
(2021) 12 GAU CK 0032
In the Gauhati High Court
Case No : Criminal Appeal No. 65 Of 2020

Brojen Timung

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 22-12-2021

Acts Referred:

Indian Penal Code, 1860 — Section 72, 201, 300, 302, 304A, 304B
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2021) 12 GAU CK 0032

Hon'ble Judges : Achintya Malla Bujor Barua, J; Robin Phukan, J

Bench : Division Bench

Advocate : H R A Choudhury

Final Decision : Allowed

Judgement

1. This Criminal Appeal, No. 65/2020, is directed against the judgment and order, dated 30.01.2020, passed by the learned Sessions Judge, Karbi Anglong, Diphu in Sessions Case No. 95/2015, under Section 302/201 IPC. It is to be mentioned here that vide the impugned judgment and order, dated 03.01.2020, the learned Sessions Judge, Karbi Anglong, Diphu has convicted the accused/appellant-Shri Brojen Timung, under section 302/201 IPC and sentenced him to suffer R.I. for life and to pay a fine of Rs.2,000/-, in default, R.I. of 3 (three) months, under Section 302 IPC and also sentenced to suffer R.I. for 1 (one) year and to pay a fine of Rs.500/-, in default, S.I. for 1 (one) month under section 201 IPC.

2. The factual background leading to filing of this Criminal Appeal is briefly stated as under:-

"The appellant - Shri Brojen Timung got married with Smti. Rina Engtipi (since deceased), in the year 2007, as per the rites and rituals prevailing in their society. On 22.03.2013, Smti Rina Engtipi had committed suicide by hanging in a room of the hostel of Walong Atori Private School, being maintained by them. She left behind one four years old son. As per the prevailing custom and tradition

of their society, the dead body, in case of unnatural death such as suicide, cremation is usually done in presence of members of both the family observing the legal formalities. But, the family members of Shri Brojen Timung, without informing the family members of the deceased, cremated the dead body. Therefore, the family members of the deceased suspected that the death of the deceased is a planned murder, not a case of suicide. Then, the mother of the deceased, - Smti. Kaku Rongpipi, lodged one FIR with the Officer-in-Charge of Dokmoka Police Station. On receipt of the said FIR, the Officer-in-Charge of Dokmoka Police Station registered a case, being Dokmoka P.S. Case No.12/2013, under Section 302 IPC and endorsed S.I. Abdul Quddus to investigate the same. The I.O. then visited the place of occurrence, examined the witnesses and arrested the accused and forwarded him to the Court. Then, on completion of the investigation, the I.O. laid the Charge-Sheet against the accused/appellant-Shri Brojen Timung, to stand trial under Section 302/201 IPC, before the Court of learned CJM, Karbi Anglong, Diphu. On commitment of the case by the learned CJM, Karbi Anglong, Diphu to the Court of Sessions, the accused entered appearance before the Court of learned Sessions Judge, Karbi Anglong, Diphu. Then, after hearing learned Advocates of both sides, the learned Sessions Judge, Karbi Anglong, Diphu has framed the charges against the accused under Section 302/201 IPC and on being read and explained over, the accused pleaded not guilty to the same. Then the prosecution side has examined as many as 7 witnesses, including the I.O., to bring home the charges against the accused. Thereafter, closing the prosecution evidence, the learned Sessions Judge has examined the accused under Section 313 Cr.P.C. Then hearing arguments of both the sides, the learned Sessions Judge, has convicted the accused/appellant under Section 302/201 IPC and sentenced him, as aforesaid."

3. Being highly aggrieved, the accused/appellant preferred this appeal on the ground that:-

(a) the learned Court below, failed to appreciate the evidence in its proper perspective and arrived at a perverse finding;

(b) the learned Court below failed to make any sincere effort to go through the entire records and arrived at a wrong conclusion;

(c) the learned Court below had mainly relied upon the circumstance that the dead body was cremated in absence of the relatives of the deceased, but overlooked the evidence of prosecution witnesses Nos. 2, who had categorically deposed that he went to the house of the accused after receiving information at about 10.30 AM and that PW. 7 categorically stated that during investigation, he found the relatives of the deceased at the time of cremation;

(d) the learned Court below has ignored the evidence of PW. 2, on the ground, that he was 15 years old, but in fact he was 22 years old at the time of cremation and on 23.03.2013, i.e. the date of occurrence he was 17 years old and the learned Court below has failed to appreciate the said fact;

(e) the learned Court below failed to appreciate the statement of the accused under Section 313 Cr.P.C., wherein, he categorically stated that the deceased was cremated in the presence of her uncle and the same was supported by PW. 7, and that mere suspicion, cannot take the place of proof;

(f) that there was 7 days delay in filing the FIR and no plausible explanation has been offered for such delay, which cause serious doubt about the veracity of the prosecution case, and therefore, it is contended to allow the petition by setting aside the impugned order;

4. Heard Mr. A. Ahmed, learned counsel for the accused/appellant, and also heard Ms. S. Jahan, learned Addl. PP for the State of Assam.

