

GAHC010228252018



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

Case No. : CrI.A./8/2019

JAHIRUL ISLAM AND ANR
S/O AZAD ALI, R/O MANAS RESERVE (CHALAPARA), P.O. AND P.S.
LAKHIPUR, DIST. GOALPA ASSAM, PIN 783129

2: AZAD ALI

S/O LATE AMIR ALI
R/O MANAS RESERVE (CHALAPARA)
P.O. AND P.S. LAKHIPUR
DIST. GOALPARA
ASSAM
PIN 78312

VERSUS

THE STATE OF ASSAM AND ANR.
RREPRESENTED BY PP, ASSAM

2:DANESH ALI
S/O LATE ABDUL MALEK
R/O KANTAPUR (NAMAPARA)
P.O. AND P.S. LAKHIPUR
DIST. GOALPARA
ASSAM
PIN 78312

Advocate for the Petitioner : MR. A C SARMA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE THE CHIEF JUSTICE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGMENT

Date : 25-08-2023

(S.P. Khaund, J)

1. This appeal under Section 374 (2) of the Code of Criminal Procedure (Cr.P.C. for short) is preferred against the judgment and order dated 30.08.2018 and 01.09.2018 passed by the Additional Sessions Judge, Goalpara in connection with Sessions Case No. 68/2015 convicting the accused-persons Jahirul Islam and Azad Ali u/s 302/34 of the Indian Penal Code (IPC for short), sentencing them to undergo imprisonment for life and to pay a fine of Rs. 5,000/- with default stipulation.

2. The genesis of the case was that, about five years ago, Danesh Ali's daughter Mustt. Sahinur Khatun was married to Jahirul Islam. From the threshold of her marriage, Sahinur Khatun was subjected to mental harassment. On 22.09.2012, Jahirul assaulted and killed his wife at the behest of his father Azad Ali. In a subterfuged manner, Jahirul Islam informed his father-in-law Danesh Ali (hereinafter referred to as the informant) that Sahinur's body was found to be numb and lifeless. Immediately, Danesh Ali rushed to his son-in-law's house and found his daughter's body lying on the floor. Both the accused Jahirul and Azad Ali were missing. Danesh Ali then lodged the FIR with the police at Lakhipur P.S. This FIR was registered as Lakhipur P.S. Case No.

532/2012 u/s 120B/302/34 IPC and the Investigating Officer (IO in short) embarked upon the investigation.

3. After completion of investigation charge-sheet was laid against the accused u/s 120B/302/34 IPC. After commitment of this case, trial commenced and a formal charge u/s 120B/302/34 IPC was framed and read over and explained to the accused, who adjured their guilt and claimed innocence.

4. To substantiate its stance, the prosecution adduced the evidence of 10 witnesses including the Medical Officer (MO in short) and the IO and the defence cross-examined some witnesses to refute the charges. The accused were confronted with the incriminating materials appearing against them and their tenor of answers to questions u/s 313 of the Code of Criminal Procedure (Cr.PC for short) depicts the plea of total denial. The accused Jahirul Islam and Azad Ali have categorically denied that the victim was strangled.

5. The trial Court decided the case on the following points:-

- [i] *Whether the accused persons made an agreement in order to kill the deceased Sahinur Khatun?*
- [ii] *Whether the accused persons in furtherance of common intention caused death to Shanur Khatun?*

6. The learned Trial Court held the accused guilty as they were last seen with the deceased. The accused failed to discharge his burden under Section 106 of the Indian Evidence Act. Eye witnesses had noticed the accused with the victim and they were thus held guilty of the offence of Sections 302/34 IPC by the learned Trial Court.

7. The learned Senior Counsel for the appellants Mr. A.C. Sarma laid stress in his argument that the accused are innocent. The trial Court erred by convicting the accused on presumption. Without sufficient evidence and on basis of the sole circumstance that the victim was found dead in her matrimonial house, both the accused were convicted. He urged that the chain of circumstances is incomplete and unconvincing and thus, conviction of the accused is fit to be reversed.

