

GAHC010003122012



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

Case No. : CrI.A./19/2012

SMT. BAKULI MEDHI
W/O LATE NILA KANTA MEDHI, R/O BHALUKMARI, P.O. GANDHIBORI, P.S.
JAJORI, DIST. NAGAON, ASSAM.

VERSUS

THE STATE OF ASSAM

Advocate for the Petitioner : MR. D C BORAH

Advocate for the Respondent :

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

Date : 10-08-2023

Heard Ms. S. Nazmeen, learned counsel appearing for the accused appellant and Mr. B. Sarma, learned Additional Public Prosecutor, appearing for and on behalf of the State respondent.

2. This appeal has been preferred under Section 374(2) of Cr.PC against the Judgment and Order dated 01.12.2011, passed by the learned Additional Sessions Judge, Nagaon, in Sessions Case No. 43(N)/2006, convicting the

accused appellant under section 323 IPC and sentencing him to undergo Simple Imprisonment for one year and to pay a fine of Rs. 1,000/- in default of payment of fine, Simple Imprisonment for two months.

3. The brief facts of the case is that the informant, Shri Dhaneswar Bordoloi, father of the deceased lodged an FIR at Jajori police station on 26.05.2005 stating inter alia that on 25.05.2005 at about 7 pm, when the deceased was returning after collection of Sahara Daily deposit money at that time, the appellant Bakuli Medhi and one Mitali Medhi restrained her way and dragged her to their house and assaulted the deceased as a result of which, the daughter of the informant i.e. Tutumoni Bordoloi died.

4. On receipt of the complaint, a case was registered vide Jajori PS Case No. 29/2005 under section 302/34 IPC and investigation was initiated. During the course of investigation, investigating officer recorded the statement of the witnesses, inquest was conducted on the dead body of the deceased and subsequently, the dead body was sent for post mortem examination. The I.O also visited the place of occurrence and seized some articles. The viscera of the deceased was sent to the Forensic Science Laboratory for examination. After completion of investigation, charge-sheet was submitted against the accused Bakuli Medhi, Mitali Medhi and Diganta Medhi under section 302/34 of IPC before the Court of learned Chief Judicial Magistrate, Nagaon. As the offence under section 302 IPC is exclusively triable by the Court of Sessions, the case was committed accordingly.

5. During trial, the charge was framed under Sections 302/34 IPC IPC, which was read over and explained to the accused persons, to which they pleaded not guilty and claim to be tried. To substantiate the case of the prosecution, sixteen witnesses were examined and marked some exhibits and material

exhibits. After completion of the trial, statements of accused persons were recorded under Section 313 CrPC, and the incriminating materials found in the evidence of the witnesses were put to them to which they denied the fact of assault. It is also stated that they have been falsely implicated in the case. After hearing the arguments advanced by learned counsel for the accused persons as well as the prosecution, the trial Court convicted the accused appellant Bakuli Medhi, under Section 323 IPC and two other accused persons, were acquitted. Hence the present appeal has been preferred by the appellant, Bakuli Medhi.

6. It is submitted by the learned counsel for the petitioner that the appellant is now 81 years of age, she is ailing person and not in a position to walk properly. The incident occurred in the year 2005 and 17 years have already been elapsed. Considering the nature of the offence and the background of the case, the appellant be released on Probation of Offenders Act.

7. Per contra, the learned Additional Public Prosecutor Assam had submitted that though the charge was framed under section 302 IPC but during trial, it is not proved how the deceased died as because the post mortem report indicates that there is no external or internal injury in the body of the deceased. However, considering the gravity of the offence, the learned trial Court has rightly convicted the appellant under section 323 IPC and sentenced her to Simple Imprisonment for one year, which needs no interference by this Court. Therefore, the learned APP prays for dismissal of the appeal.

8. I have considered the submissions of learned counsel for both the parties. I have also perused the record of Sessions Case No. 43(N)/2006, as well as the evidence of the witnesses and the documents available in the record.

9. Before proceeding further discussion on the issue, the evidence of the

witnesses is required to be looked into.

10. PW1 is the informant, who was not present when the incident occurred. PW2 Labanaya Bordoloi is the eye witness to the incident. She deposed in her evidence that on the day of incident, at the relevant time, she went to bring water from a tube well. While she was returning, she heard hue and cry of Tutumoni Bordoloi in the court yard of one Diganta Medhi. When she reached there, she had noticed that Bakuli Medhi was assaulting Tutumoni Bordoloi. PW2 then rushed to the house of PW1 i.e the father of the deceased and informed the matter and also to Gaonbura. PW2 further stated that when she visited the place of occurrence, she found that Tutumoni was lying infront of the shop house of Diganta Medhi.

