

(2019) 12 GAU CK 0015
In the Gauhati High Court
Case No : Criminal Appeal No. 91 Of 2016

Bijuli Barman And Anr

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 06-12-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 307, 357A, 493, 497
Code Of Criminal Procedure, 1973 — Section 125, 161, 162(2)
Evidence Act, 1872 — Section 32

Citation : (2019) 12 GAU CK 0015

Hon'ble Judges : Mir Alfaz Ali, J;S. Hukato Swu, J

Bench : Division Bench

Advocate : B. K. Mahajan, T. Mishra

Final Decision : Allowed

Judgement

S.Hukato Swu, J

1. The present criminal appeal is directed against the judgment dated 11-03-2016 passed by the learned Sessions Judge, Nalbari in Sessions Case No. 58/2008. The appellants are represented by Mr. B.K. Mahajan, learned counsel and the State is represented by Mr. T. Misra, learned Additional Public Prosecutor.

2. Facts presented before this Court is that on 02-08-2006 at about 5:30 P.M, accused No.1, Smti Bijuli Barman and accused No.2, Manmohan Barman poured kerosene upon Smti. Kamini Barman who is the mother of accused No.2. The accused No.1 is the sister-in-law of accused No.2, Manmohan Barman. The complainant/informant is Gunajit Barman who is the elder brother of Manmohan Barman. He is the husband of accused No.1 Smti. Bijuli Barman. The informant and the accused No.1 are reported to have been living separately after a year of their marriage in 2005. The deceased victim Kamini Barman succumbed to her injuries on 02-09-2006. An FIR was lodged by the complainant before the Mukalmua Police Station. Initially, the case was registered under Section 307/497/493/34 IPC under Case No. 122/06 of Mukalmua Police Station. On the

death of the victim, the charges were changed to 302 IPC/34. P.W.1 lodged FIR on 03-09-2006 explaining the delay that when he lodged the FIR on 20-08-2006 at concerned Police Station, it was not accepted because of the delay. Hence, complaint was filed before the Chief Judicial Magistrate, Nalbari and subsequently, the matter was registered by the Mukalmua Police Station. The main contents of the FIR is that the accused No.1, who is the wife of the complainant came into illicit relationship with accused No.2 who is the younger brother of the complainant. The deceased victim mother came to know about the affair and the victim informed the complainant which made the victim bottleneck for the accused Nos. 1 and 2 to enjoy their illicit relationship. Thus, the motive was to remove the hindrance in their relationship. The FIR also mentions that the complainant had personally seen the accused persons with his own eyes on 09-04-2006 and then on 06-06-2006 of the illicit relationship of the accused persons. Ultimately, on 02-08-2006, at about 5:30 P.M., the accused No.1 with the help of accused No.2 poured kerosene and lighted match stick causing grievous injury upon the victim. The victim went out for help in the street and the neighbours doused the fire and after scolding the accused persons coaxed them to take the victim to a nearby hospital. The victim was taken to Mukalmua Primary Health Centre where they were instructed to shift the victim to GMCH, Guwahati since it was severe burn injuries and the victim was accordingly shifted to GMCH, Guwahati. The victim subsequently succumbed to her injuries after treatment at GMCH, Guwahati.

3. P.W.1, in his deposition, has stated that on 02-08-2006, he reached home at 6:30 P.M from Guwahati where he works for a living. He was informed by the neighbours that his mother Late Kamini Barman was set ablaze by the accused persons and after committing the crime, accused Manmohan Barman fled away and Bijuli Barman remained in the house. He also learnt that the locality people coaxed the accused persons to take the victim to the hospital. On the next day of the occurrence, he went to GMCH and met his mother. His mother told that accused Manmohan Barman caught hold of her and Bijuli Barman after pouring kerosene set her ablaze. He also stated that after the occurrence, Manmohan Barman and Bijuli Barman lived together as husband and wife in the parental house of the accused Bijuli. They did not visit GMCH to see his mother during her stay there. However, in his cross-examination, PW 1 stated that after the incident, the accused Bijuli Barman stayed with her mother at GMCH for 6 to 7 days during her treatment. The police had also stated to have recovered dowry articles of Bijuli Barman from his residence. Bijuli Barman obtained order of maintenance against the complainant under Section 125 Cr.Pc. wherein, the complainant was directed to pay ₹ .300/- per month as maintenance and that he has been living in Guwahati for the last 12 to 13 years. He has also stated that he did not keep Bijuli Barman with him because of his illicit relationship with other woman. After 6 (six) months of their marriage, he came to know that his wife Bijuli Barman who is the accused, has illicit relationship with the accused Manmohan Barman and he has instituted a divorce case at Family Court,

Guwahati in 2006. The case is still pending.

