

(2022) 11 GAU CK 0026

Gauhati High Court

Case No: Criminal Appeal (J) No. 1 Of 2019

Ayub Hussain @ Ayub  
Ali

APPELLANT

Vs

State Of Assam

RESPONDENT

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Date of Decision: Nov. 17, 2022

Acts Referred:

- Indian Penal Code, 1860 - Section 302
- Code Of Criminal Procedure, 1973 - Section 161, 164, 313
- Evidence Act, 1872 - Section 25, 26

Hon'ble Judges: Suman Shyam, J; Mitali Thakuria, J

Bench: Division Bench

Advocate: Mrinmoy Dutta, B. Bhuyan, J. Das

Final Decision: Dismissed

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### Judgement

Suman Shyam, J

1. Heard Mr. Mrinmoy Dutta, learned Amicus Curiae appearing for the appellant. We have also heard Ms. B. Bhuyan, learned senior counsel and

APP, Assam, assisted by Mr. J. Das, appearing on behalf of the State of Assam. None has appeared on behalf of the respondent no. 2.

2. By the impugned judgement dated 28/09/2018 passed by the learned Additional Sessions Judge, Bajali, Pathsala in sessions case No. 102/2017, the

sole appellant was convicted under Section 302 of the IPC for committing the murder of his minor daughter and sentenced to undergo rigorous

imprisonment for life and also to pay fine of Rs. 5000/-, in default, to undergo simple imprisonment for one year.

3. The brief facts and circumstances of the case, leading to filing of this appeal, are as follows :-

4. On 24/07/2016, Ms. Asma Khatun i.e. the wife of the accused/appellant and the mother of the victim had lodged an ejahar before the Officer-in-

Charge, Bhawanipur Police Out Post reporting that at around 7-45 a.m. on that day, the accused took her daughter Suhana Akhtar (aged 2.5 years) to

the nearby shop telling that he would buy her some biscuit and killed the child on the way by stabbing her on the chest with a sharp weapon.

Thereafter, the accused had injured himself pretending to have attempted suicide.

5. Based on the ejahar dated 24/07/2016 pertaining to the Bhawanipur Out Post GDE No. 516, Barpeta Police Station case No. 1482/2016 was

registered under Section 302 of the IPC. The matter was then taken up for investigation by the Police. On completion of investigation, I.O. had

submitted charge sheet against the accused Ayub Hussain @ Ayub Ali under Section 302 of the IPC for committing the murder of his minor daughter

Suhana Akhtar. Based on the charge sheet submitted by the Police, the learned trial Court had framed charge against the accused/appellant under

section 302 of the IPC, which was read over and explained to the accused persons, to which, he had pleaded not guilty and claimed to be tried.

6. During trial, the prosecution side had examined as many as 14 witnesses including the informant Ms. Asma Khatun (PW-2), the doctor who had

conducted the Post-Mortem examination on the dead body (PW-1) and the IO, who had carried out investigation and submitted charge sheet (PW-14)

in the case. Thereafter, the statement of the accused/appellant was recorded under Section 313 of the Cr.P.C., wherein, the accused had denied all

the incriminating circumstances put to him. The appellant/accused, however, did not adduce any evidence although he was offered opportunity to do

so.

7. On conclusion of trial, the learned Additional Sessions Judge, Bajali, Pathsala, had found that the charge brought against the accused/appellant was

proved beyond reasonable doubt. Accordingly, the learned trial Court had convicted the appellant/accused under section 302 IPC and sentenced him in

the manner indicated herein above. Being aggrieved by the impugned judgement dated 28/09/2018, the appellant has preferred the instant appeal.

8. By referring to the impugned judgement, Mr. M. Dutta, learned Amicus Curiae, appearing for the appellant, has argued that save and except the testimony of PW-2, there is no other evidence available on record which implicates the appellant/accused in this case. In view of the fact that some of the villagers have deposed before the Court by stating that they have heard that it could be either the appellant or his wife i.e. the PW-2 who might have killed the child and in view of the explanation furnished by the accused/appellant while recording his statement under Section 313 Cr.P.C. by stating that it was his wife i.e. the PW-2, who had killed the child and assaulted him with a "Chaku" and later on, got married with another boy with whom she was having illicit relationship, there is a genuine doubt arising in this case as to the true identity of the culprit. As such, Mr. Dutta has argued that it is a fit case where the appellant/accused deserves to be acquitted by giving him the benefit of doubt. It is also the submission of Mr. Dutta that notwithstanding the explanation furnished by the accused/appellant, the learned trial Court has failed to deal with the same in the correct perspective. Hence, the impugned judgement and order dated 28/09/2018 is unsustainable in the eye of law. In support of his above argument, Mr. Dutta has relied upon the law laid down by the Hon<sup>ble</sup> Supreme Court in the case of Reena Hazarika Vs. State of Assam reported in (2019) 13 SCC 289.

