

GAHC010135192022



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

Case No. : CRL.A(J)/81/2022

JAHEDA BEGUM
W/O- LATE AKHTAR HUSSAIN, VILLAGE- BANDHUGURI, P.S.-
DHALIGAON, DIST.- CHIRANG, ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY P.P., ASSAM

Advocate for the Petitioner : MS. B D SARMAH

Advocate for the Respondent :

Linked Case : Crl.A./36/2022

HAFIJUR RAHMAN
S/O ABDUL MANNAN
VILLAGE NANGALBHANGA
PS AMGURI
PO BIJNI
DIST CHIRANG
ASSAM
783390

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY PP ASSAM

2:HAME RAHMAN

S/O LATE HUSSAIN ALI SHEIKH VILLAGE CHIKAPARA
PS AMGURI
PO JOYPUR
DIST CHIRANG
ASSAM. 783393

Advocate for : MR. S A HUSSAIN
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MALASRI NANDI

JUDGMENT

Date : 15-03-2023

(M. Zothankhuma, J)

Heard Ms. B.D. Sarmah, Legal Aid Counsel for the appellant in Criminal Appeal (J) No. 81/2022 and Mr. D.J. Haloi, learned counsel for the appellant in Criminal Appeal No. 36/2022. Ms. B. Bhuyan, learned Addl. Public Prosecutor assisted by Mr. J. Das appears for the State.

2. The two appellants have both been convicted vide Judgment and Order dated 12.01.2023, passed by the Court of the Addl. Sessions Judge, Bijni in Sessions Case No. 329(A)/2018, under Sections 302/34 IPC and sentenced to undergo imprisonment for life with a fine of Rs. 10,000/- each, in default, to undergo Simple Imprisonment for one month.

3. The prosecution case in brief is that FIR dated 17.09.2016 was submitted by the informant (PW-1) to the effect that on 16.09.2016, when he returned home from Tulsijora Bazar at around 8.30 pm, he learnt that his grandson i.e.

the appellant in Criminal Appeal No. 36/2022 had come to his house, alongwith the appellant in Criminal Appeal (J) No. 81/2022 and her husband, around 4.30 pm. For easier disposal of these appeals, the appellant in Criminal Appeal No. 36/2022 shall be referred to as 'X' and the appellant in Criminal Appeal(J) No. 81/2022 shall be referred to as 'Y'. The FIR further states that taking advantage of his absence at home, the appellants killed Akhtar Hussain, who is the husband of 'Y', by strangulating him with a rope inside his house at around 6:00 pm.

4. Pursuant to the FIR dated 17.09.2016, which was submitted to the Officer-in-Charge, Amguri Police Station, Chirang District, BTAD, Amguri Police Case No. 59/2016 under Sections 302/34 IPC was registered. After investigation was completed by the Investigating Officer(I.O), chargesheet was filed, as the I.O had found a prima facie case against the appellants under Sections 302/34 IPC.

5. Charge under Sections 302/34 IPC was framed against the appellants on 10.04.2019, to which the appellants pleaded not guilty and claimed to be tried.

6. The learned Trial Court thereafter examined 7 prosecution witnesses and after examining the appellants under Section 313 Cr.PC, came to a finding that the appellants had strangulated the deceased with a jute rope. The learned Trial Court thereafter convicted the appellants under Sections 302/34 IPC and imposed the sentences, as mentioned to in the second paragraph.

7. The learned counsels for the appellants submit that there were no eyewitness to the crime and that the jute rope which had been allegedly used for the purpose of strangulating the deceased was not sent to the Forensic

Science Laboratory (FSL), for examining whether the same contained the fingerprints of the appellants. They submit that the learned Trial Court had erroneously come to a finding that the appellants were guilty of murder, on the assumption that 'X' and 'Y' might have been having an illicit affair at the time of the alleged occurrence of the incident, as they had both married after the death of the deceased. They submit that as there is no evidence recorded before the learned Trial Court, with regard to 'X' and 'Y' ever having an illicit affair during the time of occurrence of the incident, the said premise could not be used as a basis for coming to a finding that an alleged unproven illicit affair was the motive for the crime.