8. Per contra, the learned Addl. P.P. Ms. B. Bhuyan laid stress in her argument that the accused failed to discharge their burden u/s 106 of the Indian Evidence Act, 1872 (the Evidence Act for short) to explain the reasons how the victim was found dead inside the house.

9. The learned Addl. PP relied on the decision of the Hon'ble Supreme Court in *Trimukh Maroti Kirkan v. State of Maharashtra*, reported in (2006) 10 SCC 681.

10. On the backdrop of these submissions the question that falls for consideration is that whether the circumstances formed a complete chain unerringly pointing towards the guilt of the accused and inconsistent with their innocence.

11. The instant case rests squarely on the plank of circumstantial evidence. Jahirul Islam will hereinafter be referred to as A1 and Azad Ali as A2.

12. The informant learnt about the incident from A1. The informant Danesh Ali deposed as PW-1 that his daughter Sahinur Khatun (hereinafter referred to as the deceased) was married to A1 about 15 years ago and she was blessed with two sons but later one son passed away. A1 called him over phone and informed him that his daughter had become numb and she was unable to speak and thereafter A1's phone was found to be switched off. PW-1 further testified that he went to his son-in-law's residence accompanied by the other villagers and he saw his daughter's body lying on the floor inside the house. Blood was streaming down her mouth and nostrils, and he noticed mud smeared on her body and jute leaves on her head. Both A1 and A2 fled away and then he went to the Lakhipur PS and lodged the FIR. The police brought his daughter's body to Lakhipur PS and later forwarded the body for autopsy. He along with some other villagers cremated his daughter's body.

13. The conduct of the accused after the incident was questioned by the prosecution. It is submitted by the prosecution that the conduct of the accused u/s 8 of the Indian Evidence Act, 1872 (Evidence Act for short) is relevant. Their conduct clearly depicts that they have fled from the place of occurrence, immediately after committing the murder. Moreover the accused have mechanically denied that the victim was not strangled. However, it is manifest from the evidence of the Medical Officer that the victim died of strangulation.

14. The Medical Officer Dr. Bichitra Kr. Bordoloi deposed as PW-9 that on 23.09.2012, she performed post-mortem on the body of the deceased which was brought on police requisition. On examination, she detected:-

Rigor mortis all over the body;

Scratch mark of nail, multiple numbers present on neck;

2x3 cm, 4x5 cm and 2x4 cm size abrasion with bruise over the midline of back just above the level of iliac crest;

No ligature mark found around the neck;

No disease or deformity detected;

No fracture or dislocation detected;

According to her opinion death was, *ex facie* a result of ante-mortem manual strangulation and death was homicidal in nature.

The time of death was approximately between 24 hours to 36 hours. She proved the autopsy report as Ext.-1 and Ext.-1(1) as her signature.

15. Thus there is not even an iota of doubt that the deceased was strangulated and the marks of injuries on her neck have been proved by the Medical Officer. The wounds received by the victim in defending herself during the assault have also been elaborated by the Medical Officer. The abrasion reveals signs of struggle.

16. Abdul Razzak is the informant's nephew. He deposed as PW-2 that on receiving information about the incident, he went to the house of the accused and saw the body of the deceased lying on the floor of her house. He noticed injury marks all over her body. The mother of the deceased was washing clothes. The village headman asked them to make preparations for last rites, but his uncle (PW-1) objected and went to the police station and lodged the FIR. No contradictions could be elicited through his cross-examination.

17. Afzalur Rahman testified as PW-3 that the informant is his brother. His niece was married to A1. She died in her matrimonial home. He along with Asiruddin went to her house after receiving the news of her death at about 7 AM. He noticed the body lying on the floor of the bedroom with mud near her body and jute leaves on her head. Blood was oozing out from her mouth and

nostrils.

18. The informant's other brother Asiruddin has also testified as PW-4 that he along with his brothers went to the place of occurrence at about 8/9 AM and saw the dead body of the deceased lying on the bedroom floor with mud smeared over her body and jute leaf on her head and blood dripping down her mouth and nostrils. This witness has stated that he did not know the cause of death of his niece.