9. Ms. B. Bhuyan, learned APP, Assam, appearing for the State, on the other hand, has argued that the PW-2 has seen the occurrence and therefore, she is an eye witness to the occurrence. Contending that the testimony of the PW-2 is not only consistent with her statement recorded by the Police under Section 161 of the Cr.P.C. but the same is also free from contradiction. As such, submits Ms. Bhuyan, PW-2 can be treated as a sterling witness in this case. In that view of the matter, she submits, the learned trial Court has rightly relied upon the testimony of PW-2 to hold the appellant guilty of the murder charge brought against him. Ms. Bhuyan further submits that the instant appeal is devoid of any merit and is liable to be dismissed by this Court. In support of her above arguments, Ms. Bhuyan has relied upon a decision of the Supreme Court rendered in the case of Santosh Prasad alias Kumar Vs. State of Bihar reported in (2000) 3 SCC 443.

10. We have considered the submissions advanced by the learned counsel for both the sides and have also gone through the materials available on record.

11. At the very outset, it deserves to be mentioned herein that the PW-2 Mustt. Asama Khatun i.e. the mother of the victim and the wife of the appellant has deposed before the Court stating that she had seen the occurrence. The learned trial Court has also treated her as an eye witness. There is nothing on record to dispute the said position. Therefore, this is a case based on direct evidence produced by the prosecution.

12. In her testimony, the eye witness (PW-2) has stated that the accused Ayub Hussain @ Ayub Ali is her husband and the deceased Suhana Akhtar, who was 2.5 years old at the time of the occurrence, was her daughter. Suhana Akhtar was the only child born out of their wedlock. At the time of the occurrence, she was with her husband in her matrimonial home at Purabharal, PS- Barpeta. PW-2 has further deposed that about four days before the incident, her husband had picked up a quarrel with her, demanding money to be brought from her parental home. On the day of the occurrence i.e. on 24/07/2016, at about 7 a.m. in the morning, while she was sitting inside her house with her child on her lap, the accused/appellant had forcefully taken away her child Suhana Akhtar and gone out of the house by saying that he would purchase her some biscuits. But she suspected ill motive on the part of her husband and, therefore, followed him. After leaving the courtyard of their house, when the accused had reached the road, immediately thereafter, being armed with a "dagger", the accused had stabbed her child three times on the chest and in the stomach, in front of her eyes, as a result of which, the child had fallen down on the road. She had raised "hulla" and picked up her injured daughter and ran towards the hospital. However, suddenly, she fell down along with her injured child and realized that the child was dead. Blood was oozing out from the injuries of the child. She became senseless on the road. Someone had brought her to the house along with the dead child. PW-2 has further stated that there was a huge gathering in her house and after some time, Police came there along with the dead body of the child brought from the hospital. On that

very day, she had lodged an ejahar with the Police. This witness has also stated that just after the occurrence, the accused fled away.

13. During her cross-examination, PW-2 had stated that she was living in her matrimonial house along with her husband,

child, mother-in-law, father-in-law, brother-in-law and nephew. At the time of the occurrence, her in-laws were in the house and her father-in-law and

brother-in-law were sitting in the courtyard. The neighbours were residing far away from her matrimonial house. There is an Anganwadi Centre and

one Mosque nearby and the place of occurrence was just near her house, in the back side. The witness has denied the suggestion made by the

defence counsel to the effect that at the time of the occurrence, she was not in her house with the child in her lap and that the accused person did not

take away the child from her nor did he stab the child with a dagger.

14. PW-1 Dr. Nabajit Barman was posted as Demonstrator in the department of Forensic Medicine, Fakaruddin Ali Ahmed Medical College and

Hospital (FAAMCH), Barpeta on 24/07/2016 when the dead body of the victim Suhana Akhtar was brought there for conducting Post-mortem

examination. Upon conducting the post-mortem examination on the dead body, the following injuries were noticed :-

“Injury:

(1) A spindle shaped stab wound of size 2.5 CM x 1 CM is present over front of left side of chest at the level of nipple, 4 cm away from midline. The

margins of the wound are clean cut and inverted. The direction of the wound is from left to right side, below upward. The skin, underlying intercostals

muscles, 3rd and 4th rib (left side), Pericardium and heart are clean cut.

