

GAHC010032762018



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

Case No. : CRL.A(J)/19/2018

Atibur Rahman @ Salim,
S/o Md. Ashar Ali,
Village – Panbari,
P.S. – Diphu,
District- Karbi Anglong **.....Appellant.**

Versus

The State of Assam,
Represented by the P.P., Assam,
Guwahati. **.....Respondent.**

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MRS. JUSTICE MALASRI NANDI

For the appellant : Mr. M.H. Laskar Amicus Curiae.

For the respondent : Ms. S. Jahan Additional PP, Assam.

Date of hearing & Judgment : 25.07.2023

JUDGMENT AND ORDER (ORAL)

(M. Zothankhuma, J)

Heard Mr. M.H. Laskar, learned Amicus Curiae and Ms. S. Jahan, learned Additional Public Prosecutor for the State.

2. This appeal has been preferred against the impugned judgment dated 20.12.2017 / 22.12.2017 passed by the learned Sessions Judge, Diphu, Karbi Anglong, in Sessions Case No. 25/2002, by which the appellant was convicted under Section 302 IPC, for killing his wife and was sentenced to undergo rigorous imprisonment for life with a fine of Rs. 2,000/-, in default, simple imprisonment for 6 (six) months.

3. The Prosecution case in brief is that an FIR dated 21.06.2000 was submitted by the Prosecution Witness (PW) No.3, who is the mother of the deceased, which is to the effect that the appellant, who was her son-in-law, had assaulted the deceased at 10 a.m. on 21.06.2000, leading to her death inside their house and thereafter had fled the scene of crime. Pursuant to the FIR submitted by PW-3, Diphu P.S. Case No.102/2000 dated 21.06.2000 was registered under Section 302 IPC.

4. The Investigating Officer (PW-5) thereafter started the investigation of the case and visited the place of occurrence on 21.06.2000 itself. However, he could not find the appellant, who was subsequently arrested only on 24.08.2000, i.e. two months after the deceased had been killed. After completion of his investigation, the IO submitted the charge-sheet, having found a prima facie case under Section 302 IPC against the appellant.

5. The learned Trial Court examined 6 (six) prosecution witnesses. The appellant was also examined under Section 313 Cr.P.C., wherein he denied having any involvement in the death of the deceased. However, with regard to Question No.5, the appellant in his answer/explanation under Section 313 Cr.P.C. stated that he was not in the house at the time the IO had come into the house. The appellant further stated in his answer that "*prior to the occurrence he found the deceased wife sleeping with another and thereafter went to the house of his mother-in-law saying that he would not further keep the deceased as his wife. Coming back he found the deceased hanging. Thereafter he took down her from hanging for nursing her in presence of his landlord but she died during nursing her.*"

6. On considering the evidence adduced by the prosecution witnesses and keeping in view the answer given by the appellant in his examination under Section 313 Cr.P.C., the learned Trial Court came to a finding that the answer of the appellant under Section 313 Cr.P.C. suggested that he had murdered his wife, having found her in intolerable circumstances by strangulating her. The learned Trial Court also held that the past conduct of the appellant played a vital role, as immediately after the occurrence of the crime, the accused had left the place of occurrence and absconded. Further, the appellant was arrested only after about two months after the date of occurrence. The learned Trial Court also held that under Section 106 of the Evidence Act, the appellant was to explain as to how the deceased had died as he was found to be inside his house with the dead body at the time of death of the deceased. The learned Trial Court thereafter held that the circumstantial evidence in the case, along with the evidence recorded by PW-3, PW-4 & PW-5, proved that the appellant was the perpetrator of the crime in killing his wife by throttling. Accordingly, the

appellant was convicted under Section 302 IPC and sentence was imposed upon him.

