

DISTRICT : GOLAGHAT.

IN THE COURT OF THE SESSIONS JUDGE AT GOLAGHAT.

Ref. :- **Criminal Appeal No. 23/2013.**

1. Sri Dimbeswar Saikia @ Dambarudhar,
2. Sri Papu Bora @ Dibakar,
3. Sri Dilip Gogoi @ Bilahi,
4. Sri Indra Gogoi @ Ghanakanta,
5. Sri Nobin Bora.

..... Appellants.

-Vs-

The State of Assam. .... Respondent.

Date of final hearing ..... 18.11.2013.

Date of judgment & Order ..... 18.11.2013.

**APEARANCES** :

For the appellants ..... Mr. M.K. Buragohain,  
Advocate, Golaghat.

AND

For the respondent/State  
of Assam. .... Mr. N.P. Acharjee,  
Public Prosecutor, Golaghat.

**PRESENT** :

SHRI T. LOHAR,  
SESSIONS JUDGE,  
GOLAGHAT.

**JUDGMENT & ORDER** :

1. Appellants Sri Dimbeswar Saikia @ Dambarudhar, Sri Papu Bora @ Diakar, Sri Dilip Gogoi @ Bilahi, Sri Indra Gogoi @ Ghanakanta and Sri Nobin Bora filed a petition u/s 374 of the Cr.P.C. against the judgment and order dated 27.6.2013 passed by the learned Sub-Divisional Judicial Magistrate (M), Dhansiri, Sarupathar in G.R. Case No. 85/2009 convicting them u/s 147/149/448/323/427 of IPC and sentenced them to undergo simple imprisonment of 6 months u/s 147/149 of IPC ; simple imprisonment of 3 months u/s 448/149 of IPC ; simple imprisonment of 3 months u/s 323/149 of IPC and simple imprisonment of 6 months u/s 427/149 of IPC.

2. The facts of the prosecution case as unfolded in the case record of G.R. Case No. 85/2009, in brief, is that one Lakhi Prasad Nath @ Soom Nath, son of Sri Bidya Nath was involved in connection with a rape case for commission of rape on a woman of 'Sabbishghoria' village, Borpathar and Borpathar police station registered a case against him and searched him. But he was not traced out. In connection with the said case, the villagers went to the house of Bidya Nath and demanded to produce said Lakhi Pd. Nath @ Soom Nath before them within 24 hours, otherwise, he would left the place. On the next day, i.e. on 12.5.2009, when the informant Sri Tarun Bora of Purani Tengani village was in the house of Sri Bidya Nath of 'Panchghoria' village under Borpathar police station, all the above named accused/appellants accompanied with other villagers in a body, arrived there and started to beat Tarun Bora with bamboo sticks in the said house. They also slapped , kicked him causing injuries on various parts of his body. Apart from it, they caused the damage of his motorcycle bearing registration No. AS-05-A/7166. In the mean time, police arrived there and saved him.

3. The O/C of Borpathar police station on receipt of the ejahar from the informant, registered the case vide Borpathar P.S. Case No. 24/09 u/s 147/448/325/307/427 of IPC. S.I. of police, Sri

Pushpendra Nath Sut (P.W.7) initially investigated into the case. During investigation, he got the informant Tarun Bora medically examined at Borpathar State Dispensary, visited the place of occurrence, examined the witnesses, drew up the rough sketch map of the place of occurrence, arrested the accused/appellants and forwarded them to the Court. On his transfer, another police officer Sri Ranjit Borah started the remaining part of investigation. He seized the motorcycle which was earlier seized in connection with Borpathar P.S. Case No. 23/09. After completion of investigation, S.I. of police Sri Ranjit Borah submitted the charge sheet u/s 147/148/149/448/323/307/427 of IPC against the accused/ appellants to face the trial.

