(2025) 12 GAU CK 0069

Gauhati HC

Case No: Crl.A. Of 288 Of 2022

Billal Hussain		APPELLANT
	Vs	
State Of Assam And Anr		RESPONDENT

Date of Decision: Dec. 5, 2025

Acts Referred:

- Indian Penal Code, 1860- Section 34, 302, 304(B)
- Code of Criminal Procedure, 1973- Section 161, 164, 216, 217, 313
- Evidence Act, 1872- Section 106

Hon'ble Judges: N. Unni Krishnan Nair, J; Michael Zothankhuma, J

Bench: Division Bench

Advocate: H.RA. Choudhury, I.U. Choudhury, B. Bhuyan, R. Das

Final Decision: Disposed Of

Judgement

Michael Zothankhuma, J

1. Heard Mr. H.R.A. Choudhury, learned Senior Counsel assisted by Mr. I.U. Choudhury, learned counsel for the appellant. Also heard Ms. B. Bhuyan, learned Senior Counsel and Additional Public Prosecutor, Assam assisted by Ms. R. Das, learned counsel for the State respondent.

2. This appeal is directed against the judgment dated 26.09.2022 passed by the learned Sessions Judge, Kokrajhar, in Sessions Case No.54/2017, convicting the appellant under Section 302 IPC for killing his wife by strangulation and sentencing him to undergo rigorous imprisonment for life and to pay a fine of Rs.5,000/-, in default simple imprisonment for 6 (six) months.

3. The prosecution case is that Prosecution Witness (PW) No.1 submitted an FIR dated 27.03.2015, stating that his niece (victim) had been married to the appellant about 2 years back and a baby girl had been born to them. The appellant thereafter, in collusion with his father and two uncles, started torturing the victim mentally as

well as physically. Further, the appellant and Md. Rashid Ali, who is the brother of the appellants father, had killed his niece and fled, leaving her body inside the house of the appellant. Around 7:00 a.m. on 27.03.2015, the appellants father had informed him over mobile that the victim had been killed. On reaching the place of occurrence, PW-1 found the victim dead, with blood coming out from her nose and mouth.

4. Pursuant to the FIR, Kokrajhar P.S. Case No.390/2015 under Section 304 (B) IPC was registered.

5. PW-9 was thereafter entrusted with investigation of the case. After investigation of the case by PW-9, the second Investigating Officer, i.e. PW-11, submitted a Charge-sheet against the appellant and his father Sahadat Ali under Section 304(B) IPC.

6. The learned Trial Court thereafter framed charge under Section 304(B)/34 IPC against the appellant and his father Md. Sahadat Ali on 02.06.2017, to which they pleaded not guilty and claimed to be tried. The learned Trial Court then examined 11 Prosecution Witnesses (PWs) and 2 Defence Witnesses (DWs). The examination of the appellant and his father was also done under Section 313 Cr.P.C.

7. After the evidence of all the witnesses had been taken and the appellant had been examined under Section 313 Cr.P.C, charge was altered by the learned Trial Court on 05.09.2022, from Section 304(B)/34 IPC to Section 302/34 IPC against the appellant and his father, to which they pleaded not guilty and claimed to be tried. The learned Trial Court in its order dated 12.09.2022 thereafter recorded the following :

Accused persons are present Seen the petition filed by learned counsel for the accused stating that the accused persons are not willing to cross-examine the prosecution witnesses after alteration of charge and requesting to proceed with the case. Hence PWs need not be recalled.

Reheard both sides.

Fixing : 26.09.2022 for judgment

8. Thereafter the learned Trial Court passed the impugned judgment by coming to a finding that there was no culpability established with respect to the co-accused Sahadat Ali (father of the appellant) having killed the deceased. On the other hand, the learned Trial Court held that the prosecution had been able to prove beyond all reasonable doubt that the appellant had killed his wife. The appellant was accordingly convicted under Section 302 IPC and sentenced to undergo imprisonment as stated earlier.

