

GAHC010160542020



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

Crl.A(J) 87/2020

Jhakari Chouhan,
Son of Late Lakshan Chouhan,
Village-Longsekjan, P.S. Bakalia,
District- Karbi Anglong, Assam

.....Appellant

Versus

The State of Assam,
Represented by the PP, Assam

.....Respondent

Crl.A(J) 88/2020

Birendra Chouhan @ Bijendra Chouhan,
Son of Shri Jhakari Chouhan,
Village-Longsekjan, P.S. Bakalia,
District- Karbi Anglong, Assam

.....Appellant

Versus

The State of Assam,
Represented by the PP, Assam

.....**Respondent**

BEFORE

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

For the appellants : Ms. M Barman, Amicus Curiae
(Crl.A.(J) 87/2020)

: Mr. N Deka, Amicus Curiae
(Crl.A.(J) 88/2020)

For the State respondent : Ms. S Jahan
Addl. Public Prosecutor, Assam.

Date of hearing & Judgment: **18.07.2023**

JUDGMENT AND ORDER (Oral)

(M. Zothankhuma, J)

Heard Ms. M Barman, learned Amicus Curiae appearing for the appellant in Crl.A.(J) 87/2020 and Mr. N Deka, learned Amicus Curiae appearing for the

appellant in Crl.A.(J) 88/2020. Also heard Ms. S Jahan, learned Additional Prosecutor, appearing for the State respondent.

2. The two appeals have been filed against the impugned judgment dated 08.01.2020 and 22.01.2020, passed by the learned Sessions Judge, Karbi Anglong, Diphu in Sessions Case 76/2017, by which the appellants have been convicted under Sections 302/201/34 IPC and they have been sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 2,000/- each, in default rigorous imprisonment for 3 (three) months under Sections 302/34 IPC and to undergo rigorous imprisonment for 1 (one) year with a fine of Rs. 500/- each, in default simple imprisonment for 1 (one) month under Sections 201/34 IPC, on being found guilty of having committed the murder of the deceased wife by hanging the wife of the appellant in Crl.A.(J) 88/2020 with a saree. Thereafter, the dead body was burnt/cremated by the appellants within two hours.

3. The appellant in Crl.A.(J) 87/2020 is the father of the appellant in Crl.A.(J) 88/2020, while the deceased is the wife of the appellant in Crl.A.(J) 88/2020.

4. The prosecution case in brief is that an FIR dated 21.02.2017 was submitted by the uncle of the deceased, who was Prosecution Witness No. 1 (PW-1). In the FIR, it has been stated that the appellant in Crl.A.(J) 88/2020 had killed his wife Suman Devi on 21.02.2017, by assaulting her and burning the dead body. It is also stated in the FIR that the deceased was the niece of the informant (PW-1). In pursuance to the FIR, Bakalia P.S. Case No. 13/2017 under

Sections 302/201 IPC was registered on 21.02.2017 at 3:00 pm.

5. PW-7, who is the Investigating Officer took up the investigation of the case and on finding a *prima facie* case against the appellants under Sections 302/34 IPC and Sections 201/34 IPC, he filed a charge-sheet against them. The learned Trial Court thereafter framed charges under Sections 302/34 IPC and Sections 201/34 IPC against the appellants to which they pleaded not guilty and claimed to be tried. In the trial proceedings held by the learned Trial Court, 7 (seven) prosecution witnesses were examined. After examination of the appellants under Section 313 Cr.PC and after hearing arguments, the learned Trial Court came to a finding that the appellants were guilty of the offence under Sections 302/201/34 IPC. They were accordingly convicted and sentenced under Sections 302/34 IPC and 201/34 IPC.

6. The learned counsels for the appellants submit that the impugned judgment passed by the learned Trial Court has to be set aside, inasmuch as, there is no evidence to show any involvement of the appellants in the death of the deceased. They further submit that the finding of guilt against the appellants has been made by the learned Trial Court on the basis of presumptions and not on the basis of the evidence adduced by the PWs, which points to the innocence of the appellants. In this respect, they have relied upon the evidence adduced by PW-6, which proves the innocence of the appellants and who has not been declared to be a hostile witness. They also submit that though PW-2 and PW-4 had given statements under Section 164 Cr.PC against the appellants, the said statements made under Section 164 Cr.PC have not been exhibited during the trial proceedings. Further, PW-2 and PW-4 were also

not confronted with the contents of the statements allegedly made by them under Section 164 Cr.PC at the time of recording of their evidence by the learned Trial Court. They also submit that the learned Trial Court has also relied upon the statement made by PW-6 under Section 161 Cr.PC, to come to a finding that the appellants were involved in the death of the deceased, which is not permitted as per Section 25 of the Evidence Act. In support of their submission that the learned Trial Court could not be allowed to make any finding on facts on the basis of presumption, they have relied upon the judgments of the Hon'ble Supreme Court of India in the case of ***Dinesh Kumar Kalidas Patel -vs- State of Gujarat***, reported in ***(2018) 3 SCC 313*** and in the case of ***Kali Ram -vs- State of Himachal Pradesh***, reported in ***(1973) 2 SCC 808***. They have accordingly prayed for setting aside the impugned judgment and for acquittal of the appellants from the charges framed against them.