19. The mother of the deceased Nal Bhanu has testified as PW-5 that her daughter was married to A1 about 12 years back. A1 quarreled with her daughter on the day of the incident. On the day of the incident, at about 6 PM her son-in-law informed them that her daughter was numb and was not breathing. They immediately rushed to her daughter's house and found her lying on the ground with blood oozing out of her mouth and nostrils and mud stains over her body. This witness was not cross-examined.

20. Abdul Rashid testified as PW-6 that the incident occurred about two and half years back. He saw A1 and A2 taking Sahinur Khatun in a push cart (thela) to the hospital as she was ailing. After 1 or 2, hours he met both the accused while they were returning home with the body of Sahinur in the cart. This witness was also not cross-examined. His evidence does not inspire confidence.

The M.O's evidence clearly depicts that the deceased was strangled.

21. Abdul Owai testified as PW-7 that he heard that A1's wife had consumed poison and she was taken to the hospital and later she passed away.

22. Sohikul Islam testified as PW-8 that he is a neighbour to the accused. Around 5:30 AM, he saw people assembled in the accused-person's house and he noticed that the deceased was sleeping on a bed. He noticed movement of her hands and legs. They took the deceased to the Lakhipur Hospital in a cart and from thereon she was referred to Goalpara. The deceased died at Lakhipur Hospital. He did not know the reason of her death.

23. The IO, Karendra Nath Rai testified as PW-10 that on 22.09.2012, while he was serving as Attached Officer at Lakhipur PS, the OC who received an FIR from Danesh Ali, registered a case and entrusted him with the investigation. He embarked upon the investigation, prepared the sketch-map of the place of occurrence and recorded the statements of the witnesses. After inquest, the dead body was forwarded for autopsy. He arrested the accused. Meanwhile he got transferred and he handed over the case-diary to the OC. Later S.I. Bhajan Mazumder completed the investigation and submitted charge-sheet. He proved the charge-sheet as Ext.-4 and identified the signature of S.I. Bhajan Mazumder as Ext.-4(1). He identified the signature of the OC on the FIR as Ext.-2(1). He

proved his signature on the sketch-map as Ext.-3(1).

24. The cross-examination of the IO reveals that no contradiction could be elicited through his cross-examination, vis-à-vis the cross-examination of the informant and other witnesses as per Section 145 of the Evidence Act qua Section 162 Cr.PC. The un-contradicted evidence of the witnesses closes in on the accused.

25. The learned counsel for the appellants laid stress in his argument that the Medical Officer, PW-9 has admitted in her cross-examination that she has mentioned about the scratch marks on the victim's neck on assumption. This argument holds no water as the medical Officer has affirmed through her opinion that death of the deceased was the result of manual strangulation and was ante-mortem and homicidal in nature.

26. The evidence reveals that the FIR was lodged on 22.09.2012 and the post-mortem was performed on the following day i.e. on 23.09.2012. The Medical Officer has opined that time of death was between 24 hours to 36 hours. As soon as PW-1 received information from A1 that his daughter was found to be numb and lifeless, he immediately went to his daughter's house and he found her body in her house. Both the accused were missing from the house. The conduct of the accused after the incident is a circumstance inferring complicity

of the accused.

27. The learned counsel for the accused has relied on the decision of the Hon'ble Supreme Court in *Narayan Lal v. State of Rajasthan*, reported in *MANU/SC/0661/1969* that:-

“6. On the evidence there can be no doubt about the following: the death was due to homicide by strangulation, the husband and the members of his family wanted to perform the cremation ceremony without informing the deceased's brother; the husband wanted to cut off all connections with his wife and the beating and maltreatment was not meted out to her by her husband alone but also by her parents-in-law. The evidence at best suggests a motive for the husband and his parents to get rid of the wife but there are no circumstances which clinch the husband's guilt beyond any room for doubt. In *Manumant v. The State of Madhya Pradesh* AIR 1952 SC 1091 (1097) it was laid down by this Court:

...that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstance should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

Judged by the above, it is not possible to hold the Appellant guilty of the murder. There were no less than twelve members of the family living in the same house. Not only the husband but the parents-in-law of the Appellant used to beat her and the evidence is far from conclusive to exclude the possibility of any one but the husband having perpetrated the crime. The husband may have been a party to the crime but there is the possibility that another or others may have done it without his help. The High Court acquitted the Appellant's father entertaining doubt about his taking part in the crime. Although this Court does not ordinarily take a view of the evidence different from that of the courts below, specially if they are concurrent, the evidence being entirely circumstantial and being far from conclusive, we find ourselves unable to endorse the view of the courts below. In the result the appeal must be allowed and the conviction and sentence of the Appellant set aside. The Appellant will be set at liberty.”

