GAHC010236022017

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

Case No. : CRL.A(J)/54/2017

Smti. Bijuli Bala Rabha.

……***Appellant***

-Versus-

1. State of Assam

2. Sri. Chandan Rabha,

…… ***Respondents***

Advocates for the appellant: Mr. K Goswami, Senior Counsel/Amicus Curiae.

Advocate for the respondent: Ms. B Bhuyan, Additional Public Prosecutor, Assam.

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MRS. JUSTICE MALASRI NANDI

Date of hearing : 14.03.2023

Date of judgment : 27.03.2023

JUDGEMENT AND ORDER (CAV)

(*Michael Zothankhuma, J.)*

Heard Mr. K Goswami, learned senior counsel and Amicus Curiae for the appellant. Also heard Ms. B Bhuyan, learned Additional Public Prosecutor appearing for the State.

2. This appeal has been filed against the Judgment and Order dated 28.04.2017 passed by the Court of the learned Additional Sessions Judge, Goalpara in Sessions Case No. 27/2016, by which the appellant has been convicted under Section 302 IPC and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.1,000/-, in default, to undergo rigorous imprisonment for 3 (three) months.

3. The prosecution case in brief is that the informant's brother Randhan Rabha was hacked to death by his wife (appellant) with a dao. In this regard, the informant (PW-1) submitted an FIR dated 22.12.2015 before the Officer-In-Charge, Bagnan Police Station, pursuant to which Bagnan P.S. Case No. 190/2015 under Section 302 IPC was registered. The Investigating Officer thereafter filed a charge-sheet, having found a *prima facie* case under Section 302 IPC against the appellant, as the appellant had apparently disclosed to the Police that she had killed her husband. Charge under Section 302 IPC was framed against the appellant on 18.04.2015, on the ground that she had killed her husband on the night of 21.12.2015. The appellant pleaded not guilty to the charge and faced trial.

4. During the proceedings before the learned Trial Court, 13 (thirteen) prosecution witnesses and 1 (one) child witness were examined. After

examination of the appellant under Section 313 Cr.P.C., the learned Trial Court came to a finding that the offence of 302 IPC had been proved against the appellant. The appellant was accordingly convicted and sentenced vide the impugned Judgment and Order dated 28.04.2017, passed in Sessions Case No. 27/2016

5. The learned Amicus Curiae submits that the entire case of the prosecution is on the alleged statement/confession by the appellant to the Police that she had killed her husband with a dao. He submits that the evidence adduced by the witnesses would show that none of the civilian witnesses was told by the appellant that she had killed her husband, except for PW-12, who stated in his examination-in-chief that he had met the appellant in the Bagnan Police Station, where she had disclosed to him that she had killed her husband. Further, in his cross-examination, PW-12 has stated that the appellant had disclosed the same in front of the Police that she had killed her husband. He submits that any statement, disclosure or confession made by any person to the Police is not admissible as evidence, in terms of Sections 25 & 26 of the Indian Evidence Act, 1872.

6. The learned Amicus Curiae also submits that though the alleged weapon, i.e. "dao" used in killing the deceased had been seized by the Police and sent to the Forensic Science Laboratory (FSL) for examination, the report of the FSL was never made a part of the charge-sheet. As such, there was no proof that the dao, which had been seized by the police, was the weapon used for killing the deceased. Also there was nothing to prove that the appellant had used the said dao.

7. The learned Amicus Curiae also submits that the explanation given by the appellant in her examination under Section 313 Cr.P.C. goes to show that the appellant was not in her house with the deceased on the night of the

incident, i.e., 21.12.2015 and the appellant only came to know about the fact of her husband's death when she went back to her house at around 8:00 am, after spending the night in her mother's house.

8. The learned Amicus Curiae accordingly submits that as there was no eye witness to the crime and as the alleged statement/confession made by the appellant to the Police is not admissible as evidence, the learned Trial Court erred in convicting the appellant under Section 302 IPC.

9. The learned Amicus Curiae also submits that the learned Trial Court erred in relying upon the GD entry made by the Police, for the purpose of convicting the appellant, as the Police Diary may be used as an aid in an enquiry or trial. However, the same could not be used as evidence. In this regard, he has relied upon the judgment of the Apex Court in the case of ***Habeeb Mohammad, Condemned Prisoner, confined in District Jail, Secunderabad –Vs- State of Hyderabad,*** reported in ***AIR 1954 SC 51***. He accordingly prays that the impugned Judgment and Order should be set aside and the appellant should be acquitted of the charge under Section 302 IPC.