(2) A spindle shaped incised wound of size 2 cm x 1 cm X muscle deep is present over front of the left side of the chest. 2 cm above the nipple and 5

cm away from midline.”

15. According to the Doctor, death was due to “hemorrhagic” and “shock” as a result of injury sustained, as described. All injuries were

antemortem, caused by pointed sharp cutting weapon which were homicidal in nature.

16. Md. Nasirul Haque is known to the informant and the accused and was examined as PW-3. This witness has deposed that on the next day of the

occurrence, when he went to Bhawanipur Panchayat Office, he had noticed a gathering at the Bhawanipur Out-post. He went there and saw that accused Ayub Ali had been arrested and the Police was interrogating him as regards the manner in which he had killed his child. According to PW-3, the accused had told the Police that he had been quarreling with his wife and thereafter, he had snatched away the child from the lap of the informant and stabbed her with the help of a "Chaku"™ leading to her death. The Police had recorded his statement.

17. PW-4 Julhas Badsa had also stated that he had heard the accused confess before the Police about committing the murder of his child. PW-7 Md.

Moinul Ali has also deposed in similar lines. However, what is significant to note herein is that the alleged confession made by the accused/appellant,

brought on record by the PWs 3, 4 and 7, were apparently made inside the Police Station and that too, when the accused was in Police custody.

Therefore, the above testimony of PWs- 3, 4 and 7 would be inadmissible as evidence in the eye of law in view of provisions of Section 25 and 26 of the Indian Evidence Act.

18. PW-5 Jainal Abedin, PW-9 Md. Kobbat Ali, PW-10 Md. Saidul Islam, PW-11 Md. Najrul Islam, PW-12 Md. Jiaur Rahman and PW-13 Md.

Abdul Motalib, have all deposed before the Court that they had heard about the incident. They have stated that on being asked, the villagers told them

that the accused had killed his daughter. These witnesses have also stated that some people had told them that the wife of the accused i.e. the PW-2

had killed her daughter. All these witnesses had been declared as hostile witnesses during trial at the instance of the prosecution. What would,

however, be significant to note therein that none of these witnesses had seen the occurrence nor did they have any personal knowledge as to who had

inflicted the injuries upon the victim Suhana Akhtar but had only heard about the occurrence from some person whom they had failed to identify. As

such, the testimony of these witnesses, viewed from any angle, would be of "hearsay" nature and, hence, would not be admissible in the eye of

law.

19. PW-8 Md. Ayub Nabi is the Gaonburah of Potagaon village. He knew the accused person very well. PW-8 has deposed that he is a resident of

Purabharal Gaon. About a year back, Mijarul Haque of Purabharal Gaon had informed him over phone that the accused had killed his daughter and had also caused injury to himself. Hearing the news, he came to the residence of the accused and saw that Police and neighbours were there. He also saw the dead body of the daughter of the accused and the injuries on her chest. Police took away the dead body. Before he had reached the spot, the Police had conducted inquest on the dead body. Ext. 2 is the inquest report which carries his signature Ext. 2(1).

20. PW-14 Sri Abhijit Kumar Baruah was discharging his duties as the In-charge Officer of Bhawanipur Police Out Post on 24/07/2016 when he had got the information over phone from Purabharal Gaon at about 8-30 a.m. that one Ayub Ali son of Jul Hussain had killed his own 2 ½ years old female baby with a dagger. PW-14 has deposed that on receipt of such information, he had made GD Entry No. 506 dated 24/07/2016 and thereafter, visited the place of occurrence. On reaching Purabharal Gaon, he went to the house of the informant and the accused and saw the dead body of Suhana Akhtara i.e. the daughter of the accused which was lying in the courtyard, covered with a piece of cloth. The dead body had injuries on the chest and blood was oozing out from the nose. There were stains of blood near the naval and left leg. The child was wearing an orange colour half pant. On making inquiry, he came to know that accused Ayub Ali i.e. the father of the deceased had killed her with a sharp weapon. He drew a sketch map of the place of occurrence, conducted inquest over the dead body and recorded statement of the witnesses. He had also sent the dead body for post-mortem examination so as to ascertain the cause of death. PW-14 has further stated that he also came to know that the accused had inflicted injury upon himself with a dagger and his brother had taken him to the FAAMCH, Barpeta for treatment. He went to FAAMCH, Barpeta to enquire about the accused and then came to know that the accused had been admitted. As such, he could not interrogate the accused but having found sufficient materials against the accused, he had made arrangements for providing security at the hospital. On that very night, he had received an ejahar from the informant which was forwarded to Barpeta Police Station. Based on the FIR, Barpeta Police Station case no. 1482/2016 was