4. Trial began before the Court of learned Sub-Divisional Judicial Magistrate(M), Dhansiri, Sarupathar. The accused/appellants were charged u/s 148/149/448/323/427 of IPC and they pleaded not guilty to the charges when the contents of the charges were read over and explained to them and they claimed to be tried.

5. Prosecution adduced the evidence of 8 witnesses to prove the case. The accused persons have been examined u/313 of Cr.P.C. They declined to adduce defence evidence. After hearing from both the sides, the learned trial Court was satisfied to hold that the prosecution was able to prove the case u/s 147/448/323/427/149 of IPC and accordingly, convicted and sentenced them as stated above.

6. Being highly aggrieved by and dissatisfied with the aforesaid impugned judgment and order of the learned trial Court, the accused/appellants have preferred this appeal on the following amongst other grounds :-

That the learned trial Court misconstrued the provisions of law under the Sections of Indian Penal Code and wrongly appreciated the evidence on record and wrongly convicted the accused/ appellants ; that the learned trial Court failed to note the important material contradictions between the evidence of the prosecution witnesses ; that the prosecution has failed to examine the Medical Officer who treated the injured person in this case.

7. Called for case record of G.R. Case No. 85/2009 is received from the learned trial Court. I have perused the same.

8. Heard the learned counsels of both the sides.

9. Let me discuss the evidence on record to see as to whether the learned trial Court has wrongly recorded the conviction of the accused/appellants by passing the impugned judgment and order.

10. P.W.1 Smti. Hiramoni Nath, the daughter of Sri Bidya Nath has deposed in evidence that while she was in the house of her father situated at Tengani along with her brothers, sisters, nephew and informant Sri Tarun Bora, the appellants accompanied with other villagers arrived there and started to demolish the house of her elder brother Lakhi Prasad Nath and they also caused mischief to her parental house, shop, granary house and the motorcycle. The appellants also took away goats, cattle etc. Further, she, her mother and informant Tarun Borah were also beaten by them.

11. As per evidence of P.W.2 Tarun Borah, the occurrence took place after 20 minutes of his arrival in the house of Bidya Nath. The villagers surrounded the said house from three sides and started to demolish the said house by means of dao, stick, axe etc. and then appellant Dilip Gogoi dragged him (P.W.2) by holding his hand from the varandah of the said house and then he was assaulted by the remaining appellants by giving kick and fisting blows and also beaten him by stick. But this fact has not been stated before the Investigating Officer by P.W.2. They damaged the motorcycle No. AS-05/7166 with the help of axe and iron rod. Then P.W.2 entered into the midst of police staff for avoiding further assault. P.W.2 was taken to Borpathar police station by the police along with the family members of Bidya Nath. They were taken to Borpathar PHC from Borpathar police station. On the next day, he lodged the ejahar Ext-2 with Borpathar police station. Police seized the said motorcycle under Ext-1 the seizure list.

In cross examination, P.W.2 has stated that about 70/80 people have attacked in the house and 400/500 people were spectators of the said incident. P.W.2 has admitted that Som Nath @ Lakhi Prasad

Nath, the son of Bidya Nath was searching by the police in connection with a criminal case involving commission of rape of a widow. The police seized his motorcycle on 22.1.2010.

12. P.W.3 Bishnu Prasad Nath is the son of Bidya Nath. According to his evidence, on the previous day, the accused persons went to their house and asked them that his elder brother Lakhi Prasad Nath should left the place within 24 hours as he had committed evil work with a woman. On the day of incident, at around 2'30 P.M., the accused/appellants arrived their house and started to demolish the house. At that time, P.W.2 Tarun Bora was in his house. Later on, police arrived there. He along with his family left for Borpathar. Accused/appellants caused mischief one motorcycle belonging to P.W.2 Tarun Bora. Further, P.W.3 has stated that P.W.2 Tarun Bora was beaten by the accused/appellants causing injuries on his mouth and various parts of his body. But P.W. 2 Tarun Bora did not state in his evidence that he had sustained injuries on his face and on various parts of his body and his teeth were broken.

