

(2018) 06 GAU CK 0102
In the Gauhati High Court
Case No : Criminal Appeal (J) 81 of 2016

Anjan Ray

APPELLANT

Vs

State Of Assam

RESPONDENT

Date of Decision : 25-06-2018

Acts Referred:

Indian Penal Code, 1860 — Section 201, 302, 304
Code of Criminal Procedure, 1973 — Section 313
Indian Evidence Act, 1872 — Section 25, 26, 27, 106, 114

Citation : (2018) 06 GAU CK 0102

Hon'ble Judges : SUMAN SHYAM, J;ACHINTYA MALLA BUJOR BARUA, J

Bench : Division Bench

Advocate : A. Tiwary, N. J. Dutta

Final Decision : Partly Allowed

Judgement

Suman Shyam, J)

1. Heard Mr. A. Tiwary, learned Amicus Curiae appearing for the appellant. I have also heard Mr. N. J. Dutta, learned Additional Public Prosecutor,

Assam, representing Â the State.

2. The sole appellant in this case has been convicted under section 302 of the Indian Penal Code for committing murder of his wife and has been

sentenced to undergo rigorous imprisonment for life and to pay the fine of Rs.5000/-. The accused has also been convicted under section 201 of the

Indian Penal Code for destroying the evidence of offence and sentenced to rigorous imprisonment for 7 (seven) years and has also to pay a fine of

Rs.3000/- with default clause.

3. The prosecution case, in brief, is that the accused Ranjan Ray had killed his wife Padumi Ray and buried the body in the courtyard of his house so

as to destroy the evidence. On 05.12.2014 the mother of the deceased Smti. Sabita Devi had lodged an F.I.R. alleging that few days after the marriage her son-in-law has been torturing her daughter in various ways but she continued to live with her husband out of which a girl child had been born. Since she did not get to see her daughter in the house of the accused for a long time, hence, necessary enquiry was made with the relatives but in vain. As such, a suspicion had arisen in her mind that the accused person had killed her daughter and kept her buried somewhere. On 05.12.2014 the police from Borghola Outpost exhumed the skeletal remains of her daughter from the compound of the accused person in presence of an Executive Magistrate.

4. Based on the ejahar dated 05.12.2014, Abayapuri P.S. Case No.486/2014 was registered under sections 302/201 IPC. The case was then entrusted for proper investigation by the police. During the course of investigation the appellant/accused was arrested and produced before the Court. On completion of the investigation, charge-sheet was submitted against the accused based on which, charges were framed to which the accused had pleaded not guilty and claimed to be tried. Eventually, the accused was convicted by the learned Addl. Sessions Judge (FTC), North Salmara under sections 302/201 of the IPC and awarded sentence as indicated above.

5. The prosecution case is based on circumstantial evidence and during the course of trial the prosecution side had examined as many nine witnesses.

The accused, however, did not adduce any evidence in his defence.

6. PW 6, Smti. Sabita Devi, is the informant in this case and also the mother of the deceased. She has deposed before the Court that after the marriage with her daughter, the accused used to frequently torture her i.e. the daughter. The PW 6 had also stated before the court that her daughter used to live with the son-in-law and had gone missing from the house of the son-in-law since a long time. It has also been stated that out of marriage of her daughter with the accused, a girl child was born who is about 2 ½ years old.

7. PW 1, Durga Charan Roy, is a neighbour of the accused and he has deposed before the court that one day at about 10.00 a.m. when he was working in the courtyard he could feel bad smell and after some days he could learn from the family members of Umesh Ray that the accused person

had killed his wife and buried the dead body in the courtyard.

8. PW 7, Umesh Chandra Ray, has deposed that the informant is the mother-in-law of the accused and the mother of the victim girl and that the

incident took place about nine years back. He had also stated that the In-charge of Borghola Outpost had come to the house of the accused person

and then he came to know that the accused had killed his wife and thereafter, buried her dead body in the courtyard. Skull and some bones were

recovered from the grave whereafter, inquest was conducted by the Magistrate. Exhibit 6 is the Inquest Report and he had put his signature in the

inquest report which was identified as Ext-6(2).

9. The witnesses PW 2, Satyen Pathak and PW 4, Rajani Medhi have testified that some bones and one skull were recovered from the courtyard of

the accused person in their presence.

