

GAHC010132022016



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

Case No. : Crl.A./280/2019

MD ANOWAR KHAN
S/O- LATE JOSIMUDDIN KHAN,
VILLAGE-MANIKPUR, P.S.- KRISHNAI, DIST- GOALPARA.

VERSUS

THE STATE OF ASSAM AND 5 ORS.
REPRESENTED BY PP, ASSAM.

2:MOJIRUL HUSSAIN @ BABU ALI
S/O- ANOWAR HUSSAIN

R/O- VILLAGE- MANIKPUR
P.S.- KRISHNAI
P.O- KRISHNAI
DIST- GOALPARA
ASSAM. PIN-783126.

3:MONIRUL ISLAM
S/O- ANOWAR HUSSAIN

R/O- VILLAGE- MANIKPUR
P.S.- KRISHNAI
P.O- KRISHNAI
DIST- GOALPARA
ASSAM. PIN-783126.

4:JAHURUL ISLAM
S/O- ANOWAR HUSSAIN

R/O- VILLAGE- MANIKPUR
P.S.- KRISHNAI

P.O- KRISHNAI
DIST- GOALPARA
ASSAM. PIN-783126.

5:ANOWAR HUSSAIN
S/O- LATE KAJIMUDDIN SK.

R/O- VILLAGE- MANIKPUR
P.S.- KRISHNAI
P.O- KRISHNAI
DIST- GOALPARA
ASSAM. PIN-783126.

6:ZORINA BIBI
W/O- ANOWAR HUSSAIN

R/O- VILLAGE- MANIKPUR
P.S.- KRISHNAI
P.O- KRISHNAI
DIST- GOALPARA
ASSAM. PIN-783126

Advocate for the Petitioner : MR.G SAROWAR

Advocate for the Respondent : PP, ASSAM

Linked Case : Crl.L.P./18/2017

MD. ANOWAR KHAN

S/O LATE JOSIMUDDIN KHAN
VILL. MANIKPUR
P.S. KRISHNAI
DIST. GOALPARA

VERSUS

THE STATE OF ASSAM and 5 ORS

REPRESENTED BY THE P.P. ASSAM.

2:MORIJUL HUSSAIN @ BABU ALI

S/O ANOWAR HUSSAIN
3:MONIRUL ISLAM

S/O ANOWAR HUSSAIN
4:JAHURUL ISLAM
S/O ANOWAR HUSSAIN
5:ANOWAR HUSSAIN

S/O LATE KAJIMUDDIN SK.
6:ZORINA BIBI
W/O ANOWAR HUSSAIN
ALL ARE R/O VILL. MANIKPUR
P.S. KRISHNAI
P.O. KRISHNAI
DIST. GOALPARA
ASSAM
PIN 783126

Advocate for : MR.G SAROWAR
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM and 5 ORS

Linked Case : I.A.(CrI.)/126/2017

MD. ANOWAR KHAN

S/O LATE JOSIMUDDIN KHAN
VILL. MANIKPUR
P.S. KRISHNAI
DIST. GOALPARA

VERSUS

THE STATE OF ASSAM and 5 ORS

REPRESENTED BY THE P.P. ASSAM.

2:MORIJUL HUSSAIN @ BABU ALI

S/O ANOWAR HUSSAIN
3:MONIRUL ISLAM

S/O ANOWAR HUSSAIN

4:JAHURUL ISLAM
S/O ANOWAR HUSSAIN
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ALL ARE R/O VILL. MANIKPUR
P.S. KRISHNAI
P.O. KRISHNAI
DIST. GOALPARA
ASSAM
PIN 783126

Advocate for : MS.S HALOI

Advocate for : MR. S D PURKAYASTHA (R2-R5) appearing for THE STATE OF ASSAM and 5 ORS

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MRS. JUSTICE MALASRI NANDI

For the appellant	: Mr. N. Uddin	 Advocate
For the respondents	: Ms. S. Jahan	 Additional PP, Assam.
	Mr. S.D. Purkayastha for Resp. No. 2.	
Date of hearing	: 19.07.2023.	
Date of judgment	: 19.07.2023.	

JUDGMENT AND ORDER (Oral)

(M. Zothankhuma, J)

Heard Mr. N. Uddin, learned counsel for the appellant. Also heard Ms. S. Jahan, learned Addl. Public Prosecutor for the State of Assam and Mr. S.D. Purkayastha, learned counsel for the respondent Nos. 2 to 6.