8. The learned counsels for the appellants submit that the learned Trial Court had also convicted the appellants on the basis of the "last seen together" theory, which is not in consonance with the evidence adduced by the witnesses. They submit that the "last seen together" theory would not be applicable to the appellants, as the last person to have seen the deceased was PW-6. They also submit that the evidence of PW-1, PW-2 and PW-6 shows that there is discrepancy with regard to the exact time when the deceased was found dead. They submit that in the cross examination of PW-1, PW-1 had stated that he returned to his house at 7.00 pm and that the time mentioned in the FIR was not correct. In the FIR, the time of PW-1 returning to his home is recorded as 8.30 pm and the time of the incident was mentioned as 6.00 pm. They also submit that PW-2 in his evidence had stated that he got information at around 6.30 pm that the appellants had left the house of PW-1 without the man they had brought into the house of PW-1. PW-2 had immediately gone to the house of PW-1 and found that his tongue was out of his mouth and blood was oozing from his tongue. He found no pulse and also found that the deceased man's

hands and legs had become black and cold. However, PW-6 in her cross examination had implied the incident took place around 7.00 pm. The learned counsel for the appellants thus submit that due to the different time given by the witnesses, with regard to when the incident took place, it is not clear that when death of the deceased had taken place.

9. The learned counsels for the appellants also submit that 'X' and 'Y' had no time to be alone with the deceased, to strangle him, as the witnesses all seemed to be in and around the place of occurrence all through the evening, as per the different timings given by them in their evidence. The learned counsels for the appellants also submit that the exact place of recovery of the jute rope, which had allegedly been used for strangulating the deceased, is different as stated by different prosecution witnesses in their evidence. They submit that while PW-7 (I.O) had stated that the jute rope was lying in the corner of the room, the seizure witness PW-1 had stated in his cross examination that the jute rope was found on the bed inside the house. On the other hand, seizure witness PW-5 had stated that the jute rope was lying near the bed where the dead body was lying. They submit that in view of the discrepancy in the place of recovery of the jute rope, it can be inferred that the jute rope was not recovered on the basis of any disclosure statement made by the appellants.

10. The learned counsels for the appellants thus submit that the learned Trial Court could not have based its findings of guilt of the appellants on presumptions, as the same had to be based on facts.

In support of their submission that the "last seen together" theory could not be a basis for convicting the appellants, they have relied upon the

Judgments of the Apex Court in the case of **Anjan Kumar Sarma & Others Vs. State of Assam** reported in **AIR 2017 SC 2617** and in the case of **Kanhaiya Lal Vs. State of Rajasthan** reported in **(2014) 4 SCC 715**.

11. In support of their submissions that the recovery of the alleged jute rope, allegedly used for strangulating the deceased was not based upon any disclosure statement made by the appellants, they have relied upon the Division Bench judgment of this Court in the case of **Abdul Malek (MD.) vs. State of Assam & Another**, reported in **2020 (5) GLT 122** and **Akibul Ali (MD.) vs. State of Assam & Another**, reported in **2020 (2) GLT 431**.

The learned counsels for the appellants thus submit that the impugned judgment and order should be set aside and the appellants should be acquitted of the charges framed against them.

12. The Additional Public Prosecutor, on the other hand submits that the informant (PW-1) is the grandfather of 'X'. Also, PW-3 is the step grandmother. She submits that the evidence of PW-1, PW-2 and PW-6 clearly proves the guilt of the appellants, as they were last seen together with the deceased and they could have been the only persons who could have strangulated the deceased. The Additional Public Prosecutor also submits that there is no denial by the appellants that they were with the deceased in the house of PW-1. As such, due to the close proximity between the time of their arrival in the house of PW-1, the time of leaving the house of PW-1 and the time of discovery of the death of the deceased, the circumstantial evidence clearly pointed to the crime having been committed by the appellants.

