
(2014) 05 GAU CK 0048
In the Gauhati High Court
Case No : Crl. A. (J) No. 107 of 2011

Azizur Rahman

APPELLANT

Vs

The State of Assam

RESPONDENT

Date of Decision : 20-05-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 313
Penal Code, 1860 (IPC) — Section 302, 304, 326, 34, 448

Citation : (2014) 05 GAU CK 0048

Hon'ble Judges : Prasanta Kumar Saikia, J; Brojendra Prasad Katakey, J

Bench : Division Bench

Advocate : Z. Hussain, Amicus Curiae, Advocate for the Appellant; S. Jahan, Addl. P.P., Assam, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

Brojendra Prasad Katakey, J.—This appeal is directed against the judgment of conviction dated 16.09.2011 passed by the learned Sessions Judge, Cachar at Silchar, in Sessions Case No. 15/2005, convicting the accused appellant u/s 448 IPC, 326 IPC and 302 IPC and sentenced him to undergo rigorous imprisonment for 6(six) months for the offence u/s 448 IPC; for a period of 7 years and also to pay a fine of Rs. 3,000/-, in default, to undergo rigorous imprisonment for a further period of 1(one) month for the offence u/s 326 IPC and to undergo rigorous imprisonment for life and to pay a fine of Rs. 3,000/-, in default, to undergo rigorous imprisonment for further period of 1(one) month for the offence punishable u/s 302 IPC.

2. A criminal investigation was set in motion on lodging of the first information report by Md. Raimuddin alias Rahim Uddin (PW-1) on 11.11.2001 with the Officer-in-Charge of Udharband Police Station alleging that at 7.30 P.M. on 10.11.2001, Md. Azizur Rahman (appellant), Md. Mizazur Rahman, Md. Sazizur Rahman and Md. Hafizur Rahman armed with sharp weapons such as dao, dagger etc. trespassed upon his house in a body, entered the room and began

hacking the inmates randomly, as a result of which his 17 years old sister Raimun Nessa, who was offering namaaz, died on the spot, with the further allegation that the informant's father Tamiz Uddin (PW-2), mother Mustt. Anis Bibi and younger brother Md. Jasim Uddin (PW-4) have also sustained grievous injuries on various parts of their persons. Based on the said first information report, Udharband P.S. Case No. 189/2001 was registered u/s 448/326/302/34 IPC. The police during investigation visited the place of occurrence, got the inquest done on the dead body of Raimun Nessa, sent the injured persons including Tamiz Uddin (PW-2) and Jasim Uddin (PW-4) for medical examination, recorded the statements of the witnesses acquainted with the facts and circumstances of the case u/s 161 Cr.P.C., prepared the sketch map and got confessional statement of the accused appellant recorded u/s 164 Cr.P.C. On completion of the investigation, police submitted the charge-sheet u/s 448/326/302 IPC against the accused appellant only. The case being exclusively triable by the Court of Sessions, the learned Sub-Divisional Judicial Magistrate(S), Silchar on 28.02.2005 committed the same to the Court of Sessions for trial and accordingly Sessions Case No. 15/2005 was registered. The learned Sessions Judge on 19.05.2005 framed the charges against the accused appellant u/s 448/326/302 IPC, which when read over and explained to him, he pleaded not guilty and claimed to be tried. Hence the trial commenced.

3. During trial the prosecution, in order to bring home the charges levelled against the accused appellant, examined 12(twelve) witnesses, which includes 3(three) eye witnesses, namely, Rahim Uddin (PW-1), who is the informant and brother of the deceased; Tamiz Uddin (PW-2), father of the deceased and who also received the grievous injuries on his person and Md. Jasim Uddin (PW-4), another brother of the deceased, who also received certain injuries on his person. The prosecution has also examined Dr. P.P. Dhar (PW-6), who medically examined the injured, namely, Tamiz Uddin (PW-2) and Jasim Uddin (PW-4) and submitted the injury report, which has been proved and marked as Ext.-2. The Investigating Officer, Sri Hiralal Dey, has been examined as PW-10. The learned Judicial Magistrate, who has recorded the confessional statement of the accused appellant, has been examined as PW-11, who has proved the confessional statement, which has been marked as Ext.-5. Dr. Gunajit Das, who conducted the autopsy on the dead body of the deceased Raimun Nessa, has been examined as PW-12, who proved the post mortem examination report, which has been marked as Ext.-7. The statement of the accused appellant was thereafter recorded u/s 313 Cr.P.C. No defence witness, however, has been examined, despite the opportunity given to do so, though in his statement recorded u/s 313 Cr.P.C., he wish to examine the defence witness.

