

GAHC010223962017



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

Criminal Appeal 108 (J)/2017

Sri Nathu Munda
S/O Lt. Mitku Munda
R/O Khowang Hospital Tea Estate Campus,
PS. Khowang, Dist. Dibrugarh
..... Appellant

Vs

The State of Assam
.....Respondent

Advocate for the Appellant
Mr. U. Choudhury, Amicus curiae

Advocate for the State Respondent
Ms. B. Bhuyan, Additional Public Prosecutor

Date of hearing and Judgment
4th day of March, 2020

BEFORE
HON'BLE MR. JUSTICE SUMAN SHYAM
HON'BLE MR. JUSTICE HITESH KUMAR SARMA

JUDGMENT AND ORDER (ORAL)

(Hitesh Kr. Sarma, J.)

This is an appeal against the judgment and order, dated 31.08.2017, passed by the learned Sessions Judge, Dibrugarh in Sessions Case No. 118/2016, convicting the accused-appellant

and sentencing him to suffer imprisonment for life and to pay a fine of Rs. 2,000/- under Section 302 of the IPC, in default of payment of fine, rigorous imprisonment for 1 (one) month.

2) The prosecution case is that on 14.07.2016, the accused-appellant Sri Nathu Munda had boxed ears of his wife, Somari Munda, and blood had oozed out from her ear. His wife died as a result of the impact of such assaults.

3) On the basis of FIR, lodged by the informant Sri Bitul Bouri (PW1), Khowang Police Station registered a case being No. 58/2016, under Section 302 IPC. On completion of investigation of the case, the investigating officer laid charge-sheet against the accused-appellant under Section 302 IPC.

4) After exhausting all legal requirement, the learned Sessions Judge, Dibrugarh commenced the trial against the accused-appellant for charge under Section 302 IPC. The accused-appellant pleaded innocence to the charge.

5) The prosecution examined as many as 6 (six) witnesses who were cross-examined by the defence.

6) After closure of the prosecution evidence, the statement of the accused-appellant was recorded under Section 313 Cr.PC. In his such statement, the accused-appellant denied the accusation made against him although admitted the fact that the dead body of the deceased was found in his house.

7) We have examined the records of the learned trial court as well as the impugned judgment. I have also heard Mr. U. Choudhury, learned Amicus-curiae for the accused-appellant and Ms. B. Bhuyan, learned Additional Public Prosecutor for the state respondent.

8) PW1 (Sri Bitul Bouri) had lodged the FIR vide Ext. 1. He deposed that the accused-appellant is his maternal uncle and the deceased was the wife of the accused-appellant. In the next morning of the date of the incident he came to know from his neighbours that Somari Munda (wife of the accused-appellant) died in her residence. Then he went to the residence of the accused-appellant and found police persons had already arrived there. He also found the dead body of the deceased lying in the house. Police did inquest over the dead body vide Ext. 2 wherein he had put his signature as witness, vide Ext. 1(1). In his

cross-examination, this witness has stated that he did not witness any injury over the body of the deceased and that Ext. 1 (FIR) was written by the officer-in-charge of the Khowang Police Station and he had only put his signature thereon, vide Ext. 1(1). He had come to know from the officer-in-charge of the police station that the accused-appellant had slapped the deceased. His further evidence is that he did not give any statement to the police.

9) PW2, Sri Ashok Manki, testified that the incident had taken place about 3 months back. In the next morning he had come to know from his wife that the deceased Somari Munda had died in her house and her body was taken to the hospital. He had also come to know that the deceased Somari was killed by her husband in her residence. He is a witness to the inquest on the dead body of the deceased vide Ext. 2 wherein Ext.2(2) is his signature. This witness was declared hostile and cross-examined by the prosecution. Prosecution had drawn his attention to his previous statement that he had stated before the police that on being asked the accused-appellant had told him that he had given a slap on the body of the deceased Somari and that she had fallen down and thereafter, he had tried to wake her but in vain. In his cross by the defence, this witness deposed that he did not see any injury on the body of the deceased and that he had no personal knowledge about the occurrence. PW6, investigating officer, has confirmed that this witness had made a statement before him as pointed out by the prosecution during his cross-examination. However, this appears to be an extra judicial confession of the accused-appellant made before the PW2. But, PW2 himself has denied making such statement in his cross by the prosecution although such statement is confirmed through the PW6. The extra judicial confession is a weak piece of evidence and to act on it, corroboration is essential. In this case, the aforesaid extra judicial confession allegedly made by the accused-appellant before the PW2 has not been corroborated by any of the witnesses and even the PW2 himself is not sure about his such statement. Therefore, to act on such extra judicial confession is not at all safe.

