
(2013) 05 GAU CK 0061
In the Gauhati High Court
Case No : Criminal Appeal No. 82 of 2011

Hazera Khatun (Musstt.) and Another	APPELLANT
Vs	
State of Assam	RESPONDENT

Date of Decision : 28-05-2013

Acts Referred:

Citation : (2013) 3 GLD 496 : (2013) 4 GLT 399

Hon'ble Judges : P.K. Musahary, J; Iqbal Ahmed Ansari, J

Bench : Division Bench

Advocate : B.M. Choudhury, for the Appellant; K.A. Mazumdar, Addl. P.P., for the Respondent

Judgement

Iqbal Ahmed Ansari, J.—By judgment and order, dated 18.4.2011, passed, in Sessions Case No. 94/2008, by the learned Sessions Judge, FTC, Barpeta, the two accused-appellants, namely, Hazera Khatun and Abdul Gafur, stand convicted u/s 302 read with Section 34 IPC and each of them has been sentenced to suffer imprisonment for life and pay fine of rupees two thousand and, in default of payment of fine, suffer simple imprisonment for a period of two months. The prosecution's case may, in brief, be described as under:

(i) On 07.06.2002, at about 9 pm, accused, Abdul Gafur, came to the house of Abdul Rahman, brother of Abdul Razak (since deceased) and told him (Abdul Razak) that he (Abdul Razak) was to accompany him in order to sort out the monetary transaction, which they had. Though Abdul Razak's mother tried to stop Abdul Razak, Abdul Razak left the house, promising to return soon; but he never returned home. On a search being made to find out where Abdul Razak was, the members of his family found Abdul Razak hanging by means of a saree from one of the beams in the house of accused Hazera, the saree having a knot on his neck near his right ear. Having seen the dead body of Abdul Razak, his brother, Samsul (P.W. 2), lodged a written Ejahar at Howly Police outpost. Having made, in this regard, an entry into the General Diary of the said police outpost, the investigating officer (P.W. 6) forwarded the Ejahar to Barpeta Police Station,

where Barpeta Police Station Case No. 239/2002, under Sections 302 /34 IPC, was registered against accused Hazera, Abdul Gafur and five others.

(ii) During investigation, police visited the place of occurrence, held inquest over the said dead body and prepared an inquest report (Ext. 2). Razak's dead body was also subjected to post mortem examination leading to post mortem report (Ext. 6). On completion of investigation, police laid charge sheet, under Sections 302, 34 IPC, against all the seven accused-persons, whose name had appeared in the said Ejahar.

2. At the trial, when a charge, under Sections 302 read with Section 34 IPC, was framed against all the seven accused persons, including the present appellants, all of them pleaded not guilty thereto.

3. In support of their case, prosecution examined altogether 7 witnesses. The accused were, then, examined u/s 313 Cr.PC and, in their examinations aforementioned, they denied that they had committed the offence, which was alleged to have been committed by them, the case of the defence being that of denial. No evidence was adduced by the defence.

4. Having, however, found the two appellants, namely, Hazera and Abdul Gafur, guilty of the offence committed u/s 302 read with Section 34 IPC, the learned trial Court convicted them accordingly and passed sentence against them as mentioned above. So far as the remaining accused were concerned, the learned trial Court found them not guilty of the charge and acquitted them accordingly. Aggrieved by their conviction and the sentence, the two convicted persons, namely, Abdul Gafur and Hazera Khatun, have preferred this appeal.

5. We have heard Mr. B.M. Choudhury, learned counsel, for the appellants, and Mr. K.A. Mazumdar, learned Additional Public Prosecutor, Assam.

6. While considering the present appeal, it is apposite to point out, at the very outset, that no witness has been examined by the prosecution at the trial, who has claimed to have seen Abdul Razak being killed by any of the two accused-appellants. Prosecution's case rests, admittedly, on circumstantial evidence. Considering the nature of circumstances, which have, eventually, led to the conviction of the accused-appellants, we deem it appropriate to examine the value, if any, of the circumstances, which, according to the learned trial Court, had been found incriminating against the two accused-appellants.

