

Present:

Mr. Justice Gobindra Chandra Tagore.
and
Mr. Justice Mohammad Ullah.

Criminal Appeal No. 1058 of 1999

Ali and another

.....Appellants

Vs

The State

.....Respondent.

Mr. B. K. Rummy, Advocate

.....For the Appellants.

Mr. Md. Mamunor Rashid, learned A.A.G.

..... For the Respondent

State.

Judgment on 27th December, 2012.

Mohammad Ullah, J.

This criminal appeal is from the judgment and order dated 26.4.1999 by which the learned Additional Sessions Judge, 3rd Court, Rajshahi in Session Case No. 88 of 1995 convicted the appellants under section 313 of the Penal Code and sentenced both of them to suffer rigorous imprisonment for 10 years with a fine of Tk. 5,000/- each in default to suffer rigorous imprisonment

for 6 (six) months more and acquitted 6 (six) other accused persons of the charge.

The prosecution case, in brief, is that the informant Md. Ali Hossain lodged a First Information Report (**shortly the FIR**) on 8.3.1995 with Mohanpur Police Station, Rajshahi against 8(eight) accused-persons on the allegations under sections 143, 148, 447, 313, 323, 324, 325, 326 and 427 of the Penal Code.

The informant alleged that the accused-persons in a preplanned way being equipped with dangerous weapons made an unlawful assembly in his homestead on 10.02.1995 at 7/7.30 a.m. to cut away different trees, from the courtyard which were planted by the informant. Aleya Bibi, the wife of the informant and his sister-in-law (ভাবী) namely Renuka Bibi came forward to resist cutting away the trees, but they failed. When the wife of the informant and his sister-in-law were going to Singmara village to inform the informant about the occurrence, accused Nos. 1-3 i.e. Solaiman, Sobhan and Ali obstructed their way and scolded them with rough and filthy words. Then accused Solaiman delt lathi blow to the wife of the informant Aleya Bibi and fell her down on the

ground and accused Solaiman also delt a dao blow on her forehead. When witness No.1 Aleya Bibi raised hue and cry, accused No.3, Ali started beating her recklessly and also poking her abdomen with a lathi. Accused No. 2, Md. Sobhan caused bleeding injury to the witness Renuka Bibi with iron rod on her hip. Upon hearing the victim's hue and cry neighbouring witnesses appeared and saw the occurrence and saved them from the clutches of the accused-persons. The accused-persons caused damage of Tk. 10,000/-by cutting the trees. The neighbouring witnesses took the victims to Mohanpur Hospital and they got admitted thereto for treatment. During treatment foetus of 3 months of his wife, Aleya Bibi was aborted.

After obtaining the medical certificate the informant lodged the FIR with Mohanpur Police Station whereupon Mohanpur Police Station Case No. 2 dated 08.03.1995 was recorded against the accused -persons and the same gave rise to G.R. No. 246 of 1995.

After investigation police submitted Charge Sheet dated 23.3.1995 against all the accused-persons under sections 143, 148, 447, 313, 323, 324, 325, 326 and 427 of the Penal Code.

The Trial Court on 03.8.1995 framed charge under sections 313 and 34 of the Penal Code against all the accused-persons and the charge was read over to them to which they pleaded innocence and claimed to be tried.

The prosecution examined as many as 11 witnesses in order to prove the charge, while the defence examined none.

After closure of the evidence of the prosecution, the accused- persons were examined under section 342 of the Code of Criminal Procedure (**hereinafter referred to as the Code, 1898**) to which they further pleaded not guilty.

The Trial Court after conclusion of the trial found the 2(two) appellants guilty of the offence under section 313 of the Penal Code and convicted and sentenced them as stated above and acquitted 6 (six) other accused persons of the charge.

Against the said judgment and order of conviction and sentence the appellants preferred this Criminal Appeal and appellant No. 1- Solaiman was granted bail by an order dated 20.4.2005.