9. The counsel for the appellant submits that when a Charge is altered from a less serious charge to a more serious charge, after examination of the witnesses and examination of the accused under Section 313 Cr.P.C, it was the duty of the Court to

give opportunity to the appellant to make a defence against the altered charge. However, the same had not been done in the present case.

10. The second ground of challenge to the judgment of the learned Trial Court is that there was no incriminating materials/evidence found against the appellant, for the learned Trial Court to have come to a finding that the appellant was guilty of the crime of killing his wife, inasmuch as, his presence was nowhere established in the place of occurrence at the relevant point of time. He accordingly submits that when there is nothing to show that the appellant was guilty of having killed his wife, the impugned judgment would have to be set aside.

11. Ms. B. Bhuyan, learned Addl. P.P., on the other hand, submits that the appellant was given opportunity to cross-examine the witnesses after the charge had been altered. As the appellant had declined the offer to cross-examine the witnesses afresh, no prejudice can be said to be caused to the appellant with the alteration of charge. She also submits that though there is no evidence to show that the appellant was at the place of occurrence at the time when his wife died, the very fact that the appellant had remained untraceable for approximately 15 days and had surrendered himself before the police on 13.04.2015, goes to show that the appellant was guilty of the crime. The absence of the appellant for more than 2 weeks even after the death of his wife, lends credence to the theory that the appellant had a hand in the killing of his wife. Further, the evidence of PW-9 (Investigating Officer) is to the effect that the appellant had confessed after he gave himself up to the police, that he had killed his wife, as he had allegedly seen his wife with another person in a compromising position.

12. We have heard the learned counsels for the parties.

13. A perusal of the evidence of the prosecution witnesses does not give any indication or inference that the appellant had anything to do with the death of his wife by strangulation or otherwise. Though it is highly suspicious that the appellant was not seen at the time of his wifes death or afterwards, in around the village and his house for around 15 days until he surrendered to the police, there is no direct or circumstantial evidence pointing to the guilt of the appellant. Though an inference could be raised that the appellant might have known the cause of death of his wife, no foundational facts in that direction has been proved by any of the PWs before the learned Trial Court in their testimony.

14. The evidence of PW-1, who is the informant and the uncle of the deceased, is to the effect that the appellant had killed the deceased and that the appellant had tortured the deceased. He however could not say how his niece was killed.

15. The evidence of PW-2, who is the grandfather of the appellant, is to the effect that the deceased married the appellant and they lived peacefully for 2 years. He also stated that the appellant tortured the victim and the appellant disliked the victim. He also stated that he did not know how the victim died.

16. The evidence of PW-3 & PW-4 is to the effect that they do not know how the victim died.

17. The evidence of PW-5 is to the effect that he had heard a hue and cry from the house of Sahadat Ali, father of the appellant. On rushing there, he saw the dead body of the deceased on the ground and he did not see any injury marks on the dead body. He saw Sahadat Ali (father of the appellant), but the appellant was not there at that time. PW-5 stated that he did not know the reason as to how the victim died.

18. The evidence of PW-6, who is the grandfather of the deceased, is to the effect that the appellant used to torture the deceased physically and mentally. A Bichar (village meeting) was also held in the village in this regard. On the day of the occurrence, his nephew Basha had visited his house and informed him that the appellant had killed the deceased. On visiting the place of occurrence, he saw the deceased and blood was coming out from the mouth of the deceased. There is no prosecution witness (Basha), who originally told PW-6 that the appellant had murdered the deceased. The closest prosecution witness that could be identified as Basha is PW-1, whose name is Badsha Mondal. However, the evidence of PW-1 clearly shows that he did not see the incident and there is nothing to show that he saw the appellant at the place of occurrence.