7. The learned Amicus Curiae submits that none of the prosecution witnesses were eyewitnesses to the death of the deceased and all the evidence was hearsay. The learned Amicus Curiae further submits that PW-3 had stated that she had heard that the appellant had killed the deceased from one Hasina Begum. However, Hasina Begum was never made a prosecution witness. He further submits that the case IO (PW-5), in his evidence, had stated that he had examined Hussain Ahmed, Hasina Begum and Sumitra Devi amongst others during his investigation, before coming to a finding that sufficient materials were present for prosecuting the appellant under Section 302 IPC. However, the above 3 persons were never made prosecution witnesses.

8. The learned Amicus Curiae submits that the burden to prove a case against an accused lies firstly on the prosecution and thereafter the defence is to be asked as to what had happened. However, in the present case, the prosecution has not been able to prove the foundational fact that the appellant had murdered his wife. He accordingly submits that in view of the above, the appellant should be acquitted of the charge framed against him and consequently the impugned judgment should be set aside. In support of his submission, the learned Amicus Curiae has relied upon the judgment of the Supreme Court in the case of ***Shambhu Nath Mehra vs. State of Ajmer***, reported in ***1956 AIR (SC) 404***.

9. Ms. S. Jahan, the learned Additional Public Prosecutor, on the other hand submits that though there were no eyewitnesses to the crime, the circumstantial

evidence in the case proved the guilt of the appellant in murdering his wife. She submits that the incorrect statement made by the appellant, while giving his answer/explanation to Question No.5 during his examination under Section 313 Cr.P.C, provides an additional link to the circumstances proving the guilt of the appellant. In this regard, she has relied upon the judgment of the Supreme Court in the case of ***Sharad Birdhichand Sarda vs. State of Maharashtra***, reported in ***(1984) 4 SCC 116***, wherein it has been held that before a false explanation can be used as additional link, the following essential conditions must be satisfied :

- (1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,
- (2) the said circumstance point to the guilt of the accused with reasonable definiteness, and
- (3) the circumstance is in proximity to the time and situation.

10. The learned Additional Public Prosecutor also submits that the very fact that the appellant absconded from the place of occurrence and being arrested two months after the death of his wife, also proved the guilt of the appellant. She also submits that the evidence of PW-3, to the effect that the appellant had a habit of torturing the deceased on and off and that the deceased had also been tortured a day before the incident, has not been denied or questioned by the appellant during cross-examination of PW-3. She accordingly submits that the impugned judgment of the learned Trial Court should be upheld by this Court as the appellant has been rightly convicted for the offence of murder.

11. We have heard the learned counsels for the parties.

12. As stated earlier, there were six witnesses who were examined by the

learned Trial Court, but there are no eyewitnesses to the crime. However, PW-3, who is the mother of the deceased had stated in her evidence that when she got the information from one Hasina Begum that the appellant had killed her daughter (deceased), she had gone to her daughter's house and found her lying dead on the bed. The appellant was also seen by PW-3 in the house. A police patrol party who were on duty came to the spot, on hearing a hue and cry and started an inquiry, besides preparing the Inquest Report in her presence. She submitted an FIR before the police written by Mintu Dutta of Sitalabari. Police seized some articles like pieces of sari, wherein PW-3 put her signature on the seizure list. PW-3 in her evidence also stated that the dead body of her daughter was handed over to her after the Post Mortem Examination. She also stated that her daughter was married to the appellant three years before her death. Further, the appellant had the habit of torturing her daughter off and on and also tortured her a day before the incident. She also stated that the appellant was arrested by the police on her information after about a month.

PW-3 has not been confronted by the appellant with regard to the truthfulness of her testimony. As such, it is proved that at the time PW-3 went to the house of the appellant, she saw the dead body of her daughter and also saw the appellant in the said house.

