

GAHC010151362017



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

Case No. : CRL.A(J)/113/2017

Kishore Chawra,
aged about 57 years,
S/o Idrish Ali.

.....Appellant

-Versus-

1. The State of Assam

2. Sri Moniram Chawra,
S/o Late Guinadu Chawra,
Village- Pukhuria Malibari,
P.S. Mariani, District-Jorhat, Assam

.....Respondents

Advocates for the appellant: Dr. BN Gogoi, Amicus Curiae.

Advocate for the respondent: Ms. B Bhuyan, Additional
Public Prosecutor, Assam.

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

Date of hearing : 15.03.2023

Date of judgment : 17.03.2023

JUDGEMENT AND ORDER (CAV)

(Michael Zothankhuma, J.)

Heard Dr. BN Gogoi, learned Amicus Curiae for the appellant. Also heard Ms. B Bhuyan, learned Additional Public Prosecutor appearing for the State.

2. The appellant has put to challenge the Judgment and Order dated 14.09.2017, passed by the learned Sessions Judge, Jorhat in Sessions Case No. 33(J-T)/2017, by which the appellant has been convicted under Section 302 IPC and sentenced to undergo rigorous imprisonment for life, with a fine of Rs.15,000/-, in default to undergo rigorous imprisonment for 6 (six) months.

3. The prosecution case in brief is that an FIR dated 23.11.2016 was submitted to the Officer-In-Charge, Mariani Police Station by PW-1, who is the father of the appellant/convict. The FIR states that at about 12:30 pm on 22.11.2016, the informant's son Kishore Chawra cut the neck of his wife Pinki Chawra with a dao in his house, which killed her. The informant also states that he informed the Police about the incident and immediately handed over his son to the Police. Pursuant to the FIR, Mariani P.S. Case No. 224/2016, under Section 302 IPC was registered on 23.11.2016.

On a perusal of the case diary, it is seen that the Police were informed of the incident of the killing of the appellant's wife, by mobile on 22.11.2016 at 1:20 pm and accordingly GD Entry No. 655 was registered by the Police on 22.11.2016. The seizure list shows that seizure

of the weapon used in the crime, i.e., dao, was seized on 22.11.2016 at 2:00 pm in pursuance to GD Entry No. 655 dated 22.11.2016.

4. As stated earlier, the FIR was lodged on 23.11.2016, the next day and consequently a new GD Entry was given on the basis of the FIR filed on 23.11.2016, wherein the new GD Entry was numbered as 672.

5. The Investigating Officer, after investigating the case filed a charge-sheet, having found a *prima facie* case under Section 302 IPC against the appellant. Charge under Section 302 IPC was framed against the appellant on 24.03.2017, to which the appellant pleaded not guilty and claimed to be tried.

6. The learned Trial Court thereafter examined 10 (ten) prosecution witnesses and after examining the appellant under Section 313 Cr.P.C. came to a finding that the appellant was guilty of the offence under Section 302 IPC. The appellant was accordingly convicted and sentenced to undergo rigorous imprisonment for life with a fine of Rs.15,000/-, in default rigorous imprisonment for 6 (six) months.

7. The learned Amicus Curiae for the appellant submits that there is no eye-witness and/or direct evidence showing that the appellant had committed the offence of murdering his wife. He also submits that there is no circumstantial evidence to prove that the crime was committed by the appellant. He also submits that the alleged weapon used for committing the crime, i.e., the dao had not been sent for examination to the Forensic Science Laboratory (FSL). He also submits that there are discrepancies in the evidence of the Prosecution Witnesses, inasmuch as, the dao has been stated to be found hanging in the bamboo fencing as per the evidence of PW-4, while the evidence of PW-2 is that he saw the dao lying in the courtyard.

8. The learned Amicus Curiae also submits that there is contradiction in the evidence

given by the Prosecution Witnesses, with regard to the presence of the appellant at the scene of the crime, as PW-2 states in his evidence that on entering the house of the appellant, he found that the villagers had tied up the appellant in the house, while PW-3 states that he did not find the appellant at the relevant point of time. He also submits that while some Prosecution Witnesses have stated that the dao was stained in blood, PW-4 in his cross-examination has stated that the dao was clean and there was no blood mark.

