

(2023) 08 GAU CK 0056
In the Gauhati High Court
Case No : Criminal Appeal (J) No. 1 Of 2020

Charua Kachua @ Sushil Kujur

APPELLANT

Vs

State Of Assam

RESPONDENT

Date of Decision : 25-08-2023

Acts Referred:

Indian Penal Code, 1860 — Section 302, 304II
Code Of Criminal Procedure, 1973 — Section 161, 164, 281, 313, 374(2), 383
Evidence Act, 1872 — Section 106

Citation : (2023) 08 GAU CK 0056

Hon'ble Judges : Kalyan Rai Surana, J; Kardak Ete, J

Bench : Division Bench

Advocate : B.J. Talukdar, U. Agusty, D. Das

Judgement

1) Heard Mr. B.J. Talukdar, learned Senior counsel and amicus curiae in this appeal, assisted by Ms. U. Augusty, learned counsel for the appellant. Also heard Mr. D. Das, learned Addl. P.P. for the State.

2) The appellant, who is in jail has filed this appeal under section 374(2) Cr.P.C. read with section 383 Cr.P.C. against the judgment and order of sentence dated 19.07.2019, passed by the learned Sessions Judge, Udalguri in Sessions Case No. 43/2017, thereby convicting the appellant under section 302 IPC and sentencing him to undergo imprisonment for life.

Case of the prosecution:

3) One Manoj Kumar Mishra had lodged an FIR on 08.12.2015 with the O/C, Dimakuchi P.S., informing that during the night hours on 06.12.2015, Dipali Kachua (Kujur), who used to work in his tea garden had passed away. It was informed that he came to know in the morning of 07.12.2015 that her husband Charua Kachua @ Sushil Kujur had killed her under the influence of liquor and thereafter he fled, taking his eight year old daughter along with him. It was informed that he got her post mortem (PM for short) done and made

arrangements for her cremation. Accordingly, the Dimakuchi P.S. Case No 63/2015 dated 08.12.2015 under section 302 IPC was registered. In the course of investigation, on finding sufficient evidence against the appellant, charge-sheet dated 31.05.2016, was submitted against the appellant.

Committal and commencement of trial:

4) The learned Chief Judicial Magistrate, Udalguri accepted the charge-sheet, took cognizance of the offence and the proceeding was then transferred to SDJM, Udalguri. The learned SDJM, Udalguri found the case exclusively triable by the Sessions Court. Accordingly, vide order dated 12.06.2017, the case was transferred to the Session Court for trial.

Trial:

5) In the course of trial, the prosecution had examined 9 (nine) witnesses, their names being Dr. Chandan Kumar Saha (PW-1); Manoj Kumar Mishra (PW-2); Dhananjoy Mishra (PW-3); Tuntun Rajbjar (PW-4); Tinku Barman (PW-5); Somin @ Sukuru Karmakar (PW-6); Jatin Karua (PW-7); Ajoy Mantry (PW-8); Dr. N.C. Bhuyan (PW-9). The following documents were exhibited by the prosecution, viz., Post-mortem (PM for short) report (Ext.1); Ejahar (Ext.2); Seizure List (Ext.3); Sketch map (Ext.4); Charge-sheet (Ext.5); Order dated 09.12.2015 (Ext.6); Order dated 11.12.2015 (Ext.7); Statement of accused under section 164 Cr.P.C. (Ext.8).

6) The appellant was thereafter examined under section 313 Cr.P.C., who had taken the plea of denial and also denied that he had made the confessional statement voluntarily. However, in defence, no witness was examined.

7) PW-1 was the Doctor who performed the post mortem examination on the dead body of the deceased. In his PM report (Ext-1) he had recorded the following injuries found on the dead body:-

- a. Big lacerated injury 10 X 4 cm on the scalp.
- b. Fracture of (i) occipital bone, (ii) right temporal bone, and (iii) right mandible.
- c. Skull bone exposed.

Accordingly, the PW-1 had opined that the death had occurred due to head injury caused by blunt object. The time since death was 18-10 hours before the examination. The defence did not cross-examine the PW-1.