13. In support of her submission that the close proximity of the place and time between the events, i.e. the appellants having been last seen together with the

deceased and the factum of death, leads to the only conclusion that the appellants had committed the crime, the learned Addl. Public Prosecutor has relied upon the judgment of the Apex Court in ***Amit@Ammu vs. State of Maharashtra***, reported in ***(2003) 8 SCC 93***.

14. In support of her submission that the "last seen together" theory can be used for convicting an accused, she has relied upon the judgment of the Apex Court in the case of ***Ram Gopal, S/o Mansharam vs. State of Madhya Pradesh***, Special Leave Petition (Crl.) 9221/2018. She also submits that in view of the disclosure statement made by 'X', the recovery of the jute rope had been made by the police, which had been used for strangulating the deceased. Further, the conduct of 'X' and 'Y', as per the evidence given by the prosecution witnesses, especially PW-2, would go to show that the appellants were aware that a crime had been committed by them. She accordingly submits that there is no ground to interfere with the impugned judgment and order of the learned Trial Court. As such, the same should be upheld.

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

16. The evidence of PW-1, who is the grandfather of 'X', is to the effect that when he arrived at his house at about 7.00 pm, he saw one person lying on the bed inside his house. On asking his wife as to who that person was, his wife (PW-3) stated that 'X' had brought the man with one woman and that the man was the husband of that woman. PW-3 thereafter told PW-1 that she left them in the house to take care of the goat. When she came back to the house, PW-3 saw 'X' and 'Y' leaving the house and on asking 'X' to take the man who they had brought alongwith them, 'X' told PW-3 that the man had taken alcohol and it was not possible for them to take the said man alongwith them. 'X' also stated

that he would thereafter take care of the man later on. Subsequently, PW-2, who resides on the land of PW-1 in another house came to the house of PW-1. PW-1 then asked PW-2 to enter his house to see the person who was lying on the bed. PW-2 checked the pulse of the person lying on the bed and found that the said man had died and some substance was coming out from his mouth. Thereafter, the village head and other villagers were called. The Police were called and they took the dead body to the Police Station. On the next date, PW-1 lodged the FIR.

In his cross examination, PW-1 states that he has two wives and 'X' is the grandson he had through his daughter from Saleha, i.e. one of the wives. He also states in his cross examination that the time of 7.00 pm was correct and the other times mentioned in the FIR and statement under Section 161 CrPC was not correct. He also states that he did not file the FIR immediately. He also states that the FIR was written by somebody else and he had given his signature on the same. He also states that the jute rope which was seized by the Police was found on the one bed, which was inside his house.

The evidence of PW-1 has not been shaken in the cross examination and no searching question was put to him.

17. PW-2, who resides in a separate house inside the land of PW-1, stated that at about 4.00 pm, while he was sitting in his courtyard, he saw 'X' coming in an Auto alongwith one man and one woman(Y), with a child in a lap of a woman. After half an hour, PW-3 came to his house and spoke with his wife, stating that 'X' had come to their house with a drunken person and the drunken person was lying on their bed. PW-3 also stated that 'X' had asked her not to talk with the drunken person or to disturb him. Further, 'X' did not allow PW-3 to even go near the drunken person. In the meantime, 'X' also arrived in the house of PW-2

and PW-2 asked him why he had taken a drunken person to his grandfather's house. 'X' thereafter told PW-2 that he was helpless. Thereafter, 'X' and PW-3 left the house of PW-2.

PW-2 then states that while he was taking food, his wife told him at about 6.30 pm that the man who was brought to the house of PW-1 by 'X' could not talk and in the meantime 'X' and 'Y' had left the house of PW-1. PW-2 then went to the house of PW-1 and saw that the man's tongue was out of his mouth and blood was oozing from his tongue. He could not find the pulse of the man and the hand and leg was also black and cold. Thereafter, the police were informed, as the said man was found to have expired.