5. Mr. Ahmed, the learned counsel for the accused/appellant has submits that there is no evidence against the accused /appellant to establish the charges under Section 302/201 IPC. Mr. Ahmed further submits that and there is no Post Mortem Report as well as Inquest Report as the same could not be conducted and also that there is no eye witnesses to support the prosecution version. Mr. Ahmed, therefore, submits that this is a clear case of acquittal.

6. On the other hand, Ms. S. Jahan, the learned Addl. PP also, in her, usual fairness, conceded to the submission of the counsel for the accused/appellant that there is no evidence and also there is no PM Report as well as Inquest Report here in this case as dead body was cremated before arrival of the Investigating Officer at the place of occurrence. However, Ms. Jahan submits that the deceased herein this case died within 7 years of her marriage and as such it has to be looked into if the offence under section 304 (B) IPC is made out here in this case.

7. But, in reply to the submission of Ms. Jahan, Mr. A. Ahmed, the learned counsel for the accused/appellant submits that there is no evidence that the deceased was subjected to cruelty, to meet the demand of dowry soon before her death and as such said section is not attracted here in this case.

8. Having heard the submission of the learned Advocates of both the sides, we have carefully gone through the record of the learned Court below and we find substance in the submission so advanced by Mr. A. Ahmed, the learned counsel for the accused/ appellant. But, before a discussion is directed into the submissions, so advanced by learned Advocates of both sides, we deem it appropriate to briefly refer to the evidence, so recorded by the learned Court below.

9. A careful perusal of the record of the learned Court below reveals that the prosecution side has examined as many as 7 witnesses including the I.O., to bring home the charges against the accused/appellant. It has examined Smti. Kaku Rongpipi, the informant, as P.W.1. She is the mother of the deceased. Her evidence reveals that her daughter- Rina Engtipi (since deceased) got married with the accused about four years back. The occurrence took place in the year

2013. On the date of occurrence at about 8.00 PM, she was returning home after attending a marriage ceremony at Chokihola and while she reached Bokolia, the family members of the accused informed that her daughter is seriously ill and she should come to the house of the accused/appellant. She then left for the house of the accused and on reaching there she came to know that her daughter has expired and the family members of the accused have already cremated her dead body without waiting for her arrival. Her evidence also reveals that her daughter left behind one son of 4 years old. And though the accused and his family informed her that her daughter has committed suicide, yet, they did not wait for her arrival and also did not report the matter to the police. Instead, they cremated the dead body and therefore, she suspects that the accused murdered her daughter and spread a lie that she had committed suicide. Then, she lodged the FIR with the Dokmoka Police Station. It is elicited in her cross-examination that one Harmon Engti reported her about the death of the deceased. It is also elicited that that her daughter married the accused after having love affairs and she heard that the accused used to pickup quarrel with the deceased.

10. PW. 2/Sri Harmon Engti is the son of the informant (PW.1). His evidence reveals that on the day of occurrence, which took place in the year 2013, the accused informed him over phone that his elder sister had passed away. But, the accused did not informed him how she had passed away. Then, he along with two of his relatives immediately rushed to the house of the accused and on reaching there, they have been informed by the family members of the accused that the deceased had committed suicide by hanging in the hostel, which was being run by them. He found the deceased lying dead on the ground, being covered with a piece of cloth, but he did not see the dead body by removing the cloth. Then, they left the house of the accused, and later on, his mother visited the house of the accused and thereafter, he also went there, but before his and his mother's arrival, the family members of the accused have cremated the dead body of his sister. His evidence also reveals that they have suspected that the accused committed murder of his elder sister and spread a lie that she had committed suicide. His cross-examination reveals that one Seson Singhna and Sagar Terang accompanied him to the house of the accused and he reached the house of the accused at about 10.30 AM. It is also elicited that his deceased sister had informed him that quarrel took place between her and the accused.