10. Ms. B Bhuyan, learned Additional Public Prosecutor submits that the prosecution did not prove the guilt of the accused beyond all reasonable doubt before the learned Trial Court, in view of the fact that the alleged admission/confession made by the appellant before the Police is hit by Section 25 & 26 of the Indian Evidence Act, 1872. She also submits that apart from the alleged statement made by the appellant to the Police, there is nothing to connect the appellant to the crime in question.

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

12. A perusal of the evidence of the Prosecution witnesses shows that the entire case of the Prosecution, implicating the appellant as the perpetrator of the crime is based on the evidence of PW-10 and PW-11. The evidence given by PW-10, who is the Sub-Inspector of Assam Police, is that on 22.12.2015 at about 8 a.m., the appellant surrendered before the police station and stated that on the previous night at about 12 midnight, she had killed her husband inside their house with a dao. Accordingly, GD Entry No.381 dated 22.12.2015 was registered and a police party led by him immediately rushed to the place of occurrence. The appellant was kept in the custody of the police station. PW-10 also states that on reaching the place of occurrence, he found a dao used by Garo community along with a half vest (ganji) which was seized by him. PW-10 also states that the appellant was arrested at 3 p.m. on 22.12.2015 and forwarded to the Court for recording her confessional statement under Section 164 Cr.P.C on 23.12.2015. In his cross-examination, PW-10 states that he had sent the seized dao to the Forensic Science Laboratory (FSL) for examination. He also states that during interrogation of the appellant in the police station, PW-12 & 13 were also present.

13. The evidence of PW-12 is that he met the appellant at the Baguan Police Station wherein she disclosed to him that she had killed her husband. In his cross-examination, PW-12 states that on going near the appellant, who was kept behind bars, the appellant told him in front of the police that she had killed her husband.

14. The evidence of PW-13 is to the effect that she had came to know that her sister (appellant) had killed her husband with a dao, without stating how she came to know of the said incident.

15. The evidence of CW-1, who is the son of the appellant and the deceased is to the effect that he does not remember anything about the occurrence of the crime, as he was very young at the relevant point of time. However, he had heard from his relatives that it was his mother, who had killed his father. He further states that on the night of occurrence, he was not present in his house. As such, he did not know what had happened between his parents.

16. The evidence of PW-1, who is also the informant, is to the effect that he had been informed over telephone from the police station that the appellant had murdered his elder brother, the deceased, at night on 21.12.2015. He also states that he did not himself see who murdered his elder brother and did not know how he died. None of the neighbours also knew about the incident and that he did not know who visited his elder brother at night. He also states that he saw a bloodstained dao and the dead body of his elder brother lying on the ground, besides a bloodstained bed-sheet.

17. The evidence of PW-4 is to the effect that he was informed about the incident of murder and that he was made a seizure witness in respect of the dao and half vest (ganji).

18. The evidence of PW-5 is to the effect that he came to know about the incident of murder only after the arrival of the police in the house of the deceased, wherein he was made a seizure witness in respect of the dao and half vest (ganji).

19. The evidence of PW-6, PW-7 and PW-8 is that they came to know

about the incident of murder from the police.

20. The evidence of PW-9, who is the Medical & Health Officer-I in the Goalpara Civil Hospital, is to the effect that he conducted the Post-Mortem Examination on the deceased on 22.12.2015 and in his opinion, death was due to haemorrhage and shock caused by the cut injuries over the throat of the deceased at the level of the thyroid cartilage and cut injury over the right side of the neck just below the right mandible.

21. Thus, as can be seen from the evidence adduced by the prosecution witnesses, the entire Prosecution case rest on the alleged statement/confession made by the appellant to the police on the morning of 22.12.2015, which is to the effect that she had killed her husband.

22. Section 25 of the Indian Evidence Act, 1872 makes a confessional statement of an accused before police officers inadmissible as evidence and the same cannot be brought on record by the prosecution to obtain conviction. Section 26 of the Indian Evidence Act, 1872 provides that statements/confessions made, while in police custody, are considered to be unreliable and not to be proved against an accused, unless it is made before a Magistrate.

23. The appellant in her examination under Section 313 Cr.P.C has stated that she was not at home with her husband on the night of the incident and she was at her maternal home. She also states that when she went home the next morning, she saw her dead husband. She then went to the police station to inform them of the same. Her brother-in-law, who went to the police station afterwards however told the police that the appellant had killed her

husband. In her examination under Section 313 Cr.P.C she states that she did not kill her husband and that this was a false case.