4. P.W. 2, Ms. Anjana Deka is the elder sister of the accused Manmohan Barman. She stated that at around 5:00 P.M., she heard hue and cry and came from the field running where she saw her mother burning. People successfully put off the fire. She brought a rickshaw to send her mother to the hospital. When she asked her mother about the incident in front of the public her mother said "When I was sitting at the verandah, my younger son Manmohan grabbed me as a result of which I fell down. He poured oil on me and accused Bijuli set fire to me." She stated that her Mother was taken to Mukalmua Hospital on a rickshaw. Thereafter, accused Manmohan Barman took her mother to GMCH for treatment. Her mother died at the GMCH after a month. Accused Manmohan Barman and accused Bijuli Barman were not present when cremation was done. In her cross-examination, she stated that Manmohan was playing cards in the nearby vicinity. Other people have stated that they saw Manmohan playing cards near the place of occurrence, Bijuli was sleeping. The two accused persons took my mother to GMCH for treatment. She stated that Gunajit is her brother. He filed the case against the accused. Bijuli filed several cases against Gunajit.

5. PW 3 is Komal Deka. He stated that at around 5:00 P.M. after hearing hue and cry, he found Kamini Barman, the deceased in front of her house. Kamini Barman was burning and he doused the fire by pouring water and sand. When asked Kamini Barman about the incident, she told that accused Manmohan Barman had set fire on her. After the fire was extinguished, a rickshaw was brought and the victim was taken to medical. Kamini was taken to GMCH from Mukalmua where she was treated for about a month and ultimately she succumbed to her injuries. In his cross-examination, he stated that Gunajit who is the complainant is his maternal uncle. His maternal uncle married Gunajit's elder sister. He did not take Kamini to Mukalmua nor did he go to Guwahati with her. Gunajit told him that he had filed a case against the accused. Long time after Kamini had caught fire Manmohan came back home.

6. P.W. 5 is Durga Barmon. She stated that Kamini was her "Jaa" (wife of husband's brother-Jr.). She stated that the incident took place about three years ago. Prior to the incident, the daughter-in-law did not provide meal to Kamini for about 3 to 4 days. She asked her to cook herself. However, Kamini told her that her daughter-in-law had kept the kitchen locked and did not allow her to eat rice on her own. Manmohan poured kerosene on Kamini's person in order to burn and Bijuli set fire by lighting the match stick. On the day of occurrence, she was at Laupara which is about 2 mile away from her house. She did not witness the incident of setting fire on Kamini. Police did not ask him about the incident.

7. P.W. 6 is Sukreswar Deka. Three days before Kamini death, she came to his house at around 9:00 P.M and told him that Manmohan Barman and Bijuli did not allow her to stay at home and they did not allow her to eat. Then he took Kamini to her home which is about 200 metres away. When he called Manmohan, he told him from inside the house that he had driven her out of the house and he

shouted that "I would kill her by setting her on fire." Then he left Kamini at her house. The same day at around 11:30 P.M., Kamini once again came back to his house. He did not allow Kamini to come to his house. He sent Kamini to Manmohan's house. Three days after this incident, the incident of fire took place and he heard hue and cry and learnt that Gunajit's mother had caught fire. He sent his son to take stock of the situation. His son took Kamini to the medical by a rickshaw. His son said that Kamini.....(unintelligible sentence) that Manmohan and Bijuli had burnt her and that the rickshaw puller had also heard that (under objection). Kamini's house is seven houses away from his house. They are not related to each other and that Manmohan shouting that he would kill Kamini may not be available in the statement made before the police. He also stated that he did not remember whether he had told the police about his son telling him that Kamini had told that her son and daughter-in-law had assaulted her. His son and Gunajit are friends. Naren, who is present in the Court, is Gunajit's brother-in-law. His son's name is Pankaj Deka and he would not be able to tell the name of the rickshaw puller. He stated that Kamini was undergoing treatment in Guwahati Medical for about a month and that Bijuli had lodged several cases against Gunajit.