8) The PW-2, who was the first informant, had exhibited the FIR (Ext.2), and his signature therein. He had stated that the incident took place on 06.12.2015 and he was informed of the incident on the next date. He rushed to the place of occurrence and saw the victim lying in a pool of blood with injury on her head and he also found that the appellant was missing from the house. Thereafter, he had lodged the FIR. He had stated that the police had seized the bamboo stick in the house of the accused in his presence and prepared the seizure list, which was

exhibited by him as Ext.3. In his cross-examination, the PW-2 had stated that his house was situated at a distance of 500 meters from the place of occurrence.

9) The PW-3 had stated in his examination-in-chief and that he resides near the place of occurrence and came to know about the incident on the next day and rushed to the place of occurrence and that two persons present there had informed him that the appellant has left the house after killing his wife. In his cross-examination, he had stated that his house is situated at a distance of 200 meters from the place of occurrence and that he did not receive any information at night.

10) In his examination-in-chief, the PW-4 had stated that he had heard that a quarrel took place between accused and deceased under the influence of alcohol and the accused had killed his wife and absconded from his house. In his cross-examination, the PW-4 had stated that he had no personal knowledge of the incident.

11) The PW-5, who is a seizure witness, had stated in his examination-in-chief that he saw many people gathered at the house of the deceased and saw the deceased lying dead with injury on her head and he heard that the appellant had killed his wife. He had stated that the police had seized one bamboo lathi in his presence and proved the seizure list (Ext.3) and his signature thereon. In his cross-examination, he had stated that he did not know how the incident took place and that he did not see when the appellant had absconded from his house.

12) The PW-6 had stated in his examination-in-chief that he came to know about the incident after the owner of the garden had called him. He went to the place of occurrence and saw the dead body of the victim with head injury and had stated that the appellant was not found in his house as he had fled away. He had also stated that the appellant was caught by the member of AATSA. In his cross-examination, the PW-6 had stated that he does not know how the deceased had died.

13) The PW-7 had stated in his examination-in-chief that on the date of occurrence he had gone to the house of his relative where he heard that one woman was killed. The defence did not cross-examine the said witness.

14) The PW-8, who was the Investigating Officer (I.O. for short) had stated in his evidence-in-chief that on 07.12.2015, when he was posted as I/C, Khagrabari Police Out Post, he was informed over telephone that a female dead body was lying in Atharikhat jungle and after recording the information as GDE No.91 dated 07.12.2015, he went to enquire about the matter. In the meanwhile, the Circle Officer and the O/C, Dimakuchi PS had already arrived at the spot. He had also stated that the inquest was conducted by the Circle Officer and thereafter, the dead body was brought to the Udalguri Civil Hospital for post-mortem examination. Thereafter, he had recorded the statement of the witnesses under section 161 Cr.P.C. and had conducted the preliminary investigation of the case on the basis of the GD entry as recorded earlier. He also prepared a sketch map

of the place of occurrence and sent the accused to judicial custody and had also seized three pieces of split bamboo at the place of occurrence. On finding prima-facie case against the appellant, charge-sheet was submitted by him. The PW-8 had exhibited the seizure list (Ext.3), the sketch map (Ext.4), charge-sheet (Ext.5), and his signatures on the said exhibits. In his cross-examination, he had stated that the appellant was not found at the place of occurrence at the time of investigation and also admitted that the extract copy of the GD entry was not made a part of the case record. He had also stated that the seized split bamboo was not sent for Serologist examination by him.