11. PW. 3/Sri Ramesh Engti is the elder brother of the deceased. His evidence reveals that though he has not been reported about the death of his younger sister by the accused, yet, hearing about her death he went to the house of the accused and in the meantime, the deceased was taken to the cremation ground. He never found any police in the house of the accused and also in the cremation ground and the family members of the accused cremated his deceased sister without giving information to him or to the police. His evidence reveals that his deceased sister got married with the accused in the year 2013. Cross-examination of this witness reveals that he did not hear about any quarrel between the accused and the deceased.

12. PW. 4/ Smti. Pratima Beypi and PW. 5/Shri Songsing Engti testified that they only heard that Rina Engtipi committed suicide. PW. 5 also visited the house of the deceased, but he did not see the dead body. PW. 6/Sri Staring Kathar is not aware of as to how the deceased passed away.

13. PW.7/Sri Abdul Quddus is the I.O. His evidence reveals that on receipt of the FIR on 29.03.2013, he registered Dokmoka P.S. Case No. 12/2013, under section 302 IPC and he took up the investigation. During investigation, he has visited the place of occurrence, examined the witnesses and prepared Sketch Map- (Exhibit-2). His evidence also reveals that while he visited the place of occurrence, he was informed that the deceased committed suicide by hanging in the hostel of Walong Atori Private School. Thereafter, he had visited the place, where the dead body was cremated. But, before his arrival, cremation was completed and he did not find any ash there. He, then, arrested the accused Brojen Timung and interrogated him and forwarded him to the Court. Then on completion of investigation, he laid Charge-Sheet, (Exhibit-3), against the accused. Cross-examination of this witness reveals that he did not seize anything from the place of occurrence and he came to know during the investigation that some people from the side of the deceased were also present at the cremation ground and the accused told him that he was in his shop while the deceased committed suicide.

14. It is apparent from the evidence discussed above and also from the FIR (Exhibit-1), that the occurrence took place on 22.03.2013. But, the FIR was lodged on 29.03.2013. And as such there was delay of 7 (seven days) days in filing the FIR and apparently no explanation for the delay is forthcoming from the prosecution side. As no explanation is offered for the delay, let alone a plausible one, we are of the view that this unexplained delay raise considerable doubt about the veracity of the prosecution version here in this case. In holding so we derived authority from a decision of Hon'ble Supreme Court in Thulia Kali Vs. State of Tamil Nadu: AIR 1973 SC 501, where it has been emphasised that the delay in lodging the FIR has to be satisfactorily explained.

15. It also appears from the from the evidence discussed above that the family members of the accused/appellant, without reporting the matter to the police, cremated the dead body of the deceased, for which no inquest and post mortem could be conducted on the dead body of the deceased. Therefore, reliance has to be placed on oral evidence adduced by the prosecution witnesses only.

16. The evidence discussed above also reveals that there is no direct as well as circumstantial evidence against the accused/appellant of committing murder of the deceased. The evidence of PW- 1, 2 & 3, who are the family members of the deceased, have heard either from the accused/appellant or from his family members about committing suicide by the deceased by hanging in the hostel of Walong Atori Private School. They suspect the accused of committing the murder of the deceased solely on the ground that before arrival of the informant and the police, the accused and his family members have cremated the dead body of the

deceased. But, it is a settled proposition of law that a suspicion, however strong, cannot take the place of proof. Except this suspicion of P.W.1, 2, and 3, there is no other evidence to rope the accused/appellant with the charge under Section 302 IPC. P.W. 4 and 5, who are the independent witnesses, also heard that the deceased had committed suicide.

17. It is apparent from the record that the learned Court below has solely relied upon the factum of cremation of dead body of the deceased by the accused and his family members without informing the police and the family members of the deceased. But, there appears to be no requirement of law that family members of both the parties should remain present during cremation of the dead body except the prevailing practice in that locality.

18. It is also incorrect to say that no family members of the deceased were present at the cremation ground. It is the evidence of P.W.2 that the accused/appellant has informed him about the death of his wife and then he reached the place of occurrence before cremation of the dead body and found the same covered by a piece of cloth. The I.O. also categorically stated in his cross-examination that during cremation of the deceased, some people of the deceased's side were also remained present. And as such, the allegation made in the FIR that the dead body was cremated without being informed to the family members of the deceased, that gave raise to suspicion in the mind of P.W. 1, 2 and 3, appears to be unfounded. And unfortunately the learned court below has acted upon such evidence and arrived at the finding of guilt of the accused/appellant without there being any evidence to establish the ingredients of such a serious charge. It has failed to direct its discussion to the materials available on the record.

