

GAHC010071322024



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

Case No. : I.A.(Crl.)/345/2024

MD. JE HARUL ALI
S/O RAFIK ALI, VILL.- MADHAPUR, P.O.- MADHAPUR, P.S.- BARAMA,
DIST.- BAKSA, ASSAM, PIN- 781346.

VERSUS

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

Advocate for the Petitioner : MR Z KAMAR, MR. R K SARMA, MR T CHAKRABORTY, MR. D CHOUDHURY, MR J DAS

Advocate for the Respondent : PP, ASSAM,

BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY
HONOURABLE MRS. JUSTICE MITALI THAKURIA

ORDER

Date : 21.08.2024

[Manish Choudhury, JJ]

Heard Mr. Z. Kamar, learned Senior Counsel assisted by Mr. R.K. Sarma, learned counsel for the applicant-appellant; and Ms. A. Begum, learned Additional Public Prosecutor for the opposite party, State of Assam.

2. The instant interlocutory application under Section 389[1], Code of Criminal Procedure, 1973 is preferred by the applicant-appellant seeking suspension of execution of the sentence passed against him and for his release on bail.
3. The applicant as the appellant has preferred the accompanying criminal appeal, Criminal Appeal no. 104/2024 against a Judgment and Order dated 07.03.2024 passed by the Court of learned Sessions Judge, Baksa, Mushalpur [‘the trial court’, for short] in Sessions Case no. 82/2022. In the trial of Sessions Case no. 82/2022, two accused persons viz. [i] Md. Rafik Ali [A-1]; and [ii] Md. Jeherul Ali [A-2], that is, the applicant-appellant had been charged for the offences under Section 365/34, Indian Penal Code [IPC] and Section 302/34, IPC. During the trial, the prosecution examined thirteen nos. of witnesses and exhibited eight nos. of documents to bring home the charges against the two accused persons. At the end of the trial, the learned trial court finding both the accused persons guilty for the offences under Section 365/34, IPC and Section 302/34, IPC, had sentenced them to undergo rigorous imprisonment for life and to pay a fine of Rs. 2,000/- each, with default stipulation. For the offence under Section 302/34, IPC, both the accused persons have been sentenced to undergo rigorous imprisonment for 3 years and to pay a fine of Rs. 2,000/- each, with default stipulation.
4. The accompanying criminal appeal, Criminal Appeal no. 104/2024 has already been admitted for hearing on 09.04.2024.
5. Mr. Kamar, learned Senior Counsel appearing for the applicant-appellant, that is, Md. Jeherul Ali [A-2] has contended that the learned trial court had erred in applying the last seen together theory to return the finding of guilt against the accused persons, more particularly, against the applicant-appellant [A2]. It is his contention that the prosecution had failed to establish all the circumstances by cogent and credible evidence and as a result, there were a nos. of missing links in the chain and as such, the conviction of the applicant-appellant is completely unjustified. It is further contended that the injuries allegedly sustained by the deceased were not such injuries which would result in death of a person in the ordinary course of nature. Mr. Kamar has also referred to the decision in *R. Sreenivasa vs. State of Karnataka*, 2023 INSC 803, to contend that the last seen together theory is not applicable in the case in hand, more particularly, when there is failure on the part of the prosecution to establish the motive to bring in the rule of evidence contained in Section 106 of the Evidence Act into operation.
6. Ms. Begum, learned Additional Public Prosecutor, opposing in the application, has contended

that the Autopsy Doctor [P.W.7], in his testimony, had clearly opined that the injuries sustained by the deceased were sufficient to cause death in the ordinary course of nature. Though the Autopsy Doctor had opined that the cause of death was due to both homicidal injuries and drowning, the injuries, more than one, were definitely sustained by the deceased prior to drowning. Ms. Begum has further contended that on 28.03.2020, the deceased was last seen alive together in the company of both the accused persons, A-1 and A-2. In such situation, the accused persons owed an explanation under Section 106 of the Evidence Act. But the accused persons including the applicant-appellant [A-2], did not offer any explanation, much less plausible explanation, either in their/ his examination under Section 313, CrPC or even by the way of any suggestion during cross-examination of the prosecution witnesses.