7. With the above end in view, we come to the evidence of the doctor (P.W. 7), who had, admittedly, conducted post mortem examination, on 09062002, on the dead body of Abdul Razak and found as follows:

External appearance: An average built male body, not decomposed, rigor mortis present Blackish coloration of face, lips, nails beds present. Dried up saliva seen from left angle of mouth, no fecal discharge seen. Semen found at the tip of the penis, (i) an oblique interrupted ligature mark seen high up in the neck. Knot mark is on the right side behind the ear. Skin over the mark is hard and

parchmentised, cut section shows a band of white fibrous tissue at the base, no wound or bruise mark over the body (tongue is swollen and profused against the teeth) on examination of thorax, walls, ribs etc and found healthy. Lungs found healthy and congested. Heart healthy, right side is filled with dark fluid blood and left side is empty vessels, healthy on examination of muscles, bones and joints found absent. On examination on abdomen, walls, peritoneum etc found healthy and small and large intestine found healthy. Distended with partly digested food, gas and focal materials.

On examination of cranium and spinal canal scalp, skull, vertebrae membrane etc are found healthy. Liver spleen and kidneys found healthy and congested organs of generation, external and internal is found healthy intact Semen at the tip of penis.

More detailed description of injury of deceased: The ligature mark in the neck is anti mortem in nature. No other injury detected in his person.

8. In the opinion of the doctor (P.W. 7), the death was due to asphyxia as a result of hanging.

9. In his cross-examination, however, tire doctor (P.W. 7) has clarified that he did not find any injury on the person of the deceased except ligature mark around his neck, which was, as we have already pointed out above, ante mortem in nature.

10. In no uncertain words, has deposed by the doctor (P.W. 7), that according to him, the case at hand was a pure case of suicidal death. In other words, the doctor (P.W. 7) did not find any injury on the said dead body and the death, in the opinion of the doctor, was due to asphyxia as a result of hanging and hanging was suicidal. Unless, therefore, prosecution can show that Razak's death was homicidal in nature, one would have no option, but to interfere with the conviction of the accused-appellants.

11. Our quest, for an answer to the question as to whether Razak met homicidal death or not, brings us to the evidence of P.W. 1. This witness has deposed that one day, in the morning, his niece, Momtaz, (who has not been examined as a witness), accompanied by two small boys, one of whom used to work as domestic help of Razak, came to his house and informed him that someone had killed Razak and kept him hanging of Matiur Rahman, husband of appellant, Hazera Khatun, Motiur Rahman having died prior to the occurrence.

12. It is in the evidence of P.W. 1 that he went to the place of occurrence and saw Razak's dead body hanging by means of a saree, which was tied around his neck, and, upon seeing the dead body, he went to Howly Police Outpost and lodged there a written Ejahar(Ext. 1).

13. In his cross examination, P.W. 1 has clarified that he did not reside with Razak inasmuch as Razak resided in a separate house. P.W. 1 has also clarified, in his cross-examination, that he has no personal knowledge if Razak had been

killed by someone.

14. Bearing in mind the above evidence of P.W. 1, when we turn to the evidence of P.W. 2, elder brother of deceased Abdul Razak, we notice that his evidence is that on the day of the occurrence, at about 9 pm, accused Abdul Gafur came to his house and told that Razak was required to go for sorting out the monetary transaction and though Razak's mother tried to prevent Razak from going, Abdul Gafur told that Razak would return home soon, whereupon Razak went away with Abdul Gafur and did not come back at night and, in the morning, oncoming to the house of Hazera Khatun, he found Razak's dead body hanging by means of a saree and he, then, went to the police station and he found there 5 to 6 persons including his brother P.W. 1, who had lodged the FIR.

15. Notwithstanding the fact that P.W. 2 has claimed that accused Abdul Gafur came to his house and told Razak that Razak as required to go for sorting out the monetary transaction and though Razak's mother tried to prevent Razak from leaving the house, Gafur told that Razak would return home after sometime, P.W. 2 has conceded, in his cross-examination, that he had come to know from his mother about the conversation between Gafur and Razak. Mother of Razak was not, however, examined at the trial. Consequently, what the evidence, given by P.W. 2 as to what conversation Gafur had with Razak, is nothing, but hearsay. This apart, the investigating officer has confirmed that P.W. 2 had not stated, when his statement was recorded during investigation, that Gafur had asked Razak to accompany him for sorting out the monetary transaction and that Razak's mother had tried to stop Razak from leaving. In the face of the above material infirmities in the evidence of P.W. 2, one cannot implicitly rely upon the claim of P.W. 2 that accused Gafur came to the house of Razak and told him to go with him to sort out monetary transaction.

