GAHC010017902020

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

Case No. : Crl.A./63/2020

SRI ANUPAM BARUAH
S/O SRI JATIN BARUAH, R/O VILL. GOSSAI PATHAR NO.2, P.O. AND P.S. BIHPURIA, DIST. LAKHIMPUR, ASSAM, PIN 784161

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY THE PUBLIC PROSECUTOR

2:SRI JATIN BORAH
S/O JOGEN BORAH
R/O VILL. GOSSAIBARI
P.O. AND P.S. NARAYANPUR
DIST. LAKHIMPUR
ASSAM
PIN 78416

Advocate for the Petitioner : MR. K M HALOI

Advocate for the Respondent : MR. M PHUKAN, ADDL. PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM
HONOURABLE MR. JUSTICE MIR ALFAZ ALI

JUDGMENT

Date : 09-04-2021

M.A. Ali, J.

Learned counsel Mr. N.J. Das appearing for the appellant and the learned Additional P.P., Mr. M. Phukan for the respondent were heard.

2. This appeal is directed against the judgment and order dated 26.11.2019 rendered by the learned Additional Sessions Judge, Lakhimpur in Sessions Case No. 178(NL)/2016, whereby the appellant was convicted under Section 302 IPC and sentenced to undergo rigorous imprisonment for life and to pay fine of Rs. 3000/- with default stipulation.

3. The prosecution case in a nutshell was that the deceased Janmoni Baruah was the wife of the appellant Anupam Baruah. The appellant hacked his wife Janmoni Baruah to death on the night of 19.01.2016. Having come to know about the occurrence, the brother of the deceased lodged the FIR (Ext.3) with the Bihpuria Police Station, on the basis of which, police registered Bihpuria P.S. Case No. 31/2016 under Section 302 IPC and upon completion of investigation submitted charge sheet against the appellant.

4. During the course of trial, learned Sessions Judge framed charge against the appellant under Section 302 IPC, which was abjured by him. Prosecution examined 8 witnesses in order to bring home the charge. Upon completion of the prosecution evidence, the appellant was examined under Section 313 CrPC, wherein the appellant took the plea of innocence and had examined three witnesses in his defence.

5. Appreciating the evidence adduced by both the sides, learned Sessions Judge convicted the appellant under Section 302 IPC and awarded sentence as indicated above.

6. Aggrieved by the conviction recorded and sentence awarded by the learned Trial Court, the appellant has preferred the instant appeal.

7. Learned counsel for the appellant submitted that there was no direct evidence and the conviction of the appellant was recorded solely on the basis of circumstantial evidence. The prosecution could neither adduce actionable evidence to establish any of the circumstances conclusively, nor could any chain of circumstances capable of drawing an inference unerringly pointing to the guilt of the accused, be established and as such, the conviction and sentence of the appellant is unsustainable, submits Mr. Das. Supporting the impugned judgment, learned Additional P.P. contended that overwhelming evidence adduced by the prosecution has established the incriminating circumstances pointing to the guilt of the accused. The incriminating circumstances duly established together with the falsity of the defence plea completed the chain, so as to bring home the charge against the accused beyond all reasonable doubt and as such, the impugned judgment calls for no interference, submit Mr. Phukan.

8. We have considered the submission made by the learned counsel for both the sides and also meticulously scrutinized the evidence and materials brought on record.

9. As revealed from the submission made by the learned counsel, there is no direct evidence and the prosecution case is solely based on the circumstantial evidence. On our assessment of the evidence and perusal of the impugned judgment we find that the learned Additional Sessions Judge recorded conviction of the appellant under Section 302 IPC primarily relying on the following circumstances.

(i) The death of the deceased in the mysterious circumstances in the matrimonial home,

(ii) the appellant was with the deceased at the time of occurrence.

(iii) Ill treatment to the victim by the accused appellant since her marriage upon demand of money.

(iv) Availability of blood stain in the bed and other places in the house.

(v) Leading to discovery of an axe allegedly used in the commission of the offence under Section 27 of the Evidence Act.

(vi) False explanation given by the appellant.