7. We have considered the submissions of the learned counsel for the parties and also have gone through the evidence/materials on records for the purpose of consideration of the instant application, preferred under Section 389, CrPC.

8. For consideration of an application under Section 389, CrPC, this court as the appellate court is not supposed to re-appreciate the evidence and to look for few lacunas or loopholes here or there in the case of the prosecution. It is settled that while undertaking the exercise, if the appellate court finds that there is something palpable or glaring illegality or the finding is perverse then only such an application should be considered favourably. The power exercisable under Section 389, CrPC is different from an application either under Section 437 or under Section 439 of the Code, pending trial, for the reason that the presumption of innocence and bail is the rule and jail is the exception may not be available to the appellant, who has suffered a conviction.

9. From the prosecution evidence, it has emerged that at around 09-00 p.m. on 28.03.2020, A-1 came to the house of the deceased and had dinner with the family of the deceased. The said fact was also admitted by A-1 when he was examined under Section 313, CrPC. It is the case of the prosecution that on the same night at about 10-00 p.m., both the accused persons, A-1 and A-2 again came to the house of the deceased and called the deceased on the pretext that they had something to discuss with the deceased and on their such call, the deceased went out with the two accused persons, A-1 and A-2 and thereafter, the deceased was found missing. It is the further case of the prosecution that in the morning on the following day, the wife of the deceased, P.W.1, went to the houses of the accused persons to know the whereabouts of her husband as he did not return home till that time. When the

answers of the two accused persons were found of incoherent nature, putting the blame against each other, the FIR came to be lodged by the wife of the deceased, P.W.1 at around 05-00 p.m. on 29.03.2020.

10. The materials go to indicate that it was in the early morning hours on 30.03.2020, the deadbody of the deceased was found floating in a pond located in a nearby village. After recovery of the deadbody, post-mortem examination was performed at Dr. R. Boro Civil Hospital, Mushalpur at about 01-00 p.m. on 30.03.2020 by the Medical & Health Officer [P.W.7] posted there. As per the testimony of P.W.7, there were injury marks over back of head, back side of the body and right upper extremity [including cut mark]. According to the Autopsy Doctor [P.W.7], the death was due to both homicidal injuries and drowning and it occurred approximately 30-40 hours before post-mortem. The Autopsy Doctor [P.W.7] further opined that the injuries sustained by the deceased were sufficient to cause death of a person in the ordinary course of nature. If the time of death mentioned by the Autopsy Doctor [P.W.7] is taken into consideration, then the time of death of the deceased would fall between 10-00 p.m. on 28.03.2020 and 08-00 a.m. on 29.03.2020.

11. The contention of the applicant-appellant as to whether the injuries sustained by the deceased were sufficient to cause death in the ordinary course of the nature or not is a matter which can only be deliberated in the course of a detailed hearing. At this stage, such contention need not be gone into.

12. It has been observed in R. Sreenivasa [supra] that in the absence of definite evidence that the accused and the deceased were last seen together and when the time gap is long, it would be dangerous to come to conclusion that the accused was responsible for the murder of the deceased. Where the time gap is long it would be unsafe to base the conviction on the 'last seen theory'. When in that context, the materials emerging from records of the instant case is looked into, it emerges that the time-gap appears to be about 10 hours, indicated above. Whether such time gap is a prolonged one to rule out the theory of last seen together form consideration is also an matter which can be considered only at the stage of detailed hearing. The applicant-appellant appeared to have offered no explanation as when he parted with the company of the accused after going out with him at around 10-00 p.m. on 28.03.2020.

13. From the materials on record, as discussed hereinabove, we are of the considered view that the

applicant-appellant has not been able to make out a *prima facie* case for extending the benefit under Section 389[1], CrPC. The instant application, in our considered view, is, not thus, merited. Accordingly, the instant application stands dismissed.

14. It is made clear that the observations made hereinabove are only for the purpose of consideration of the application of the applicant-appellant seeking suspension of the execution of sentence passed against him and the observations made hereinabove shall not be construed as observation in respect of the accompanying appeal at the time of its hearing.

JUDGE

JUDGE

Comparing Assistant