18. PW-2 in his evidence also states that while he was standing on the road, 'X' came riding a bicycle alongwith two persons. PW-2 then informed 'X' that the man he had left behind in the house of PW-1 had expired. 'X' seemed surprised and told PW-2 that he had left the man in a good condition. Thereafter, the two persons who came alongwith 'X' ran away. 'X' also tried to run away, but PW-2 caught hold of him. 'X' was thereafter, taken into the house of PW-1 and in the meantime, the police arrived.

The evidence of PW-2 has not been shaken in the cross examination and no searching question was put to him.

19. The evidence of PW-3, who is the wife of PW-1 is to the effect that 'X' is her grandson. She also states that she knew 'Y'. PW-3 stated in her evidence that while she was sitting in the courtyard of PW-2 at about 4.00 pm, 'X' and 'Y' brought one man in an Auto to their house. 'X' took the man inside the house and lay him on the bed of PW-3. The further evidence of PW-3 is to the effect that she was told by 'X' not to go near the person, as he had taken alcohol. 'X'

thereafter left them in her house and went to care of the goat. When she returned, she did not enter into her house as she feared the person who had apparently taken alcohol. PW-3 then went to the house of PW-2 and informed him about her fear of entering her house due to the man lying on her bed, who had apparently taken alcohol. PW-2 thereafter came along with PW-3 to their house and in the meantime, PW-1 had also returned to their house. Thereafter, PW-1 and PW-2 entered the house and PW-2 on checking the pulse of the person informed her that the man had died. Thereafter, police were informed.

The evidence of PW-3 has not been shaken in the cross examination and no searching question was put to her.

20. The evidence of PW-4, the Senior Medical & Health Officer, Kajalgaon, who conducted the Post Mortem examination of the dead body of Akhtar Hussein, is to the effect that there was a ligature mark on the neck of the deceased and that in his opinion, the cause of death was due to asphyxia as a result of strangulation, which is homicidal and antimortem in nature.

21. The evidence of PW-5 is that he was a witness with regard to the inquest report, which was made against the deceased person.

22. The evidence of PW-6, who is the wife of PW-2 is to the effect that at about 4.00 pm on the relevant date, she asked 'Y' as to what had happened to the man lying on the bed of PW-1 and PW-3. 'Y' told PW-6 that the person lying on the bed was her husband, who was ill. PW-6 also states that she recognized 'X' who was the grandson of PW-1. Thereafter, PW-6 went back to her own house and gave food to her husband (PW-2). PW-6 went again to the house of PW-1 and PW-3, wherein she saw 'X' and 'Y' coming out of the house and going away. When she asked 'X' and 'Y', as to where they were going and as to why

they had left the person lying on the bed, 'X' and 'Y' informed PW-6 that they would be coming back later to take the said person. Thereafter, PW-6 went back to her house and told her husband. Her husband, on finishing his food, went to the house of PW-1 and PW-3 and found that the said person was dead. PW-6 then again went to the house of PW-1 after some time.

In her cross examination, PW-6 has given various time periods of 1 to 2 hours, with regard to PW-6 going to the house of PW-1 on three occasions. As per the cross-examination of PW-6, the entire time period appears to be around 5 hours, which would imply that the incident of death of the person occurred between 3 to 5 hours starting from 4.00 pm.

23. PW-7 is the I.O, who in his evidence states that upon interrogation, the accused confessed to the crime, stating that 'X' and 'Y' had strangled the deceased with the jute rope. Further, the jute rope was recovered from the corner of the room in which the deceased was found dead, based on the disclosure statement made by 'X'.

In his cross examination, the I.O has stated that the house of PW-1 consist of one room and one kitchen.

