
(2019) 10 GAU CK 0037
In the Gauhati High Court
Case No : Criminal Appeal No. 218 Of 2018

Ahed Ali @ Abed Ali And 3 Ors

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 31-10-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 201, 302, 342
Code Of Criminal Procedure, 1973 — Section 107, 161

Citation : (2019) 10 GAU CK 0037

Hon'ble Judges : Mir Alfaz Ali, J; Manish Choudhury, J

Bench : Division Bench

Advocate : H R A Choudhury

Final Decision : Allowed

Judgement

Mir Alfaz Ali, J

1. Heard Mr. HRA Choudhury, learned senior counsel assisted by Mr. Azad Ahmed, learned counsel for the appellants and M.Phukan, learned

Additional Public Prosecutor, Assam for the State/respondent.

2. This appeal is directed against the judgment and order passed by the learned Additional Sessions Judge, Bilasipara in Sessions Case No. 30/2011.

By the said judgment, learned Sessions Judge convicted the appellants under Sections 342/302/201 read with Section 34 of the Indian Penal Code and

sentenced them to imprisonment for life u/s 302 IPC , imprisonment for three years u/s 201 IPC and imprisonment for one month u/s 342 IPC. The

appellants were also sentenced to varied amount of fine with default stipulation.

3. The prosecution case, as unfolded in the FIR is, that on 29-06-2004 at about 9 to 9.30 am, accused Ahed and Osman came to the house of the

victim Babul Ali @ Abdul Kader and took him along with them on the pretext of playing cards. After going out with them, the victim did not return at night. On the next day, when the members of the victim's family asked the accused persons about the victim, they told, that the victim left their house without playing cards. Later on the members of the victim's family noticed some blood stain in the bridge and the same was said to the informant. The FIR named accused persons suspected to have caused the death of the victim, inasmuch as, few days before the occurrence, a criminal proceeding u/s 107 CrPC was instituted by the victim against the FIR named accused persons. The FIR was lodged on 02-07-2004 by the PW-1, Keramot Ali, on the basis of which, police registered Chapar P.S. Case No. 101/2004. In course of investigation, the beheaded body of the victim was recovered from a drain and the same was sent for post-mortem examination. The witnesses were examined u/s 161 and on conclusion of investigation charge-sheet was laid against seven accused persons, out of nine named in the FIR.

4. During trial, charges were framed against the appellants u/s 302/201/34 IPC, which were abjured by them. In order to bring home the charges, prosecution examined eleven witnesses and on appreciation of evidence, learned Addl. Sessions Judge convicted the seven accused persons, namely, Jasmat Ali, Shahjamal Sk., Abed Ali, Samad Ali, Osman Ali, Ismail Hussain and Rohimuddin Sk. u/s 342/302/201 read with Section 34 IPC and acquitted the remaining accused persons, namely, Samad Ali, Jasmat Ali and Rohimuddin Sk.

5. Aggrieved by the conviction and sentence awarded by the learned Addl. Sessions Judge, the appellants Ahed Ali @ Abed Ali, Osman Ali, Shahjamal Sk. and Ismail Sk. have preferred the instant appeal.

6. We have considered the submissions made by the learned counsel for the appellants as well as the learned Addl. Public Prosecutor.

7. On our assessment of the evidence and materials brought on record and perusal of the impugned judgment, we find that there was no eye witness of the occurrence and the learned Addl. Sessions Judge primarily relying on the two circumstances, viz., 'last seen theory' and alleged recovery of the body at the instance of the accused Shahjamal, convicted the appellants.

8. PW-2, Jamila Khatun, the wife of the victim deposed, that in the evening, on the day of incident, the accused/appellant Ahed Ali @ Abed Ali and

Osman Ali came to their house and took the victim along with them on the pretext of cutting tree and thereafter, the victim did not return at the night.

On the following day, he reported the matter to Keramot Ali (PW-1). Later on police came and recovered the dead body of the victim from the

Chapar Tea Estate on the basis of the statement of accused Shahjamal.

9. PW-1, Keramot Ali stated that his brother (the victim) went missing from his house and PW-2, Jamila Khatun informed him about the occurrence

on the next day. Accordingly, he along with others made a search and lodged the Ejahar. After lodging of the FIR, police visited the house of the

accused Shahjamal and during interrogation, Shahjamal confessed before the police that he, accused Ismail, Ahed and Osman committed the murder

of the victim. PW-1 also went on saying that he accompanied the police along with Shahjamal to Chapar Tea Estate and Shahjamal showed the body of

the victim. Accordingly, the body was recovered from a drain.

