contrary to the FIR, PW-1 has stated that the appellant attacked the victim with a dao. It is submitted that there is much difference between a kukri and a dao.

10. Reverting back to the evidence, PW-1 stated in his cross-examination that the appellant is his cousin and his house is about 150 meters from his (PW-1) house. At the time of the incident, his sister-in-law was a school student, who was only 14 (Fourteen) years old.

11. Manika Baruah @ Mamani deposed as PW-2 that on 18.09.2009 while she was in her brother-in-law's house, at about 8.30 PM, the appellant came and attacked her with a dao from behind. He dealt a blow on her head and thereafter, she received 2/3 blows with a dao on her hand and on her head. She sustained injuries on her left finger. At that time, she was cooking in the kitchen and her elder sister was feeding her child while her brother-in-law was in Guwahati. She further deposed that when she raised alarm, her sister and neighbouring people came to her rescue while the appellant went away leaving behind his weapon. She further deposed that the appellant expressed his love for her but she disagreed to enter into

any relationship with the appellant.

12. Meanwhile, when her brother-in-law reached home, she was taken to the Lower Assam Hospital where she underwent treatment for five days. The injuries on her head and hand were stitched. In her cross-examination, PW-2 deposed that she was staying in her brother-in-law's house for 5/6 days. She had no animosity with the appellant. She had noticed that the accused was carrying a dao.

13. The victim's sister deposed as PW-3 that the appellant is a co-villager and the informant is her husband. Her younger sister Manika @ Mamani was staying in their house. On the fateful day, at about 8.30 PM, her child felt asleep and she went to put him on the bed. At that time, her younger sister Manika was cooking in the kitchen. Her husband was at Guwahati. She heard her younger sister screaming and she rushed to the kitchen and saw the appellant running away from the kitchen and leaving behind his dao in the kitchen. She noticed cut injuries on Manika's head and on her left hand and fingers. Meanwhile, they raised alarm, and Khanin Ray, Sunil Mazumdar, Dulu Singha, Shimal Singha Sarkar and her brother-in-law Hemanta Sarkar came to their rescue. Khanin Ray called a 108 ambulance. Meanwhile, her husband reached home. The victim was initially taken to Bongaigaon Civil Hospital but she was not provided treatment and then the victim was taken to the Lower Assam Hospital at Bongaigaon. She further deposed that the appellant tried to have a relationship with her younger sister but her sister did not respond to his overtures. Hence, the appellant assaulted her younger sister. In her cross-examination, she deposed that her younger sister came to their house about ten days before the incident and she was staying in their house. She admitted that she did not witness the

incident. She has also admitted that police did not seize the dao in her presence nor did the police seize any blood stained garments from her younger sister.

14. It is apt to mention at this juncture that the evidence of PW-1, PW-2 and PW-3 and the evidence of the IO Sri Basanta Kr. Goswami PW-7, reflects that no contradictions as per Section 145 of the Indian Evidence Act, 1872 (Evidence Act for short) qua Section 162 of CrPC could be elicited. All the witnesses were cross-examined at length but no contradictions could be elicited.

15. Learned counsel for the appellant relied heavily on the contradictions relating to the weapon of offence described by the witnesses *vis-à-vis* the weapon of offence mentioned in the FIR. It is submitted that a kukri is not a dao.

16. The IO has also admitted in his cross-examination that he did not seize the weapon of offence. He deposed that on 19.09.2009 he was serving at Bongaigaon Sadar Police Station. The Officer-In-Charge received an FIR and entrusted him with the investigation. He went to the Lower Assam Hospital but he did not interrogate the victim as she had sustained a head injury. The girl was discharged from the hospital on 26.09.2009 and then he recorded her statement. He further deposed that he recorded the statements of the other witnesses on the following day of the lodgment of FIR. He seized the dagger at the place of occurrence. The IO has admitted that he did not produce the seized dagger before the Magistrate for endorsement. He has proved his signature on the seizure list as Exhibit-2(2). He has proved the sketch map prepared by him as Exhibit-4 and his signature as Exhibit-4(1). He further deposed that the appellant surrendered in the Court and the injured was taken to the Lower Assam Hospital in a 108 ambulance. Meanwhile, he was transferred and he could not collect

the injury report and he handed over the Case Diary to the Officer-In-Charge. He has admitted in his cross-examination that there were blood stains on the dagger.

17. This IO was cross-examined at length relating to the description of the weapon as the defence was primarily relating to the description of the weapon of offence. PW-7 has admitted in his cross-examination that there is no description in the seizure list whether the hilt of the dagger was of wood or iron. The length and breadth of the dagger was not mentioned nor the description of the hilt was mentioned. The IO has admitted that he did not seize any blood stained garments from the victim or the age certificate of the victim. The only contradiction that could be elicited through the cross-examination of IO is that the IO has affirmed that PW-3 did not mention in her initial statement that she went to put her child on the bed.

18. The other IO Sri Khargeswar Rabha deposed as PW-8 that on 28.01.2010, he was entrusted with the remaining part of investigation of this case. He collected the medico-legal report of the victim and on finding sufficient materials against the appellant, he submitted charge sheet against him under Sections 448/326/307 of IPC. He has proved his signature on the charge sheet as Exhibit-5(1).