24. As stated earlier, there is no evidence adduced, corroborating the alleged statement made by the appellant to the police that she had killed her husband. As the statement/confessional statement made to the police is inadmissible as evidence, we are unable to agree with the finding of the learned Trial Court that the appellant is guilty of the crime of murder, especially when there is no evidence corroborating the alleged statement. Though PW-10 had stated in his evidence that the appellant had been forwarded to the Court for recording her statement under Section 164 Cr.P.C, we find that no such confessional statement was recorded under Section 164 Cr.P.C. Further, though PW-10 in his cross-examination has stated that he sent the seized dao to the FSL for examination, there is nothing to show that the FSL had made any report with regard to the seized dao, to connect the appellant with the weapon or the crime.

25. On perusing the impugned judgment dated 28.04.2017, we also find that the learned Trial Court appears to have relied upon the GD entry, which recorded that the appellant had surrendered before the police and informed the police that she had killed her husband with a dao, to come to a finding that the conduct of the appellant was the motive and that she was the perpetrator of the crime.

26. The Apex Court in the case of ***Habeeb Mohammad (supra)*** has held that any criminal Court may send for the police diaries of a case under enquiry or trial in such Court and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. It further held that the learned Trial Court could get assistance from the case diaries for further elucidating points

which needed clearing up and which might be material for the purpose of doing justice. However, the learned Trial Court would be in error in making use of the police diaries in it's judgment and in seeking confirmation of it's opinion on the question of appreciation of evidence from statements contained in the police diaries. Thus, in terms of the judgment of the Apex Court in ***Habeeb Mohammad (supra)***, we are of the view that the entries in the police diary could not be used in seeking confirmation of an opinion on the question of appreciation of evidence, as there is no evidence, other than the appellant's alleged statement to the police connecting the appellant to the crime.

27. In the case of ***Kuthu Goala –Vs- The State of Assam*** reported in ***1980 SCC OnLine Gau 21***, the Division Bench of this Court has held that the piece of evidence in regard to the conduct of an accused admissible under Section 8 of the Evidence Act, is by itself not sufficient to find the accused guilty of the offence of murder. It may give rise to suspicion, but it cannot be the basis for conviction for the offence of murder. In the above case, the accused therein had brought the severed head of a human body in a bag to the police station at Dibrugarh and he had admitted under Section 313 Cr.P.C that he had brought the human head to the police Station. The Division Bench on considering the statement made by the accused under Section 313 Cr.P.C in the above case, held that the accused was entitled to the benefit of doubt and was entitled to be acquitted on the ground that there was no other evidence to fasten the accused to the offence.

28. In the case of ***Gamparai Hrudayaraju vs. State of Andhra Pradesh,*** reported in ***(2009) 13 SCC 740***, the Apex Court has held that the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of

any other person. It has further stated that the circumstances from which an inference as to the guilt of the accused is drawn, have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In the present case, the conviction of the appellant has been basically made by the learned Trial Court, on account of the appellant having allegedly surrendered before the police and admitting that she had killed her husband. However, the appellant has denied surrendering before the police or admitting to the murder. Her explanation given under Section 313 Cr.P.C also does not corroborate the stand of the police that the appellant had admitted to murdering her husband or being present in the place of occurrence at the relevant time of the incident. In fact her case is that she had been arrested by the police due to her brother-in-law blaming her as the person who killed her husband, without any evidence being adduced to that effect.

29. With regard to whether the "last seen together" theory could be applied to the facts of the case, we find that there is no evidence adduced, to show that the appellant was staying with the deceased on the night of the incident and as such, it cannot be said that the prosecution has succeeded in leading evidence to show that the appellant and the deceased were last seen together on the night of the incident. As stated earlier, Section 26 of the Indian Evidence Act prohibits proof of a confession made by a person in custody, unless the confession is made in the immediate presence of a Magistrate. In view of the fact that the alleged statement/confession made by the appellant has only been made to police officers, the said statement/confession cannot be the basis for convicting the appellant for an offence under Section 302 IPC, as the same is inadmissible in evidence. In that view of the matter, we are of the view that the conviction of the appellant by the learned Trial Court under Section 302 IPC is not sustainable in law. The judgment dated 28.04.2017 passed by the Court of the learned

Additional Sessions Judge, Goalpara in Sessions Case No. 27/2016 is hereby set aside. Consequently, the sentence imposed upon the appellant under Section 302 IPC is also set aside. The appellant is acquitted of the charge under Section 302 IPC. The State respondent is directed to immediately release the appellant from jail.

30. The appeal is accordingly allowed. Send back the LCR.

31. In appreciation of the assistance provided by the learned Amicus Curiae, the appropriate fee payable to him should be paid by the State Legal Services Authority.

JUDGE **JUDGE**

Comparing Assistant