10. Out of the eight prosecution witness, PW-1, PW-2 and PW-5 are basically the witnesses to the occurrence. PW-3, PW-4 and PW-6 are formal witnesses to the search and seizure. PW-7 & PW-8 are the Doctor and Investigating Officer respectively. The father of the deceased has been examined as PW-1. He deposed that the appellant married the deceased four years before the occurrence. Since after the marriage, the appellant used to torture his daughter under the influence of alcohol and also for non-fulfillment of the demand of money. He further stated that the deceased informed about the demand of money and initially he paid Rs. 20,000/-. Thereafter again he paid Rs. 20,000/- and Rs. 10,000/- respectively to meet the demand of the appellant. He also stated that before one day of the incident, the appellant had assaulted the victim and therefore, the father of the appellant invited him over phone to their house in order to discuss the matter. Accordingly he (PW-1) along with his wife went to the house of the accused. On their arrival, the victim informed that the accused would kill her and expressed her reluctance to stay in the matrimonial home. He therefore wanted to take the deceased back home. But the accused had fled taking his two years child with him and therefore, PW-1 could not bring the victim with him. He also stated that at about 1.30 AM, at night, the father of the appellant informed him over phone about the death of the victim. He further stated that having come to know about the death of his daughter, he rushed to the house of the accused accompanied with Hiron Saikia, Anada Baruah and Ratul Bhuyan and came to know that father and cousin of the accused had taken the victim to Lakhimpur Civil Hospital. This witness however, did not state in his previous statement recorded under Section 161 CrPC by police that the appellant being drunk subjected the deceased to torture. He also did not state before police regarding any demand of money or payment thereof by him. He also did not state before police that the accused assaulted the deceased for not fulfilling the demand or that the victim told him that the accused would kill her or that she was reluctant to stay in the matrimonial home.

11. The informant PW-5 is the brother of the deceased. He stated in his evidence that the victim used to pick up quarrel frequently with the accused and husband and therefore, his father (PW-1) once took the victim to their house and the accused brought her back promising not to be engaged in quarrel. In the FIR lodged by this witness, there was not even a whisper regarding any ill treatment or demand of money by the appellant. Surprisingly, this witness was not even examined by the police under Section 161 CrPC and he deposed for the first time in court.

12. What therefore crystallizes from the oral testimony of PW-1, the father and the PW-5, the brother of the deceased is that for the first time in court, both of them have brought the allegation of ill treatment to the deceased for non-fulfillment of the demand for money. The omission of such material facts as to ill treatment meted out to the deceased, both in the FIR as well as in the previous statement recorded under Section 161 CrPC, in our considered view cannot be ignored as insignificant or inconsequential minor omission, inasmuch as, omission of material facts amounts to contradiction. Thus, the omission of this material fact in the FIR and also in the previous statement before police certainly affected the credential of the allegations to the effect, that the appellant subjected the victim to ill treatment or demand of money as deposed by the PW-1 & PW-5. Once the evidence of PW-1 & PW-5 is discarded, the prosecution would be left with no iota of evidence to substantiate the allegation, that the victim was ill treated in the matrimonial home for non-payment of money. Therefore, the circumstance of ill treatment to the victim by the appellant, relied by the learned trial court can by no stretch of imagination be held to have been established beyond all reasonable doubt.

13. Evidently, on the date of the occurrence, the deceased was in her matrimonial home. It is in the evidence of PW-1 that he visited the house of the appellant on the previous day of the occurrence and he wanted to take the victim to his house. However, the appellant had left the house with his two years old child and therefore, he (PW-1) could not take his daughter to his house. The appellant by examining himself as DW-1 has also deposed that his father-in-law (PW-1) and mother-in-law visited his house on the previous day of the occurrence and on that day, the deceased wanted to go to her paternal house and there was an altercation between them on the said issue. He further stated that out of anger, he had left the house with his three years old child and spent the night in the house of his friend, Uttam Hazarika at Jakaipetua. Uttam Hazarika has been examined as DW-3, who also supported the version of DW-1, that the appellant went to his house with his child and spent the night there and on the next morning, he came back having come to know about the death of his wife (deceased). The DW-3 stated in his evidence that distance between his residence and that of the accused is 6/7 kilometer.

14. The PW-1 further stated in his deposition that when he visited the house of the accused upon getting the information regarding death of the deceased at about 1.30 AM, he came to know, that the deceased had been taken to hospital by the father and the cousin of the appellant. No evidence has been

brought on record by the prosecution to show that on the relevant night, the appellant was in his home with the victim, though, the burden to establish the presence of the appellant with the deceased at the relevant time was on the prosecution. Rather, the oral testimony of PW-1 to the effect that when the deceased wanted to visit her paternal home with PW-1, the appellant had left the house with the minor child, lent support to the defence version as deposed by DW-1 & DW-3 and thereby probabilised the stand taken by the appellant.