13. The evidence of case IO (PW-5) is to the effect that the O.C, Diphu Police Station registered the Diphu P.S. Case No.102/2000 dated 21.06.2000 at 1 p.m. under Section 302 IPC, on the basis of an FIR and that the case was endorsed to him for investigation. He visited the place of occurrence on the same day and examined PW-3 and other local persons. He found the dead body lying in an improvised bed (made of bamboo) inside the house of the deceased and made

the inquest in presence of witnesses. He seized two pieces of spotted sari with knots and a long piece of the same sari. These pieces were found beside the dead body. The dead body was then sent to Diphu Civil Hospital for Post Mortem Examination. PW-5 also stated that the appellant was not found on the spot, i.e. place of occurrence. He further stated that the appellant was arrested on 24.08.2000. Finding sufficient materials for prosecuting the appellant under Section 302 IPC, he had submitted the charge-sheet and other documents, which were exhibited.

The evidence of PW-5 thus shows that the appellant had absconded from the place of occurrence by the time PW-5 had arrived.

14. The evidence of PW-6, who was the doctor working at Diphu Civil Hospital, is to the effect that he conducted Post Mortem Examination of the deceased at about 4:10 p.m. on 21.06.2000. The deceased was about 21 years old and he found the following injury marks on the dead body of the deceased :

“(I) A semilunar injury mark near the right upper front of the neck. With nail like light impression and multiple blackish colours over the front of the neck with local oedema.

(II) On cut section blackish colouration of blood coming out from the surrounding area of neck ante mortem in nature.”

In the opinion of PW-6, the death of the deceased was due to asphyxia, as a result of throttling.

15. The evidence of PW-1, PW-2 and PW-4 is only hearsay evidence, inasmuch as they were not eye-witnesses to the crime. They had only heard

about the death of the deceased.

16. In the present case, we find that PW-3 had not been informed about the death of the deceased by her husband, i.e., the appellant but by some other person, i.e. one Hasina Begum. Though PW-5 had stated that he had examined Smt. Hasina Begum, Smt. Sumitra Devi and one Hussain Ahmed, amongst others during his investigation of the case, the above three named persons were not made prosecution witnesses. Be that as it may, it is not the case of the appellant that the prosecution was hiding facts from the learned Trial Court, which was not in favour of the prosecution case.

17. PW-3, on being told of her daughter's death, had rushed to her daughter's house and found her dead on the bed. However, when the Investigating Officer went to the house of the appellant, the appellant could not be found. He could only be arrested two months after the death of the deceased, i.e., on 24.08.2000. The evidence of PW-3 that the appellant used to habitually torture the deceased and had also tortured the deceased a day before the incident has not been denied by the appellant, as PW-3 had not been confronted with any suggestion made by the appellant, to the effect that the evidence of PW-3 was false.

18. The explanation given by the appellant to question No. 5 during his cross-examination under Section 313 Cr.PC implies that the motive of the appellant, for killing his wife was that he had found his wife sleeping with another man. If we accept the explanation given by the appellant, then it clearly proves that he had killed his wife due to seeing his wife sleeping with another person. However,

there is no proof of the same. On the other hand, if the explanation given by the appellant is a lie, then the issue is whether there was any motive for the appellant to have killed his wife. In the present case, there is nothing to show that the explanation given by the appellant against question no.5 in his 313 Cr.P.C. explanation is truthful. There is nothing stated by the appellant as to whether he did anything to the deceased or the person she was alleged to have slept with. Further, PW-3 was never questioned by the appellant during cross-examination, with regard to the appellant telling her that the deceased was seen sleeping with some person, other than the appellant. Other witnesses were also not questioned on this count. On considering the explanation, we are of the view that the said explanation is false, as the said explanation was never taken up by the appellant earlier.

No doubt, motive is important in establishing a case based on circumstantial evidence. However, in the case of ***Sukhpal Singh –vs- State of Punjab***, reported in ***2019 15 SCC 622***, the Supreme Court has held that inability of the prosecution to establish motive in a case of circumstantial evidence is not always fatal to the prosecution case, more so, when the accused person could not establish any *alibi* or cogent defence. In the present case, the evidence adduced by PW-3 shows that the appellant was in the habit of torturing his wife. Further, the conduct of the appellant in being untraceable for more than two months after the death of his wife, leads us to believe that the appellant had absconded due to his guilty conscience.