28. Recapitulating the entire evidence of this instant case it can be safely held that the A1 committed the murder of his wife. The circumstances arising against him forms a complete chain and he has failed to discharge his burden u/s 106 of the Evidence Act. PW-1 has testified that A1 called him over phone and informed him that his daughter was numb. Thus, presence of A1 at the scene corresponding to the time of incident is established from the evidence of PW-1. Immediately PW-1 accompanied by PW-2, PW-3 and PW-4 went to the place of occurrence and the appellants were nowhere to be found at the place of occurrence. The body of the deceased was found lying on the ground, in the bedroom. The conduct of the accused in this case after the incident as per Section 8 of the Evidence Act is relevant. The autopsy report clearly depicts that the deceased was strangled. It could be deciphered from the evidence that the incident occurred on 22.09.2012 and the FIR was lodged on the same day i.e. on 22.09.2012. The dead body of Mustt. Sahinur Khatun was subjected to autopsy on 23.09.2012 and the post-mortem report Exhibit-1 was prepared. The FIR lodged by PW-1 is substantiated by his evidence. The evidence of PW-1 is corroborated by the evidence of PWs-2, 3, 4 and 5. The evidence of PWs-1, 2, 3, 4 and 5 is similar and corroborative. No contradictions could be elicited through the cross-examination of PWs-1, 2, 3 and 4 vis-à-vis the cross-examination of the IO, PW-10.

29. The argument of the learned counsel for the accused that there were other inmates in the house and the accused i.e. A1 and A2 cannot be roped in with the offence of culpable homicide amounting to murder can be safely brushed aside. The evidence depicts that the inmates of the house consisted of the accused, the victim, her mother-in-law and her three year old son. The evidence of the mother of the deceased PW-5 reveals that A1 had a quarrel with her daughter on the day of the incident. This evidence of PW-5, Nal Bhanu was not contradicted. She was not even cross-examined by the defence counsel. The evidence of PW-1 also clearly reveals that A1 informed him that his daughter's body was lifeless and numb. A presumption can be raised in the common course of events that the spouses would be staying together in the bedroom. The body of the deceased with the marks of strangulation was found lying in the bedroom where she and her husband A1 resided together. Thus, the circumstances leading to the homicidal death of Mustt. Sahinur Khatun (deceased) were definitely in the exclusive knowledge of her husband the accused A1, who was under an obligation to explain the same by virtue of Section 106 Evidence Act. He failed to offer any explanation and offered a blank denial. Thus, a presumption of culpable mental state has to be raised against A1. Thus the evidence comprising of a chain of circumstances closes in on A1 and A2 gets the benefit of doubt.

30. It has been observed by the Hon'ble Supreme Court in *Trimukh Maroti Kirkain's* case (supra) that:-

“In the earlier part of the judgment we have given a resume of the evidence which is available on record. The appellant was plying a tempo in order to earn his livelihood. It is fully established that the deceased Revata was being ill-treated and harassed on account of non- fulfilment of demand of Rs.25,000/- which the appellant wanted for purchasing a tempo. The deceased Revata was often beaten and was sometimes not given food. After Revata had been murdered, information was sent to her parents that she had died on account of snake bite, which was reiterated when they reached the house of the appellant in village Kikki. In fact, everyone in the village had been told that Revata had died on account of snake bite and the Police Patil, believing the said information to be true, had lodged an Accidental Death Report at the police station. The medical evidence, however, showed that she had died on account of asphyxia due to strangulation. The body of the deceased was purposely placed in a sitting posture with her back taking support of the wall so that no one may suspect that she had actually been killed as a result of strangulation and may believe the version of snake bite given by the appellant and his parents. The appellant in his statement under [Section 313 Cr.P.C.](#) did not offer any explanation as to how she received the injuries which were found on her body. Recovery of some articles of the deceased was made at the pointing out of the appellant. The circumstances enumerated above unerringly point to the guilt of the accused and they are inconsistent with his innocence.”