19. The evidence of PW-7, is to the effect that at about 5 a.m. about 2 years ago, Sahadat Ali (father of the appellant) had come to his residence and invited him to go to his house, telling him that some serious incident had occurred in his house. On going to the house of Sahadat Ali, he saw the dead body of the deceased. PW-7 further stated that the deceased was his niece. Thereafter, he returned home.

20. The evidence of PW-8 is to the effect that he had heard about death of the deceased. However, he did not know how she had died.

21. PW-9 in his examination-in-chief stated as follows :

On 27.03.2015 I was working at Kokrajhar police station as attached officer. On that day the Officer-in-charge, Kokrajhar police station received an information about the death of a woman namely Asma and accordingly I visited to the place of occurrence. A vehicle was sent to Kokrajhar P.S. with dead body for postmortem. I recorded the statement of witnesses at the place of occurrence. It has come to knowledge that she got married to accused Billal. Thereafter, it has come to notice that her husband and father-in-law of deceased used to torture her mentally and physically demanding dowry and she was murdered by the accused persons. Accused Sahadat Ali was arrested and forwarded before the Court. Postmortem and inquest were done accordingly. Accused Billal surrendered before the police station and he also confessed that he saw his wife along with other person in a compromising situation for which he gave a blow on her body and strangulated her and committed murder. After collection of postmortem report I got my transfer

order and I handed over the case diary to O/C, Kokrajhar P.S.

22. This Court has gone through the Trial Courts records and surprisingly we do not find any statement made by the appellant before the police under Section 161 Cr.P.C. Thus, we are surprised as to how PW-9 could have come up with the said statements in his testimony, when there is nothing to show that the appellant had made any statement to PW-9, prior to the recording of the testimony of PW-9. It is also surprising that PW-9 had not taken the appellant before a Magistrate to record his confession under section 164 Cr.P.C., when he had allegedly surrendered in the police Station and had confessed to the Police that he had killed his wife, on seeing her with another person in a compromising position. It is surprising that no investigation was carried out by the Police, to find out the person with whom the deceased was allegedly seen in a compromising position by the appellant, as testified by PW-9. Further, though PW-9 in his testimony stated that the appellant and his father tortured the deceased mentally and physically demanding dowry, no prosecution witness has testified that the appellant and his father demanded dowry from the deceased. As such, when there is nothing to substantiate the statement made by PW-9, it is not understood as to how PW-9 could have made such statement. Further, PW-9 has completely failed to investigate the alleged statement made by the appellant that he had killed the deceased, as the deceased was seen in compromising position with another person. The statements made by PW-9, in our view, completely lacks credence and as such, cannot be taken seriously, when there has been such lapses in the investigation.

23. The evidence of PW-10, who is the Medical & Health Officer at RNB Civil Hospital, Kokrajhar, is to the effect that he performed post-mortem examination on 27.03.2015 on the deceased. He found laceration and bruises on the dead body and in his opinion, death was due to strangulation. The extract of the testimony of PW-10 is as follows :-

Rigor mortis is present. Bruise over right and left maxillary region. Bruise over right upper eyelid. Lacerated wound over nose approximately 2cm X 0.5 cm in size. Blood and clots seen in both nostrils. Bruise seen in lower back. Bruise over anterior aspect and both sides of neck. Another injury over hyoid bone was seen and fracture of trachea and larynx. In my opinion, the cause of death is asphyxia due to manual strangulation (trothing) it is ante mortem in nature and time since death is 12-24 hours. On being cross-examined by the Court, PW-10 stated that some bruises which were seen, also suggested some physical assault.

24. The evidence of PW-11, who is the second investigating officer, is to the effect that he had submitted the Charge-sheet against the appellant and his father Sahadat Ali under Section 304(B) IPC.

25. The evidence of DW-1 is to the effect that the co-accused Sahadat Ali and his other family members had told him that the appellant had gone to Guwahati about

10 days back and had not returned.

26. The evidence of DW-2, is to the effect that the parents of the appellant had told him that the appellant had gone to Guwahati for work about 15 days back.