9. The learned Amicus Curiae thus submits that in view of the discrepancy and contradiction in the evidence of the witnesses, coupled with the fact that there were no eye-witnesses or circumstantial evidence connecting the appellant with the crime relating to the death of his wife, the impugned Judgment and Order, passed by the learned Trial Court was without any basis. As such, the same should be set aside.

10. The appellant's counsel has relied upon the Division Bench judgment of this Court in ***Bhupan Bora vs. State of Assam***, reported in ***2010 (3) GLT 158*** and ***Chitpal Munda vs. State of Assam***, reported in ***2013 (5) GLT 427*** to hold that the evidences adduced by the witnesses are only circumstantial, which do not form a complete chain to convict the appellant of the offence under Section 302 IPC. He also submits that when two views are possible, the view favourable to the accused should be relied upon by the Court. In this regard, he has relied upon the case of ***Anukul Mandal vs. State of Assam***, reported in ***2013 (5) GLT 239***.

11. On the other hand, Ms. B Bhuyan, learned Additional Public Prosecutor submits that the evidence of PW-1 proves that the appellant was present at the place of occurrence, as the appellant did not go to work on the said date. Further, the evidence of PW-4 is to the effect that the accused was tied by the public in his house and on asking the accused about the incident, the accused did not make any reply to the said question.

12. The learned Additional Public Prosecutor further submits that the evidence of PW-10 also proves the fact that the appellant was in his residence when the Police arrived in his residence, to enquire about the incident, on receiving information by them regarding the death of his wife. She submits that in view of the fact that the appellant was all along present in his house along with his deceased wife, it was the duty of the appellant to give an explanation as to how his wife had died. However, as the appellant had failed to give any explanation as to how his wife died, though the same was within his knowledge, as he was with his wife, an adverse inference can be drawn by the Court against the appellant in terms of Section 106 of the Indian Evidence Act. In support of her submission, the learned Additional Public Prosecutor has relied upon the judgment of the Apex Court in the case of *Trimukh Maroti Kirkan –vs- State of Maharashtra*, reported in (2006) 10 SCC 681.

13. The learned Additional Public Prosecutor thus submits that as the appellant has not been able to explain the cause of death of his wife, despite not leaving the house and keeping in view the approximate time of the occurrence of the incident, there is no infirmity with the decision of the learned Trial Court in convicting the accused under Section 302 IPC.

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

15. The evidence of PW-1, who is the informant and father of the appellant convict, is to the effect that his son had cut the deceased (daughter-in-law) with a dao and thrown the dao away. He produced the dao when the police came to his house and put his thumb impression on Material Exhibit-1 (dao). He also states that the villagers tied up his son (appellant) in the house. He also states that he was not present at the time of incident, as he was at work during the time of incident.

16. The evidence of PW-2 is to the effect that he knew both the appellant and the appellant's deceased wife. While returning home, he heard from a boy, who resides near his house, that someone had cut a woman. He went to the place of occurrence and on entering

the house, he found the dead body of the deceased with the accused tied up by the villagers. He also noticed one big dao lying in the courtyard.

17. The evidence of PW-3 is that the appellant was his brother-in-law and the deceased was his first cousin. On coming to learn that the appellant had killed his wife, he went to the place of occurrence and saw the dead body of the deceased. He did not find the accused therein, but he was told by the other persons in the house that the appellant had killed the deceased.

18. The evidence of PW-4 is that he knew both the appellant and the deceased wife. On learning that the appellant had killed his wife, he rushed to the place of occurrence and found the deceased lying under the bed with cuts to her neck. The accused had been tied up by the public. On asking the appellant about the incident, the appellant did not make any reply. Thereafter the PW-4 informed the police about the incident. The police came and seized the dao. PW-4 also states that he became the seizure witness for the seized dao, which was found in the courtyard of the residence of the appellant. In his cross-examination, PW-4 states that seized dao was hanging in the bamboo fencing and there was no blood stain on the dao.