10. PW 8, Nabajyoti Ojha, is the Circle Officer, who had conducted the inquest on the dead body of the victim. PW 8 had deposed that he being

accompanied by the police, had gone to the residence of the accused person and on digging the courtyard had found a few long bones, flat bones, skull

etc. belonging to the victim woman. The witness had also stated that the accused person had taken them to the place where they found the bones and

in his presence, the accused had confessed that after killing his wife, he had buried her body in that place. PW 8 had also stated that he had conducted

the inquest in presence of witnesses Samiul Islam (PW-9), Sabita Devi (PW- 6), Dhajen Ray and Umesh Chandra Ray (PW-7) and that Ext-6 is the

inquest report. During the cross-examination the PW 8 had, however, admitted that the bones were not sent for FSL or DNA test but were only sent

for post mortem examination.

11. PW 3, Dr. Kochir Ali Ahmed, is the Medical and Health Officer, who had conducted the post mortem examination on the skull and bones

recovered from the backyard of the accused and is an important witness in this case. The PW 3 had deposed that on 05.12.2014 he had conducted the

post mortem examination in connection with Borghola Outpost GDE No.64 dated 05.12.2014 and in this case, only few pieces of long bones, flat

bones and small bones were brought to him for examination. The findings recorded by the PW 3 in the post mortem report are as follows :-

EXTERNAL APPEARANCE

A few pieces of long bones (femur, tibia, humerus), skull, ribs and part of vertebra & pelvis presented for PM Examination. These bones belong to

the inquest report.

HUmerus Length 29.98 cm (H)

Tibia " Length " 32.90 cm " (T)

- NB :- All these findings are in favour of female skeleton.

3. Bruise Position size and nature

4. Mark of ligature on neck dissection, etc.: $\hat{A} \hat{A} \hat{A} \hat{A} \hat{A} \hat{A}$ Does not arise.

1. Scalp, Skull, Vertebrae : No soft tissue remains. However, tuft of hair (long), skull and few pieces of vertebrae remains. The

2. Membrane No membrane remains.

III - THORAX

1. Walis ribs and cartilages : o soft tissue or thoracic viscera remains, only few pieces of ribs are present

along with the few piece of bong bone & skull i.e. part of skeleton remains.

2. Pleurae : Absent (as above)

3. Larynx and trachea : Absent (as above)

4. Right lung : Absent (as stated above)

5. Left lung : Absent (as stated above)

6. Pericardium : Absent (as stated above)

7. Heart : Absent (as stated above)

8. Vessels : Absent (as stated above)

IV " ABDOMEN

1. Walls : Absent

No soft tissue, abdominal wall or abdominal viscera present. Only a few pieces of vertebra present, as the dead body is skeletonised with

remaining few piece of bone.

2. Peritonoum : Absent (as

stated above)

3. Mouth, Pharanx, oesophagus : Absent (as above)

4. Stomach and its contents : Absent (as above)

5. Small intestine and its contents : Absent (as above)

6. Large intestine and its contents : Absent (as above)

7. Liver : Absent

Absent (as only parts of skeleton presented for PM Exam)

8. Spleen : Absent

Absent (do)

9. Kidneys : Absent

Absent (do)

10. Bladder : Absent

(do)

11. Organs of generation external and internal : Absent (do).

V " MUSCLES, BONES AND JOINTS

1. Injury : No soft tissue or viscera remains.

2. Disease or deformity : Does not arise.

3. Fracture : There is a fracture on the frontal bone (Rt) of skull with depression of the outer table.

4. Dislocation : Absent.

The doctor had opined that the skeletal remains were of a female and the approximate height of the victim during life was 158.30 cm to 160.80 cm.

From the fracture line present in the frontal bone it was assumed by the doctor that the death might have been caused by head injury which was likely to be ante mortem. In the post mortem report Ext-2 it has also been mentioned that time since death is about one month.

12. PW 9, SI Samiul Islam, was the In-charge of Borghola Outpost on duty on 05.12.2014 and he had deposed that the informant Sabita Devi had

lodged an ejahar on 05.12.2014 based on which he had made G.D. Entry No.64 and thereafter, went to the place of occurrence. The accused was

then brought to the Police Station and when he was interrogated, he had confessed that he had assaulted his wife Padumi Ray and she had expired

after two days whereupon he had kept the dead body buried in a pit which had been dug earlier. The PW 9 has also deposed that after intimating the

Officer-in-charge of the Police Station he again went to the place of occurrence along with the accused when the accused had showed him the place

where the dead body was kept buried. Accordingly, the place was dug up and some bones and a skull was recovered in presence of the Executive

Magistrate Nabajyoti Ojha (PW -8), who had conducted inquest over the same. Ext-6 is the inquest report and Ext-6(4) is his signature. PW 9 has

also deposed that the bones and the skull recovered were then sent to the Bongaigaon Civil Hospital for post mortem examination.