15) The PW-9, is the judicial officer who had recorded the confessional statement of the appellant. In his examination-in-chief, he had stated that the appellant was produced before him on 09.12.2015 and he, after informing the appellant that he was not bound to make confession and if he did so, it may be used as evidence against him, had send the appellant to judicial custody, thereby giving him time for reflection. While doing so, he had also appointed a Legal Aid Counsel for the appellant. Thereafter, on 11.12.2015, the appellant was produced from judicial custody and he was once again informed that he was not bound to make confession and that if he did so, it may be used as evidence against him. PW-9 had stated that the appellant had stated that he wanted to make the confession and thereupon, he had placed the appellant under the custody and supervision of Court Peon from 3:30 pm to 4:00 pm for reflection and thereafter, he had recorded the confessional statement of the appellant after once again explaining to the appellant that he was not bound to make confession and that if he did so, it may be used as evidence against him in the trial. Accordingly, the PW-8 had stated that the confession by the appellant was voluntary and made in fit state of mind. He had also stated that the Bench Assistant of the Court had taken the signature of the appellant in his presence. PW-9 had proved the order dated 09.12.2015 (Ext.6), the order dated 11.12.2015 (Ext.7), and confessional statement of the appellant (Ext.8) and also proved his signatures thereon and also proved the signatures of the appellant in Ext.8.

16) The appellant was then examined under section 313 Cr.P.C. and incriminating circumstances appearing against the appellant was put to him. The appellant took a plea of total denial and also declined to give defence evidence.

Finding and decision by the learned trial Court:

17) The learned trial Court, after taking into consideration the evidence of the witnesses and taking into consideration the nature of injuries suffered by the deceased, arrived at a finding that there were no eye witnesses to the incident. The learned trial court took into consideration the retraction of confession made by the appellant while he was being examined under section 313 Cr.P.C. and considering that appellant was put to notice that he was not bound to make confession and the confession may be used against him, arrived at a conclusion that the confession made by the appellant was voluntary and was the truthful statement of what had happened at the time of the incident by taking note of the

fact that the defence had declined to cross-examine PW-9 who had recorded the confessional statement (Ext.8).

18) Accordingly, the learned trial Court had accepted the confessional statement made by the appellant and discarded the defence that the confession made by the appellant when he was examined under section 313 Cr.P.C. The defence that the appellant was intoxicated was discarded on the ground that voluntary drunkenness is not a defence for the commission of murder. The learned trial Court held that the injury found in the dead body had tallied with the injury mentioned in the confessional statement (Ext.8), as well as the injuries seen on the dead body by the PW nos. 1, 2, 4 and 5. The learned trial Court had considered the evidence of PW-2 and PW-5 that the blood stained lathi was seized vide Ext.3 and considered the circumstances that the appellant had absconded after the incident with his minor daughter, leaving the dead body in the house.

19) The learned trial Court also considered the fact that murder had taken place in the house of the appellant, who was unable to explain how the wife had died. Thus, it was concluded that instead of explaining the circumstances under which his wife had died, the appellant had chosen complete denial as his defence and it was held that the mere denial on the case of the prosecution and the absence of any explanation offered by the appellant was inconsistent with the plea of innocence of the appellant.

20) Accordingly, upon considering the cumulative effect of the evidence on record including the confessional statement of the appellant, he was found guilty of commission of offence under section 302 IPC. The appellant was then heard on sentence and he was sentenced for imprisonment for life under section 302 IPC.

Submissions by the learned amicus curiae:

21) The learned Amicus Curiae had submitted that there was no eye witness of the incident. It was also submitted that the chain of circumstances against the appellant was broken because the I.O. did not send the seized split bamboo stick for forensic/ serological examination to ascertain whether the said seized article was the weapon of assault and whether it contained any strain of human blood. It was submitted that the confessional statement of the appellant ought to have been discarded because the said statement was retracted when the appellant was examined under section 313 Cr.P.C. It was also submitted that the learned trial Court had failed to take into consideration the circumstances existing at the relevant point of time. The appellant had stated that his wife was consuming liquor daily from the last 7/8 months and that she had assaulted the appellant on many occasions as he had asked her not to establish physical relation with other persons, because of which frequent quarrel had taken place between them. He had also stated that on 06.01.2015, his wife had come home in an inebriated condition and she wanted to consume more liquor and he prevented her from

doing so and at that time, she caught hold of his penis tightly with her hand and she tore the buttons of his shirt. Hence, he pushed her which made her fall on the ground and he had also stated that he was also under the influence of liquor and he dealt 4/5 heavy blows on the head of his wife. She had suffered injury on her head and blood was coming out of her head and she died on spot. Moreover, it was submitted that the motive for murder having not been proved, the appellant is liable to be acquitted.

