

(2012) 01 GAU CK 0050

Gauhati High Court

Case No: Criminal Appeal (J) No. 114 of 2005

Babul Baruah

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: Jan. 25, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 106
- Penal Code, 1860 (IPC) - Section 302, 34

Citation: (2012) 1 GLD 921

Hon'ble Judges: Adarsh Kumar Goel, C.J; C.R. Sharma, J

Bench: Division Bench

Advocate: R.K. Adhikary, Amicus curiae, for the Appellant; Z. Kamar, PP Assam, for the Respondent

Final Decision: Dismissed

Judgement

C.R. Sarma, J.

This appeal is directed against the judgment and order, dated 16.08.2005, passed by the learned Additional Sessions Judge (Ad-hoc), Biswanath Chariali, Dist. Sonitpur in Sessions Case No. 56/2005.

By the impugned judgment and order, the learned Sessions Judge convicted the appellant, namely, Shri Babul Baruah, who is the husband of the deceased, for the offence u/s 302 of the Indian Penal Code (for short, "IPC") and sentenced him to suffer rigorous imprisonment for life and pay fine of Rs. 500/- (Rupees five hundred), in default, suffer rigorous imprisonment for another period of 15 (fifteen) days. Aggrieved by the said conviction and sentence, the convicted person, as appellant, has come up with this appeal.

We have heard Mr. R.K. Adhikary, learned amicus curiae, appearing for the appellant and Mr. Z. Kamar, learned Public Prosecutor, appearing for the State respondent.

2. The prosecution case, as revealed during the trial, may, in brief, be stated as follows :

The accused-appellant, who married the deceased out of love affairs, used to live with his wife and their two minor children separately from his parents. He, sometimes, being drunk, used to assault the deceased. On the night of 16.04.2004, when the appellant and his wife were living together in their house alongwith their minor children, the dead body of the deceased was found lying on her bed with a piece of partly burnt cloth (2-1/2 cubic meter length). The appellant, who also attempted to commit suicide by hanging in another room, was found hanging with a Gamocha (Napkin) from the roof and he was rescued by Shri Sanjib Basumatary (PW-2), who is the brother of the deceased. Coming to know about the said incident, Shri Bipul Basumatary (PW-8) lodged the FIR (Ext. No. 3) with the police. Police registered a case, being Gohpur P.S. Case No. 67/2004, u/s 302, IPC and launched investigation into the matter.

3. During the course of investigation, police arrested the appellant and prepared the inquest report in respect of the dead body of the deceased and forwarded the same for post-mortem examination. At the close of the investigation, police submitted the charge-sheet, under Sections 302/34, IPC. The case being committed to the Court of Sessions, the learned Additional Sessions Judge framed charge u/s 302, IPC against the appellant. The charges were read over and explained to the accused person, to which he pleaded not guilty and claimed to be tried.

4. The prosecution version is that the appellant killed his wife by strangulation. In order to prove its case, the prosecution examined as many as 12 (twelve) witnesses, including the Medical Officer (PW-12), who performed autopsy and the Investigating Officer (PW-11). The learned Sessions Judge, considering the evidence, on record, convicted and sentenced the accused-appellant, as indicated above. Being aggrieved by the conviction and sentence, the appellant has come up with the appeal.

5. Mr. M.R. Adhikary, learned amicus curiae, taking us through the evidence, on record, has submitted that there is no direct evidence on record, to substantiate the charge that the appellant caused the death of the deceased. It is submitted that the learned Sessions Judge recorded the conviction u/s 302, IPC, without sufficient evidence. It is also submitted that the appellant, who married the deceased out of love affairs, had no reason to cause the death of his wife and that the conviction has been based only on surmise and presumption.

In view of the above, learned amicus curiae has submitted that this is a case of no evidence and as such, the appellant is entitled to be acquitted.

6. Controverting the said argument, advanced by the learned amicus curiae, Mr. Z. Kamar, learned Public Prosecutor has submitted that, though there is no eye-witness to the occurrence, in view of the fact that the appellant and the deceased lived in the same house at the time of occurrence and that, the deceased died in presence of the appellant, there is strong circumstantial evidence to show that the appellant had killed the deceased. It is also contented that in view of the attending circumstances the appellant was the best person to know the circumstance under which his wife died and as such, it was his burden to prove his innocence. It is also submitted that the failure of the appellant to explain as to how his wife died, forcefully indicate that none other than the appellant, who was in the house, alongwith the deceased, at the relevant time, was the perpetrator of the crime. In support of the said contention, the learned Public Prosecutor, referring to the medical evidence, has submitted that the medical evidence conclusively indicates that the deceased died due to homicidal strangulation and the said medical evidence ruled out the possibility of committing suicide by the appellant.

In view of the above, the learned Public Prosecutor, supporting the impugned conviction and sentence, has submitted that the learned trial Judge rightly held the appellant guilty of the offence of murder, u/s 302, IPC and as such, the impugned judgment needs no interference.

7. Having heard the learned counsel, appearing for the parties and considering the materials on record, we have no doubt regarding the death of the deceased.