15. Learned Addl. P.P. submitted referring to the distance between the house of the appellant and that of the DW-3, that even if the appellant had left his house with the child, in the evening, his presence at the place of occurrence at the night was not improbable or absurd in view of the distance between the two houses as deposed by the DW-3 and therefore the plea of alibi taken by the accused shall not stand. Even if it is assumed for the sake of argument, that the plea of alibi taken by the appellant could not be proved by the required standard of evidence, the oral testimony of DW-1 & DW-3 coupled with the oral testimony of PW-1, as pointed out above, at least probabalised the plea of the accused that he had left the house and did not return at night. It is to be borne in mind that standard of proof for the prosecution case and that of defence are not same. The prosecution is bound to prove its case beyond all reasonable doubt, whereas, defence plea is required to be proved by the standard of preponderance of probability. If the accused can reasonably probabalise his case either by adducing evidence or from the prosecution evidence, burden of the accused stands discharged. In the present case, when the prosecution failed to establish that accused was with his wife at the relevant time and on the contrary accused has probabalised his case with the support from prosecution witness itself in the touchstone of preponderance of probability, that he was not present with his wife at the relevant time, the vital circumstance relied by the learned trial court that the appellant was with the deceased on the night of occurrence also cannot be held to have been proved beyond reasonable doubt. Situated thus, neither there could be any presumption against the appellant that he was with the deceased, only because of the fact that he is the husband of the victim, nor could any explanation be sought from him under Section 106 of the Evidence Act.

16. Looking from another angle, even if it is assumed that the death of the victim had taken place in the matrimonial home in a mysterious circumstance, than also facts remain is that there were admittedly other members of the family in the house of the accused, inasmuch as, it has been

established by the prosecution evidence itself, that the parents of the appellant was also staying in the same house. It is also in the prosecution evidence that the father and the cousin of the appellant had taken the victim to hospital on the night of the occurrence. Therefore, in the facts and circumstances of the case, even if someone owe any explanation for the death of the victim, it could not be the appellant alone, rather, all the inmates of the matrimonial house of the deceased would be under the obligation to explain as to how the death of the victim occurred. In that situation also the finger of accusation cannot be pointed to the accused appellant alone.

17. The father of the appellant examining himself as DW-2, deposed that on the previous day of the occurrence, the father-in-law and mother-in-law of the appellant visited his house and the father-in-law of the accused (PW-1) wanted to take his daughter with him. He also deposed that an altercation took place between the appellant and the deceased over the said matter and the appellant left the house with his son. He further deposed that at about 11 O'clock at night, he heard a sound in the room of his daughter-in-law (deceased). Having heard the sound, he and his wife rushed to the room of the deceased and had found that a trunk had fallen on her. He also deposed to have noticed an injury on her forehead. He further stated that immediately, he along with his nephew took the victim to civil hospital and after examining the victim in the emergency department, the doctor declared her dead. Thereafter, he immediately informed the PW-1. The PW-1 also supported the version of DW-2 that he was informed by DW-2 about the death of the deceased at about 1.30 AM and upon his arrival at the house of the accused he found that the deceased was taken to hospital by DW-2 and his nephew.

18. Doctor Betai Doley, who conducted the postmortem examination on the body of the deceased found only a "lacerated injury over the forehead above the left eye. Size 10 cm x 3.5 cm x 3 cm with intra cranial hemorrhage all over the brain." The doctor opined that the injury was ante mortem and the cause of death was shock and intracranial hemorrhage. During cross examination, the doctor has stated that the injury sustained by the victim could be caused by falling a heavy trunk on the head. Learned Addl. P.P. contended that no trunk was seized and as such explanation given by the accused or DW-2 was false and unacceptable.

19. The PW-2, during cross examination stated that on being asked by him, about the injury

sustained by the deceased, the parents of the deceased told that a box had fallen from the overhead slab which caused the injury. The PW-3 also stated that on being asked by him, he was told that the victim sustained the injury when she tried to bring a box down from the overhead slab. The PW-4 also stated that when he visited the house of the deceased in the next morning, the parents of the accused told, that a trunk had fallen on the victim from an overhead slab. Thus the oral testimony of PW-2, PW-3 & PW-4 that when they visited the house of the accused in the morning following the night of occurrence, the parents of the appellant told that the victim had sustained injury by falling of a trunk also appears to be relevant and lend support to the defence plea. The PW-4 also stated in his evidence that he had seen a trunk lying in the room of the deceased. In view of all these evidence and more particularly the testimony of the PW-4, that a trunk was lying in the room of the deceased, non-seizure of the trunk can only be attributed to the wisdom or callousness of the Investigating Officer. Failure of Investigating Officer to perform his duty in expected manner does not affect the case of the prosecution or the defence if otherwise established by the evidence on record.