Mr. K. B. Rummy, the learned Advocate appearing on behalf of the appellants submits that the prosecution miserably has failed to prove the charge by producing credible witnesses beyond reasonable doubt and the victim-witnesses being P.Ws. 2 and 3 contradicted themselves in their testimonies about the time, place and manner of the occurrence, and alleged miscarriage of foetus of P.W.2-Aleya Bibi.

Mr. Rummy, the learned Advocate submits further that the learned Additional Sessions Judge failed to consider the material discrepancies of the prosecution's evidence and the conviction and sentence were based on misreading and non-consideration of the evidence on record and hence, the appeal should be allowed by setting aside the impugned judgment and order of conviction and sentence.

Mr. Romy, finally submits that the appellants were falsely implicated in the alleged occurrence out of internal feud between the appellants and the informant as they were extended from the same family.

On the other hand, Mr. Md. Mamunor Rashid, learned Assistant Attorney General appearing on behalf of the respondent-State submits that the prosecution proved the charge by producing credible evidence and the conviction and sentence are well founded and need not be interfered with by this Court.

The learned A.A.G submits further that the Trial Court upon proper appreciation of the evidences on record convicted the appellants and thus nothing remains to interfere with the decision of the Trial Court.

For coming to proper decision about sustainability of the impugned judgment and order of conviction and sentence, we need to examine and assess the evidence on record keeping in view of the charge framed. Accordingly the relevant evidence on record is briefly presented below:

P.W. 1 Md. Ali Hossain is the informant, who reiterated the facts as stated in the FIR, but is not a witness of the occurrence or in other words the informant is a hearsay witness. However he proved the FIR as exhibit 1 and his signature therein as exhibit 1/1.

P.W. 2 Aleya Bibi is one of the victims of the alleged occurrence, who stated that the occurrence took place on 10.2.1995 at about 7/7.30 a.m. She stated that accused Solaiman caused her injury and fell her down on the ground and accused Ali dealt lathi blow indiscriminately on her body. This P.W.2 also stated that accused Sobhan dealt rod blow to her sister-in-law, Renuka Bibi (P.W. 3) when she had come to the place of occurrence upon hearing her hue and cry. She also stated that she and Renuka Bibi (P.W. 3) were admitted to the hospital and her foetus aged about 3 months was aborted during her treatment.

In her cross-examination she stated that accused Solaiman is her cousin (চাচাতো ভাই). She further stated that when her foetus was miscarriaged she could not know. She also stated that after 4/5 days the foetus was shown to her. She could not say whether any bleeding was caused or not. She denied the suggestion that

she deposed falsely due to internal feud between them and the accused-persons.

P.W. 3 Renuka Bibi is allegedly another victim of the occurrence, who stated that the accused-persons including the appellants indiscriminately caused injury to her, when she went forward to resist them. She also stated that accused Solaiman and Ali dealt lathi blow to her sister-in-law, Aleya, P.W.2.

In her cross-examination she stated that the foetus of Aleya (p.w.2) was aborted after 4/5 days of the occurrence and Aleya was admitted to the hospital for 15 days.

P.W. 4. Alauddin is not the witness of the occurrence.

P.W. 5 Md. Iqbal Hossain and P.W.6 Raja were declared hostile and defence declined to cross-examine them.

P.W. 7 Halima did not disclose the name of any of the accused- persons involving them in the occurrence and defence declined to cross -examine this P.W.7 .

P.W. 8, Dr. Md. Belal Hossain, who treated the victim, Renuka (P.W.3) in the Mohonpur Thana Health Complex on

10.2.1995 at about 3 p.m. and also treated other victim Aleya Bibi (P.W.2) on the same day at about 3.15.p.m.

In his cross-examination he stated that “বাচ্চা কত বড় ছিল তাহা রিপোর্টে লেখা নাই। বাচ্চাটা কি হলো তাহা জানি না। বাচ্চাটির সম্পর্কে রিপোর্টে কিছুই লেখা নাই। দারোগা আমার নিকট থেকে রক্তমাখা কাপড় সিজ করে নাই। দারোগা সাহেব আমার নিকট হতে বাচ্চা সিজ করে নাই। ”

P.W. 9 and 10 were not the witnesses of the occurrence.