8. PW 1 is the Secretary of the VDP. He coming to know about the incident, visited the house of the appellant and found that the deceased was lying dead on her bed with a piece of cloth measuring about 2-1/2 cubic meter length. He stated that the said cloth was found to be partly burnt in its middle. According to this witness, he was informed by Shri Sanjib Basumatary (PW 2), the brother of the deceased.

9. Shri Sanjib Basumatary, deposing as PW 2, stated that he found the deceased lying dead on her bed and also the appellant hanging from the roof, in another room. According to this witness, the appellant who was struggling with life, was rescued by him. According to this witness, he suspected that the appellant had killed the deceased.

10. Shri Haren Mushahary, who deposed as PW 3, in tune with the evidence of PW Nos. 1 and 2, stated that he found the deceased lying dead on the bed and that the appellant was lying unconscious on the floor. He was a witness to the inquest report (Ext. 2). He exhibited his signature, on the inquest report, as Ext. 2(1).

11. PW 4 (Shri Markus Surin) also saw the dead body of the deceased. He was also a witness to the inquest report.

12. Shri Maniram Basumatary, deposing as PW 5, stated that he found the deceased lying dead with a piece of Arnai, (a Bodo traditional stole) around the neck of the

deceased. This witness stated that the appellant, being drunk used to torture the deceased.

13. Shri Rajen Mushahari @ Rajen, who deposed as PW 6, stated that he found the deceased lying dead.

14. Shri Raju Basumatary, deposing as PW 7, stated that he saw the dead body of the deceased. According to this witness, the appellant had made attempt to hang himself, but he was rescued by Shri Sanjib (PW 2).

15. Shri Bipul Basumatary, brother of the deceased, deposed as PW-8. He lodged the FIR, which has been exhibited as Ext. No. 3. He stated that he suspected that the appellant had killed the deceased by pressing her neck with a piece of Arnai.

16. Smti Sabitri Basumatary, the mother of the deceased, deposed as PW 9. According to this witness, her daughter had no reason to commit suicide and as such, the appellant had strangled her.

17. Smti Rani Basumatary deposed as PW 10, she is the relative of the deceased. She stated that the appellant had killed the deceased by strangulation.

18. Shri J.R. Das, the Investigating Officer has been examined as PW 11. He stated that he had received the FIR (Ext. 3). He also stated that when the dead body of the deceased was found on the bed nothing was found hanging from the roof. According to this witness, he found one "Arnai" (a traditional stole used by woman belonging to "Bodo" community) lying by the side of the deceased, which he seized vide Ext. No. 2. He further stated that he sent the dead body for post-mortem examination and at the close of the investigation he submitted the charge sheet, which he exhibited as Ext. No. 4.

19. From the above stated evidence, rendered by the prosecution witnesses, it is clearly found that both the deceased and the appellant used to live in the said house and at the relevant time they were available therein. The appellant, in his statement, made u/s 313, Cr. P.C., has stated that he was innocent and that his wife committed suicide by hanging with a "Gamocha" from the threshold of the door. According to the appellant he set fire to the said Gamocha and brought down the dead body and thereafter he became senseless.

20. Considering the entire facts and circumstances of this case, as revealed from the evidence on record, as the said couple were living together, at the relevant time, the appellant was the best person to say as to under what circumstances the deceased died. If the plea taken by the appellant, in his statement, u/s 313, Cr.P.C. regarding the cause of death of the deceased is believed then it must be held that the victim committed suicide by hanging herself from the threshold of the door with a piece of cloth and the dead body was brought down by the appellant, after setting fire to the said piece of cloth (Gamocha), which was used for hanging. In that event, the other part of the Gamocha should have remained hanging from the threshold of the door.

None of the witnesses have stated anything indicating that the other part of the Gamocha was found hanging from the threshold of the door.

21. The investigating officer, in his evidence given as PW 11, clearly stated that the Gamocha i.e. Arnai, which was a complete one, was found lying on the side of the dead body. He did not see any other part of the Arnai. The Investigating Officer, who visited the place of occurrence, has clearly stated that he found nothing hanging from the roof. This belies the appellant's version that he had brought down the dead body after burning the Arnai i.e. Gamocha. Further, if the deceased had committed suicide, then, the appellant, immediately after bringing down her body should have taken steps to provide medical treatment and to inform others seeking help. But instead of doing so, he was found hanging in other room. This conduct that goes against him. The said reaction of the appellant does not indicate his innocence.

22. PW 1 i.e. the Secretary of the VDP, who was an independent witness, clearly stated that he found a piece of cloth i.e. Arnai, which was about 2-1/2 cubic in meter length, near the dead body. None of the witnesses, who visited the place of the occurrence, stated that the other part of the Arnai was found hanging from the threshold of the door. PW 1 stated that the middle part of the Arnai was found burnt. This indicates that the Arnai was found in its complete length, but the same was found burnt in its middle. This evidence does not indicate that the said burning had torn the Arnai into two parts thereby detaching the dead body from the hanging portion.