10. PW-8, Rabin Malakar, the investigating officer stated that on receipt of the FIR on 2/7/2004, the O/C registered the case and entrusted him to

investigate the case. Accordingly, the investigating officer visited the house of the deceased and prepared a sketch map on the same day. On 03-07-

2004 he visited the place, where the beheaded body was found. He also stated that the head of the victim was severed, however, members of the

victim's family identified the body and inquest report was prepared by the Executive Magistrate. He also stated to have seized one piece of

lungi and one piece of bamboo vide Ext.-7. It was elicited in his cross-examination, that the dead body was found lying in a drain. This witness

did not state that the body of the victim was recovered on being led by the accused Shahjamal.

11. A dispassionate scrutiny of the oral testimony of the above three witnesses transpires, that though, PW-2 deposed in her examination-in-chief that

in the evening, the two accused persons, Ahed and Osman came to their house and took the victim along with them on the pretext of cutting tree, she

did not make such statement before police recorded u/s 161 CrPC. It further appears from the oral testimony of PW-1, that PW-2 also did not state

before PW-1, that in the evening Ahed and Osman took away the victim along

with them on the pretext of cutting tree, inasmuch as, the PW-1, in his deposition did not state about the PW-2 telling him regarding the two accused persons Ahd and Osman calling the victim and taking him away along with them. Rather, PW-1 stated that the victim was missing from his house.

12. Ext.-1, the FIR lodged by the PW-1 shows, that he has made a different averment in the FIR. Where it was stated in the FIR that Ahd and

Osman came to the house of the victim at about 9 am/pm on the day of occurrence and took the victim with them on the pretext of playing games.

What therefore, transpires from the above testimony of PW-1 & PW-2 is that, the PW-2 for the first time, while deposing before the court, stated that

Ahd and Osman came to his house in the evening and took away the victim on the pretext of cutting tree. She even did not tell about the same to

PW-2 and PW-1 also did not state in his evidence before the court regarding the accused Ahd and Osman taking the victim along with them.

However in the FIR he has made a different statement that it was at 9 to 9.30 am the accused persons took the victim along with them on the pretext

of playing cards. In view above facts and circumstances, the oral testimony of PW-1 for the first time in court that on the previous day the accused

Ahd and Osman came to the house of the victim and took him away along with them, in our considered view, is hardly worthy of inspiring

confidence. Therefore, the circumstances of 'last seen theory' relied by the learned trial court which is based on the oral testimony of PW-

2, as indicated above, which in our considered view, is hardly worthy of placing reliance.

13. The second circumstances relied by the learned trial court is the recovery of the body of the victim on being led by the accused/appellant

Shahjamal. Although PW-1 and PW-2 both stated that police went to the house of Shahjamal and Shahjamal led the police to the tea garden and

showed the dead body, such testimony of PW-1 and PW-2 does not find any support from the testimony of PW-8, the investigating officer. What is

evident from the oral testimony of PW-8, the investigating officer is, that the body of the victim was detected even before arrival of the police.

Therefore, we find no legal evidence to prove that the body of the victim on being led by accused/appellant Shahjamal.

14. It is the trite law, that in a case, which solely rests on circumstantial

evidence, prosecution has to prove beyond all reasonable doubt the circumstances relied on by the court. Besides, proving the circumstances solidly and conclusively, prosecution further needs to prove that the circumstances so proved cumulatively must form a chain of circumstances, to lead the court to an irresistible conclusion, that none-else, but the accused/appellant was the perpetrator of the offence. In the instant case what we find is that, not to speak of the chain of circumstances, even the two circumstances, viz., the two circumstances, 'last seen theory' and alleged recovery of body relied by the learned trial court, have not been proved beyond all reasonable doubt.

15. In view of the above evidence, we are constraint to hold that prosecution hopelessly failed to prove the charge against the accused/appellants beyond reasonable doubt. Therefore, the conviction recorded and the sentence awarded by the learned Additional Sessions Judge, Bilasipara is not sustainable. Accordingly, we set aside the impugned judgment of conviction and sentence and set aside the accused/appellants at liberty forthwith.

The bail bonds, if any, stands discharged.

16. Send back the record.