11. In her cross-examination PW2 replied that Tutumoni was lying infront of the shop of Diganta Medhi. PW2 also stated that she saw mother and sister of Diganta Medhi were assaulting Tutumoni Bordoloi. From the evidence of PW2, it discloses that she saw appellant Bakuli Medhi and Mitali Medhi assaulting Tutumoni Bordoloi.

12. PW3 Jugmai Bordoloi deposed in her evidence that on the day of incident, on hearing hue and cry she came out from her house and found mother of Diganta Medhi pulling the hair of Tutumoni Bordoloi and Mitali Medhi was standing nearby. Having seen the incident. She returned back home and out of fear, she did not come out on that day and on the following day she came to know regarding death of Tutumoni Bordoloi.

13. In her cross-examination, PW3 replied, that the incident occurred infront of the shop house of the appellant in the evening hour. At that time he was about 50 meters away from the place of occurrence. On hearing hue and cry near the shop of Diganta Medhi she went there and saw Titumoni tried to enter into the

house of Bakuli Medhi but Mitali Medhi resisted her as a result of which scuffle started amongst them.

14. According to PW4, Smti Bina Medhi, she also tried to disperse both of them and thereafter, she left the place of occurrence.

15. PW5 Junmoni Bordoloi deposed in her evidence that on the day of incident, she was in her house. Having heard hue and cry from the house of Diganta Medhi, she went there and saw the appellant Bakuli Medhi by holding the hair of Tutumoni Bordoloi, assaulted her by using hands. She then reported the matter to Bina Medhi and other people who gathered there. According to PW5, on the same day at night, at around 8 pm, she came to know about the death of Tutumoni Bordoloi.

16. PW6, Saurab Medhi stated that on the day of incident at about 6 pm alleged incident took place. While he was returning to his house he noticed a gathering in front of the house of Bakuli Medhi. He went there and noticed that Tutumoni was trying to enter into the house of Bakuli Medhi and Bakuli Medhi resisted her to enter into their house. Then he informed the matter to the father of the deceased and in the night, he came to know that Tutumoni Bordoloi died.

17. PW7, is Sarumai Bordoloi. From her deposition, it reveals that on the date of incident at about 6.30 pm while she was returning home, she saw a gathering in their village and she went there and found Tutumoni Bordoloi was fastened in a betel nut tree. She also noticed Bakuli Medhi and sister of Diganta Medhi were standing nearby and they also tried to assault Tutumoni Bordoloi. Then she left the place. Later on, she came to know that Tutumoni died.

18. PW8 is Lakhi Kanta Bordoloi. According to PW8 on the day of incident he was at Jagiraod and he came to know about the incident from his nephew Ritu Bordoloi over phone that Tutumoni Bordoloi was being assaulted by Bakuli

Medhi and Mitali Medhi. At the time of returning back home, he went to the place of occurrence and found Tutumoni was lying in front of the house of Diganta Medhi.

19. PW9, Mahindi Bordoloi who is the mother of the victim/deceased. From her deposition, it discloses that the incident occurred in front of the house of accused Diganta Medhi. At that time, PW9 was in their house and Tutumoni went out for collection of money for Sahara Company. In the evening one boy named Gautam came to their house and informed that her daughter was being assaulted by Bakuli Medhi and Mitali Medhi. Thereafter, PW9 and her husband (PW1) went to the place of occurrence and found Tutumoni was lying in front of the house of Diganta.

20. PW10 Smti Nirmali Bordoloi, PW11 Nabajyoti Bordoloi and PW12 Sri Cheniram Saikia deposed in their evidence that they were not present when the incident occurred.

21. PW13, Dr. K. Goswami is the medical officer. He deposed in his evidence that on 20.06.2005 he was working at Nagaon Civil Hospital. On that day, he conducted post mortem examination on the dead body of Tutumoni Bordoloi and found abrasion in her both elbows and left cheek with haematoma of size 2" x 1/2" 1/2". According to the doctor, as the cause of death could not be ascertained, viscera were preserved for forensic examination. PW13 proved the post mortem report vide exhibit-2.

22. In his cross-examination, PW13 replied that abrasion of both elbows and cheeks were superficial and those injuries could not cause death. Except those injuries, no other injuries were found on the body of the deceased. Doctor opined that cause of death could not be ascertained as such viscera were preserved for forensic examination. Death was not caused due to internal or

external injuries.

