

GAHC010210722018



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

Case No. : CRL.A(J)/96/2018

SMT. BANDANA BORA
W/O. LT. TOKHESWAR BORA, R/O. KUNDAR GAON, P.S. TITABAR, DIST.
JORHAT.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MR S ISLAM, AMICUS CURIAE

Advocate for the Respondent : MS. B BHUYAN(ADDL.PP, ASSAM)

BEFORE
HONOURABLE MR. JUSTICE LANUSUNGKUM JAMIR
HONOURABLE MRS. JUSTICE MALASRI NANDI

JUDGEMENT AND ORDER (CAV)

Date : 06.03.2024

(Malsari Nandi, J)

Heard Mr. S. Islam, learned *Amicus Curiae* appearing for the appellant.
Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor appearing
for the State/respondent.

2. The appellant, being the wife of the deceased, has preferred this appeal against the judgment and order dated 30.07.2018 passed by the learned Sessions Judge, Jorhat in Sessions Case No. 205(J-T)/2017, whereby the accused/appellant was convicted under section 302 IPC and sentenced to undergo rigorous imprisonment for life with fine of Rs.15,000/-, in default of payment of fine, to undergo rigorous imprisonment for six months.

3. The prosecution case in brief is that the informant one Anil Borah lodged an FIR before the in-charge of Jalukanibari out post under Titabar police station stating *inter alia* that on 29.09.2017 at about 09:00 p.m., the deceased Tokheswar Borah of Kundargaon was killed by his wife Bandana Bora i.e. the present appellant with an iron rod causing injury on his head as a result of which, he died on the spot.

4. On receipt of the complaint, a GD entry was recorded vide Jalukonibari O.P GDE No. 551 dated 30.09.2019 and forwarded the same to O/C Titabar police station for registering a case and accordingly a case was registered vide Titabar P.S. case No. 233/2017 under section 302 IPC, and investigation was initiated.

5. During investigation, the investigating officer visited the place of occurrence, seized one iron rod from the place of occurrence and recorded the statement of the witnesses. Thereafter, inquest was conducted on the dead body of the deceased and forwarded the dead body for postmodern examination. On receipt of the relevant documents including the postmortem report, charge-sheet was submitted against the appellant

under section 302 IPC before the court of learned SDJM, Titabar. As the offence under Section 302 IPC is exclusively triable by the court of Sessions, the case was committed accordingly.

6. During trial, charge was framed under section 302 IPC which was read over and explained to the accused/appellant to which she pleaded not guilty and claimed to be tried. To prove the case against the appellant, prosecution examined seven witnesses and exhibited some documents and one material exhibit vide Material Ext. iron rod. On the other hand, the defence did not adduce any witness in support of her case.

7. After conclusion of the trial, the statement of the accused was recorded under section 313 Cr.P.C. wherein the appellant denied her guilt but stated that she has been falsely implicated in the case. Her husband was a drunkard. Her husband fell on the ground when he was under the influence of liquor and received injuries on his head. On the evening of incident, the deceased came back home after consuming alcohol and demanded money from her. She could not give money to him. She left the house out of fear and came back in the next morning and found her husband dead inside the room. She could not say how her husband died.

8. After hearing the argument advanced by the learned counsel for the parties, the accused/appellant was convicted as aforesaid.

9. It was urged by the learned counsel for the appellant that there was no eyewitness to the incident and the conviction of the accused/appellant was based only on the circumstantial evidence. It is the settled principle of

law that in cases where the evidence is purely on circumstantial in nature, the facts and circumstances from which the conclusion of guilt is sought to be drawn must be fully established beyond reasonable doubt. The trial court had convicted the accused/appellant on surmises and conjectures because the deceased was the husband of the appellant and lived in the same house.

10. It is also submitted that the investigating officer seized one iron rod from the place of occurrence but the said weapon was never sent for forensic examination. The prosecution without examining the said weapon came to a conclusion that the accused/appellant used the said weapon for killing her husband. In a criminal case, it is settled law that the benefit of doubt always goes in favor of the accused person.

11. The learned counsel for the appellant also pointed out that as per sketch map, Makhar Gogoi and Bolin Borah are the adjacent neighbours of the deceased and the appellant but the prosecution did not examine the said neighbours which is fatal to the prosecution case. Learned counsel also stated that the medical officer who conducted the autopsy of the deceased, has opined that the cause of death was due to hemorrhage and shock following the injuries sustained by the deceased and all the injuries were antimortem in nature and caused by blunt weapon.