8. P.W.7 states that it was on 2nd August, 2006 at about 5:30 P.M, while she was transplanting paddy seedlings at that time, he heard hue and cry. Manmohan came running to the place where she was transplanting paddy seedlings. When they asked what had happened, Manmohan wetted his hands with water and left the place without saying anything. They also heard hue and cry on the road near Manmohan's house. Then they saw Manmohan's mother Kamini on a rickshaw. They asked her how she caught fire. Kamini told to her "when I was sitting at home Manmohan poured Kerosene on my person and Bijuli set fire to me." Later, she succumbed to the burn injuries. In her cross-examination, she stated that Gunajit is her brother by village courtesy. Anjana Deka, the woman who has come with her today is the elder sister of Gunajit. She and Anjana have been married to the same village. She is her 'Jaa'.

9. P.W.8 is Tukna Ram Deka. He is a rickshaw puller who testifies that he knows both the accused. It was around 4:00 to 5:00 P.M when he was taking passengers to Baruaputa village some youths asked him to take an old woman who sustained burn injury and the accused Bijuli boarded the rickshaw. He brought the rickshaw to Mukalmua. The old woman was in a critical state but she was able to speak. The old woman on the rickshaw was saying "why did you set fire to me Bijuli?" She was writhing in agony. He took her to the medical on his rickshaw and the doctor treated her. He cannot say the name of the woman but he knew her. He used to address her as "Aunt". It is my maternal uncle's village. He visited Gunajit's place even once in a month. The old woman was lifted on rickshaw with Bijuli the accused. He does not know the name of women assembled there. He was present when the doctor was dressing the old woman. He stated that he did not tell anyone about the old woman saying " Bijuli, Manao and you have burnt me". He did not even tell this to the doctor. He stated that he

stayed at Gunajit's house till 1991 by erecting a house. After 1991, he left the place.

10. P.W. 9 is Niranjana Kakati. He deposed that on the day of fire incident at about 3:00 P.M., they were playing card at Sapkata Chowk. The accused Nande @ Manmohan was also playing card. He went to Mukalmua at about 6:00 P.M. and he heard that the mother of Manmohan's died due to burn injury.

P.W. 10 also stated that on the day of incident, four of their friends were playing card and in the night, he heard that the mother of Manmohan was burnt by fire and she was taken to hospital for treatment.

11. P.W. 11 is the Medical Doctor Tarun Kumar Das who conducted post mortem report. He has opined that the death was caused due to shock resulting from Dermoepidermal burn as described which was antemortem and involving 45% of total body surface area. Burn area : Dermo-epidermal burn involving in the body over lower parts of both sides of the face, whole neck front and back of whole chest wall, both upper limbs, upper parts of front and back of abdominal wall right side of flanks of abdomen. Burn area is covered by unhealthy granulation tissue, pus and slough at places and emits foul smell. Dermo-epidermal burn involving the body 40% of total surface area.

12. P.W.12 is Mr. Binoy Kr. Ray, S.I. of Police. He stated that on 03-09-2006, he was ASI at Mukalmua P.S. and on that day, S.I. Bhupen Bora received an FIR from Gunajit Barman through the Court. On receipt of the FIR, the O.C., Mukalmua P.S. has registered a case bearing No. 122/06 under Sections 307/497/493/34 IPC and endorsed the same to him to investigate. He visited the place of occurrence on 03-09-2006 and found the dead body of the victim which was taken back from GMCH. After returning from the place of occurrence, the accused Bijuli was at the Police Station. She was brought before the Court on 05-09-2006. After getting information about the accused Manmohan Barman, he was arrested from a rented house at Survey, Guwahati on 08-09-2006 with the help of police of Bashistha P.S. Originally, the case was registered under Sections 307/497/493/34 IPC but when the victim succumbed to the burnt injuries, a prayer was made before the Chief Judicial Magistrate for adding Section 302 IPC and was accordingly allowed to be added on 05-09-2006. He completed the investigation and submitted the charge sheet. P.W. 4, Mahesh Kalita stated before him that he had heard that an old lady was uttering repeatedly that she was set on fire by her daughter-in-law. P.W. 3 stated before him that he came to know that in the absence of Gunajit, the accused Manmohan had illicit relationship with Bijuli. In the cross-examination, he stated that the date of occurrence as per Exhibit-2 is on 02-09-2006. No information was given to P.S. prior to lodging of this ejahar. Nothing was found in the place of occurrence and there were no seized materials. He did not record the statements of any person in the hospital. He did not know who was attending doctor and nurse. He does not know the name of landlord of the house wherefrom the accused Manmohan was arrested. He recorded the statement of witness Kamal Deka on 04-09-2006.