22) It has been submitted that there was sufficient materials in the statement made by the appellant under section 313 Cr.P.C. to show that the deceased had created a situation which gave rise to grave and sudden provocation, which led the appellant to assault his wife in the spur of the moment, moreso, because the appellant was also under the influence of liquor. Accordingly, it was submitted that this is not a case where there was an intentional murder of the victim and that this is a fit case to convert the conviction from section 302 IPC to one under section 304 Part-II and to set-off the sentence to the period already undergone by the appellant. In the said context, it was submitted that the appellant was arrested on 07.01.2015, and thus, he is in judicial custody for more than seven and a half years.

Submissions by the learned Addl. PP:

23) Per contra, the learned Addl. PP has submitted that the confessional statement made on 11.12.2015, and only on 14.06.2019, while being examined under section 313 Cr.P.C., the appellant had retracted his confession, i.e., after 31/2 (three and half) years. Thus, it was submitted that as the retraction of confession was not made at the earliest available opportunity, this was not a case of retraction at all. In support of his submission, the learned Addl. PP has cited the case of Ram Singh v. State of Assam, 2011 (2) GLT 196. It was further submitted that the learned Magistrate, before recording the confessional statement, had given sufficient time on three occasions to the appellant to introspect and moreover, on all three occasions, the appellant was put to notice that he was not bound to make any confession and the confession, if made, would be used against him. Accordingly, it was submitted that the learned trial Court had rightly held the confessional statement to be voluntary and admissible and was rightly relied on.

24) It was submitted that immediately after the incident the appellant had absconded with his minor daughter by leaving the dead body of his wife at his home, which was not a natural conduct. Moreover, it was also submitted that none of the witnesses were cross-examined on the case projected by the appellant that the deceased was drinking liquor since 7-8 months prior to the date of incident or that she was having physical relationship with any other person. Thus, it was submitted that the appellant failed to create a doubt that there was existing materials in this case that the deceased did something which gave grave and sudden provocation to the appellant so as to assault the deceased. It was also submitted that in his examination under section 313

Cr.P.C., it was not stated that the deceased was armed and therefore, the defence could not show that the deceased was armed and had attacked the appellant first and that the appellant had killed her in self defence. Accordingly, it is submitted that no case has been made out by the appellant for punishing the appellant under section 304 Part-II IPC and to reduce the sentence to one already undergone.

Points of determination:

25) The Court has given thoughtful consideration to the submissions advanced at bar and have gone through the impugned judgment and have minutely re-appreciated the evidence available on record. The Court finds that the following points of determination has arisen in this case:-

- a. Whether under the facts and circumstances of the case, it can be said that the appellant had retracted his confession for which it was liable to be discarded?
- b. Whether the deceased had given grave and sudden provocation to the appellant, which led him to assault her?
- c. Whether the failure of the prosecution to prove motive of the appellant to kill his wife would be fatal to the prosecution, and would entitle the appellant to be acquitted?
- d. Whether the impugned judgment and sentence passed by the learned trial Court warrants interference in this appeal?

Reasons and decision:

26) The learned senior counsel, who is the Amicus Curiae in this case had made a strenuous submission to impress upon the Court that this was a case of acquittal and even if the Court has found any material against the appellant, at best, it would be a case of convicting the appellant for committing offence punishable under section 304 Part-II IPC and he may be sentence to the period already undergone.

27) There is no eye-witness to the incident of killing of the deceased. Thus, the prosecution rests entirely on the circumstantial evidence coupled with the confessional statement (Ext.8). We, thus, proceed to examine the evidence of prosecution witnesses in sequence regarding these links in the chain of circumstantial evidence.

28) In the sketch map (Ext.4), the place of occurrence is a house which is marked with letter 'A'. As per the PW-3 the quarrel took place in the labour quarter. The PW-5, he saw the deceased lying in her house. However, the PW-8, ASI, who was the then In-Charge of Khagrabari P.S. and the I.O. of the case, had stated that he had received information from the O/c, Dimakuchi P.S. that a female dead body was lying on Atharikhat jungle. No contradiction was brought out to discredit the PW-3 and PW-5 that the dead body was not recovered from the house of the labour quarter where the appellant and the deceased had

resided.