10) The evidence of PW3, Sri Ratan Mirdha, is to the effect that he had learnt from the co-villagers about the death of the deceased in her house. He went to the house of the accused-appellant and found the dead body of the deceased there. The accused-appellant was arrested by the police. He had come to know, at a later stage, that the accused-

appellant had assaulted the deceased resulting in her death. In his cross-examination, he expressed his lack of personal knowledge about the occurrence.

11) PW4, Sri Ronel Mirdha, is the witness to the inquest of the dead body of the deceased. He deposed that he had come to know from his co-villagers that the deceased had died in her residence. He further deposed that the deceased usually stayed in her residence along with the accused-appellant. He went to the residence of the deceased and found her dead body there. Police had arrested the accused-appellant. He had come to know that the deceased was assaulted by the accused-appellant.

12) The evidence of PW3 & PW4 has no bearing on the decision of this case as none of them has indicated in their evidence as to the source of their information that the accused-appellant had assaulted the deceased. Therefore, their evidence remains hearsay having no evidentiary value.

13) PW5, Dr. Debarshee, is the autopsy doctor. On 15.07.2016, she had performed the postmortem examination on the dead body of the deceased Somari and found as follows.

External Appearance: A female dead body of average built and swarthy complexion with eyes closed and mouth partially opened. Wearing a red colour blouse and brown petticoat. Swelling of the left periorbital area is present. The rigor mortis is found to be present all over the body and the body was cold to touch externally and warm internally.

Injuries:-

1. A contusion of size 3 cm x 2 cm is present in the 6th intercostal space in the mid axillary line on the right side of the chest;
2. A contusion of size 16 cm x 14 cm is present over anterolateral aspect of left arm along with swelling;
3. The left ear lobule is found to be lacerated at places. The margins of the wound are found to be contused and irregular;
4. Sternum is found fractured in its upper one third;
5. 2nd, 3rd, 4th, 5th and 6th ribs are found fractured in the mid clavicular in the right chest;
6. 2nd, 3rd, 4th and 5th ribs are found fractured in the mid calvicular line on the left side of chest.

On examination of cranium and spinal canal: Scalp healthy. Left temporalis muscle found

contused at places. Skull and vertebrae are healthy. Membrane and brain are pale. Spinal cord not examined.

On examination of the abdomen: The superior surface of the liver is found lacerated and the size of the laceration is 6.5 cm x 1 cm x liver parenchyma deep. Spleen was healthy. Kidneys are pale. The bladder mucosa was pale and the bladder cavity was empty. The walls were healthy and on dissection, the abdominal cavity was found to contain 1200 ml liquid and clotted blood. Peritoneum was pale. Mouth, pharynx and oesophagus, mucosa was pale in stomach. Mucosa was pale and the stomach cavity was empty and small intestine, mucosa was pale and contents glue like contents. Large intestine, mucosa was pale and contained gaseous and fecal matters.

Thorax:- Walls as described. Ribs and cartilaged as described. On dissection, the chest cavity was found to contain 400 ml liquid and clotted blood.

Pleurae:- Pleurae were pale and lacerated on the right side at places. Larynx and trachea: mucosa were pale. Right lung was found lacerated and contused at places. Left lung was contused at places. Pericardium was contused at places. Heart was healthy and chambers were found empty. Thoracic vessels were found healthy. Organs of generation externally healthy and internally uterus was empty and healthy. Others were found healthy.

The opinion of the doctor is follows:

Death was due to hemorrhagic shock as a result of the injuries sustained over abdomen and chest as described. All the injuries described were ante mortem and caused by blunt force impact. Approximate time since death 6-12 hours.

14) The evidence of PW6, the investigating officer, is that on 15.07.2016 he had received the FIR from PW1 and thereafter he had investigated into the case. He prepared the sketch-map of the place of occurrence vide Ext. 5. He also caused the inquest of the dead body done by one Executive Magistrate, namely, A. Baruah. He also visited the place of occurrence and sent the dead body of the deceased for postmortem examination. He also found the accused persons at the place of occurrence and arrested him. He recorded the statement of the accused-appellant and after completion of the investigation filed the charge-sheet. He has confirmed in his evidence that the PW2 had made a statement before him that the accused-appellant had told him that on the last night he had given a slap on the body of the deceased following which she fell down.