2. This appeal has been filed by the informant/prosecution witness No.1 (PW1) against the impugned Judgment dated 16.05.2016 passed by the Court of the Sessions Judge, Goalpara in Sessions Case No. 213/2013, acquitting the respondent Nos. 2 to 6 from the charge under Sections 302/34 IPC on the ground of benefit of doubt, in the murder of one Anisa Begum@ Anisa Khan@ Anisa Khatun, who is the daughter of PW1.

3. The learned Trial Court, by it's impugned Judgment, had acquitted the respondent Nos. 2 to 6 in relation to the death of the deceased Anisa Begum, on the ground that there was a long gap between the respondent No. 2 (boyfriend of the deceased) and the deceased being last seen together and the time the dead body of the deceased was discovered.

4. The learned counsel for the appellant submits that the respondent No. 2 and the deceased, who were in love, had gone out from the house of the deceased after 9 pm on 02.02.2013. As the respondent No. 2 was the last person to have seen the deceased alive, it would have been the respondent No. 2, who had killed the deceased, with the possibility of the other respondents, who were the relatives of the respondent Nos. 2, being involved in the death of the deceased, as they had made a threat to PW1 that they would kill the deceased if she stepped into their home, due to they being against the relationship between the respondent No. 2 and the deceased. He also submits that the circumstantial evidences in the case only points to the involvement of the respondent Nos. 2 to 6 in relation to the death of the deceased. As such, the impugned Judgment should be set aside and the respondent Nos. 2 to 6 should be convicted under Sections 302/34 IPC and sentenced accordingly.

5. The Additional Public Prosecutor and the counsel for the respondent Nos. 2 to 6 submit that on a careful perusal of the records, there is nothing to show that the last seen together theory could have been applied to the case of the respondent No. 2, inasmuch as, the evidence of the prosecution witnesses was contradicted by the evidence of the I.O, who had stated that the prosecution witnesses had not told him in their statements under Section 161 CrPC that the respondent No. 2 had gone to the house of the deceased at around 9 pm on 02.02.2013 or had left with the deceased on the said night for a walk. They also submit that there was no link in the circumstantial evidences showing the involvement of the respondent Nos. 2 to 6 in the death of the deceased.

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

7. The prosecution case in brief is that an FIR dated 03.02.2013 was submitted at 12.10 noon by PW1, who is the father of the deceased Anisa Begum. He stated in his FIR that his daughter Anisa Begum was having a love affair with the respondent No. 2 for about a year. However, his daughter was brutally killed a 100 metres away from their house and he suspected the respondent No. 2 to have committed the said crime.

8. In pursuant to the FIR, Krishna PS Case No. 23/2013 under Section 302 IPC was registered. After investigation of the case, charge sheet was filed, as the I.O. had found a prima facie case under Sections 302/34 IPC against the respondent Nos. 2 to 6.

9. Charge was framed against the respondent Nos. 2 to 6 under Sections 302/34 IPC to which they pleaded not guilty and claimed to be tried. Thereafter, 8 prosecution witnesses were examined by the learned Trial Court and examination of the respondent Nos. 2 to 6 was undertaken under Section 313 CrPC, in which they denied their involvement in the death of the deceased. The learned Trial Court thereafter, vide the impugned Judgment dated 16.05.2016, came to a finding that in view of the long gap between the time the respondent No. 2 and the deceased had gone out from the house of the deceased and the time the dead body was recorded, the possibility of other persons coming in between having existed during the said time period, it would be hazardous to come to a conclusion of guilt against the respondent Nos. 2 to 6, on the basis of "last seen together" theory. It also held that as there were no eye witnesses to the occurrence of the murder and in the absence of the exact time of death of the deceased, the last seen together theory could not be applied to the respondent Nos. 2. It also held that mere communication between the accused and the deceased over phone, prior to the death of the deceased, was not enough to hold the respondent Nos. 2 to 6 guilty of the crime. The learned Trial Court thereafter, acquitted the respondent Nos. 2 to 6 from the charge under Sections 302/34 IPC, by holding that the prosecution had failed to establish its case beyond all reasonable doubt and by giving the respondent Nos. 2 to 6 the benefit of doubt.

10. The evidence of PW1 (father of the deceased), PW2 (cousin brother of the deceased), PW3 (brother of the deceased) and PW4 (sister in law of the deceased) is to the effect that the respondent No. 2, who was in a relationship with the deceased, had come over to the house of the deceased on 02.12.2013

at around 9.00 pm and they had left the house together on the night of 02.12.2013 to take a walk. PW4 in his evidence has exhibited his statement given to the Magistrate under Section 164 CrPC as Ext.5 and Ext. 5(1) & Ext.5(2) as his signatures.