16. Coupled with the above evidence of P.W. 2, the evidence of P.W. 3, sister of Abdul Razak, is considered, it transpires that according to her evidence, on the day of the occurrence, at about 9 pm, Abdul Gafur came to their house and, for sorting out some monetary transaction, took Razak with him and though her mother had asked Razak not to go, Razak told his mother that he would come back after making necessary calculation, but Razak did not return at night and, in the morning, on the following day, she (P.W. 3) and Md. Abdur Rahman (P.W. 2) found Razak's dead body in Hazera Khatun's house.

17. In his cross-examination, P.W. 3 has very clearly deposed that there was no enmity between Razak and Gafur and she has also admitted that she is not aware as to where Razak was between 9 pm and till the time he (Razak) was found dead and that Gafur's name had not been mentioned in the Ejahar and that it was, on the basis of the instructions of the police, that Gafur's name was included. This apart, the investigating officer has confirmed that while giving her statement to the police, P.W. 3 had not stated that on the night of the occurrence, Gafur had come to call Razak and despite Razak's mother trying to stop Razak, Razak went away by saying that he would come back soon. It is,

thus, abundantly clear that P.W. 3 has also no knowledge or information as to whether Razak was killed and if he was killed, who had killed him or how he was killed or he committed suicide.

18. The above discussion of the evidence on record brings us to the evidence of P.W. 4 and P.W. 5.

19. So far as P.W. 4 and P.W. 5 are concerned, they had merely seen Razak's dead body hanging by means of a saree at the house of Hazera Khatun and P.W. 5 has clarified in his cross-examination, that he does not have any personal knowledge how Razak died.

20. Thus, the evidence, which we have discussed above, gives no indication at all as to how Razak had died or who had killed him except that the doctor's evidence reveals that Razak's death was suicidal in nature. In this regard, one cannot ignore the fact that prosecution did not dispute the findings of the doctor and/or his opinion with regard to Razak's cause of death. We, too, do not notice anything inherently incorrect or improbable in the evidence given by the doctor or his opinion with regard to Razak's cause of death.

21. Situated thus, it is well-nigh impossible to hold that Razak's death was homicidal in nature. This apart, there is no evidence, direct or circumstantial, showing that Gafur was, in any way, involved in the causing of Razak's death.

22. No doubt, when the dead body had been found hanging inside the house of accused-appellant, Musstt. Hazera Khatun, needle of suspicion points to her as the person, who was possibly responsible for causing Razak's death. This proposition is, however, not free from defects inasmuch as we cannot ignore the medical evidence on record, which shows Razak's death as suicidal in nature. This apart, the evidence of Investigating Officer, the inquest report and also the evidence of the doctor (P.W. 7) eloquently shows that no injury had been found on the dead body of Razak.

23. Situated thus, though there may be suspicion that the appellant, Hazara Khatun, might be involved in the causing the death of Razak, the fact remains that suspicion, however high, cannot take the place of proof, more particularly, when there is nothing in the evidence on record for the Court to confidently and boldly hold that Razak's death was not suicidal, but homicidal in nature.

24. Because of what have been discussed and pointed out above, we are of the considered view that the learned trial Court ought to have acquitted the two appellants by giving them, at least, benefit of doubt.

25. In the result and for the reasons discussed above, this appeal succeeds. The impugned order of conviction of the accused-appellants and the sentence passed against them, by the judgment and order, under appeal, are hereby set aside. The accused-appellant are held not guilty of the offence u/s 302 read with Section 34 IPC and they are acquitted of the same under benefit of doubt.

26. Let the two accused-appellants be set at liberty, forthwith, unless they are required to be detained in connection with any other case. Send back the LCR.