19. PW-5, who is a Doctor working as a Demonstrator at Jorhat Medical College & Hospital, in the Department of Forensic Medicine, in his evidence states that he held an autopsy over the body of the deceased and found 3 wounds of various sizes over the nape of the neck. According to him, the cause of death was instantaneous as a result of neck injuries. All the injuries were anti-mortem and caused by moderately heavy to heavy sharp cutting weapon and were homicidal in nature. The autopsy was conducted on 23.11.2016 and it was stated that approximate time since death was 18 to 24 hours.

20. The evidence of PW-6 is to the effect that he knew the appellant and the deceased. On coming to learn of the incident he went to the house of the appellant and asked PW-1 as

to who had committed the murder. PW-1 thereafter informed PW-6 that the appellant had murdered the deceased. In his cross-examination, PW-6 states that prior to his arrival in the house of the appellant, the appellant had already been taken to the police station by the police. He also states that he did not tell the police that PW-1 had informed him that the appellant had committed the crime.

21. The evidence of PW-7 is to the effect that he knew the appellant and the deceased. PW-7, who is the brother of the deceased, states that on learning about the incident, he came to the house of the appellant and saw the dead body of his sister. He also states that he did not meet the appellant in the house nor the appellant's father.

22. The evidence of PW-8 is to the effect that PW-1 had requested him to write the FIR. Accordingly, the FIR was written by him and PW-1 put his left thumb impression in the FIR.

23. The evidence of PW-9 is to the effect that the Post Mortem examination of the deceased could not be done on the night of 22.11.2016 and the Post Mortem was done on the next date.

24. The evidence of PW-10, who is the IO of the case, is that the Officer-in-Charge of the Mariani Police Station received information on 22.11.2016 at around 1:20 p.m. that someone from Pukhuri Mali Basti had stabbed his wife. The Officer-in-Charge then asked PW-10 to accompany him to the place of occurrence of the incident. On reaching the place of occurrence, they found the appellant sitting in his house along with the dead body of his wife. Inquest was done on the same day by the Magistrate on the body of the deceased. The Dao, which was the weapon used to kill the deceased, was seized by PW-10 on 22.11.2016 at about 2 p.m. The FIR was thereafter filed on the next date i.e. 23.11.2016. PW-10 in his cross-examination states that the seized dao contained bloodstains. However, he did not send the dao to the FSL for examination. He also states that he did not mention in his case diary that the dao contained bloodstains.

25. The examination of the appellant under Section 313 Cr.P.C shows that the appellant has denied having committed any crime against the deceased. However, the appellant has not denied the fact that he was tied up by the villagers. The appellant was asked as to why PW-3 and PW-4 did not find the appellant in his house, vide question No. 4 in his examination under Section 313 CrPC, to which he answered that he was present in his house when the police arrived.

26. As can be seen from the evidence adduced by the witnesses, there is no eye-witness to the crime. On the other hand, the appellant has not taken a stand in his examination under Section 313 Cr.P.C. that he was not present at the place of occurrence of the crime. As such, if the appellant was present at the place of occurrence of the crime, i.e., in his house with his wife during the relevant time period, it was his duty to explain the circumstances or reason as to how his wife died, as the said knowledge could have been known only to him. No doubt, there are discrepancies and slight contradictions in the evidence adduced by the witnesses, with regard to the place of recovery of the dao and whether the same was blood stained or not. Also there is some discrepancy with regard to whether the appellant was in his house. However, the same had been set to rest in the explanation given by the appellant in his examination under Section 313 Cr.P.C, wherein he has stated that he was present in the house when Police arrived. Nothing has been stated by the appellant or any alibi taken, to the effect that he was not present in the house at the time of death of his wife. Further, no witness has been confronted with a suggestion that the appellant was not present in his house at the time of the occurrence of the incident of murder.

