

(2014) 07 GAU CK 0019

Gauhati High Court

Case No: Criminal Appeal No. 37 (J) of 2014

Jatil Bardoloi

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: July 22, 2014**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 25
- Penal Code, 1860 (IPC) - Section 302

Citation: (2014) 3 GLT 511**Hon'ble Judges:** M.R. Pathak, J; C.R. Sarma, J**Bench:** Division Bench**Advocate:** I.H. Saikia, Advocate for the Appellant; S. Jahan, Addl. PP, Advocate for the Respondent

Judgement

C.R. Sarma, J.

Heard Mr. I.H. Saikia, learned Amicus Curiae, appearing for the appellant. Also Heard Ms. S. Jahan, learned Addl. Public Prosecutor, Assam, appearing for the State respondent. This appeal is directed against the judgment and order, dated 5.3.2014, passed by the learned Sessions Judge, Morigaon in Sessions Case No. 22/2012, under Section 302 of the Indian Penal Code (for short IPC), whereby the learned Sessions Judge, while convicting the accused-appellant for the offence under Section 302 IPC sentenced him to suffer rigorous imprisonment for life and to pay fine of Rs. 10,000/- in default, suffer rigorous imprisonment for another period of 1(one) year.

2. The prosecution case, in brief, is that Sangita Kathar, (hereinafter called the deceased) had eloped with the appellant and they lived as husband and wife. After about 5(five) days of her said elopement i.e. on 13.10.2011, at about 6.00 a.m., the dead body of the deceased, bearing burn injury, was found in the bamboo garden, near the house of the appellant.

3. Smti Mamoni Kathar (PW-1), who is the maternal aunt of the deceased, lodged the FIR (Ext. No. 4) with the Officer-in-Charge of the Lahrihat Police Station on the same date and on receipt of the FIR, police registered a case under Section 302 IPC, being Lahrihat P.S. Case No. 132/2011 and launched investigation into the matter. During the investigation, police visited the place of occurrence, performed the inquest in respect of the dead body, and sent the same for post-mortem examination. The police also seized one empty bottle of kerosene oil and one empty bottle of liquor from the place of occurrence, vide seizure list (Ext. No. 1) dated 13.10.2011, in presence of witnesses and examined the witnesses.

4. The appellant, who was available in the place of occurrence, was arrested and on being asked by the police in presence of the witnesses including P.W. Nos. 2 and 4, he confessed that he had caused the death of his wife i.e. the deceased.

5. At the close of investigation, police submitted charge sheet under Section 302 IPC. The offence under Section 302 IPC, being conclusively triable by the court of the Sessions, the learned Chief Judicial Magistrate committed the case to the court of the Sessions for trial. The learned Sessions Judge, considering the materials, on record, framed charge under Section 302 IPC. The charge was read over and explained to the accused-appellant and he pleaded not guilty of the offence.

6. In order to prove the charge, the prosecution examined as many as 9 (nine) witnesses. The accused/appellant was examined under Section 313 Cr.P.C. He denied the allegations, brought against him and declined to adduce defence evidence.

7. Considering the evidence, on record, the learned Sessions Judge, on the basis of the extra judicial confession, alleged to be made before the P.W. Nos. 2 and 4 and the circumstantial evidence, convicted and sentenced the accused-appellant, as indicated above.

8. Aggrieved by the said conviction and sentence, the convicted person, as appellant has preferred this appeal from the jail. As the appellant could not engage any counsel to represent him, this court appointed, Mr. I.H. Saikia, as amicus curiae, to represent the appellant.

9. Mr. I.H. Saikia learned Amicus Curiae, referring to the evidence, on record and the impugned judgment, has submitted that the learned the learned Sessions Judge committed error by recording the conviction on the basis of extra judicial confession, alleged to be made by the appellant, inasmuch as the said confession was made before the police.

The learned Amicus curiae has also submitted that there is serious discrepancy in the oral evidence given by the prosecution witnesses and the medical evidence given by the P.W. No. 5. It is pointed out that according to P.W. Nos. 2 and 4, the appellant had stated that he had killed his wife by strangulation, but according to

the Medical Officer (P.W. 5), who performed autopsy, the deceased died due to shock and coma leading to hypovolemia cardio-respiratory failure as a result of 90% burn injury.