19. In *Richhpal Singh Meena vs. Ghasi @ Ghisa*, Criminal Appeal No. 341 of 2005, on 4 July, 2014, Hon'ble Supreme Court has held that to ascertain whether the offence was of murder or culpable homicide, a five prong enquiry is necessary. In paragraph No. 46, it has been held as under:-

"Having considered all the decisions cited before us (and perhaps there are many more on the subject but not cited), in our opinion, a five-step inquiry is necessary: (i) Is there a homicide? (ii) If yes, is it a culpable homicide or a 'not-culpable homicide'? (iii) If it is a culpable homicide, is the offence one of culpable homicide amounting to murder (Section 300 of the IPC) or is it a culpable homicide not amounting to murder (Section 304 of the IPC)? (iv) If it is a 'not-culpable homicide' then a case under Section 304-A of the IPC is made out. (v) If it is not possible to identify the person who has committed the homicide, the provisions of Section 72 of the IPC may be invoked."

20. In the case in hand, the prosecution side has failed to lead any evidence to establish that the death of the deceased was a homicidal death. Nor there is any evidence to term it as culpable homicide amounting to murder or not amounting to murder. Also there is no evidence to suggest that a case under Section 304-A

of the IPC is made out. Rather, P.W. 4 and 5, who appears to be independent witnesses, have categorically stated that the deceased had committed suicide. Thus, the evidence on the record are falling far short of to establish the charge under section 302 IPC.

21. That, in order to establish the charge under section 201 IPC, the prosecution side is required to prove the following ingredients:-

- (i) An offence has been committed;
- (ii) The accused knew or had reason to believe that an offence has been committed;
- (iii) The accused-
 - (a) caused any evidence of the commission of offence to disappear, or
 - (b) gave any information relating to the offence which he knew or believe to be false;
- (iv) The accused did so intending to screen the offender from punishment, whether that offender be himself or another person; and
- (v) The offence in question was punishable with:-
 - (a) death, or
 - (b) imprisonment for life, or
 - (c) punishable with less than 10 years of imprisonment.

22. Here in this case, from the evidence adduced by the prosecution witnesses, it cannot be said that the above ingredients of the offence under section 201 is established. It has even failed to establish commission of any offence by the accused. In view of the above, we record our concurrence to the submissions made by the learned counsel for the accused/appellant that there is no direct or indirect evidence against the accused/appellant, for commission of the offence under section 302/201 IPC.

23. We have also considered the submission of Ms. Jahan, the learned Addl. PP, in respect of applicability of section 304-B IPC here in this case, as the deceased died in a mysterious circumstance, within 7 years of her marriage with the accused/appellant. But, we are left unimpressed by such a submission, in absence of any evidence to suggest that soon before the death, the deceased was subjected to cruelty or harassment by her husband or relative of her husband in connection with demand of demand of dowry.

24. It is clear from the decision of Hon'ble Supreme Court in Sher Singh Vs. State of Haryana (2015) 3 SCC 724, that to prove a dowry death, the prosecution has to prove the following:-

- (i) that the death of a woman has by her having been burned or having been

bodily injured,

(ii) within seven years of her marriage,

(iii) and that she was subjected to cruelty or harassment by her husband or any relative of her husband,

(iv) in connection with demand of dowry, and

(v) that the cruelty of harassment meted out to her continued to have a casual connection or a live link with the demand of dowry.

25. In the case in hand there is no iota of evidence, even to remotely suggest that the deceased was subjected to cruelty of harassment by the accused/appellant or by his relative in connection with demand of dowry. Though P.W.1, the mother of the deceased and P.W.2, the brother of the deceased stated that they heard that quarrel took place between the accused/appellant and the deceased, yet, they have not uttered even a single word to establish a connection of such quarrel with that of the demand of dowry.

26. Under the above facts and circumstances, we find that the finding of the learned Court below, in recording guilt of the accused/appellant under Section 302/201 IPC, is based on surmise and conjecture. Without there being any evidence, either circumstantial or direct on the record, such a finding cannot be allowed to stand.

27. In the result, we find sufficient merit in this appeal and accordingly, the same stands allowed. Conviction and sentence of the accused/appellant vide impugned judgment and order, dated 03.01.2020, stands set aside. The accused/appellant be released from the custody immediately if his detention is not warranted in any case. Send down the record of the learned court below with a copy of this judgment and order.