19. The Medical Officer Dr. Itesh Bordoloi deposed as PW-6 that on 18.09.2009, he was working in the Lower Assam Hospital as Child Specialist and on that day, he examined Manika Baruah, 14 years, female, on police requisition in connection with this case and on being identified by Pabitra Sarkar, brother-in-law of the victim and found the following :-

“The patient reported with history of physical assault with some persons, who assaulted her. She got cut injuries due to the alleged assault on her scalp and left hand. No opinion was

given. Case of cut injury on her scalp. In case of left hand, injury was grave in nature. Both the injuries were caused by sharp cutting weapon."

20. He has proved the medico-legal report as Exhibit-3. The MO has admitted in his cross-examination that he did not mention in his report, the part of scalp of the victim where the injuries were inflicted as the opinion was reserved. It is also not mentioned in his report that the other findings relating to the injuries on the hand or whether any final report has been collected. He has not mentioned specifically the measurement of the injuries on the scalp or on the left hand.

21. Thus, there is not even an iota of doubt that the victim has sustained injuries on her left hand and on her scalp. It is true that different description has been given relating to the weapon of offence. Exhibit-2 clearly reveals that the length of the dagger was mentioned as about 2 ½ ft. and breadth about 1 ½ inches. It is described that it is a sharp pointed weapon. Thus, it has been proved beyond a reasonable doubt that the victim has sustained injuries caused by a sharp pointed weapon, which was seized in connection with this case as the appellant left behind the weapon after inflicting the injuries. Seizure list has been proved as Exhibit-2. The medico-legal report marked as Exhibit-3 was not found in the case record. However, the evidence of the Medical Officer can be relied upon to hold the appellant guilty of offence under Section 324 of IPC.

22. The learned trial Court has correctly held that the prosecution could only establish offence under Section 324 of IPC and not under Section 326 of IPC. It has been held by the learned Trial Court that :

"32. In the case in hand, from the evidence of PW 1 and the victim, it appears that

the victim was in hospital for 5/6 days and there was no evidence on record to show that after discharge from the hospital she could not perform her ordinary pursuits for the twenty days or that she was in severe bodily pain. The prosecution did not bring any other facts which would be necessary for bringing the case under any Clause of Section 320 of the Indian Penal Code. Neither it was elicited from the doctor that the injury was endangered to life nor that the injured suffers severe bodily pain during the space of 20 days nor that she was unable to follow her ordinary pursuits during the said period. In the absence of such evidence having been led by the prosecution, it is not possible on the basis of the evidence of doctor to hold that the injury in question falls under any Clause of Section 320 of the Indian Penal Code. Therefore, on the face of the case, the conviction of the accused U/S 326 IPC is not proved beyond reasonable doubt but the offence disclosed would fall U/S 324 of the IPC.”

23. It has also been correctly held by the learned Trial Court that the appellant is guilty of offence under Section 448 of IPC as the appellant trespassed into the informant's house to commit an offence. The evidence of PW-1, PW-2 and PW-3 is substantiated by the evidence of neighbours, Sri Bhaskar Sutradhar, who deposed as PW-4 and Sri Khanindra Chandra Roy, who deposed as PW-5. PW-4 deposed that both the informant and the appellant are co-villagers. On the day of the incident, at about 8.30 PM while he was watching TV in the informant's house, he heard the informant's wife screaming. At that time, the informant's sister-in-law Manika was at home and the informant's wife Dalimi Sarkar told him that the appellant had cut Manika. He saw injuries on Manika's head and left hand and blood was oozing out from her injuries. The other villagers also reached the place of occurrence and Manika @ Mamani was taken to the hospital in a 108 ambulance.

24. This evidence is substantiated by the evidence of PW-5, who deposed that on the fateful day at about 8:00/9:00 PM, he heard a commotion emanating from Pabitra Sarkar's house. Immediately he went there and he saw blood oozing out from the injuries sustained by Mamoni on her head and hand. Dalimi i.e. Pabitra Sarkar's wife told him that the appellant had inflicted the injuries on Mamoni with the help of a dao. He called a 108 ambulance and Mamoni was taken to Bongaigaon Civil Hospital.

25. It would be apt to reiterate that no contradictions could be elicited through the evidence of PW-4, PW-5 *vis-à-vis* PW-7 and PW-8. As submitted by the learned counsel for the appellant, this is not a case where the evidence of only family members have incriminated the appellant. The evidence of neighbours i.e. independent witnesses have substantiated the evidence of the family members. The learned Trial Court has correctly held the appellant of guilty under Section 448/324 of IPC.

26. I, therefore, record my concurrence to the decision of the learned trial Court as there appears to be no ground to interfere with the Judgment and Order, passed by the learned trial Court in connection with this case. However, the sentence is modified and scaled down.

27. In the wake of the foregoing discussions, the order of conviction of the appellant under Sections 448/324 IPC is upheld, but the sentence is scaled down. This is an old pending case and much water has flowed under the bridge and I deem it appropriate to scale down the sentence. The appellant is hereby sentenced under Section 324 IPC to the period of imprisonment already undergone by the appellant during investigation and trial. As the sentence of fine under Section 448 of IPC cannot be set off, the sentence of fine of Rs. 1,000/- under Section 448 IPC with default clause is upheld.

28. The appellant is directed to appear before the learned trial Court within one month from today and deposit the fine amount.
29. With the aforesaid observations and directions, this criminal appeal stands disposed of.
30. Send back the Trial Court Record.

JUDGE

Comparing Assistant