11. As the deceased did not return to her house, a search was made for her the next morning and her dead body was found lying in a field. The evidence of PW2 is also to the effect that a lock chain (zipper slider), which was a part of the jacket worn by the respondent No. 2 was held in the hand of the deceased, when her body was found. Further there were injuries in the head and hand of the deceased and that a red and black chador had been tied with knots on the neck of the deceased. A SIM Card was also found besides the dead body, along with a red ribbon and a red high neck sporting T-Shirt.

12. The basis for appellant's counsel stating that the respondent No. 2 was involved in the murder of the deceased is due to the last seen together theory, keeping in view the evidence of PWs 1 to 4, which is to the effect that the respondent No. 2 and the deceased gone out together on the night of 02.02.2013 and that was the last time the deceased was seen alive.

13. The further stand of the appellant that the respondent Nos. 3 to 6 could be involved in the murder of the deceased was due to the evidence of PW1, which is to the effect that the family of the respondent No. 2 were against the relationship between the respondent No. 2 and the deceased. They had apparently threatened PW1 a few months back that they would kill the deceased if she ever landed up in the house of the respondent Nos. 2 to 6.

14. The evidence of PW6, who is the Senior Medical & Health Officer, Goalpara Civil Hospital is to the effect that he performed post mortem examination on the dead body of the deceased and in his opinion, the cause of death was due to asphyxia following strangulation by a sheet of cloth, which was ante-mortem in nature.

15. The evidence of PW7, who was working as a Bench Assistant in the court of the Judicial Magistrate First Class is that she recorded the statement of PW1 under Section 164 Cr.PC. It may be clarified here that no Judicial Magistrate First Class gave evidence before the learned Trial Court.

16. In the statement made under Section 164 Cr.PC by PW-1, PW-1 has stated that on the night of 03.02.2013, the respondent No. 2 took his deceased daughter away by enticing her. He also stated that the respondent No. 2 and his daughter had been in love for 1½ to 2 years and that about 4 months back, the respondent Nos. 3 to 6 had threatened him that they would kill his daughter, if the respondent No. 2 were to take her to their house. He further stated that his daughter had taken along money and gold from the house with her on the fateful night.

17. PW-4 in his statement made under Section 164 Cr.PC has stated that on 03.02.2013, the deceased was found dead in the field. She was supposed to get married with the respondent No. 2 with whom she was in love. On 02.02.2013, they had retired to bed at about 11:00 pm after watching TV. The deceased had also retired to bed. However, the following day, they did not find the deceased in her room and thought that she had eloped with the respondent

No. 2. However, they found her dead in the field. PW-4 also stated that the mother and brother of the respondent No.2 had rebuked them, saying that they would not accept the deceased as their daughter-in-law. PW-4 also stated that the deceased had been raped and killed.

18. In the statement made by PW-4 under Section 164 Cr.PC, there is nothing stated to the effect that the respondent No. 2 had come to the house of the deceased on 02.02.2013 or that PW-4 had seen the respondent No. 2 and the deceased going out together from the house of the deceased. In the evidence given before the learned Trial Court, PW-4 had stated that at about 7:00 – 7:30 pm, the respondent No. 2 had come over to their house and started having a conversation with the deceased. After a while, the respondent No. 2 and the deceased went out of the house saying that they would go for a walk. At about 09:15 – 09:20 pm, the respondent No. 4's husband came back from the market and after having dinner, PW-4 locked the door. On getting up at 05:30 am the next morning, PW-4 found that the deceased had not returned home and on a search being made, they found the dead body of the deceased in the field. As can be seen from the above, there is a contradiction between the contents of the statement made under Section 164 Cr.PC by PW-4 and her testimony before the learned Trial Court.

19. The above being said, PW-4 did not tell the Police in her statement under Section 161 Cr.PC that the respondent No. 2 had been talking to the deceased or that they had gone out of the house together. PW-4 was confronted with the discrepancy in her statement made under Section 161 Cr.PC vis-a-vis her testimony during her examination-in-chief before the learned Trial Court at

the time of her cross-examination, wherein PW-4 denied the suggestion that the Police did not question her or that she did not see the respondent No. 2 and the deceased having a conversation in their house and thereafter going out together. PW-4 was also confronted with her statement made under Section 164 Cr.PC with regard to PW-4 retiring to bed at around 11:00 pm and also stating that the deceased had also retired to bed.

20. These discrepancies in the statement made by PW-4 under Section 161 Cr.P.C and Section 164 Cr.PC vis-à-vis her testimony before the learned Trial Court was also put to the Investigating Officer (PW-8) during recording of his evidence. PW-8 stated in his cross-examination that PW-4 did not give him any statement to the effect that the respondent No. 2 had come to the house of PW4 or had any conversation with the deceased or that they had left the house together. PW-8 further denied that PW-4 had stated that the respondent Nos. 3 to 6 had told him that they would not accept the deceased as their daughter-in-law.