He came to know that somebody had given information to Nande about the burn injury while Nande was playing card at Sapkata. Manmohan is known as Nande also. P.W. 6, Sukleswar Deka did not state before him that he sent his son to get information of the occurrence and this witness also did not state before me that his son told him that Kamini had told his son that Manmohan and Bijuli set fire on Kamini. P.W.7 did not state before me that the accused persons had set fire on Kamini by pouring kerosene.

13. With the above evidences enumerated, the learned Sessions Judge has recorded conviction under Section 302/34 IPC by her order dated 11-03-2016. From the reading of the judgment, it is apparent that the learned Sessions Judge has placed reliance upon the dying declaration that was made by the deceased as stated by P.W.1, P.W.2, P.W. 3, P.W. 7 and P.W. 8. All these witnesses have at some point of time stated that the deceased had declared that accused Nos. 1 and 2 had caused her death by setting her ablaze. Secondly, the learned Sessions Judge placed reliance upon the circumstantial evidence that have been brought before the Court as evidence. Challenging the decision of the learned Sessions Judge, the appellants represented by Mr. B.K. Mahajan (Advocate) has challenged the decision impugning that both these points considered by the learned Sessions Judge fall short of the criterion laid by several decisions of Superior Courts to record conviction on the basis of dying declaration and circumstantial evidence. Besides, there are many irregularities in the dying declaration.

14. Several infirmities which have cropped up in the dying declaration have been pointed by the learned counsel for the appellant. P.W. 1 who filed the complaint which was registered as the FIR, did not make mention of the dying declaration and his FIR was also lodged at a belated stage which discredits the reliability of the FIR itself. It was stated that the FIR was first presented before the Mukalmua Police Station on 20-08-2006. However, it was not accepted for the delay. This statement is discredited by the statement of the I.O. himself who appears as P.W. 12. He has categorically stated that no information was given to the Police Station prior to lodging of this ejahar which is dated 03-09-2006. Hence, the FIR itself may be an afterthought to avenge the animosity between P.W. 1 and P.W.2 and the complainant himself. The animosity between these parties is clearly reflected in the evidence which shows matrimonial disturbances of illicit relationship. For all the above facts including the unexplained delay of about a month, sanctity of the F.I.R. is in doubt.

15. There is also allegation and counter allegation amongst the parties. This being the position and undeniable facts, the question of motive in the instant criminal case can be attributed to either of the parties. Hence, the theory of removing the deceased who remains the bottleneck to the relationship of accused Nos. 1 and 2 may not be accepted without understanding and taking into consideration the animosity amongst the parties as well. The dying declaration as deposed by P.W.2 who is the sister of the accused and the

complainant is that "when she asked her mother about the incident in front of the public her mother said 'when I was sitting at the verandah, my younger son Manmohan grabbed me as a result of which I fell down. He poured oil on me and accused Bijuli set fire to me.'". It is apparent on the case record that her mention of the public is conspicuous in the so called dying declaration supposed to be made by the deceased. None of the public except partisan witnesses were examined which makes the dying declaration in issue subject to doubt. P.W. 3 testifies that when he asked Kamini Barman, she told that her younger son and Bijuli Barman had set fire to her. This witness is related to Gunajit who is the complainant and matrimonial uncle to the witness. The statement of the P.W.2 and P.W. 3 are at variation. P.W. 7 stated that we asked her how she caught fire while she was seated on the rickshaw and she replied "when I was sitting at home Manmohan poured kerosene on me and Bijuli set fire to me". The dying declaration as deposed by P.W. 7 also varies from the one deposed by P.W. 2, who has stated that his younger son Manmohan grabbed her and as a result of which she fell down. Hence, there is marked difference between the two dying declarations. This witness is also related maternally to Gunajit the complainant.