registered under Section 302 of the IPC. On completion of investigation, he had submitted charge sheet against the accused. PW-14 has also stated

that on receiving the information that the accused has been discharged from the FAAMCH, Barpeta on the next day, he immediately went there and

apprehended the accused and thereafter, brought him to the Police Outpost. During interrogation, accused Ayub Ali had confessed before him that he

had killed his daughter. However, the accused had refused to record his confessional statement under Section 164 Cr.P.C. before a Magistrate.

21. During his cross examination, the PW-14 had admitted that witness Asma Khatun(PW-2) did not state before him that she had been tortured by

the accused since four days prior to the occurrence; that witness Nasirul Haque (PW-3) did not state before him that on the next day of the

occurrence, he went to Bhawanipur Panchayat Office; that witness Ajaharuddin (PW-6) did not state before him that on the next day of the

occurrence he had gone to Bhawanipur Panchayat Office along with his friend; that witness Mainul Ali (PW-7) did not state before him that the

accused had confessed that he had committed wrong and as such, he should do as he like; that witness Ayub Nabi (PW-8) did not state before him

that while he was in the house, Jiarul told him over phone about the occurrence; that PW-5 Jainal Abedin did not state before him that he had heard

that accused Ayub Ali killed his minor daughter aged about 2 ½ years and in that regard there was a "hulla" in the entire area of their village

and then he went to the house of the accused and came to know that there was a quarrel between the accused and his wife and the accused took

away the child from the lap of his wife and killed her with a "dagger"; that Kobbat Ali (PW-9) did not state before him that accused Ayub Ali

had suspected the informant and knowingly stabbed his daughter Suhana Akhtar, as a result of which, she died. In his cross-examination, the PW-14

has also made similar statement pertaining to PWs 10, 11, 12 and 13, which are not of much significance in this case and therefore, discussion thereof

is not deemed necessary.

22. From a careful analysis of the evidence available on record, we find that the prosecution case is primarily based on the testimonies of PWs. 1, 2

and 14. However, the evidence adduced by PW-8 also has some relevant bearing in this case. From the testimony of PW-1, it is established beyond

doubt that the victim Suhana Akhtar had suffered a homicidal death due to multiple injuries inflicted on her body by a sharp weapon.

23. PW-2, who is the mother of the victim, in her testimony has narrated in details, the manner in which the incident took place. The evidence of PW-

2, as discussed herein above, not only appears to be consistent and free from contradiction but the same is also in conformity with her statement

recorded under Section 161 Cr.P.C. During her cross-examination, this witness could not be shakened.

24. In the case of Santosh Prasad @ Santosh Kumar (Supra), the Supreme Court has observed that the testimony of a sterling witness is of high

quality and, therefore, would be unassailable. Having regard to the nature of evidence adduced by the PW-2, we have no doubt in our mind that she

had not only seen the occurrence but had also truthfully deposed about the incident before the Court. The evidence of PW-2 appears to be of a

sterling quality and, therefore, found to be trust worthy and acceptable by the Court. We are, therefore, of the opinion that the learned trial Court was

correct in placing reliance on the testimony of PW-2.

25. From the evidence of PW-2, it is firmly established that on the date of the occurrence, it was none other than the accused/appellant, who had

taken away the victim girl from the lap of her mother i.e. the PW-2 and thereafter, killed the child by inflicting grievous injuries on her body with sharp

weapon just outside the house and on the road. The incident was seen by the PW-2. When she tried to take the child to the hospital, she fainted on the

road and later on, was taken to her home by someone. The evidence adduced by the PW-2 also goes to show that the accused had carried with him, a

sharp weapon, when he had left the house along with the child and therefore, an element of pre-meditation on the part of the accused to commit an

offence punishable under section 302 IPC is also well established from the materials brought on record.