12. Learned counsel for the appellant also submitted that the deceased was an alcoholic. On the date of incident, after consuming liquor, he came back home and demanded money from the appellant, she refused to pay the same money and left her house. When she returned back home on the

next morning, she found her husband dead.

13. According to learned counsel for the appellant, the prosecution has failed to prove the fact that the accused had committed murder of her husband on the date of incident as she was not present on the whole night in her house as such, it is not proved who had committed the murder. It is also submitted that the deceased sustained injury on his head by falling on the ground and the medical officer also supported the fact by stating that due to hemorrhage and shock, on sustaining injury on his head, the deceased died. Under such scenario, the learned counsel for the appellant prayed that the appellant be acquitted on benefit of doubt.

14. In support of his submission, learned counsel has placed reliance on a case law- Asab Uddin v. The State of Assam & Anr. Reported in 2019(2) GLT 1077.

15. Per contra, the learned Additional Public Prosecutor submits that in the case in hand, the occurrence took place inside the four corners of the house, wherein the accused/appellant used to reside. Although in her statement recorded under section 313 Cr.P.C., the appellant took the plea that on the evening of incident, her deceased husband came back home under the influence of liquor and demanded money from her. She could not give money to her husband and left the house out of fear and came back in the next morning and found her husband lying dead inside the house. But the plea of alibi is not proved by adducing any evidence.

16. The Addl.P.P. also stated that the appellant has also taken another

plea that her deceased husband was an alcoholic and he sustained injuries on his head when fell on the ground under the influence of liquor but the postmortem report belies the fact about consumption of alcohol as no contents was found on his stomach. Further, as per opinion of the doctor, the cause of death was due to hemorrhage and shock following the injury sustained. According to learned Addl.P.P., the deceased sustained multiple injuries on his person which is not possible by onetime falling on any hard substance.

17. Learned Addl.P.P. also pointed out that as the incident had taken place inside the house of the deceased, the inmates of the house would be the better person to give answers as to under what circumstances, the victim died. Incidentally, the accused/appellant who is the wife of the deceased was an inmate of the house as such, she has to give explanation under what circumstance, her husband died. Though, she took the plea of alibi but which is not proved by adducing any evidence that at the relevant time of incident, she was not along with her husband in the house.

18. The learned Addl.P.P. has also submitted that the aforesaid circumstances show that the appellant who was the inmate of the house, has given a false explanation and which would be additional link to the chain of circumstances that she is the perpetrator of the crime. In the case in hand, the offence has been committed in secrecy inside the house as such, 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 the same degree as it is required in other

cases of circumstantial evidence.

19. It is further submitted that in view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation of the supposed premise that the burden to establish his case lies entirely upon the prosecution and there is no duty on the accused to offer any explanation. Learned Addl.P.P. further submits that under the facts and circumstances of the case, the conviction rendered by the learned trial court needs no interference by this Court and prays for dismissal of this appeal.

20. In support of her submission, the learned Addl.P.P. has relied on the following case laws-

(i) Trimukh Maroti Kirkan v. State of Maharashtra reported in 2006 v. 10 SCC 681.

(ii) Kalu @ Laxminarayan v. State of Madhya Pradesh reported in 2019 v. 10 SCC 211.

21. We have considered the submissions of the learned counsel for the parties and perused the relevant case laws and the judgment and record of the trial court.

22. Admittedly, there was no eyewitness to the incident. PW1 who is the

brother of the deceased. He deposed in his evidence that he used to reside at a distant place away from the house of his elder brother. On the relevant day at about 8/9 a.m. his nephew Pranjali Borah came to his house and asked him to come to his house. He reached the house of the deceased and found his dead body on the floor near his bed. At that time, police was also present there and as per instruction of the police personnel, he accompanied the dead body for postmortem examination to Jorhat Civil Hospital. He noticed injury on the head of his deceased brother. Thereafter, he lodged the FIR vide Ext.1.

23. In his cross examination, PW1 replied that he did not know the contents of the FIR. He did not have any personal knowledge about the incident. This witness was declared hostile on the request of the prosecution as he did not support the prosecution case.

24. PW2 is the son of the deceased as well as the appellant. He deposed in his evidence that he used to reside with his grandfather for last five years. On the date of incident, he visited the house of his parents at about 07:00 a.m. He found his father lying dead. He asked his mother as to how his father died, to which she replied that she did not know how he died. He noticed injury on the head of his father. After his arrival in the house of his parents, his mother informed the police. Police came along with Executive Magistrate who conducted inquest on the dead body of the deceased wherein he put his signature vide Exhibit 2(1). This witness was also declared hostile on the request of the prosecution.