15) The evidence of the autopsy doctor (PW5) and her opinion show that the deceased had died due to the hemorrhagic shock as a result of the injuries sustained over abdomen and chest and the injuries were ante mortem in nature. There is no evidence adduced by any of the witnesses that the accused-appellant had assaulted the injured on any part of her

body except on ear. From the judgment of the learned trial court, it appears that the conviction of the accused-appellant is based on circumstantial evidence as indicated in paragraph-22 of the impugned judgment. The circumstances, as pointed out by the learned trial court, are,

- i) Last seen together theory,
- ii) Recovery of the dead body of the deceased Somari from the accused person's house; and
- iii) Severe injuries detected on the body.

16) That apart, the learned trial court has also held that since the dead body was found in the house of the accused-appellant and as the accused-appellant and his deceased wife were the only occupants of the house, the accused-appellant is required to furnish an explanation as to under what circumstances the deceased had died.

17) We have already found that the evidence of none of the witnesses has implicated the accused-appellant with the commission of the alleged offence except speaking in unison that the dead body of the deceased was found lying in the house of the accused-appellant.

18) There is no evidence to suggest that the accused-appellant was seen together with the deceased before the occurrence. The fact that the accused-appellant and the deceased usually stayed together in the house do not necessarily mean that on the date as well at the time of occurrence also, they were together. That apart, in the statement of the accused-appellant under Section 313 Cr.PC he had taken the plea that the deceased went out of his house with his permission and he had told her to come back early. Therefore, in the absence of any evidence, it cannot be said with certainty that the accused-appellant and the deceased were together at the relevant time of occurrence in her own house. So far as the injuries sustained by the deceased is concerned, the postmortem examination is contradicted by the Inquest Report (Ext. 2). The inquest report, on perusal, shows that there was no injury over the dead body of the deceased.

19) In **State of Rajasthan v. Kashi Ram (2006) 12 SCC 254**, the Hon'ble Supreme Court has held that the provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person,

the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain.

Reiterating the law laid down in the case of **KanhaiyaLal v. State of Rajasthan**, reported in **(2014) 4 SCC 715**, the Hon'ble Supreme Court, in the case of **Anjan Kumar Sarma vs State of Assam, CrI. App 560/2014**, dated 23.05.2017, held that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.

20) In this case, we have noticed that the circumstances of last seen together theory has not been proved by the prosecution. There is an explanation given in his statement under Section 313 Cr.PC by the accused-appellant that his wife/deceased left the house in the night with his permission. Section 106 Indian Evidence Act does not shift the burden of proof in a criminal trial, which is always upon the prosecution. From the evidence discussed above, we have already found that the prosecution has not been able to discharge its initial burden of proving the case as none of the witness has implicated the accused-appellant except the fact that the accused-appellant was in his house on the date of occurrence and the deceased usually resided with him there in that house. But, there is no evidence to establish that at

the time of occurrence, the deceased was with the accused-appellant in his house. Such fact has to be read in combination with the explanation of the appellant given in his statement under Section 313 Cr.PC. The accused-appellant had stated in his statement that he did not know as to at what time the deceased had come back home after she left the house with his permission. Apart from that, to base conviction on circumstantial evidence there has to be a consistent chain of circumstantial pointing unerringly to the guilt of the accused. But, here in this case we have not found any circumstance, except the evidence that the accused-appellant and the deceased usually stayed together in their house. For this circumstance only, in spite of failure on the part of the prosecution to discharge its initial burden to prove the case, we are unable to persuade ourselves to hold the accused-appellant guilty of commission of murder of the deceased taking refuge of the provisions of Section 106 of the Indian Evidence Act.

- 21) In view of the above, we do not find that the conviction of the accused-appellant is based on evidence on record. Therefore, he deserves acquittal on benefit of doubt.
- 22) Accordingly, the appeal is allowed.
- 23) The accused-appellant be set at liberty forthwith.
- 24) Issue release order accordingly.
- 25) This court records its appreciation for the assistance rendered by learned Amicus Curiae. The learned Amicus-curiae be paid an amount of Rs. 7,500/- as remuneration.
- 26) Send down the LCR along with a copy of this judgment.
- 27) Also send a copy of the judgment to the Superintendent of Central Jail, Dibrugarh, for furnishing to the accused-appellant.

JUDGE

JUDGE

Comparing Assistant