26. The accused did not adduce any evidence. However, in his statement recorded under Section 313 Cr.P.C., the accused had stated that his wife

Asma Khatun had an illicit relationship with one boy and when he asked her about the same, then there was a quarrel. Thereafter, she had killed her

daughter Suhana Akhtar and had also assaulted him with a "chaku", as a result of which, he had sustained injuries. So, the accused has also

admitted that soon before the occurrence, he had a quarrel with his wife. Such statement of the accused fits into the prosecution story that a quarrel

between the accused and his wife had taken place just before the occurrence, thereby lending further credence to the prosecution case.

27. The learned trial Court had also dealt with the above explanation of the accused in paragraph 29 of the judgement dated 28/09/2018 and held that

the stand of the accused was merely to shift the allegation to his wife which was not supported by any material available on record. We find ourselves

in agreement with such view expressed by the learned trial Court. The explanation furnished by the accused, apart from being wholly improbable, also

does not fit into the facts and circumstances of the case, which is established on the basis of cogent evidence available on record. The accused has

not given any particulars about the manner in which or the place in which, the wife (PW-2) had allegedly killed the child or attacked him. It is also not

understandable as to why, a mother would kill a child merely because her husband had suspected her of having an illicit relationship with another

person. Rather, viewed from any angle, it is most likely that suspecting illicit relationship of his wife with another person, it is the husband who would

kill the child treating her to be the out-come of the illicit relationship maintained by his wife. Under such circumstances, the explanation furnished by

accused appears to be highly improbable and, therefore, had been rightly rejected by the learned Court below. Be that as it may, since the learned trial

Court has dealt with the explanation furnished by the appellant/accused and rejected the same by recording proper reason, we are of the opinion that

the ratio laid down in the case of Reena Hazarika (Supra), in so far as the duty of the Court to consider the explanation of the accused furnished

under Section 313 Cr.P.C. is concerned, has been duly met in this case.

28. Mr. M. Dutta, learned Amicus Curiae, has made an attempt to convince this Court that due to the failure on the part of the prosecution to examine

the in-laws of the informant (PW-2), who were present in the courtyard at the time of the occurrence, the prosecution case suffers from fatal defect,

inasmuch as, there is no explanation for not examining the material witnesses who could have easily corroborated the version of PW-2. In support of

his above argument, Mr. Dutta has relied upon a decision of the Supreme Court rendered in the case of Joginder Singh Vs. State of Haryana reported

in (2014) 11 SCC 335.

29. Although the above arguments of Mr. Dutta, learned Amicus Curiae, appears to be attractive, yet, on a deeper analysis of the facts and

circumstances of the case, we are unable to accept the same for the following reasons :-

(i) Firstly, this is a case based on direct evidence viz. the eye witness account of the PW-2 and not a case based on circumstantial evidence. If the

evidence of the eye witness is found to be trust worthy and free from contradiction than the Court would be wholly justified in basing the conviction on

the testimony of such eye witness. In such a case, the burden of the prosecution to establish each link in the chain of circumstances by adducing

evidence would be considerably lessened.

(ii) Secondly, the "in-laws" of the informant were not present in the place of occurrence i.e. the road where the incident took place and therefore,

they were not eye witnesses to the occurrence. Those persons could have at best testified as to whether the appellant and the informant were at

home on the date of the occurrence and if so, was there a quarrel between them and also did the accused take the child with him before the

occurrence. The said facts have, however, been finally established from the other evidence already available on record and, therefore, we are of the

opinion that non-examination of the inmates (in-laws) of the matrimonial home of the informant would not cause any serious dent in the prosecution

case. While it was desirable that the prosecution had examined these persons as witnesses, yet, it would always be open for the prosecution to decide

on the quality and quantity of evidence that they wish to lead in order to establish the charge and this Court cannot comment on such aspect of the

matter, as long as it is found that the charge has been proved beyond reasonable doubt based on the evidence brought on record.

30. Having regard to the nature of evidence brought on record, we are convinced that it was none other than the appellant/accused who had brutally murdered his 2½ years old baby girl with a sharp weapon due to a quarrel arising between himself and his wife out of suspicion of illicit affair maintained by the wife with another person. As such, we find ourselves wholly in agreement with the conclusion drawn by the learned trial Court that the charge brought against the accused/appellant u/s. 302 IPC stood established beyond reasonable doubt.

31. In the result, this appeal fails and is hereby dismissed.

Send back the LCR.

Before parting with the case record, we wish to put our appreciation on record as regards the valuable assistance rendered by Mr. Mrinmoy Dutta, learned Amicus Curiae and recommend that just remuneration, as per the notified rate, be paid to him.