25. In his cross examination, PW2 replied that he could not say how his

father died. As his father used to quarrel with people after consuming liquor as such, he was staying away from his house. His mother did not tell him that she assaulted his father.

26. PW 3 is the Government Gaonbura. According to him, on receipt of the information, he went to the place of occurrence and found the husband of the appellant dead. This witness also stated that when he reached the place of occurrence, he found the brother of the deceased informant Anil Borah and police. On the instruction of the informant, he wrote the FIR. Police also seized one piece of iron rod vide Exhibit 3 wherein he put his signature vide Ext. 3(1). This witness also proved the iron rod before the trial court vide material Ext.1. This witness also stated that he noticed injury on the head of the deceased.

27. PW4 who is the sister of the deceased. She deposed in her evidence that at the time of incident she was at her house. She came to know about the incident on the next day morning. The accused told her that 'Kali Marilu Marile' (yesterday assaulted and died). The accused told her that she assaulted her husband. Then she rushed to the police station. She went inside the house of the accused on arrival of police and other people. She saw the dead body of the deceased near the door.

28. In her cross examination, PW4 replied that deceased used to consume liquor and he was also in habit of creating nuisance after consuming alcohol. Sometimes she used to hear the quarrel. She could not say how the deceased died. It was suggested that she did not state before police that appellant told her that 'Kali Marilu Morile' (yesterday assaulted

and died).

29. PW5 is the seizure witness. He came to the spot on receipt of the information regarding death of the deceased. Police seized one iron rod from the place of occurrence vide Ext.3. He heard from police that accused killed her husband.

30. PW6 is the medical officer who conducted postmortem examination on the dead body of the deceased. He deposed in his evidence that on 30.09.2017 he was posted at Jorhat Medical College and Hospital. On that day, as per police requisition, he performed autopsy over the dead body of the deceased on being identified by one relative of the deceased and the police constable. On examination of the dead body, he found the following-

A male dead body of average built, brown complexion, wearing a ganji and jangia, body warm stained. Body cold externally and internally. Rigor mortis fully developed all over the body. Eyes and mouth closed. Penis, anus and scrotum are healthy.

Injuries-

(i) Abrasion with contusion of 7 cm X 5 cm is present over the left shoulder.

(ii) Linear abrasion with contusion of size 10 cm X 2 cm is present over the front of neck, below the tuboid cartilage.

(iii) Linear abrasion with contusion of size 20 cm X 4 cm is present over back of neck, extending up to the left cheek.

(iv) Laceration of size 1.5 X 0.5 cm and 1.5 and 0.5 is present, 1 cm apart soft tissue depth over the left cheek, just above the angle of mandible.

(v) Scalp, Skull and vertebrae- Scalp lacerated over the parietal region of size 4 cm X 1 cm X soft tissue depth, obliquely positioned 10 cm above the left mastoid, with underlying contusion.

(vi) Brain, spinal cord, liver, spleen, kidneys, bladder, walls Ribs, cartilage, organs of generation, extema, internal and heart are healthy.

(vii) Walls, peritoneum, mouth pharynx and oesophagus- congested and contains about 2 liters of blood both fluid and clotted.

(viii) Stomach and its contents- pale and empty, without any specific smell.

(ix) Small intestine and its contents- Pale, contains glue like substances.

(x) Large intestine and its contents- pale, contains gas and faeces.

(xi) Pleurae- pale

(xii) Right and left lung- pale

The doctor opined that the cause of death was due to haemorrhage and shock following the injuries sustained. All the injuries were antemortem in nature and caused by blunt weapon. The medical officer proved the postmortem report vide Ext. 4.

31. PW7 is the investigating officer. He deposed in his evidence that on 30.09.2017, he was working as in-charge of Jalukanibari police out post. On that day, he received an FIR from one Anil Borah. Prior to receipt of the FIR, on the same day in the morning hour, one lady, namely Smt. Bandana Borah appeared before the police station and she confessed that she had killed her husband Tukheswar Borah i.e. deceased with an iron rod. Accordingly, he had recorded a GD entry vide Jalukonibari O.P. GDE No. 546 dated 30.09.2017. After making GD entry, he took the accused to the place of incident. He had drew sketch map vide Ext. 5. Thereafter, he informed the Executive Magistrate to conduct inquest on the dead body of the deceased. After that he sent the dead body for postmortem examination. He also seized one iron rod on being produced by the accused/appellant vide exhibit 3 (seizure list). He recorded the statement of the witnesses. After completion of the preliminary investigation, he returned back to the police station. Then the FIR was lodged by the informant Anil Borah. He forwarded the same to Titabar police station for registration of the case. The then officer-in-charge of Titabar police station registered a case vide Titabar P.S. Case No. 233/2017 under Section 302 IPC. He recorded the statement of the accused/appellant at the police station. After finding

sufficient material against the accused/appellant, he submitted charge sheet under section 302 IPC that vide 6.