19. The appellant, in his answer/explanation to question No. 5 during his examination under Section 313 Cr.P.C, had taken a stand that he had found his wife sleeping with another man and he went to his mother-in-law's house telling her that he could not keep the deceased as his wife any longer. Coming back to

his house, he found his wife hanging. He took down her body for nursing her in the presence of his landlord. However, she died while he was nursing her. On a careful reading of the explanation given by the appellant to question No. 5 in his Section 313 Cr.PC examination, we find that the appellant was present at the time his wife died and that it could only have been the appellant who could have throttled her to death, inasmuch as, the evidence of the Doctor is to the effect that the deceased had died due to asphyxia caused by throttling. The further conduct of the appellant after the death of the deceased, wherein it has been clearly shown that he could be arrested only two months after the death of his wife, also points towards the guilt of the appellant as he had apparently absconded. He was only arrested on the basis of the information provided by PW-3, as has been stated in her evidence, which has not been put to the test by the appellant during cross-examination of PW-3.

20. As we find that the explanation given by the appellant with regard to question No. 5 in his examination under Section 313 Cr.PC is a lie, then, as held by the Supreme Court in the case of ***Sharad Birdhichand Sarda*** (supra), a false plea can at best be considered as an additional circumstance, if other circumstances points unfailingly to the guilt of the accused.

21. The above being said, there being no eye-witness to the crime and as the offence had taken place within the secrecy of the four walls of the house of the appellant, the same implies that the appellant was aware as to how his wife had died. Section 106 of the Evidence Act states that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

22. In the case of ***Shambhu Nath Mehra (supra)*** the Supreme Court has held that as a general rule, the burden of proof in a criminal case is on the prosecution and Section 106 of the Evidence Act is not intended to relieve it of that duty. On the contrary, Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which is especially within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word 'especially' stresses that it means facts that are pre-eminently or exceptionally within his knowledge. If the Section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case, the burden lies on the accused to prove that he did not commit the murder.

23. In the case of ***Trimukh Maroti Kirkan –vs- State of Maharashtra***, reported in ***(2006) 10 SCC 681***, the Supreme Court has held that if an offence takes place inside the privacy of a house where the assailant has all the opportunity to plan and commit the offence, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused. It held that though the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led to establish the charge, cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. It further held that in view of Section 106 of the Evidence Act, there would be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The Supreme Court in para 22

of the said judgment has further held that where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence, to show that shortly before the commission of crime they were seen together or the offence had taken place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Similar decisions have been passed by the Supreme Court in the case of ***Nika Ram –vs- State of Himachal Pradesh***, reported in ***(1972) 2 SCC 80*** and ***GaneshLal –vs- State of Maharashtra***, reported in ***(1992) 3 SCC 106***.

24. Section 8 of the Evidence Act provides that any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. It further provides that the conduct of any person against whom the offence is the subject matter of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. On a perusal of the conduct of the appellant in absconding from the scene of the crime and the fact that the Police was able to arrest him only after two months of the crime, coupled with the fact that he was in the scene of the crime at the time of death of his wife, completes the chain of circumstantial evidence pointing to the guilt of the appellant with reasonable definiteness. The false statement made by the appellant is thus an additional link, which lends assurance to the circumstantial evidence proving the guilt of the appellant.

25. On considering all the above reasons and facts, we are of the view that the prosecution has been able to establish the chain of circumstances, consistently pointing to the guilt of the appellant and which is inconsistent with the attempt to prove his innocence. Accordingly, we do not find any ground to interfere with the impugned judgment passed by the learned Trial Court in Sessions Case No. 25/2002.

26. The appeal is accordingly dismissed. Send back the LCR.

27. In appreciation of the assistance provided by Mr. M.H. Laskar, learned Amicus Curiae, his fees as per the fee structure should be paid by the Assam State Legal Services Authority.

JUDGE

JUDGE

Comparing Assistant