In cross examination, P.W.3 has stated that on the day of incident, a criminal case has been registered against his elder brother Lakhi Prasad Nath involving him in commission of rape on a woman and in connection with the said case, the accused/appellants went to his house and to the house of his brother Lakhi Prasad Nath. The accuse/appellants helped the police for searching his elder brother Lakhi Prasad Nath. P.W.3 has fuhrer stated in cross examination that at the time of breaking his house, the police personnel were present there. P.W.3 has admitted that Tarun Bora, P.W.2 was not beaten by the accused persons.

13. P.W. 3 Sri Kon Nath has deposed in evidence that at the time of incident, he, his wife, his father Bidya Nath, his sisters, his mother and Tarun Bora (P.W.2) were present there. At that time, the public went to the house of Lakhi Prasad Nath to search him, but they did not find him there. Then they demolished his house with the help os dao, axe and lathies. They also demolished his shop. When P.W.2

Tarun Bora asked the assailants to make compromise, then he was beaten by them and his motorcycle was broken and then set on fire. Further, Tarun Bora was beaten by the accused Dilip Gogoi with a stick. Accused/appellant Dimbeswar Saikia simply waiting there. Tarun Bora was beaten by remaining four appellants. At the instruction of the villagers, he along with his brother Bali, Tapan and Bishnu Prasad Nath fled away from there. Later on, P.W.2 Tarun Bora lodged the ejahar. P.W. 4 is the eye witness to the incident. But P.W.2 Tarun Bora did not supported the said fact.

14. P.W.5 Bali Prasad Nath has supported the said fact. P.W.6 Gakul Gogoi is not an eye witness to the occurrence.

15. From the aforesaid evidence, it is found that the villagers including the appellants consisting of 70/80 numbers of people caused mischief to the house of Bidya Nath when they did not find Lakhi Prasad Nath @ Som Nath, the son of Bidya Nath who was involving in a rape case for commission of rape on a village woman prior to the occurrence. The police made effort to nab the said Lakhi Prasad Nath @ Som Nath, but could not succeed. On the previous day of the occurrence, the villagers, led by the appellants have warned Bidya Nath and his family members to produce Lakhi Prasad Nath @ Som Nath before them, otherwise, they should left the village. On the day of incident, the villagers, consisting of 70/80 numbers of people arrived there and surrounded the house of Bidya Nath and started to demolish the said house. About 400/500 villagers were present there and saw the incident. The appellant Dilip Gogoi dragged Tarun Bora (P.W.2) from the varandah of the said house by holding his hand, but this fact has not been disclosed by P.W. 2 Tarun Bora before the police while recording his statement u/s 161 of Cr.P.C. P.W.1 Smti. Hiramoni Nath, P.W.3 Bishnu Prasad Nath, P.W.4 Kon Nath are claimed to be the eye witnesses. But they did not support the version of P.W.2 Tarun Bora. On the other hand, P.W.1 has stated that accused/appellants had beaten her, her mother and P.W.2 Tarun Bora. According to P.W.1, the assailants were 11 numbers, namely – Dilip Gogoi, Dimbeswar Saikia, Papu

Gogoi, Bitul Gogoi, Premedhar Saikia, Moina Gohain, Ratul Gogoi, Nilu Phukan, Bhaiti Gogoi, Indra Gogoi, Nobin Bora, Manjul Gogoi, Golap Gogoi, Bitul Bora, Moneswar Gogoi and many others.

16. According to the P.W.3 Bishnu Prasad Nath, the accused/appellants had beaten Tarun Bora (P.W.2) and in the result, he sustained injury on his mouth and on various parts of his body and his teeth were also broken. But according to P.W.2, Tarun Bora, the appellants had beaten him with bamboo sticks and also kicked him and gave fisting blow on him. But he did not state anything in respect of any injury sustained by him. He has specifically stated that he was taken to Borpathar PHC for treatment. But neither the injury report was produced, nor the Doctor has been examined by the prosecution to prove the said fact. Therefore, the facts regarding sustaining of injury by P.W.2 is appears to be not proved.