23. PW14 Telemai Bordoloi, also appears to be the eye witness to the incident. She deposed in her evidence that on the date of incident when she along with Labanya, Sarumai, Punamai Bordoloi and others were returning after attending a second marriage ceremony in their village, they heard hue and cry in front of the house of Diganta and then they rushed to the place and saw Tutumoni Bordoloi was being assaulted by the accused Bakuli Medhi along with others and tied her on a betel nut tree. Tutumoni was shouting for help but nobody was forwarded to rescue her. Then Bakuli Medhi dragged her on their Courtyard and slapped her by using filthy languages. On the request of Tutumoni, she went to the house of Tutumoni and informed the matter to her parents. After some time, she heard that Tutumoni died.

24. PW15, Gunamai Saikia also stated in her deposition that when she came to the spot, she noticed one old woman had been beating a lady and near the lady some boys were standing. The victim was tortured very badly in front of the people and she was shouting for help and next day she heard that Tutumoni died.

25. PW16, is the I.O of the case. From his deposition it discloses that on 26.05.2023 he was in-charge of Jajori Police Station. On receipt of an ejahar from one Dhonai Bordoloi, he registered a case vide Jajori P.S. Case No. 29/2005 under section 302/34 IPC. He took up the case for investigation. He proved the ejahar vide exhibit-1. He examined the witnesses and recorded their statements and inquest was also done by a Magistrate. Thereafter, he sent the dead body for post-mortem examination. He collected viscera and sent the same for FSL examination. He collected the report of FSL vide exhibit-4. He arrested three accused persons.

26. In his cross-examination, PW16 replied that three witnesses were sent to record their statements before the Magistrate and as per viscera report, it was not a case of poison.

27. As per evidence of the witnesses, the deceased was being assaulted by the present appellant and some of the witnesses also stated that Mitali Medhi was also present, she also assaulted the deceased but some of the witnesses did not say anything about Mitali Medhi to be present on the spot.

28. Considering the evidence of the witnesses and the medical report, the learned trial Court observed that the prosecution has failed to prove the case under section 302 IPC as the deceased did not have any external or internal injuries and it is not alleged by any of the witnesses that the appellant used any such weapon for which the victim sustained injuries and died. As per medical report, abrasions were found on the elbows and cheeks of the deceased which were not vital parts of the body. Though viscerae were sent for chemical examination but FSL report was found negative. Apparently, it appears that the prosecution has failed to ascertain the cause of death.

29. The only question that remains to be answered is about the quantum of punishment and the manner in which the same is to be executed. It appears that the appellant had been sentenced to Simple Imprisonment for a period of one year and to pay a fine of Rs. 1,000/-, in default to undergo Simple Imprisonment for 2 (two) months. Corollary to such findings it is the request of the appellant to exercise the power vested under the provisions of Code of Criminal Procedure and the Probation of Offenders Act, 1958, in the wake of various grounds shown by the learned counsel for the appellant, the accused appellant be released on Probation of Good Conduct, in accordance with law. It is further culled out that 11 years have elapsed by now and no undue

advantage has been taken. Moreover, there are no other past criminal antecedents against the accused/appellant.

30. In the instant case, no previous conviction or any criminal antecedent of the appellant has been brought on record. As noticed, the circumstances of the case have revealed that the prosecution has failed to prove the injury which caused death to the deceased. Under such circumstances, whether it would be appropriate to provide the benefit of Probation of Offenders Act to the accused/appellant.

31. The Apex Court in case of Rashanali Burhanali Syed Vs. State of Gujarat, reported in AIR 1982 SC 784 (1) was considering the request to release the appellant on probation having regard to the petty nature of the offence committed by him. The Court allowed such an appeal and instead of sentencing the appellant at once to imprisonment, had directed that the appellant may be released on executing a bond of good behaviour for a period of one year and to furnish two sureties and a personal recognizance bond of the same amount. It was further directed that if he is found to commit some offence during this period, he will be directed to appear and serve the sentence, which has been imposed on him.

32. The Apex Court in case of Ved Prakash Vs. State of Haryana, reported in (1981) 1 SCC 447, while discussing the provisions of Section 360 CrPC held that, sentencing an accused person is a sensitive exercise of discretion and not a routine or mechanical prescription acting on hunch. The trial Court should have collected materials necessary to help award a just punishment in the circumstances. Even if Section 360, CrPC is not attracted, it is the duty of the sentencing Court to be activist enough to collect such facts as have a bearing on punishment with a rehabilitating slant.