20. Thus, in view of the oral testimony of DW-2 as well as PW-2, PW-3 & PW-4 coupled with the medical evidence to the effect, that the injury causing death of the deceased could be caused by fall of a trunk from a height, the defence plea or the explanation offered by the inmates of the house of the deceased as to how the death was caused cannot be held to be unreasonable or absurd, nor can the same be held to be a false explanation in the facts and circumstances of the case. It is to be borne in mind that this is not a case, where there was no explanation from the side of the accused as to how the death of the victim was caused. Rather, the explanation offered by the accused appears to be reasonable and a probable one, in view of the evidence brought on record including the medical evidence. Therefore, the probability and reasonableness of the defence plea or the explanation offered by the inmates of the house of the deceased also raises a reasonable doubt on the prosecution case.

21. Learned Addl. P.P. submitted referring to the oral testimony of PW-4 that a blood stain axe allegedly used in commission of the offence was seized on being led by the accused. In fact, the seizure of the axe has also been considered as an incriminating circumstance by the learned trial court, inasmuch as, the learned trial court observed that an axe with stain of blood had been recovered on being led by the accused under Section 27 of the Evidence Act and the axe was accepted to be the weapon of offence. The only evidence brought on record as to recovery of the axe is the testimony of

the PW-4. The PW-4 deposed that police seized a blood stained axe from a pond in the place of the occurrence in his presence and he also proved the seizure list as Ext.2. However, during cross examination, he has stated that the axe was lifted from the water. He also stated that he was not sure whether the axe contained blood stain or it was rusted. Therefore, from the evidence of PW-4, it cannot be held conclusively that the axe contained any stain of blood. This apart, the testimony of this witness that the axe was lifted from water itself suggests, that even, had there been any blood stain in the axe, it could hardly be seen by bare eyes, when admittedly the axe was brought out from the water at least after one day of the occurrence. In the seizure list (Ext.2), it has been mentioned that on being led by the appellant Anupam Baruah, one rusted axe with bamboo handle having suspected blood stain was recovered by Raju Basfor from the pond in the campus of the accused. Though Raju Basfor was shown as an witness to the seizure list (Ext.2), he has not been examined in court. No evidence has been brought on record to show that there was any disclosure statement as to recovery of the axe vide Ext.2. Even the Investigating Officer has not deposed before court, that the appellant made any disclosure as to the axe or the axe was recovered pursuant to such disclosure of the appellant. In absence of any evidence that the accused made any disclosure statement while in custody and the recovery of the axe was made pursuant to such disclosure, the recovery of the axe vide Ext.2 shall not come within the purview of Section 27 of the Evidence Act.

22. Section 27 of the Evidence Act is an exception by way of the proviso to Section 25 and 26, which provides that any confession made to police is not admissible. However, Section 27 provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Thus, the statement pursuant to which any fact is discovered, which has a relevance to the offence is made admissible to the extent strictly and distinctly related to the facts discovered for the reasons, that the statement is confirmed by the subsequent fact discovered pursuant to the statement made to police. Therefore, any fact discovered or any statement, to the extent of discovery of fact to be admissible, it must be within the scope and ambit of Section 27 of the Evidence Act. The Apex Court in ***Amit Singh Bhikam Singh Thakur Vs. State of Maharastra*** reported in ***(2007) 2 SCC 310*** succinctly laid down the requirement of Section 27 of the Evidence Act in paragraph-19 of the judgment, where the Apex Court held as under:

"19. The various requirements of the Section can be summed up as follows:

(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2) The fact must have been discovered.

(3) The discovery must have been in consequence of some information received from the accused and not by accused's own act.

(4) The persons giving the information must be accused of any offence.

(5) He must be in the custody of a police officer. (6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

23. Evidently, there is no evidence on record, oral or documentary that the accused, while in custody made any disclosure statement, inasmuch as, neither the Investigating Officer who seized the axe from the pond nor any witness to the seizure list has deposed in Court as to any disclosure statement made by the accused or that the recovery of the axe was made pursuant to such disclosure made by the accused. The essential requirement for invoking Section 27 of the Evidence Act is that the discovery of fact in consequence of information received from the accused must be deposed in Court. Therefore, in absence of any disclosure statement the recovery of the axe cannot be held to be a discovery fact under Section 27 of the Evidence Act.