13. PW 9 has further deposed that on the basis of the ejehar dated 05.12.2014 Abhayapuri P.S. Case No.486/2014 was registered under Sections

302/201 of the IPC and he was entrusted with the investigation of the case. He had then arrested the accused who was kept in safe custody in the

Abhayapuri Police Station and later forwarded to the Court. On 07.12.2014 the PW 9 again went to the place of occurrence along with the accused

and recovered the piece of wood used in committing the crime.

14. As mentioned above, there is no eye-witness in this case. Therefore, the prosecution case is entirely based on circumstantial evidence. In the

statement of the accused recorded under section 313 Cr.P.C. he has claimed to be completely innocent.

15. From the evidence available on record we find that the victim was the wife of the accused and she had gone missing from the house of the

accused for a long time. From the testimony of PW-9 it appears that the mother of the deceased had made a complaint before the police that her

daughter could not be traced after searching her for months and hence, a prayer was made for her recovery. Upon receipt of ejahar a G. D. Entry

was made whereafter, the police went to the place of occurrence and interrogated the accused. Evidence on record also suggests that on being lead

by the accused, the dead body, which was buried in the backyard of his house, was recovered by the Police in presence of a Magistrate who had

conducted an Inquest on the body. The corpse was then sent for post mortem examination. The testimony of the PW 8 and 9 corroborates each

other's version and proves the fact that the accused had himself led the police to recover the dead body. The said fact also finds mention in the

inquest report Ext-6 wherein it has been clearly mentioned that the place where the dead body was buried had been identified by the accused in

presence of the Magistrate.

16. PW 5, Janak Ray had stated in his examination-in chief that the accused had

confessed of killing his wife before the villagers but during the cross-examination he had admitted that he had come to know about the same from the police. As such, the testimony of PW-5 would be of no probative value in this case.

17. The PWs 8 and 9 have stated that the accused had confessed of having killed his wife before the villagers. But we find that, during that period when the confession was allegedly made, the accused was in the custody of the Police. As such, in view of the provisions contained in sections 25 and 26 of the Indian Evidence Act, 1872 such confession of the accused cannot be proved against him. Therefore, the plea of the prosecution side as regards the extrajudicial confession made by the accused of having killed his wife is found to be untenable in the eye of law.

18. What would, however, be of great significance in this case is the fact that the PWs 8 and 9 have both deposed before the court that the body was exhumed from the pit in the back yard of the house of the accused based on his information given to the Police that he had himself buried the body therein. The testimony of the PWs 8 and 9 have remained un-impeached during cross examination.

19. Section 27 of the Evidence Act permits the prosecution to prove the fact that has lead to the discovery of facts relevant in the case. Section 27 reads as follows:

â??27. How much information received from accused may be proved. Provided 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 related distinctly to the fact thereby discovered, may be proved.â??

20. A Division Bench of this court had the occasion to interpret section 25, 26 and 27 of the Evidence Act in the case of *Â Rajiv Phukan and Anr vs State of Assam* reported in 2009 (2) GLT 414. After considering the law declared by the Honâ??ble Supreme Court on the scope of section 27 in a series of earlier decisions, the Division Bench had observed as follows :

â??(8) While considering the scope of Section 27, what needs to be borne in mind is that the first condition, which is necessary in order to apply Section 27 is that there must be discovery of a fact, albeit a relevant fact, in

consequence of information received from a person, who is accused of an offence. The second condition for application for Section 27 is that the discovery must be deposed to. This, in turn, means that the factum of discovery has to come on record by way of evidence and not otherwise. The third condition is that at the time of receiving the information, the accused must have been in police custody. The fourth, but, perhaps, the most important condition is that only "so much of the information", as relates "distinctly" to the "fact thereby discovered", is admissible. The rest of the information, which an accused person might have given, must be kept excluded. The meaning of the expressions, "so much of the information", and "distinctly", have been subject to interpretation of a number of judicial pronouncements. The expression, "so much of the information", means only that part of the information, supplied by the accused, which is the direct and immediate cause of the discovery.

21. In the case of *State of Maharashtra vs. Suresh* reported in (200)1 SCC 471 as relied upon by the learned Additional Public Prosecutor it has been held that in a case where recovery of dead body is made from a place pointed out by the accused, three possibilities are there. One is that the accused himself would have concealed it. Second, that he would have seen somebody else concealing it and third, that he would have been told by another person that it was concealed there. The Hon'ble Supreme Court has held that in such situation if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the two last possibilities, then the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer an explanation as to how else he had come to know about such concealment and therefore, if he chooses to refrain from telling the court as to how he had come to know of it, the presumption that the concealment was made by him would be well justified and such an interpretation will be also consistent with the principles embodied in section 27 of the Evidence Act.