23. In view of the above, there is no difficulty in understanding that the Arnai was not torn due to burning. That apart, there is no record to show as to how the deceased could reach the threshold of the door for tying the Arnai. There is nothing on record to show that any equipment including a stool or chair etc., were there, within the reach of the deceased to facilitate her to tie the Arnai from the threshold of the door or the roof. The absence of other portion of the "Arnai" and non-availability of any thing to reach the threshold or the door negates the plea of the appellant that the deceased committed suicide.

24. Further, the appellant's plea, that the deceased committed suicide has been ruled out by the medical evidence, given by the doctor (PW-12), Dr. Smti Mina Borah Biswasi, who performed the autopsy, on the dead body of the deceased. The said medical officer opined that the death was caused due to shock as a result of homicidal strangulation. She has exhibited the postmortem report as Ext. No. 5. She has given the following findings concluding that it was not a case of suicide :

"External Appearance:

Body was stout. Rigor Mortis present. Eyes closed and froth was found around nose and mouth Mark of one non-continuous transverse ligature mark around high up in the neck on front side, length 4" breadth 2 cm which pressed voice box. Stomach

contains food matter with smell of organo phosphorus compound (poisonous).
Stomach content is preserved.

Other organ :	NAD.
Cranium and spinal canal :	
Scalp, skull and vertebrae :	NAD
Membrane :	NAD
Brain and spinal cord :	Congested
Wallis, ribs and cartilages :	NAD
Thorax :	
Wallis, ribs and cartilages :	NAD
Pleurae :	Congested.
Larya Congested and compressed.	Congested.
Trachere :	
Left and right lung :	Congested.
Pericardium :	Congested.
Heart & Vessels :	NAD
Abdomen :	
Walls :	NAD
Peritoneum :	Congested.

Stomach & its contents: Stomach contains food matter, with smell of organo phosphorus Compound Stomach content preserved.

Small intestine and its contents :	NAD
Large intestine and its contents :	NAD
Liver and spleen :	Congested.
Kidneys :	NAD
Bladder :	Empty.

More detailed description of injury or disease:

All the findings are ante-mortem in nature.

Opinion:

The death was due to shock as a result of strangulation. In my opinion death was due to homicidal strangulation.

25. In her cross-examination, made on behalf of the appellant, the Medical Officer (PW-12) also opined that, in the event of committing suicide, there would have been visible mark of ligature, which was absent in the present case. The said medical

evidence, rendered by the PW-12, remained un-demolished. From the above medical evidence, it is clearly found that the deceased was killed by strangulation.

26. Now, the question is, who had caused the death of the deceased by strangulation. Admittedly, as revealed from the evidence on record, there was none other than the appellant and their baby with the deceased, in their house, on that fateful night. Therefore, there is nothing on record to show that any other person had access to the house of the said couple prior to the death of the deceased. From the above discussed evidence, it has been found that the appellant and the deceased used to live in the same house to the exclusion of others and at the time of occurrence both of them were present in their house. Therefore, in view of the provision prescribed by Section 106 of the Evidence Act; the burden of explaining the circumstance in which the deceased died and proving his innocence lied on the appellant.

27. As discussed above, in view of the uncontroverted medical evidence regarding culpable homicide by strangulation and absence of anything (i.e. Arnai) found hanging, either from the roof or threshold of the door, as well as the availability of the Arnai, which was found to be burnt in its middle, negate the appellant's plea that the deceased had committed suicide by hanging from the threshold with the Arnai and that the appellant had brought down the dead body by setting fire to the Arnai.

28. The circumstantial evidences that, the said couple i.e., the appellant and the deceased lived under the same roof on the fateful night, that the deceased was found lying dead on her bed with a gamocha (i.e. an Arnai), (which was found to be burnt in its middle), that the appellant also attempted to commit suicide by hanging, that no part of the said piece of cloth, which claimed by the appellant to be used by the deceased for committing suicide, was found hanging from the threshold of the door, that there was no scope or facility for the deceased to reach the roof or top of the threshold or the door to tie the piece of cloth to hang herself and the medical evidence that the deceased died due to homicidal strangulation, form a complete chain of events, pointing the guilt to the appellant to the exclusion of others.

Therefore, in our considered opinion, the appellant, who was supposed to have knowledge about the cause of death of the deceased, failed to discharge the said burden by reasonably explaining the cause of death.

29. The above discussed circumstantial evidences, surfacing from the evidence on record, conclusively lead to believe, to the exclusion of any other hypothesis, consistent with the innocence of the appellant, that it was none other than the appellant, who caused the death of the deceased by strangulation.

30. In the light of the above discussions, we have no hesitation in holding that the prosecution could prove the charge, brought against the appellant. Therefore, the learned trial Judge committed no error by recording the conviction u/s 302, IPC and

accordingly sentencing him to suffer imprisonment for life, as indicated above.

31. Therefore, we find no merit in this appeal. Hence, this appeal stands dismissed.

32. Return the LCRs. While appreciating the assistance rendered by the learned amicus curiae, we direct that an amount of Rs. 3,500/- (Rupees three thousand five hundred) be paid to Mr. R.K. Adhikary, learned amicus curiae, as remuneration by the State Legal Service Authority.