32. After going through the evidence of the aforesaid witnesses, it reveals that though PW1 and PW2 had stated before the police that they had seen the incident when the appellant hit her husband with an iron rod, but subsequently they had resiled from their earlier statement. Accordingly, PW1 and PW2 were declared hostile on the request of the prosecution. PW4 stated that the appellant disclosed before her that she assaulted her husband and he died, but she did not state the same before the police while her statement was recorded by the investigating officer under section 161 Cr.P.C. It also appears from the evidence of the investigating officer that after committing the offence, the appellant went to the police station and stated before the investigating officer that she had killed her husband. Though, subsequently, she denied the fact in her statement under section 313 Cr.P.C. She took the plea that her husband used to take alcohol. On the date of incident, he returned back to home after consuming alcohol and fell on the ground and sustained injuries on his head as a result of which, he died.

33. Coming to the question of hostile witness, it appears from the case of *Mrinal Das v. State of Tripura* reported in (2011) v. 9 SCC 479, it was held as under-

"It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of the public

prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness. Normally, it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of the prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution."

34. It is also clearly well settled that the mere fact that a witness is declared hostile by the party calling him and allowed to be cross-examined does not make him an unreliable witness so as to exclude his evidence from consideration altogether. In ***Bhagwan Singh v. State of Haryana Bhagwati***, reported in ***(2016) v. 3 SCC 108***, the Hon'ble Court has observed as follows-

"The prosecution could have even avoided requesting for

permission to cross-examine the witness Under Section 154 of the Evidence Act. But the fact that the court gave permission to the prosecutor to cross-examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence."

35. In *Balu Sonba Shinde v. State of Maharashtra*, reported in 2002 4 Crimes (SC) 200, the Hon'ble Supreme Court held that, the declaration of a witness to be hostile does not ipso facto reject the evidence and the portion of evidence being advantageous to parties may be taken advantage of but the Court shall have to be extremely cautious and circumspect in such acceptance.

36. As held by the Hon'ble Supreme Court in *Koli Lakhmanbhai Chanabhai v. State of Gujarat*, reported in 1999 4 Crimes (SC) 256, the evidence of a hostile witness can be relied upon to an extent it supports the prosecution version; there is no legal bar to base conviction upon the testimony of a hostile witness if corroborated by other reliable evidence.

37. From the above, it is clear that the evidence of a hostile witness shall not get effaced altogether. It carries its own weight and more particularly the prosecution can take advantage of, to the extent it gets corroboration. But, at the same time, the accused will not lose her right to cross-examine that witness, in view of Section 137 of Indian Evidence Act.

38. Normally, when a witness resiles from his/her earlier statement and supports the case of the accused, definitely his/her evidence would be in line with the case of the accused, when subjected to cross-examination. Such a witness cannot be treated as a wholly reliable witness.

39. In the instant case, it appears that PW1 and PW2 were declared hostile. PW1 is the own brother of the deceased and PW2 is the son of the deceased as well as the appellant. It is quite natural that the appellant being the sister in law of PW1, he has not supported the prosecution case and PW2 who has lost his father, also has reason not to support the prosecution case to save his mother.

40. Now the question which falls for consideration by this Court is whether the death of the deceased occurred in the house when the appellant was present with her deceased husband.

41. From the evidence of the witnesses, it is proved that the deceased died of homicidal death and the dead body of the deceased was found inside the room and the appellant used to stay along with her deceased husband. But no reasonable convincing explanation has been offered by the appellant in her statement recorded under section 313 Cr.P.C. as to how the deceased died. There is absolutely no substantive piece of evidence on record to suggest that any third person entered into their house on the relevant night and caused injuries to the deceased. In her statement recorded under section 313 Cr.P.C., the appellant took the plea that on the relevant date of incident, her husband came home under the influence of liquor and demanded money, but she did not pay the money and left the

house. Though, she took the plea of alibi, but it was not proved by adducing any evidence. None of the witnesses examined by the prosecution had stated that on the relevant night of incident, the appellant was not at home along with her husband. Apart from that the appellant also did not adduce any evidence to prove the fact in question that she was not present on the relevant night in their house along with her deceased husband. According to the appellant, as her husband was under the influence of liquor on the relevant time, it is presumed that her husband fell on the ground and sustained injuries on his head as a result of which he died.