33. When the Court having found no blemish record of the young person, who was before it, had called for the report of the Probation Officer which had indicated that he was pursuing a peaceful vocation and he was an agriculturist and had a family to maintain. These were held to be stabilizing factors in life. A long period of litigation and the little period of imprisonment suffered, according to the Court, had acted as sufficient deterrence and the Court directed the accused to be released under Section 4(1) of the Probation of Offenders Act.

34. In yet another case of Ghanshyam Das Vs. Municipal Corporation of Delhi, reported in 1975 Cri. L.J. 753 in a conviction under the Prevention of Food Adulteration Act, when there was a protracted criminal proceedings, the Court released the accused on probation of good conduct under Section 4 of the Probation of Offenders Act by holding that it would not be proper to send him to jail.

35. In case of ***Hansa Vs. State of Punjab; reported in AIR 1977 SC 1991***, in a case of conviction under Section 325 IPC, having regard to the circumstances of the case, nature of offence and character of the offender held that it was expedient to release the offender on probation of good conduct for a period of one year, invoking the powers under Section 4 of Probation of Offenders Act. It would be profitable to reproduce the relevant observations made in the said decision, which reads thus:

“The occurrence took place as a result of sudden quarrel between some children and others of the family of Hansa and Mst. Rao in regard throwing of some bricks or brickbats. In the course of this sudden occurrence Hansa is stated to have caused the injury on the head of Mst. Rao. Learned counsel for the appellant has

pressed for our consideration the application of provisions of Section 4 of the Probation of Offenders Act, 1958 to his case. We are inclined to accept this stand taken on behalf of the appellant as justifiable and tenable in law on the special facts of this case. The appellant was found guilty of having committed the offence of causing grievous hurt punishable under Section 325 of the Penal Code. The maximum sentence provided therein is seven years."

36. Delhi High Court in the case of M/s. Hindustan Times Limited Vs. Ashok Kumar Agrawal and Anr, reported in 1990 Cri. L.J. 1563, had availed the benefit of probation to the accused charged under Section 120-B and sections 408/477-A and Section 120-B of the Indian Penal Code. The accused in this case were ordered to undergo sentence for a period of two years and they were released on probation for maintaining peace and being of good conduct on furnishing bail bond.

37. This provision, as is well laid down time and again by the Apex Court is to be applied in appropriate and suitable cases. And, particularly referring to the case of Phul Singh v. State of Haryana, reported in AIR 1980 SC 249 is not to be mistaken as undue leniency nor to be applied in the undeserving cases, where the offenders have committed serious offences. Neither in case of economic offenders nor in the serious offences against women, nor in case of those acting against the unity of the country, the benefit of Probation is to be given. This is a preventive measure which saves the offenders from the adverse effects of incarceration and help checking recurrence as the objective of such provisions is to afford an opportunity of reformation to the offender as also rehabilitation of such persons.

38. In the instant case, the admitted position is that this appeal is pending in

the Court for last 11 years. The trauma, which the accused appellant was facing during the period of 11 years, is something one cannot imagine. As it appears from the record that the appellant is a poor and age old person having several ailments.

39. The fact is also not disputed that there are no past criminal antecedents and none of her conduct is found objectionable or contrary to the requirement of law. No apprehension is made out nor emerging on record as not to exercise such discretion. Apparently, the accused appellant is the first offender. Keeping in view the provisions of Probation of Offenders Act, 1958, the principles of law laid down in the judgments cited above and the facts and circumstances leading to the occurrence, it would be appropriate in this case to give the benefit of Probation of Offenders Act to the accused appellant as a chance to improve herself instead of sending her to jail at once.

40. For the foregoing reasons, the appellant Bakuli Medhi is released on probation for a period of one year in terms of Section 4 of the Probation of Offenders Act, 1958. The accused appellant is directed to appear before the learned trial Court within one month from today and execute a bond of Rs. 20,000/- with one surety of the like amount to the satisfaction of the learned trial Court on condition that during the period of probation she would maintain peace and be of good behavior. In addition, the accused/appellant be placed under the supervision of jurisdictional Probation Officer for the said period of one year for appropriate counseling. After the accused/appellant appears before the trial Court, the trial Court shall fix a date for appearance of the Probation Officer for placing the accused/appellant under his/her supervision. The Probation Officer shall, thereafter, submit periodical report before the trial Court about the conduct of the accused/appellant during the period of

probation.

41. In the result, appeal stands disposed of with the aforesaid observations.

42. Send back the LCR.

JUDGE

Comparing Assistant