7. On the other hand, Ms. S Jahan, learned Additional Public Prosecutor submits that there is a discrepancy between the statement made by PW-6 under Section 161 Cr.PC and his testimony given before the learned Trial Court. In the statement made under Section 161 Cr.PC, the PW-6 has stated that he had heard that the wife of Birendra Chouhan had died. Further, Birendera Chouhan and his father (Jhakari Chouhan) had taken the dead body for cremation, without informing any other person in the village. He also stated in his statement under Section 161 Cr.PC that he did not know how Birendra Chouhan's wife had died. Although the contradiction and differences with regard to the statement under Section 161 Cr.PC and PW-6's testimony during recording of evidence was not proved, the fact remains that there was a

contradiction made by PW-6. As such, in the interest of justice, PW-6 cannot be said to be a reliable witness. As such, keeping in view the circumstances of the case, there was no infirmity with the conviction of the appellants by the learned Trial Court. She also submits that the circumstantial evidence only points towards the guilt of the appellants in the death of the deceased. Further, there is nothing to show that the appellants had attempted to inform the relatives of the deceased with regard to the death of the deceased and that the burning of the dead body of the deceased had been done within two hours after the death of the deceased. She accordingly submits that the impugned judgment should not be interfered with.

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

9. The evidence given by PW-1, the informant, who lodged the FIR with the Police, shows that he had only heard about the death of the deceased from one person in the village, who has not been identified. PW-1's testimony that he had also been told by one woman that the appellants had killed the deceased is also hearsay, as the said woman has not been identified by PW-1 or by any of the prosecution witnesses.

10. The evidence of PW-2, who is the neighbour of the appellants is that on the date of occurrence, at about 7:00 am while he was in his house, he heard shouts in the house of the appellants. He did not immediately go to the appellants' house. Subsequently, PW-2 found the appellant in CrI.A.(J) 87/2020 near his house and on asking him, the appellant told him that the deceased had

committed suicide with a saree at about 7:00 am in their house. PW-2 also states that at about 9:00 am, he saw villagers and the appellants taking the dead body of the deceased in a plank for cremation towards the sugarcane field.

In his cross-examination, PW-2 states that he never heard any quarrel taking place between the appellant Birendra Chouhan and his deceased wife. He also states that about 10/12 persons of the village took part in the cremation of the deceased.

11. PW-3 in her testimony states that she had heard from villagers that the deceased had died by committing suicide.

12. PW-4 in his evidence states that he was not in the village at the time the incident occurred. He only came to know that the deceased had committed suicide from the villagers. He had also heard that the appellants had not informed the Police about the suicide and cremated the dead body instead.

In his cross-examination, PW-4 states that he was not aware if any villager was present when the body was cremated.

13. The evidence of PW-5 is that he was not present at the time the incident occurred and that he returned to his village twelve days after the death of the deceased. He states that he had been informed by his wife over phone that the deceased had committed suicide by hanging herself.

In his cross-examination, the PW-5 states that he did not know who amongst the villagers were present at the time when the dead body was cremated.

14. The evidence of PW-6, who is the neighbour of the appellants is to the effect that he knew the appellants and the deceased. While going to a shop to buy biscuits at around 7:00 am on 21.02.2017 (tuesday), he saw the appellant Jhakari Chouhan (father of Birendra Chouhan) sitting outside his house. While asking him how he was and on being replied by the appellant that he was fine, he heard an uproar from inside the appellant's house to the effect that someone had hanged herself/himself. On entering the house, PW-6 saw the deceased hanging by her saree, which was wound around her neck, in a room where paddy was kept. The appellant Jhakari Chouhan thereafter held the dead body and pushed it upwards by holding her feet and asked PW-6 to cut the saree. Seeing a dao lying nearby, PW-6 cut the body loose from the saree. Thereafter, the appellant Jhakari Chouhan laid the dead body on the ground. Although the fingers and toes of the deceased moved for a little while, the deceased later died and the body became still. The appellants thereafter cremated the dead body. After the dead body was cremated, the Police came to the place of occurrence as they had received information about the same. PW-6 also states that when he went to the place of occurrence, the appellant Birendra Chouhan (husband of the deceased) was not present, but he came to the place of occurrence 5/6 minutes after the dead body had been brought down.