4. The learned Sessions Judge, upon appreciation of the evidence on record, both oral and documentary, passed the judgment of conviction as aforesaid. Hence the present appeal.

5. We have heard Mr. Z. Hussain, learned amicus curiae appearing for the

appellant and Ms. S. Jahan, learned Addl. Public Prosecutor appearing for the State of Assam.

6. The learned amicus curiae referring to the deposition of the eye witnesses, namely, PWs-1, 2 and 4, has submitted that there being contradiction on the material part of their evidence, no conviction could have been recorded based on their oral testimony. It has also been submitted that it is evident from the statement recorded u/s 164 Cr.P.C. (Ext.-5) that the accused appellant never admitted that he has killed Raimun Nessa and as such the learned Sessions Judge ought not to have convicted the accused appellant, based on the confessional statement and hence the judgment of conviction recorded u/s 302 IPC needs to be set aside. The learned amicus curiae, however, in the alternative, has submitted that if this Court finds that the evidence of PWs-1, 2 and 3 is reliable and trustworthy and the conviction can be based on such oral testimony, apart from the statement recorded u/s 164 Cr.P.C., as it is evident from the confessional statement that the accused appellant had inflicted the blow on the person of Raimun Nessa, without any intention to kill her and because of the continued provocation by the family of the deceased, more particularly, by the brother of the deceased, he ought to have been convicted under Part-II of Section 304 IPC. The learned amicus curiae further submits that since the prosecution has failed to prove the commission of any offence punishable u/s 326 IPC as well as u/s 448 IPC, the learned Sessions Judge ought not to have convicted the accused appellant under the said provisions of law.

7. The learned Addl. Public Prosecutor, on the other hand, supporting the judgment of conviction recorded by the learned Sessions Judge, has submitted that it is evident from the deposition of the prosecution witnesses that the prosecution could prove the ingredients constituting the offence of house trespass, which is punishable u/s 448 IPC, apart from the grievous injuries caused to Tamiz Uddin (PW-2). The learned Addl. Public Prosecutor further submits that though Dr. P.P. Dhar (PW-6) has proved the injuries found on the person of Tamiz Uddin (PW-2), which he has opined as of grievous nature, the defence did not challenge the said version of PW-6 by putting any question challenging the injuries found as well as his opinion, during cross-examination. The learned Addl. Public Prosecutor, therefore, submits that the learned Sessions Judge has rightly convicted the accused appellant u/s 448/326 IPC.

8. Ms. Jahan, learned Addl. Public Prosecutor further submits that all the three eye witnesses, namely, PWs-1, 2 and 4 have stated how the accused appellant has committed the offence punishable u/s 302 IPC by inflicting the dagger blow on the person of Raimun Nessa, apart from inflicting the grievous injuries on the person of Tamiz Uddin (PW-2) and simple injury on the person of Jasim Uddin (PW-4). Referring to the confessional statement recorded u/s 164 Cr.P.C., which has been marked as Ext.-5, it has also been submitted by the learned Addl. Public Prosecutor that the accused appellant has confessed his guilt and such statement being voluntary and having been recorded by following the required

formalities and the requirement of law, the learned Sessions Judge has not committed any illegality in recording the judgment of conviction u/s 302 IPC. Hence, according to the learned Addl. Public Prosecutor, the appeal deserves to be dismissed.

9. We have considered the submissions advanced by the learned counsel appearing for the parties and also perused the evidence available on record, apart from the judgment of conviction recorded by the learned Sessions Judge.

10. Dr. Gunajit Das (PW-12), who conducted the autopsy on the dead body of Raimun Nessa, in his deposition, has narrated the injuries found on the person of the deceased, by proving the post mortem examination report, which has been marked as Ext.-7. The defence did not, during cross-examination, challenge the injuries, which were found on the person of the deceased, apart from the opinion of the doctor that all the injuries are anti-mortem in nature, caused by sharp weapon and the death is homicidal in nature, which has been caused because of the injuries sustained by her. The factum of death of Raimun Nessa because of the injuries found on her body, has, in fact, not been challenged by the learned amicus curiae appearing for the appellant. The prosecution, therefore, could prove the death of Raimun Nessa, which is homicidal, because of the injuries found on her person.