22. As noted above, the materials on record clearly indicates that the prosecution has been able to prove by leading cogent evidence that the dead body of the victim women was recovered acting on the basis of the information provided by the accused. The information regarding the position of the

dead body would be relevant fact for the purpose of this case and therefore, would come within the sweep of section 27 of the Evidence Act. Having regard to the ratio of the decision in the case of Rajib Phukan and another (supra) we are of the opinion that the prosecution has succeeded in proving the fact regarding discovery of the dead body against the accused.

23. It needs to be noted herein that the evidence of PWs 3, 4, 5 and 6 have projected a consistent picture which unequivocally goes to show that the deceased was the wife of the accused and used to live together with him in the same house. The testimony of the aforesaid witnesses also go to show that the deceased was last seen together with the accused. But what is significant to note herein that although the accused had informed the Police about the place where the dead body was lying, yet, he has not offered any explanation as to how the skeleton had occurred there-in. He has also failed to offer any explanation as to the whereabouts of this wife or as to how she had disappeared.

24. The testimony of the PW 3 also goes to show that the bones are of a female person and the existence of fracture in the skull, as indicated in the post mortem report, support the prosecution story that the victim was assaulted with a piece of wood which was also recovered by the police from the place of occurrence.

25. In this case the deceased was living with the accused in the same house, wherefrom she had gone missing. Therefore, it was incumbent upon the accused to offer an explanation in the matter which he has failed to do. In the case of Trimukh Maroti Kirkan vs. State of Maharashtra reported in (2006)10 SCC 681 the Honâ??ble Supreme Court has observed that in an offence like murder which is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly lie upon the prosecution but the nature and extent of evidence to be lead by the prosecution cannot be of the same degree as in other cases of circumstantial evidence. The Supreme Court has observed that in view of section 106 of the Evidence Act, there would be a corresponding burden upon the inmates of the house to give a cogent explanation as to how the crime was committed.

26. In the present case, as noted above, it is established by cogent evidence that the deceased Padumi Ray, who was living with her husband i.e. the accused in his residential house, had gone missing and later on her dead body

was recovered from the back yard of the house. Therefore, having regard to the law laid down in the case of Trimukh Maroti Kirkan (supra), in a case of this nature, the accused cannot chose to remain silent and offer no explanation on an assumption that the burden to establish the charge is entirely on the prosecution. Due to his silence, strong presumption of guilt under section 114 of the Evidence Act would, therefore, arise against the accused in this case.

27. The prosecution case is based on circumstantial evidence and we find from the record that the prosecution has been able to prove the fact that the deceased had gone missing while residing with the accused and later on her dead body had been recovered from the pit dug up in the back yard of the accused. It has also been established that the accused was aware that the dead body was lying there and had provided the information to the police which has lead to the discovery of the body. The post mortem report and the opinion of the medical expert prove that the bones were of a female who had died due to head injury. There is no report of any other female having gone missing in that area around that time and the accused had also failed to offer any explanation as to how the crime was committed. We therefore, find that all the circumstances so as to establish that the accused was responsible for his wife's death could be proved by the prosecution by leading cogent evidence. Although in this case the bones exhumed from the grave were not sent for FSL or DNA test, yet, having regard to the facts and circumstances of the case, as noticed above, as well as the opinion of the doctor PW 3, we are of the view that such omission would not be material in this case.

28. We have, however, noticed that the medical reports indicates of a single head injury being the cause of death of the deceased and the injury was caused by a blunt object i.e. a piece of wood. We are, therefore, of the view that the appellant had inflicted the injury on the head of the deceased without having the intention of causing death to the deceased nor was it done with the knowledge that the injury so inflicted would result into death of the deceased in ordinary course. We have also taken note of the fact that the appellant has a minor child who is in the need of parental care.

29. Considering the above, we set aside the conviction of the appellant under Section 302 of the IPC and also the sentence of rigorous imprisonment

for life and instead, convict him under Section 304 Partâ?"I and sentence him to undergo rigorous imprisonment for 10 (ten) years.

30. The sentence of fine imposed by the learned Sessions Judge as well as the sentence of rigorous imprisonment of 7(seven) years under Section 201

of the IPC, however, stands affirmed.

This appeal stands partly allowed.

Send back the LCR.