29) It is also noted that except for the statement made in the FIR (Ext.2) that the appellant had fled away from his home with his 8 (eight) year old daughter after killing his wife, none of the witnesses examined by the prosecution proved that after killing his wife, the appellant had absconded with his 8 (eight) year old daughter. The prosecution did not make any attempt to trace out the minor girl and to record her statement. This is also a lapse on part of the prosecution.

30) It is noted from the statement of I.O. (PW-8) that inquest of the dead body was conducted by the Circle Officer, but the inquest report has not been exhibited, which is apparently a lapse on part of the prosecution. Moreover, the PW-8 had exhibited the seizure list (Ext.3), but the weapon of offence was not produced as material exhibit and therefore, none of the prosecution examined by the witnesses in Court were shown the weapon of assault i.e. three pieces of split bamboo, purportedly seized vide Ext.3. The said bamboo was also not sent for forensic/ serological examination to ascertain whether it contained traces of human blood and whether it matches with the blood of the deceased. This is also a lapse on part of the prosecution.

31) The PW-6 had stated that the appellant was caught by the member of AATSA. However, the prosecution did not examine the purported member of AATSA who had allegedly caught the appellant while he was escaping after the alleged incident. This is also a lapse on the part of the prosecution.

32) Nonetheless, it appears that the deceased had died in her matrimonial home. The prosecution has been able to show that the appellant had absconded after the incident. This is an incriminating material against the accused. In the case of *Shivaji Sahabrao Bobade v. State of Maharashtra*, (1973) 2 SCC 793 (para 19), the Supreme Court of India had observed as follows:-

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between may be and must be is long and divides vague conjectures from sure conclusions."

33) At the cost of repetition, it is found from the nature of evidence available in this case that the prosecution could not establish that at the time when crime took place, the appellant was in the house. The prosecution failed to establish that while trying to escape from the crime scene, he was allegedly apprehended by a member of AATSA and moreover, prosecution could not establish that the appellant was trying to escape with his 8 (eight) year old daughter. The prosecution, having introduced the minor girl of the appellant and deceased to be purportedly in the crime scene, did not make any attempt to examine the minor to find out if she had witnessed the murder of his mother. The weapon of offence, i.e. split bamboo, though seized, was not examined by forensic/ serological expert to determine if the same was the weapon of assault. The motive of the murder was also not proved. Therefore, the chain of circumstantial evidence against the appellant is not complete. In other words, the

circumstances appearing against the appellant cannot be said to be conclusive in nature to exclude every possibility except the hypothesis that the appellant is guilty of committing murder of his wife.

34) Thus, the only material based on which the conviction of the appellant can be affirmed is his confessional statement.

35) It would now be appropriate to extract the provision of section 281 Cr.P.C., which reads as under:-

281. Record of examination of accused- (1) Whenever the accused is examined by a Metropolitan Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the Court and such memorandum shall be signed by the Magistrate and shall form part of the record.

(2) Whenever the accused is examined by any Magistrate other than a Metropolitan Magistrate, or by a Court of Session, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the Presiding Judge or Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by any officer of the Court appointed by him in this behalf.

(3) The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court.

(4) The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(5) It shall thereafter be signed by the accused and by the Magistrate or presiding judge, who shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(6) Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial.

36) An ordinary reading of the above provisions of law would go to exhibit that a Magistrate while recording of confessional statement, before taking up such exercise is required to explain to the person making such confession that he is not bound to make such confession and the said person must be informed that if he does so it may be used against him. Furthermore the Magistrate must be satisfied that such confession is being made voluntarily.

Even sub-clause (4) of Section 164 Cr.P.C. clearly indicates that such confession must be recorded in the manner provided under Section 281 Cr.P.C. Section 281 Cr.P.C. provides for recording of examination of the accused and such confession must be signed by the person and the Magistrate is required to make

memorandum at the foot of such record with the recital as already quoted above by putting his signature.