24. The seizure list (Ext.2) shows that there was no visible stain of blood in the axe. It was only suspected that there might be stain of blood. The PW-4 though, stated in his evidence in chief that the axe contained blood stain, during cross examination, he has stated, that he did not notice the axe properly and according to him, it could either be stain of blood or rust. Evidently, the axe seized by Ext. 2 was not sent for forensic examination and as such, there is no evidence to link the axe sized by Ext. 2 with the commission of offence. Therefore, the observation of the learned trial court that the blood stained axe used in the crime has been recovered and admitting the same as an incriminating

circumstance does not appear to be borne out of evidence on record.

25. PW-6 stated in his evidence that he had seen blood stain in the room of the deceased. PW-5 also stated that when he entered the residence of the accused, he found blood stained clothes lying on the bed, but the deceased was not there and he came to know that she had been taken to Civil Hospital, Lakhimpur. PW-3 deposed that police seized blood stained clothes from the place of occurrence in his presence vide seizure list (Ext. 1). According to PW-1, he was told by his companion that there was blood stain on the articles in the bed room of his daughter. Evidently the blood stained clothes seized were not sent for forensic examination. There is no dispute that the victim sustained injuries inside his house. As such, finding any blood stain in the bed or in any other place inside the room might be possible. Even if it is assumed for the sake of argument that some blood stained clothes were seized from the house of the victim, that by itself, would be of no consequence in absence any other evidence to link the appellant with the commission of offence.

26. What, therefore, crystallizes from the evidence brought on record is that none of the circumstances relied by the learned trial court for recording conviction of the appellant has been conclusively established by the prosecution beyond reasonable doubt, except the death of the victim and as such, the chain of circumstance pointing to the guilt of the appellant is found totally absent in the present case.

27. Coming to the defence plea of alibi or the alleged false explanation given by the accused, it must be borne in mind that a plea of alibi taken by the defence does not absolve the prosecution of its responsibility to prove the case beyond reasonable doubt. If the prosecution fails to discharge its burden to prove its case beyond reasonable doubt, the failure of the accused to prove the plea of alibi or any other defence plea is of no consequence, inasmuch as, prosecution cannot bank upon the weakness of the defence case. Once the prosecution succeeds in proving the guilt of the accused beyond all reasonable doubt by other circumstances, then only any answer given by the accused or a false explanation can be taken as an additional link to the chain of circumstances, proved otherwise. False explanation by itself cannot be construed as an independent incriminating circumstance to draw an adverse inference against the accused, in absence of other incriminating circumstances pointing to his

guilt. Reference may be made to a decision of this Court in ***Narayan Debnath –Vs.- State of Assam, 2009 (4) GLT 338***, where a co-ordinate bench observed as under:

> "*(46) We may also point out that before a Court examines the correctness of the plea of alibi taken by an accused, the evidence on record must, otherwise, be sufficient to bring home the charge against the accused. If the evidence, adduced by the prosecution, is insufficient to uphold the charge brought against the accused, the plea of alibi, taken by the accused, may not be necessary to be examined. When the prosecution succeeds in proving its case, the Court has, if the accused has taken the plea of alibi, obligation to determine whether the plea of alibi is or is not true. Moreover, when the plea of alibi, taken by an accused, is found to be false, it becomes an additional link in the chain of circumstances, which may appear against the accused. In other words, it is only when the prosecution succeeds in discharging its burden of proving its case against an accused that the evidence, given by the accused, as regards his plea of alibi, can be examined in order to ascertain as to whether the accused has been able to exclude the possibility of his presence at the place and time of the alleged occurrence."*

28. As noticed here-in-before that the prosecution has not been able to discharge its burden to establish the charge against the accused and as such, the court is not even required to examine the plea of alibi in the instant case. Be that as it may, the probability of the defence plea to the effect that the injury causing death of the deceased was self inflicted one is sufficient to raise a reasonable doubt on the prosecution case. Therefore, we are of the considered opinion that prosecution evidence is grossly inadequate to bring home the charge against the appellant or at least the appellant in the facts and circumstances of the case is entitled to benefit of doubt. Accordingly, we set aside the conviction and sentence of the appellant u/s 302 IPC and allow the appeal.

29. The appellant if in jail, shall be released forthwith if not required in connection with any other case.

30. Send back the LCR.

JUDGE JUDGE

Comparing Assistant