42. In case where the murder is committed inside the house is an issue, the burden is on the shoulder of the accused to explain as to under what circumstances the deceased died. While dealing with the matter involving the murder committed inside the house, it has been held by the Apex Court in the case of *Trimuti Marati Kirkon*(supra) which reads as follows,

“14. if an offence takes place inside the privacy of a house, and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to give evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. 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 held. The duty on the prosecution is to be led to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here, it is necessary to keep in mind section 106 of the Evidence Act, which says that when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him. Illustration(a) appended to this section throws some light on the content and scope of this provision, and it reads '(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him.'

15. Where an offence like murder, is committed in secrecy inside the 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 of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime is committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

43. In the case of ***State of Rajasthan v. Thakur Singh*** reported in ***2014 v. 12 SCC 211***, it has been held by the Apex Court as under-

"in a specific instance in *Trimuk Maroti Kirkan v. State of Maharashtra*,

reported in (2006) 10 SCC 681, this court held that when the wife is injured in the dwelling home where the husband ordinarily resides and the husband offers no explanation for the injuries to his wife, then the circumstances would indicate that the husband is responsible for the injuries. It was said "when an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime, they were seen together, or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries, or offers an explanation which is found to be false, it is a strong circumstances which indicates that he is responsible for commission of the crime."

44. In the case of ***Gyanchand v. State of Haryana***, reported in **2013 v. 14 SCC 420**, a large number of decisions of the Hon'ble Supreme Court were referred to and the interpretation given to section 106 of the Evidence Act in Shambu Nath Mehra was reiterated. One of the decisions cited in Gyanchad is that of State of West Bengal vs. Mir Mohammed Omar, which gives a rather telling example explaining the principle behind section 106 of the Evidence Act in the following words, "During arguments we put a question to the learned senior counsel for the respondents based on hypothetical illustration. If a boy is kidnapped from the lawful custody of his guardian in the sight of his people, and the kidnappers disappeared with the prey, what would be the normal inference if a mangled dead body of the boy is recovered within a couple of hours from elsewhere. The query was made whether upon proof of the above facts, an inference could be

drawn that the kidnappers would have killed the boy. The learned senior counsel finally conceded that in such a case the inference is reasonably certain that the boy was killed by the kidnappers unless they explain otherwise.”

45. Reverting to the case in hand, the circumstance of the case is that the wife committed murder of her husband but the parameters of the offence would be the same as discussed in the aforesaid proposition of law.

46. In view of our conclusion that the prosecution has clearly established a primacy case, the precedents cited on behalf of the appellant are not considered relevant in the facts of the present case. Once the prosecution established a prima facie case, the appellant was obliged to furnish some explanation under section 313 Cr.P.C. with regard to the circumstances under which the deceased met an unnatural death inside the house. Her failure to offer any explanation whatsoever, therefore, leaves no doubt for the conclusion of her being assailant of deceased husband.

47. In the light of the above legal position flowing from the judgments of the Hon’ble Supreme Court, it is clear that in the present case the prosecution has proved that the deceased died by an unnatural death inside the room occupied by the appellant and her deceased husband. There is no evidence that anybody else had entered into the room or could have entered the room. It also appears that immediately after the incident, the accused/appellant went to the police station and stated that she had killed her husband. Though the admitted position is that the confession before the police personnel is not admissible in law. The appellant had

given false explanation that the deceased died of falling on the ground as he was under the influence of liquor. But the medical officer did not support the fact that on dissection of the body of the deceased, the doctor found any alcoholic substance present on the stomach of the deceased during autopsy. From the postmodern report, it reveals that the deceased sustained multiple injuries on his person which is not possible by falling once on the ground. Thus the prosecution has clearly established a case against the appellant and once the prosecution established a prima facie case, the appellant was obliged to furnish some explanation under section 313 Cr.P.C. with regard to circumstances under which the deceased met an unnatural death inside the house.

48. Hence, we find that the finding of the learned trial court is based on proper appreciation of oral and documentary evidence available on record and law as well and justified in convicting the appellant herein. We do not find any merit in this appeal.

49. In the result, the appeal is dismissed and the judgment and order dated 30/07/2018 passed by the learned Sessions Judge, Jorhat in Sessions case No. 205(J-T)/2017 is hereby affirmed.

50. Send back the trial court records.

JUDGE

JUDGE