37) In the LCR, the confessional statement is available at pages 28 to 32 of file no. 2/3 of record of GR Case No. 1287/15, tried as Sessions Case No. 43/2017. Although the form is in English, but the statement of the appellant has been recorded in Assamese and at the foot of the said statement, the learned Magistrate has given a certificate containing memorandum that the appellant was explained that he was not bound to make confession and that if he did so, it may be used as evidence against him and it was also mentioned that the judicial officer had believed that the confession was voluntary and is true, that it was taken in his presence and hearing, and was read over to the appellant and admitted it to be correct, and that it contained full and true account of the statement made by him. The confessional statement contains the signature of the appellant in all pages, which were exhibited as Ext.8(3) to 8(8). Ext.8(1) and Ext.8(2) were the signature of the Judicial Magistrate.

38) It is reiterated that the Judicial Magistrate, who had recorded the confessional statement of the appellant was examined as PW-9. His cross-examination was declined. Therefore, it could not be shown by the appellant before this Court that there were any procedural lapses in recording of the confessional statement of the appellant, so as to give him any benefit of doubt.

39) Now it is to be examined as to whether the confessional statement can be the sole ground and/or circumstances to convict the appellant. In this regard, it is well settled that conviction can be based on a voluntary confession, but the rule of prudence requires that wherever possible it should be corroborated by independent evidence.

40) In his confessional statement, the appellant had admitted having given 4-5 heavy blows on the head of the deceased with bamboo. His said statement is in consonance with the injuries described in the post mortem report of the deceased. As per the post mortem report (Ext.1), the deceased had suffered fracture (i) of occipital bone, (ii) right temporal bone and (iii) right mandible. The skull bone of the deceased was exposed. The deceased had big lacerated injury 10 X 4 cm. on the scalp. As per the opinion expressed in the post mortem report, the death had occurred due to head injury caused by blunt object.

41) Therefore, the Court does not find this to be a fit case to discard the confessional statement of the appellant (Ext.8).

42) The retraction of the confessional statement (Ext.8) was made during examination of the appellant under section 313 Cr.P.C., but as indicated herein before, the PW-9, who had recorded the confessional statement was not cross examined. No circumstances have been brought on record as to why the Court should accept the retraction when the appellant did not give any evidence to demonstrate that the retraction should be accepted. The learned Addl. P.P. has demonstrated that the confessional statement made by the appellant on

11.12.2015, and after 31/2 (three and half) years, only on 14.06.2019, while being examined under section 313 Cr.P.C., the appellant had retracted his confession. Thus, the retraction of confession was not made at the earliest available opportunity, for which the Court is unable to accept that this was a case of retraction of confessional statement at all.

43) In light of the discussions above, the first point of determination (a) is answered in the negative and against the appellant by holding that under the facts and circumstances of the case, it can be accepted that the appellant had retracted his confession. Therefore, no case has been made out by the appellant for discarding the confessional statement of the appellant (Ext.8).

44) In light of the discussions above, the second point of determination (b) is answered in the negative and against the appellant that the appellant could not establish that the deceased had given a grave and sudden provocation to the appellant, which provoked the appellant to assault her.

45) Similarly, in light of the discussions above, the third point of determination no (c) is answered in the negative and against the appellant by holding that the failure of the prosecution to prove the motive of the appellant to kill his wife in this case would not be fatal to the prosecution and the appellant would not be entitled to be acquitted because the crime took place in the confines of their matrimonial home and under section 106 of the Evidence Act, 1872, it was his burden to prove what had happened in the confines of their matrimonial home.

46) Thus, in view of the discussions above, the Court is of the considered opinion that the impugned judgment and sentence passed by the learned trial Court does not warrant any interference in this appeal and accordingly, the impugned judgment and order of sentence dated 19.07.2019, passed by the learned Sessions Judge, Udalguri in Sessions Case No. 43/2017, thereby convicting the appellant under section 302 IPC and sentencing him to undergo imprisonment for life, stands affirmed.

47) Let a copy of this judgment be communicated free of cost to the appellant through the concerned jailor where the appellant is presently lodged and serving his sentence.

48) The learned senior counsel, who is the Amicus Curiae in the matter, shall be entitled to the usual fees.

49) Return the LCR.