24. The explanation given by 'X' and 'Y' during their examination under Section 313 CrPC is to the effect that they went away from the house of PW-1, with the intention of coming back later to take the husband of 'Y', after he recovered from the effect of consumption of alcohol. With regard to the question put to them, as to what they had to say regarding the opinion of the Doctor that the deceased had died due to strangulation, they stated that they did not kill the deceased.

25. The evidence of the prosecution witnesses shows that the appellants were

last seen together with the deceased and that no one had entered the house of PW-1 and PW-3, besides the appellants, at the time the deceased was still alive. There is nothing to show that PW-1, PW-2, PW-3 and PW-6 knew the husband of 'Y'. Further, it is not in dispute that the deceased person was brought to the house of PW-1 and PW-3 by 'X' and 'Y'. There was no reason for PW-1, PW-2, PW-3 and PW-6 to have any reason to kill the deceased. On the other hand, the conduct of 'X' and 'Y', in leaving behind the husband of 'Y', with the alleged intention to come for him later, after the husband of 'Y' recovered from the effects of alcohol consumption, though suspicious, appears to be quite normal. However, the evidence of PW-2 is quite damning to the appellants, inasmuch as, 'X' had come back with two persons to the house of PW-1 and PW-3. When PW-2 informed 'X' that the husband of 'Y' had died, the two persons who came with 'X' ran away. 'X' himself also tried to flee, but was caught by PW-2. The behaviour of 'X' in trying to run away, on being told of the death of the husband of 'Y', is not at all normal. A normal person would have immediately rushed to the place of occurrence to see what had actually be-fallen a friend/acquaintance. However, the very fact that 'X' had tried to run away implies that 'X' had already known the fate of the husband of 'Y', when 'X' and 'Y' had left the house of PW-1 and PW-3, without the husband of 'Y'. Thus, if 'X' had known about the fate of the husband of 'Y', at the time of leaving the house of PW-1 and PW-3, 'Y' would have surely known about the fate of her husband also.

26. In the case of ***Amit@Ammu*** (*Supra*), the Apex Court has held that the circumstances of the last seen together theory does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. The Apex Court further held that in cases

of close proximity of place and time, between the event of the accused having been last seen with the deceased and the factum of death, the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide, where no explanation was being offered under Section 313 CrPC and defence is of complete denial. As the principle of last seen together theory casts a heavy responsibility on the appellant to explain as to how the victim died and in the absence thereof, can suffer the consequences, which is conviction.

27. In the case of **Anjan Kumar Sarma** (*Supra*), the Apex Court has held that in the absence of proof of other circumstances pointing to the guilt of the accused, the only circumstances of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.

28. In the case of **Kanhaiya Lal Vs. State of Rajasthan**, reported in **(2014) 4 SCC 715**, the Apex Court has held that the circumstances of last seen together does not by itself lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, by itself cannot lead to proof of guilt against the appellant. It also held that the conviction of the appellant cannot be maintained merely on suspicion, however strong it may be or on his conduct. It also held that facts assume further importance on account of absence of proof of motive, particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time.

29. In the case of **Abdul Malek(Md.)** (*Supra*), the Division Bench of this Court has held that Section 27 of the Evidence Act makes statement before the Police to the extent distinctly related to the facts discovered, albeit relevant fact,

admissible, only because such statement is confirmed by subsequent event of discovery of the facts.

30. In the case of ***Akibul Ali (Md.)*** (*Supra*), the Division bench of this Court has held that when time between the accused and the deceased being last seen together and the deceased being found dead is considerably large, i.e. more than 48 hours, the possibility of any person other than the accused being the author of the crime cannot be ruled out.