27. In the case of *Trimukh Maroti Kirkan* (supra), the Apex Court has held that if an offence takes place inside the privacy of a house where the assailants have all the opportunities to plan and commit the offence, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused, if the strict principle of circumstantial evidence is insisted upon by the Courts. It further held that a Judge does not preside over a

criminal trial merely to see that no innocent man is punished, but also presides to see that a guilty man does not escape. The Apex Court further held that the law does not enjoin a duty on the prosecution to lead evidence of such character, which is almost impossible to be led or at any rate extremely difficult to be led. It thus held that in an offence of murder committed in the secrecy of a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be on the same degree and the burden would be of a comparatively lighter character in view of Section 106 of the Evidence Act.

28. In the case of *Ganeshlal vs. State of Maharashtra*, reported in (1992) 3 SCC 106, the appellant therein was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give plausible explanation for the cause of her death in his statement under Section 313 Cr.P.C. The mere denial of the prosecution case, coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant was a prime accused in the commission of murder of his wife.

29. In the case of *Ashok –vs- State of Maharashtra*, reported in (2015) 4 SCC 393, the Apex Court has held that if it is established that the accused was last seen together with the deceased, the prosecution is exempted from proving the exact happening of the incident, as the accused himself would have special knowledge of the incident and thus, would have the burden of proof as per Section 106 of the Indian Evidence Act. In the case of *State of Uttar Pradesh –vs- Naresh & Ors.*, reported in (2011) 4 SCC 324, the Apex Court has held that normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. On considering the depositions of the Prosecution Witnesses, we are of the view that the discrepancies and contradictions are minor in nature and do not go to the core of the prosecution case. In respect of the dao being seen in the courtyard and on the fence, we are of the view that minor discrepancies

would not affect the prosecution case, as the fence fences in the courtyard.

30. The appellant's counsel has relied upon the Division Bench judgment of this Court in ***Bhupan Bora vs. State of Assam***, reported in **2010 (3) GLT 158** and ***Chitpal Munda vs. State of Assam***, reported in **2013 (5) GLT 427** to hold that the testimony of solitary witnesses can be acted upon only if they do not suffer from any inconsistencies, loopholes etc. and if the various circumstances form a chain pointing only to the guilt of the accused, can the Criminal Court convict an accused. On perusing the above judgments, we find that the case of ***Bhupan Bora (supra)*** is not applicable to the facts of this case, as there is no eyewitness to the crime, except with regard to the fact that the appellant has not denied the fact that he was with his deceased wife, in his house, at the relevant point of time. Further, in view of Section 106 of Evidence Act, we are of the view that there is no requirement of eyewitnesses to be present in the crime scene to convict the appellant as the perpetrator of the crime. Though the learned counsel for the appellant has also relied upon the judgment of the Division Bench of this Court in the case of ***Anukul Mandal vs. State of Assam***, reported in **2013 (5) GLT 239**, wherein the Division Bench held that if two views are possible, one leading to the guilt of the accused and the other to his innocence, the view favourable to the accused should be taken/ relied upon by the Court, we are of the view that the above case is not applicable to the facts of this case, as the question of two views arising in the facts of this case does not arise, keeping in view Section 106 of the Evidence Act.

31. Though there is no direct evidence, the fact that the appellant was in his house with his wife at the relevant point of time required the appellant to offer a reasonable explanation in the case of "*last seen theory*" circumstance, to the cause of death of his wife. However, as no explanation has been forthcoming from the appellant as to what had happened in the confines of his house, we are of the view that an adverse inference can be drawn against the appellant that he was the perpetrator of the crime, which resulted in the killing of his wife. Thus, keeping in view Section 106 of the Evidence Act and the reasons stated in the foregoing paragraphs, we do not find any ground to interfere with the impugned Judgment and Order. The appeal is accordingly dismissed. Send back the LCR.

32. In appreciation of the assistance provided by the learned Amicus Curiae, the appropriate fee payable to him should be paid by the State Legal Services Authority.

JUDGE

JUDGE

Comparing Assistant