16. P.W. 8 who is the rickshaw puller and who took the deceased to the hospital stated that the old woman on the rickshaw was saying "why did you set fire to me Bijuli". We can easily see the marked difference between the statements of P.W. 7 and P.W. 8. They were both present near the rickshaw which was carrying the deceased and both P.W. 7 and P.W. 8 have different version of dying declaration coming out from the same spot and time which is practically not possible. P.W. 7 nor P.W. 8 had corroborated the dying declaration made by the deceased to them. We also must remember that accused Bijuli was seated with the deceased and when such charges are leveled against her in her very presence, it is logical that she would say something. But none of the witnesses speaks about this. Hence, from the evidence that is placed before us, we see that there are marked differences between the oral dying declarations that is deposed by 5 witnesses on whom the learned Sessions Judge has relied for recording a conviction. The principle underlying the acceptance of a dying declaration as an exception to the normal doctrine of hearsay evidence is that "a man will not die with lies on his lips". He is not subjected to cross-examination as he is no more. Hence, appropriate care should be taken to see that the dying declaration is pure and un concocted. The person recording the dying declaration must satisfy himself that the declarant is mentally sound to make a statement. The dying declaration which was purported to be made to the witnesses was never recorded before the police under Section 161 Cr.Pc. which is evident from the statement of the I.O. himself. Statements were never recorded nor any endeavor was made to record the dying declaration before the two doctors who treated the deceased inspite of the long treatment she had in the hospitals. The I.O. also clearly states that he does not know the doctor nor the nurse who treated the deceased. Since the statement was never recorded before the I.O. by the witnesses, who deposed regarding oral dying declaration nor any endeavor was made to get the dying

declaration recorded by doctor or magistrate though the victim survived for about a month, the reliability of the dying declaration is put to much doubt.

17. Learned counsel for the appellants has appropriately placed reliance on the case of Sanjay-vs-State of Maharashtra, reported in (2007) 9 SCC 148, where the Court held that in our opinion in view of the different dying declarations, it would not be safe to uphold the conviction of the appellant and we have to give him the benefit of doubt. Again, in the case of Dalip Singh and Others-vs-State of Punjab, reported in (1979) 4 SCC 332, the Court has opined that Section 32 of the Indian Evidence Act in view of the exception provided in sub-section (2) of Section 162 of the Code of Criminal Procedure, 1973, it is better to leave such dying declaration out of consideration until and unless the prosecution satisfies the Court as to why it was not recorded by a magistrate or by a doctor. In the instant case, the dying declaration was never recorded by a Magistrate or by a doctor. Furthermore, severity of the injuries due to burn caused upon the deceased, there is every likelihood of person uttering uncoordinated statement which cannot be relied upon. In the above given facts, there is no room to accept the dying declaration recorded by the PWs as being pure and free from any embellishment and afterthought statements as recorded by the witnesses.

18. On the point of circumstantial evidence which the learned Sessions Judge has relied upon for conviction in the instant case is that the fact that the accused Manmohan Barman was playing cards at the relevant point of time of the incident of setting ablaze the victim is not believable because of the fact of statement made by P.W. 9, who stated that the accused No. 2 was playing card uptill 3:00 P.M. and the time of the incident is recorded as 5:00 P.M to 5:30 P.M by other prosecution witness which disproves the possibility that the accused No. 2 could not be at the place of occurrence at the time of incidence. However, on scrutiny of the statement, it shows that there is no time recorded about the departure of accused No.2. P.W. 9 only stated that on the day at about 3:30 P.M. we were playing cards at Sapkata Chowk. To disprove this fault, the learned Sessions Judge has relied on the statement of P.W. 7 who recorded that the accused No. 2 ran through the field without telling her anything is nothing short of suspicion against the accused. However, in our view, this reaction of the accused cannot be considered to establish his guilt. There is the possibility of accused No.2 not departing from the place where he was seen playing cards. He was seen by at least three witnesses. Anxiety for good or for bad reasons, a man is capable of not doing something in the natural course such as not replying to a relative etc. Even the fact that the accused person took the victim to the hospital for treatment has been considered as a ploy to project themselves as innocent. It may be conveniently argued that none of the relatives went to the hospital with the victim but the accused persons alone. If the relatives of the deceased had suspicion upon the accused person and they had concern for the deceased, they should have accompanied the victim to the hospital to get assurance that the victim gets best of treatment. This shows clearly that the other relatives did not have genuine concern for the deceased and rather took advantage by projecting