21. The statements made by PW1, PW2 & PW3 under Section 161 Cr.PC also does not speak of the respondent No.2 coming into the house of the deceased on the night of 02.02.2013 or the respondent No.2 and the deceased leaving the said house together for a walk on the fateful night. PW1, PW2 & PW3 were thereafter confronted with their statements made under Section 161 Cr.P.C. during the recording of their evidence, as they had stated otherwise in their testimonies before the learned Trial Court, wherein they stated that the respondent no.2 had come to the house of the deceased and had left with the deceased for a walk on the night of 02.02.2013. However, as in the case of

PW4, PW8 in his evidence has denied that PW1, PW2 & PW3 had given such statements to him under Section 161 Cr.P.C. Further, the contents of the statement made under Section 164 Cr.P.C. by PW1, with regard to the deceased carrying away money and gold does not find mention in the evidence adduced by PW1.

22. The fact that the PW1 to PW4 had been confronted with their statements made under Section 161 Cr.P.C., which were not in sync with their evidence recorded before the learned Trial Court, regarding the respondent No.2 having come to the house of the deceased and taking her out for a walk on the said night shows that they are unreliable witnesses. In the case of ***V.K. Mishra & Anr. –vs- State of Uttarakhand & Anr.***, reported in ***(2015) 9 SCC*** 588, the Apex Court has held that a witness should be confronted with his previous statement made before the Police under Section 161 Cr.PC, to contradict his statement at the time of recording of his evidence, to discredit the witness. Section 145 of the Indian Evidence Act, 1872 also provides that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The Apex Court in ***V.K. Mishra*** (supra) further held that thereafter, when the Investigating Officer is examined in the Court, his admission should be drawn to the passage marked for the purpose of contradictions. In the case in hand, PW-1 to PW-4 have been confronted with their statements made to the police under Section 161 Cr.P.C. and the Investigating Officer has also been examined in

Court, by drawing his attention to the contradictions in the statements of PW-1 to PW-4 made under Section 161 Cr.P.C. and their testimonies before the learned Trial Court. As it is clear that the question of respondent no.2 coming to the house of the deceased on 02.02.2013 and taking out the deceased for a walk on the said night was never a part of their statements made under Section 161 Cr.P.C., but had appeared for the first time in their evidence recorded before the learned Trial Court, it cannot be said that the issue of the respondent No.2 having come to the house of the deceased and taking the deceased out for a walk on 02.02.2013 has been proved. In that view of the matter, we are of the view that even the "last seen together" theory would not be applicable to the facts of this case. Consequently, we do not agree with the learned Trial Court with regard to the last seen together theory, as the said theory cannot find place in the facts of this case.

23. The above being said, there is nothing to prove that the lock chain (zipper slider) found in the hand of the deceased was a part of the jacket worn by the respondent No. 2. This is fortified by the contradiction in the statement made by PW-2 in his cross-examination, which has not been supported by the evidence of PW-8, wherein PW-8 states that PW-2 did not state to him that the lock chain belonged to the jacket worn by the respondent No.2. The attempt to somehow rope in respondent No. 2 and connect him with the death of the deceased in their evidence recorded before the Trial Court seems to be an after-thought. Further, there is no evidence to show the involvement of the respondent Nos. 3 to 6 with the crime.

24. There is one aspect of the matter which has also been pointed out by

the learned counsel for the appellant i.e. with regard to the Call Detail Records (CDR) of the mobile of the respondent No.2 made to the mobile of the deceased. There is nothing to co-relate the calls with the death of the deceased and in any event, there being no certificate made with regard to the said CDR in terms of Section 65(B) of the Evidence Act, the said CDR in any event would not be admissible as evidence. In the case of **Anvar P.V. -vs- P.K. Basheer & Ors.**, reported in **(2014) 10 SCC 473**, the Hon'ble Supreme Court has laid down the conditions required for admissibility of a document, depending upon the satisfaction of the four conditions laid down in Section 65(B) of the Evidence Act. As there is no certificate made in respect of the CDRs of the mobile belonging to the respondent No. 2, the said CDRs cannot be used as evidence.

25. In view of the reasons stated above, we do not find any ground to interfere with the findings of the learned Trial Court in acquitting the respondent Nos. 2 to 6 of the charge under Sections 302/34 IPC.

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

JUDGE

JUDGE

Comparing Assistant