27. The evidence of DW-1 & DW-2 shows that the appellant has taken the plea of alibi, to show that he had no involvement with the death of his wife, as he was allegedly away from his village at the relevant point of time.

28. The examination of the appellant under Section 313 Cr.P.C is to the effect that the deceased was his wife and he never misbehaved with her or assaulted her. The answers to the other questions basically amount to a blanket denial of having anything to do with the death of the deceased.

29. A perusal of the impugned judgment shows that the learned Trial Court was of the view that the appellant was in the village and that the evidence of DW-1 and DW-2 that the appellant was not in his village at the relevant point of time, was not to be believed. As such, the learned Trial Court held that it could not be ruled out that the appellant was at the place of occurrence at the relevant point of time. As the appellant could not offer any satisfactory explanation as to how the deceased had died, even after setting up a false plea of alibi, besides the defence not being able to dislodge the prosecution evidence that the appellant used to mistreat and torture the deceased, the prosecution had been able to prove the guilt of the appellant beyond all reasonable doubt.

30. On considering the reasoning given by the learned Trial Court for convicting the appellant, we find that just because the appellant might have mistreated and tortured the deceased at an earlier point of time, does not automatically prove that the appellant had killed his wife. The very presence of the appellant at the time of occurrence of the incident not having been proved, we are unable to convince ourselves that the appellant can be impliedly held to be guilty, only because the appellant was a resident of the house in which the deceased had died and that he had set up a false plea of alibi. Further, there is no definite proof that the appellant was not in Guwahati at the relevant point of time.

31. The evidence of PW-5, is to the effect that when he rushed to the house of the deceased, he saw the deceased lying on the ground and he also saw co-accused Sahadat Ali. As such, the burden of proving the fact of death of the deceased, would lie especially with co-accused Sahadat Ali, as the same would/could be within the knowledge of Sahadat Ali, in terms of Section 106 of the Indian Evidence Act, 1872. However, there has been no attempt made by the police, to find out as to how the death of the deceased had occurred. There is also no evidence adduced, to show that the appellant was present at the time of death of the deceased, for which Section 106 of the Evidence Act would/could have been made applicable to the appellant. The mistreatment and torture of the deceased by the appellant in the past, does not prove that he had caused the death of the deceased, even though

there is a likelihood of the appellant having caused the death of the deceased.

32. In the case of Pritinder Singh Vs. State of Punjab, reported in (2023) 7 SCC 727, the Supreme Court held that however strong a suspicion may be, it cannot take place of proof beyond reasonable doubt.

33. The absence of the appellant from the village during the death of his wife for around 15 days implies that the appellant could be/was aware that his wife had expired, as the needle of suspicion points towards the appellant and a grave suspicion lurks that he may have something to do with his wifes death. However, as held by the Supreme Court, suspicion cannot take the place of proof, especially when the person seen at the place of occurrence during the relevant point of time was Sahadat Ali, who has been acquitted and not the appellant.

34. The above being said, there is no circumstantial evidence to prove the involvement of the appellant, except to the extent that he was not heard or seen for 15 days after his wifes death, which ended with his alleged surrendering before the police. However, there is nothing to show that the appellant had surrendered in the police, as it is only the word of the case I.O. (PW-9). Further, the evidence of PW-9 that the appellant had confessed to his crime is nowhere recorded by the case I.O. in his case diary. In the absence of the above, we would have to see as to whether the evidence/circumstantial evidence is complete, which leaves out every other hypothesis except the fact that the appellant is guilty. In this respect, we would have to see whether the circumstantial evidence falls within the conditions laid down by the Supreme Court in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra, reported in (1984) 4 SCC 116 and in the case of Shivaji Sahabrao Bobade Vs. State of Maharashtra, reported in (1973) 2 SCC 793, which is reproduced in para 16 of Pritinder Singh (supra), as follows:-

16. We may gainfully refer to the following observations of this Court in Sharad Birdhichand Sarda [Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116 : 1984 SCC (Cri) 487] : (SCC p. 185, paras 153-54)

153. 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 [Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033] where the following observations were made : (SCC p.