P.W. 11 Shamsul Alam is the Investigation Officer of the case, who stated that he went to the place of the occurrence, recorded the statements of the witnesses under section 161 of the Code, 1898, prepared the index and the sketch map and after investigation he submitted charge sheet against the accused-persons.

In his cross-examination he stated that the occurrence took place on 10.2.1995 and the FIR was lodged on 8.3.1995. But no explanation of the delay was explained in the FIR. He further disposed that he did not seize any blood stain cloth of the victim, Aleya Bibi (P.W.2).

We have heard the learned A.A.G, perused the impugned judgment and evidence on record and also considered the ground taken in the petition of appeal.

The informant is not the witness of the occurrence, who lodged the FIR on 08.3.1995 alleging the date of occurrence on 10.2.1995. But in the FIR we do not find any explanation of causing delay of 26(twenty six) days in lodging the FIR. P.W. 2 Aleya is the principal victim of the alleged occurrence, who stated that her foetus was miscarriaged on 10.2.1995 in the Hospital. But in the deposition of P.W. 3 Renuka stated that the foetus of Aleya was miscarriaged after 4/5 days of the occurrence, who is also a victim of the alleged occurrence. P.W.2 Aleya Bibi also did not state about injuries of her abdomen caused by the appellant Ali at the time of alleged occurrence. Victim Aleya Bibi (P.W.2) deposed that she did not know when her foetus was aborted in the hospital nor could she say whether any bleeding was caused when the foetus was aborted. In the instant case only P.W. 2 and 3 were the victim-witnesses, who contradicted themselves in their testimonies about the alleged occurrence as stated in the FIR.

Dr.Md. Belal Hossain (P.W. 8) who treated the victim Aleya Bibi stated in his cross-examination that nothing was written in the medical report about the foetus of the victim Aleya Bibi (P.W. 2).

The other prosecution witnesses were not the witnesses of the occurrence.

Upon consideration of the evidence on record as produced by the prosecution it appears that the prosecution miserably failed to prove the time, place, and manner of the occurrence as well as its case as a whole, but the learned Additional Sessions Judge upon misreading and non-consideration of the evidence on record convicted the appellants under section 313 of the Penal Code.

Moreover, so far the medical jurisprudence is concerned, it is absurd that a lady being the P.W.2 Aleya Bibi would not have knowledge about her miscarriage of foetus and whether any bleeding was caused in such miscarriage.

We do not find any material on record to sustain the conviction of the appellants.

Moreover, there is nothing on record to be considered as a reason for believing the testimonies of the P.Ws. 2 and 3, who were the victim witnesses of the alleged occurrence as they contradicted themselves in their testimonies about abortion of Aleya Bibi (P.W.2) inasmuch as the testimony of the alleged victim, Aleya is absurd .

In view of the above, we hold that the prosecution has failed to prove beyond reasonable doubt that the appellants committed the alleged offence under section 313 of the Penal Code.

We find no reason to agree with the finding and the decision arrived at by the trial court. Accordingly we hold that the appeal should be allowed.

In the result, the appeal is allowed. The impugned judgment and order of conviction and sentence dated 26.4.1999 passed by the learned Additional Sessions Judge, 3rd Court, Rajshahi in Session Case No. 88 of 1995 is set aside.

The convict appellants (1) Ali, son of Late Johir (2) Md. Solaiman, son of Late Inat Ali Mondol both of village –Maldia,

Police Station–Mohanpur, District-Rajshahi are acquitted of the charge and released from their bail bond, if furnished any.

Send copy of this judgment along with the lower court record to the learned Additional Sessions Judge, 3rd court, Rajshahi.

Gobindra Chandra Tagore, J.

I agree.