11. The prosecution has also proved the injuries found on the persons of Tamiz Uddin (PW-2) and Jasim Uddin (PW-4), by examining Dr. P.P. Dhar (PW-6), who medically examined those persons. While Dr. P.P. Dhar has deposed that the injuries found on the person of Tamiz Uddin are grievous in nature, the injuries found on the person of Jasim Uddin are simple in nature and all these injuries were caused by sharp weapon. The defence did not challenge the nature of injuries found on the persons of Tamiz Uddin (PW-2) and Jasim Uddin (PW-4), during cross-examination. PW-1 Rahim Uddin, PW-2 Tamiz Uddin and PW-4 Jasim Uddin, who are witness to the occurrence, have also proved inflicting injuries on the persons of Tamiz Uddin and Jasim Uddin by dagger, which is a sharp cutting weapon, by the accused appellant at around 7 P.M. on 10.11.2001. The defence during cross-examination could not shake the credibility of these witnesses. There is absolutely no contradiction on the material part relating to the injuries caused by the accused appellant on the persons of Tamiz Uddin and Jasim Uddin, inside the house of Tamiz Uddin (PW-2).

12. The prosecution, therefore, could prove the ingredients to constitute the grievous hurt, which is punishable u/s 326 IPC, on the person of Tamiz Uddin by the accused appellant and hence the learned Sessions Judge has rightly convicted him u/s 326 IPC for causing such grievous injuries on the person of Tamiz Uddin (PW-2).

13. PWs-1, 2 and 4, apart from PW-3 have also deposed that the accused appellant at about 7 P.M. on 10.11.2001 has entered their house armed with a dagger and inflicted the injuries on the persons of PWs-2 and 4, apart from the

mother of PW-4 as well as the deceased Raimun Nessa. The defence did not cross-examine these witnesses, in so far as it relates to the allegation of house trespass by him on 10.11.2001 at about 7 P.M. The learned Sessions Judge, therefore, has also rightly convicted the accused appellant for the offence of house trespass, which is punishable u/s 448 IPC.

14. The next question which requires determination is whether the learned Sessions Judge has rightly convicted the accused appellant u/s 302 IPC or whether the accused appellant ought to have been convicted under Part-II of Section 304 IPC? Rahim Uddin (PW-1), Tamiz Uddin (PW-2) and Jasim Uddin (PW-4) in their depositions have narrated the incident occurred on 10.11.2001 at about 7 P.M. All these witnesses have stated that on the evening of 10.11.2001 the accused appellant armed with a dagger entered the house of Tamiz Uddin (PW-2) and gave a dagger blow on the person of Raimun Nessa, while she was offering namaaz, as a result of which she died. PWs-1, 2 and 4 have corroborated each other on such testimony. Their testimony is also supported by Dr. Gunajit Das (PW-12), who has spoken about the injuries found on the person of Raimun Nessa. There is no material contradiction on the material part of the evidence adduced by PWs-1, 2 and 4, though there is bound to be minor discrepancies in their evidence, which are not material, because of the time gap between the date of commission of offence and recording the statement before the Court. Such minor contradiction, not on the material point, would not render their testimony unreliable and untrustworthy. It, however, appears from their evidence as well as the confessional statement of the accused appellant (Ext.-5) that there was an incident relating to an illicit relationship between Jasim Uddin (PW-4) and the wife of the accused, for which though the accused appellant insisted the villagers as well as his parents and the in-laws to try for settlement, which, however, has not been done. It also appears that on the day of occurrence the paternal uncle of the wife of the accused appellant further provoked the accused appellant, thereby adding fuel to the fire and at the heat of the moment he went to the house of the PW-2 and first inflicted a blow on the person of Jasim Uddin (PW-4) and thereafter having lost his senses, he indiscriminately gave few blows without any intention of causing any harm to the deceased Raimun Nessa and such blow, however, having fell on the vital part of the body of the deceased Raimun Nessa, she died. It, therefore, appears that there was a continuous provocation from the first stage, because of Jasim Uddin having an illicit relationship with the wife of the accused appellant, the intensity of which instead of decreasing on passing days has instead increased due to subsequent development and provocation, which resulted in loss of all senses and control on himself, in turn resulting in commission of the crime.

15. Having regard to the aforesaid discussion, it can safely be held that the accused is guilty of commission of the culpable homicide not amounting to murder and he having no intention to kill Raimun Nessa, he is required to be punished under Part-II of Section 304 IPC.

16. In view of the above, the conviction of the accused appellant u/s 302 IPC has been altered to Part-II of Section 304 IPC and he is sentenced to undergo rigorous imprisonment for 7 years and to pay a fine of Rs. 5,000/-, in default, to undergo rigorous imprisonment for a further period of 3(three) months. The sentence of imprisonment in respect of the offence punishable u/s 448 IPC, 326 IPC and Part-II of Section 304 IPC shall run concurrently. The fine, if realized, shall be paid to Tamiz Uddin, the father of the deceased.

17. The appeal is accordingly allowed in part, as indicated above.

18. Registry is directed to send down the records.

19. The learned amicus curiae shall be paid his professional fee of Rs. 7,500/- by the State of Assam within a period of 1(one) month from today.