In his cross-examination, PW-6 states that he visited the house of the appellant occasionally and he did not see any quarrel taking place between the deceased and the appellants. He also stated that the deceased had committed suicide and at the time of cremation, some 30/40 villagers were present, besides the village headman.

15. The evidence of PW-1 to PW-5 is basically hearsay evidence. The evidence of PW-6 does not give any indication of the involvement of the appellants in the death of the deceased and in fact only points towards the deceased having committed suicide. Though it is surprising that the appellants did not inform the relatives of the deceased with regard to the death of the deceased and the fact that the cremation took place within two hours of the death of the deceased, is suspicious, no finding can be made on the basis of presumptions or suspicious. Further, there is nothing in the evidence to show that the deceased was having any living parents or other relatives besides PW-1. There is nothing in the evidence of the Investigating Officer (PW-7) to show that he had made any attempt to ascertain whether the deceased was having any living parents or other relatives besides PW-1. As stated earlier, though the circumstances in cremating the dead body at such short notice is suspicious, we cannot decide this case on the basis of suspicion and speculation. Further, there is nothing to show that the testimony of PW-6 is not reliable. Though PW-6 in his statement under Section 161 Cr.PC had stated that he came to the place of occurrence after hearing of the death of the deceased and that the villagers were absent at the time of cremation of the dead body, PW-6 has not been confronted with the contents of his statement allegedly made under Section 161 Cr.PC. Section 145 of the Indian Evidence Act, 1872 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. In this respect, the Supreme Court in the case of **V.K. Mishra & Anr. -vs- State of**

Uttarakhand & Anr., reported in ***(2015) 9 SCC 588*** has held that a witness should be confronted with his previous statement made before the Police under Section 161 Cr.PC to contradict his testimony. However, in the present case, neither has PW-6 been confronted with his previous statement made under Section 161 Cr.PC, nor has any question been put to the Investigating Officer (PW-7), with regard to the above. As such, there is nothing to show that PW-6 is not a reliable witness or that his testimony given before the learned Trial Court should be disbelieved.

16. PW-7, who is the Investigating Officer of the case, in his evidence has stated that on questioning the people at the place of occurrence, he came to know that the neighbours had heard a quarrel between the deceased and her husband (Birendra Chouhan) and on hearing a hue and cry in the appellants' house, the neighbours were told that the deceased had committed suicide. The appellants had thereafter immediately taken the dead body in a bullock cart to a sugarcane field and burnt the dead body of the deceased. He also states that after recording the statement of the witnesses, he started searching for the accused persons. He apprehended the husband Birendra Chouhan while he was hiding in a sugarcane field, near the place where the dead body was cremated. However, he could not trace out Jhakari Chouhan (father of Birendra Chouhan). On coming to know from a secret source on 22.02.2017 that the appellant Jhakari Chouhan had gone to Rajapathar market, he apprehended Jhakari Chouhan from the market. PW-7 also states in his evidence that he made a prayer to the Court to record the statements of PW-2 and PW-4 under Section 164 Cr.PC, which was accordingly recorded. Thereafter, finding sufficient incriminating materials against the appellants in the death of the deceased,

charge-sheet was filed against them.

In his cross-examination PW-7 states that after questioning the witnesses, he learnt that no villager except the two appellants, were present at the time of burning the dead body of the deceased. Further, he could not record the statement of the village Headman, as he could not be found

17. The evidence of PW-7 is allegedly based upon the statements made by the villagers. However, the evidence given by all the PWs does not support the evidence given by PW-7. PW-2 and PW-4 had apparently made statements under Section 164 Cr.PC before a Judicial Magistrate. However, the Judicial Magistrate, who had recorded the statements made under Section 164 Cr.PC has not been made a witness and has never been examined by the learned Trial Court. Further, the statements of PW-2 and PW-4 made under Section 164 Cr.PC, has also not been exhibited before the learned Trial Court. In their testimonies before the learned Trial Court PW-2 and PW-4 have not made any mention with regard to the contents of the statements made by them under Section 164 Cr.PC. As such, the statements made by PW-2 and PW-4 under Section 164 Cr.PC are not admissible as evidence.

18. The examination of the appellants under Section 313 Cr.PC show that they have denied any involvement in the death of the deceased, by stating that the deceased committed suicide by hanging, while they were in the paddy field away from their house. They have further stated that the body was cremated on the advice of the villagers and the village Headman.