17. According to the evidence of P.W. 4 Kon Nath, when Tarun Bora (P.W.2) asked the assailants to make compromise, then the appellant Dilip Gogoi beaten him with a stick. But this part of statement of P.W.4 is not found in the evidence of other eye witnesses. According to P.W.4, appellant Dimbeswar Saikia was standing at the place of incident while other four appellants were participating the commission of the offence against P.W.2 Tarun Bora. But this fact does not find support from the evidence of other eye witnesses.

18. P.W.5 Bali Prasad Nath is also one of eye witness to the incident. According to his evidence, all the appellants dragged P.W.2 Tarun Bora while he was sitting in the varandah of the house towards the court-yard and assaulted him with lathi on his hand and feet.

19. From the aforesaid evidence, we could not ascertain the specific part played by the appellants while committing the offence. The learned trial Court with the help of provisions of Section 149 of IPC made liable all the appellants in commission of the offence. In order to attract of provisions of Section 149 of IPC, there must be unlawful assembly. According to the prosecution evidence, about 70/80 people attacked the house of Bidya Nath. Now, the question is whether

they arrived there to nab the alleged rapist or to commit the alleged offence in the instant case. P.W.2 has stated in cross examination that about 70/80 people attacked the house of Bidya Nath, whereas, P.W.4 Kon Nath has stated that about 30 people damaged the house. The scope of section 149 of IPC has been explained by the Apex Court in various judgments holding that applications of Section 149 of IPC would highly unsafe unless it is positively proved that each one of the accused shared common object and accordingly participated in the occurrence.

20. In the instant case, we find that there are material contradictions of the evidence of the eye witnesses. P.W.1 has stated that the accused/appellants taken away their goats, cattle etc. But this fact has not been corroborated by the evidence of other eye witnesses. Further, P.W.1 has specifically stated that in connection with the same occurrence, she has lodged a separate case. The learned trial Court in Para No.24 of the impugned judgment and order hold that the I.O. has seized the motorcycle in question vide the seizure list prepared in connection with Borpathar P.S. Case No. 23/09 and P.W.1 has also stated in her evidence that relating to the occurrence, her family members lodged a case separately and P.W.2 also lodged a case separately.

21. From the said fact, it appears to be that in connection with the same incident, separate case had been lodged. Under such circumstances, we find that the person should not be vexed twice in the same incident. P.W.4 has stated that the motorcycle in question has been set ablaze by the accused persons. But said fact has not been supported by the evidence of other witnesses. The sketch map of the place of occurrence was prepared by the I.O. (P.W.7). But the said sketch map has not been exhibited by the prosecution.

22. Considering the aforesaid fact, it is found that the prosecution has failed to prove positively that each one of the accused shared the common object and accordingly, they participated in the occurrence. Further, it is also found that the prosecution has failed to

prove beyond reasonable doubt that P.W.2 Tarun Bora has sustained injury. Further, the prosecution has failed to prove that the motorcycle has been broken by the accused/appellants and set it on fire.

23. In the result, I find and hold that the appeal has merit, and accordingly, the appeal is allowed on contest. The impugned judgment and order dated 27.6.2013, passed by the learned trial Court in G.R. Case No. 85/09 is, hereby, set aside. The accused/appellants are set at liberty forthwith.

24. Their bail bonds stand discharged.

25. Send back the case record of G.R. Case No. 85/09 to the learned trial Court along with a copy of the judgment and order passed by this Court.

Given under my hand and seal of the court on this the 18<sup>th</sup> day of November, 2013.

( T. Lohar ),  
SESSIONS JUDGE,  
GOLAGHAT.

Dictated & corrected  
by me.

( T. Lohar ),  
SESSIONS JUDGE,  
GOLAGHAT.

Dictation taken & transcribed  
by me :- S. Borpatra, Steno.