31. The Hon'ble Supreme Court has observed in the case of *Sharad Birdhichand Sarda v. State of Maharashtra* reported in *AIR 1984 SC 1622* that:-

“A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* MANU/SC/0167/1973 : 1973CriL J1783 where the following observations were made:

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

32. In the light of the decisions of the Hon'ble Supreme Court, it would be pertinent to reiterate that the circumstantial evidence against A-1 forms a complete chain, but, it would be perilous to hold the appellant A-2 guilty of the offence under Section 302/34 IPC.

(i) The evidence of PW-5 clearly reveals that at the time of the incident, A-1 had a quarrel with the deceased. PW-1 has categorically stated that he was informed by A-1 over phone that his daughter was numb and lifeless, and when he tried to contact A-1, his phone was found to be switched off. The body of the deceased was found in her house and A-1 and A-2 were missing from the house. The conduct of the accused after the incident is relevant.

(ii) There is not a scintilla of evidence of any conflict or cruelty between A-2 and his daughter-in-law, and her family members have also not implicated A-2. The dead body of the deceased was found in the bedroom of A-1 and Mustt. Sahinur Khatun and no explanation was offered by A1, as to how his wife was strangulated in the bedroom where only he and his wife resided.

(iii) A-1 thus failed to discharge his burden under Section 106 of the Indian Evidence Act.

(iv) The evidence of the M.O. clearly reveals that strangulation was the cause of the death.

(v) A-1 being the husband of the deceased was definitely in company of the deceased, when she received the fatal injury by strangulation.

(vi) A1 called PW-1 and informed him about the fact that Sahinur had stopped speaking and thereafter, he absconded from his house.

(vii) The circumstances against A-2 are not of conclusive nature and tendency.

Thus, the chain of circumstances narrows down to only one accused i.e. the husband of the deceased and the father-in-law, A-2 gets the benefit of doubt.

It is evident that the circumstances are of conclusive nature and the circumstances form a complete chain such as to exclude every hypothesis but the one proposed to be proved by the prosecution. The chain of circumstances does not leave any reasonable ground for a conclusion consistent with the innocence of the accused and the circumstances show that with all human probability the act was done by A1.

33. The accused A2 was erroneously held guilty of offence under Section 302 IPC with the aid of Section 34 IPC. In this case the accused Azad Ali is not

found guilty of offence under Section 302/34 IPC. Common intention contemplated by Section 34 IPC pre-supposes prior concert. It requires meeting of minds. It requires a prearranged plan before a man can be vicariously convicted for the criminal act of another. The criminal act must have been done in furtherance of the common intention of all the accused. In this case at hand, there is no evidence of meeting of minds and prior concert between the accused. The last seen theory is relevant only with respect to the accused A1. The reverse burden of proof by virtue of Section 106 Evidence Act also operates against him. It has already been discussed in the foregoing discussions that in this case at hand, the facts so established cannot be said to be consistent only with the hypothesis of the guilt of the accused A2.

34. In view of the foregoing discussions, it is held that prior concert and prearranged plan to kill the deceased has not been established. No culpability could be attributed to the accused A2, Azad Ali to saddle him with the liability of Section 34 IPC.

35. The accused Azad Ali is hereby, acquitted from the charges u/s 302/34 IPC on benefit of doubt. The appeal preferred by the accused Jahirul Islam is dismissed, upholding the order of conviction and sentence dated 30.08.2018 and 01.09.2018, passed by the learned trial Court in Sessions Case No.

68/2015. We record our concurrence to the findings of the learned Addl. Sessions Judge, Goalpara, insofar as the conviction of A1, Jahirul Islam under Section 302 IPC is concerned. The accused Azad Ali is on bail. His bail bonds are discharged. He need not surrender. The accused Jahirul Islam is in jail. He will continue to serve the sentences awarded by the trial Court. Appeal is partly allowed.

36. Send back the LCR.

JUDGE CHIEF JUSTICE

Comparing Assistant