31. In the present case, the evidence of the prosecution witnesses suggests that the deceased had died some time between 6.30 to 7.00 pm. PW-2 in his evidence states that after taking food around 6.30 pm, he had gone to the house of PW-1, where he found the husband of 'Y' to be dead. Thus, on considering the Judgments of the Apex Court and the Division Bench of this Court, we are of the view that the time gap, between the time when the appellants and the deceased were last seen together and the finding of the deceased as a dead person, could not be more than 2½ to 3 hours and as such, the appellants have the liability to explain the circumstances as to how the deceased died. Though, the last seen together theory would not necessarily lead to the inference that the appellants had committed the crime, the evidence shows that the jute rope which had been used for strangulating the deceased had been recovered on the basis of disclosure statement by 'X'. Though there is some discrepancy with regard to where exactly the jute rope was recovered from, i.e. on the bed or from the floor of the house of PW-1 and PW-3, we are of the view that the same is a minor discrepancy, keeping in view the fact that the house of PW-1 and PW-3 is only a one room house with one kitchen.

32. With regard to the submission made by the counsel for the appellants that there is discrepancy in the evidence given by the prosecution witnesses, with

regard to the exact time the death occurred and that the appellants could not have been the perpetrator of the crime, as other persons were always around them, we are of the view that the discrepancy in the time given by the prosecution witnesses are minor discrepancies. With regard to when PW-1 returned home and the time when prosecution witnesses came to realise the time of death of the husband of 'Y', we are of the view that normal and minor discrepancies are bound to occur in the deposition of the prosecution witnesses, keeping in mind the fact that while the incident had occurred on 16.09.2016, the evidence had been recorded by the learned Trial Court after nearly 3 years from the date of occurrence of the incident. As such, due to the long time gap, it is possible that due to failing memory, the exact time could not be remembered. In any event, even for a normal person, exact time of an incident is difficult to remember and as such, minor inconsistencies and contradiction, which do not go to the core of the prosecution case, can be overlooked.

In the case of ***State of U.P Vs. Naresh & Others***, reported in ***(2011) 4 SCC 324***, the Apex Court has held that normal discrepancies are bound to occur in the deposition of witnesses and that the prosecution case cannot be thrown away only on account of the same, unless they go to the core of the prosecution case. On considering the facts of this case and the evidence given by the prosecution witnesses, we are of the view that the minor inconsistencies and discrepancies do not affect the core of the prosecution case and would not be fatal to the prosecution.

33. With regard to whether 'X' and 'Y' might have been having an illicit affair at the time of death of the deceased, we are of the view that no evidence to that effect has been adduced by the prosecution witnesses. As such, just because 'X' and 'Y' are now married, the said marriage cannot be viewed for the

purpose of assuming that there was a motive for killing the deceased by 'X' and 'Y' at that particular time, though the same is plausible. However, a presumption on that score would be speculative and presumptions. The same however does not discount the fact that there was pre-meditation on the part of the appellants in killing the deceased, for whatever reasons best known to them, as at the time of occurrence of the incident, the person apparently lying on a bed due to illness or the effects of alcohol, had been strangled.

34. With regard to the submission made by the learned counsels for the appellants that there was failure of the Police, to send the jute rope to the FSL for examining the fingerprints of the appellants, we are of the view that the same does not vitiate the trial. Further, there can hardly be any fingerprint in a jute rope.

35. In view of the appellants being last seen together with the deceased, coupled with the fact that the jute rope had been recovered on the basis of a disclosure statement and the fact that 'X' had tried to flee on learning of the death of 'Y's husband, we are of the view that the chain of circumstances form a connected chain/link, leading to the inference that it was the appellants, who committed the crime of murder.

36. Accordingly, in view of the reasons stated above, we do not find any ground to interfere with the impugned Judgment and Order dated 12.01.2023, passed by the Court of the Addl. Sessions Judge, Bijni in Sessions Case No. 329(A)/2018.

37. The appeals are accordingly dismissed.

38. Send back the LCR.

39. In appreciation of the assistance provided by the learned Amicus Curiae,

the appropriate fee payable should be paid by the State Legal Services Authority.

JUDGE

JUDGE

Comparing Assistant