In view of the said evidence, it is submitted that there is no consistency in the prosecution evidence, regarding cause of death of the deceased. The learned Amicus curiae has further submitted that the prosecution failed to prove the charge, against the appellant, beyond all reasonable doubt and as such, the impugned conviction and sentence cannot be maintained.

10. Controverting the said argument, advanced by the learned Amicus Curiae, Ms. S. Jahan, learned Addl. Public Prosecutor, Assam, appearing for the State respondent has submitted that the appellant had made extra judicial confessional statement before P.W. Nos. 2 and 3 and as such the learned Sessions Judge committed no error by holding the appellant guilty of killing his wife. It is also submitted that the attending circumstantial evidence indicates that the appellant committed the said offence.

11. Having heard the learned counsel appearing for both the parties and considering the materials, on record, we find that the learned Sessions Judge convicted the appellant on the basis of the extrajudicial confession, alleged to be made by the appellant before P.W. Nos. 2 and 4.

12. P.W. No. 2 (Mrs. Anjali Bordoloi), in her evidence, stated that, on being asked by the police, the appellant had admitted that he had killed his wife by pressing her with a pillow. P.W. 4 (Shri Dipankar Bardoloi), in his evidence, stated that the appellant, on being asked by the police and the public, confessed that he had killed his wife by strangulation.

13. From the evidence of P.W. Nos. 2 and 4 it is clearly found that the alleged extra judicial confession was made by the appellant before the police that too on being interrogated by police i.e. the Investigating Officer.

14. Section 25 of the evidence Act provides that the confession made before police officer cannot be proved against the maker i.e. the accused person.

15. Considering the evidence of P.W. 2 and P.W. 4 we find no difficulty in understanding that the alleged extrajudicial confession was made by the appellant before the police i.e. I.O. A careful reading of the evidence of P.W. Nos. 2 and 4 indicates that the appellant was interrogated by the police, in the presence of the said P.Ws. and other persons and on being so asked he had made the said confession. Therefore, the said extra judicial confession, being made before the police officer is clearly hit by Section 25 of the Indian Evidence Act and as such the same cannot be the basis for conviction.

16. That a part, according to the PW-4, the death of the deceased was caused by pressing with a pillow. The said pillow, alleged to be used by the appellant, has not

been seized by the police. In the absence of the concerned pillow, it cannot be believed that the appellant had caused the death of the deceased by pressing with pillow.

17. Further, there is major contradiction in the evidence of P.W. Nos. 2 and 4. According to P.W. No. 2, the death of the deceased was caused by pressing with a pillow, but according to P.W. No. 4, the death of the deceased was caused by strangulation. In view of the above, if the evidence of P.W. 4 is believed, then P.W. 2's evidence cannot be believed. Therefore, the evidence of P.W. Nos. 2 and 4 cannot be believed.

According to the Medical Officer also, who performed the autopsy, the deceased died due to 90% burn injuries. There is no medical evidence to show that the deceased died due to strangulation.

18. In view of the above, the evidence, on record, does not conclusively lead to hold that the death of the deceased was a homicidal one. The said medical evidence, given by P.W. No. 5, negates the prosecution version that the appellant had caused death the deceased either by strangulation or by pressing with pillow.

19. In view of the above discussion, we find no substantive evidence to believe that the appellant had caused death of the deceased. In our considered opinion, the prosecution failed to prove the case, beyond all reasonable doubt. Therefore, the conviction and sentence awarded by the learned Sessions Judge cannot be maintained.

20. In view of what has been discussed above, we find sufficient merit in this appeal. Accordingly, the appeal is allowed. The impugned conviction and sentence are set aside. The appellant is acquitted. He be set at liberty forthwith, if not required in any other case.

21. Before parting with this judgment, we acknowledged the assistance rendered by Mr. I.H. Saikia, learned Amicus Curie and order that an amount of Rs. 7,500/- (Rupees seven thousand five hundred) only be paid to the learned Amicus Curiae as his remuneration by the State. Return the LCRs.