19. On considering all the above facts, we are unable to find evidence to prove the involvement of the appellants in the death of the deceased.

20. In the impugned judgment passed by the learned Trial Court, we find that the learned Trial Court has placed importance on the fact that there was no evidence recorded showing that the relatives of the deceased were informed about her death, before cremation/burning of the dead body. Further, the learned Trial Court appears to have given importance to the statement made by PW-6 under Section 161 Cr.PC, as PW-6 has stated in his statement under Section 161 Cr.PC that on coming to the house of the appellants at 8:30 am after hearing of the death of the deceased, he came to know that no villager had been informed of the death of the deceased. Further, the appellants had taken the dead body in a bullock cart for cremation. Besides the above, the learned Trial Court in the last sentence of para 21 of the judgment has stated as follows:-

“In view of the discussion made above, it can safely presume that the accused persons were the culprits who caused death of the deceased”.

The above statements implies that the finding of guilt against the appellants has been made by the learned Trial Court, on the basis of presumptions and statements that are not admissible in evidence, while the law requires that a person should be presumed to be innocent until the prosecution proves it's case beyond all reasonable doubt. It has been clearly laid down by the Supreme Court in various cases that a person cannot be convicted on the basis of presumptions and suspicions, no matter how grave the suspicion is.

21. In view of the above reasons, we are of the view that the charge under Sections 302/34 IPC cannot be said to have been proved beyond all reasonable doubt and the appellants are accordingly given the benefit of doubt.

22. With regard to the question whether the finding of guilt under Section 201/34 IPC is sustainable, it would be profitable to refer to the decision of the Hon'ble Supreme Court in the case of ***Dinesh Kumar Kalidas Patel*** (supra), wherein it was held that maintaining a conviction under Section 201 IPC was not justified on the ground that no communication was given to the Police and that the post-mortem had not been performed on the dead body.

In the case of ***Hanuman –vs- State of Rajasthan***, reported in ***1994 Supp. (2) SCC 39***, the Apex Court has held that the mere fact that the deceased allegedly died an unnatural death could not be sufficient to bring home a charge under Section 201 IPC. Unless the prosecution was able to establish that the accused person knew or had reasons to believe that the offence had been committed, causing the evidence of the commission of the offence to disappear, he cannot be convicted.

23. In the case of ***Dinesh Kumar Kalidas Patel*** (supra), the last rites has been performed in the presence of the father and the brother of the deceased. However, in the present case, there is nothing to show that the appellants had made any attempt to inform the relatives of the deceased with regard to the death of the deceased except for PW-1. The Police had also not made any attempt to communicate with any relative of the deceased with regard to her death. However, we cannot lose sight of the fact that PW-1, who was the uncle

of the deceased, had been informed of the death of the deceased. As such, PW-1 could have easily informed the other relatives of the deceased, including her parents, if the parents of the deceased were still alive. There is no evidence to show that the parents of the deceased were alive or that any attempt had been made to communicate with them by PW-1. The prosecution is also silent on this score. As such, we are of the view that the non-communication of the death of the deceased to the other relatives, who may have been alive, cannot be held against the appellants, with regard to the circumstances involving the death of the deceased. Further, as the Hon'ble Supreme Court in the case of ***Dinesh Kumar Kalidas Patel*** (supra) has held that conviction under Section 201 IPC would not be justified on the ground that no communication was given to the Police or that post-mortem has not been performed just because the deceased had died an unnatural death, we are of the view that the same would not be sufficient to bring home the charge under Section 201 IPC against the appellants. Due to the above reasons, we are of the view that the appellants cannot be found guilty of the charge under Sections 201/34 IPC also and are given the benefit of doubt on this charge also.

24. The prosecution not having been able to prove the guilt of the appellants beyond all reasonable doubt are given the benefit of doubt. The appellants are accordingly acquitted of the charge framed against them under Sections 302/34 IPC and 201/34 IPC. The appellants should accordingly be released from judicial custody, if not involved in any other criminal case. Accordingly, the impugned judgment dated 08.01.2020/22.01.2020, passed by the learned Sessions Judge, Karbi Anglong, Diphu in Sessions Case 76/2017 is hereby set aside.

25. The appeals are accordingly allowed. Send back the LCR.

26. In appreciation of the assistance provided by Ms. M Barman, learned Amicus Curiae appearing for the appellant in CrI.A.(J) 87/2020 and Mr. N Deka, learned Amicus Curiae appearing for the appellant in CrI.A.(J) 88/2020, their fees as per the fee structure should be paid by the Assam State Legal Services Authority.

JUDGE

JUDGE

Comparing Assistant