the persons attending the victim as offenders. The statement of P.W. 6, Sukreswar Deka who testifies that the deceased came to his house and complaint before him that she was not provided food by them prior to the incident is also considered as a chain of event in the circumstantial evidence. Statement of P.W. 5 and P.W. 6 are also relied upon as circumstantial evidence. P.W. 5 is a relative of the complainant and she has made statement on hearsay. She is 80 years old lady who was at her daughter's place at Laupara which is about 2 miles away from the place of occurrence. She stated that she is not an eye witness to the incident. P.W. 6 is a neighbor of the deceased who states that he sent his son to take stock of the situation and who stated that his son reported that the deceased had said that the accused Manmohan and the accused Bijuli had burnt her and that the rickshaw puller too had heard that. However, his son Pankaj Deka who was sent to take stock of the situation was never examined by the prosecution and the statement of the P.W. 6 cannot be relied upon. He has also stated that the deceased came to his house at around 9:00 P.M which was three days before the incident of fire and when he took the deceased to her home which is 200 metres away and called Manmohan, he told him from inside the house that he had driven her out of the house. He also shouted that he would kill her by setting her on fire. However, as recorded above, the reliability of this witness is also in doubt, as he states that he does not remember about telling anything to the police in connection with the incident. Hence, his statement was not recorded under Section 161 Cr.Pc. and is put to much doubt.

19. The general principle of criminal jurisprudence is that when two views are possible, the view that favours the accused should be adopted. In the instant case, we observe that there is departure from this doctrine. The learned District Judge has opined that the present accused/appellants taking the victim to hospital was to feign innocence. The other view which could have been adopted is that the accused persons did not have the intention to kill the deceased and charges under Section 302 IPC could not be recorded. As discussed earlier, the accused persons were the ones who took the victim to the hospital and there is no record of other family members accompanying the deceased to the hospital. P.W. 1 had stated that the accused persons did not come to the hospital to take care of the victim. However, on revealing the truth, he had to retract his statement in cross-examination and admit that the accused had spent 6 to 7 days in the hospital at Guwahati. When this action of the accused are proved that they had shown concern for the welfare of the deceased, it is very difficult to prove that they had intention to murder the deceased.

20. The circumstantial evidence as shown in the instant case does not confirm a chain of events which points finger to the accused person out ruling the rest of the world for the commission of the offence which is a requirement of the law. The Apex Court in the case of Gambhir-vs-State of Maharashtra, reported in (1982) 2 SCC 351, has held that when the case rests upon circumstantial evidence such evidence must satisfy the following test :- (1) the circumstances

from which the inference of guilt is sought to be drawn, must be cogently and firmly established; (2) those circumstances should be definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. On a bare reading of facts, the instant case does not qualify the stand and as laid down by the Apex Court.

21. For all the reasons recorded above, we are unable to concur with the findings of the learned Sessions Judge and accordingly set aside the judgment dated 11-03-2016 passed by the learned Sessions Judge in Sessions Case No. 58/2008.

22. Appeal is allowed.

23. The conviction is set aside and the appellants be released and set at liberty forthwith, if not required in any other case.

24. There is no record of any order passed by the learned Sessions Judge with regard to compensation under Section 357 A IPC. It appears from the record that there is no dependent of the deceased, however, the concerned District Legal Services Authority shall examine the necessity of providing compensation to the dependants of the victim, if any.

25. Remit the LCRs to the concerned District Judge for further steps.