807, para 19)

19. 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.

35. On considering the circumstantial evidence against the parameters laid down in Sharad Birdhichand Sarda (supra), we find an incomplete chain of circumstantial evidence against the appellant. We are, thus, of the view that the hypothesis on the basis of which the learned Trial Court has convicted the appellant, does not show that it is only the appellant that could have committed the crime.

36. Another issue to be considered is whether section 106 of the Evidence Act is attracted to the present case. The evidence shows that the appellant and his wife were living in the appellant fathers house with the appellants father. The incident having occurred inside the four walls of the house, it was expected that the appellant and his father would have special knowledge of the cause of death of the deceased. However, to attract section 106 of the Evidence Act, the foundational facts have to be proved against the appellant. The presence of the appellant at the place of occurrence at the relevant time have, as stated earlier, not been proved.

37. When the foundational facts have not been proved by the prosecution, the requirement of the appellant giving an explanation or proving a fact under Section 106 of the Evidence Act would not be attracted. It might be a case that the appellant was in the village when the deceased had died at the relevant point of time and his absence for around 15 days prior to his arrest is no doubt very suspicious. However, there is no definite proof/evidence of the appellants presence at the relevant point of time. Further, suspicion cannot take the place of proof.

38. In the case of Sukpal Singh Vs. NCT of Delhi [Criminal Appeal No. 55/2015], the Supreme Court has held that a bald plea of denial by an accused to a gravely incriminating circumstance is not sufficient to absolve him of the burden cast upon

him by virtue of section 106 of the Evidence Act. In the case of Nagendra Sah Vs. State of Bihar [(2021) 10 SCC 725], the Supreme Court has held that section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts, from which a reasonable inference can be drawn regarding the existence of certain other facts, which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of the said other facts, the court can always draw an appropriate inference. The Supreme Court further held that when a case rest on circumstantial evidence, if the accused fails to offer a reasonable explanation in the discharge of the burden placed on him by virtue of section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused. In the case of Nusrat Parween Vs. State of Jharkhand [2024 SCC OnLine SC 3683], the law laid down in the case of Nagendra Sah (Supra) has been reiterated.

39. Another aspect which has to be considered is whether the alteration of the charge from Section 304(B)/34 IPC to Section 302/34 IPC, after the evidence of all the witnesses had been recorded by the learned Trial Court and examination under Section 313 Cr.P.C. had concluded, would have caused prejudice to the appellant. Section 216 Cr.P.C states that Court may alter or add to any charge at any time before judgment is pronounced. Section 217 Cr.P.C provides that when a charge is altered or added to by a Court after commencing of the trial, the prosecutor and the accused shall be allowed to recall or re-examine any witness with reference to such alteration or addition of charge. The prosecutor and the accused shall also be allowed to call any further witness, whom the Court may think to be material.

40. A reading of Section 216 and 217 Cr.P.C thus goes to show that when there has been an alteration or addition of charge, the Court may allow re-trial, prior to judgment being pronounced or recall any witness or examine a new witness. In the present case, the learned Trial Court had brought the new altered charge to the notice of the appellant and had also given him an opportunity to cross-examine the witnesses again. However, the appellant declined to do so. As such, we are of the view that no prejudice has been caused to the appellant on being convicted and sentenced under the altered charge.

41. In view of the reasons stated above, we are of the view that the prosecution has not been able to prove the guilt of the appellant in killing the deceased beyond all reasonable doubt. The appellant is accordingly acquitted of the charge under section 302 IPC by giving him the benefit of doubt. The appellant should accordingly be released immediately from judicial custody. Consequently, the impugned judgement dated 26/09/2022 passed by the learned Sessions Judge, Kokrajhar, in

Sessions Case No. 54/2017, is hereby set aside.

42. Send back the TCR.