
(2019) 12 GAU CK 0046
In the Gauhati High Court
Case No : Criminal Appeal No. 152 Of 2016

Kajol Chakraborty

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 20-12-2019

Acts Referred:

Indian Penal Code, 1860 — Section 302, 304(B)
Code Of Criminal Procedure, 1973 — Section 313, 357A
Evidence Act, 1872 — Section 106

Citation : (2019) 12 GAU CK 0046

Hon'ble Judges : Mir Alfaz Ali, J; Manish Choudhury, J

Bench : Division Bench

Advocate : B.K. Mahajan, A Choudhury

Final Decision : Allowed

Judgement

Mir Alfaz Ali, J

1. This appeal is directed against the judgment and order passed by the learned Addl. Sessions Judge (FTC), Silchar in Sessions Case No.142/2011, whereby, learned Addl. Sessions Judge convicted the appellant under section 302 IPC and sentenced him to imprisonment for life and fine of Rs.5,000/- with default stipulation.

2. Deceased Silpi Chakraborty was the sister of the informant Moloi Chakraborty. As per prosecution case, the deceased Silpi Chakraborty was married to the appellant Kajol Chakraborty. Since after marriage, the deceased was subjected to torture by the appellant, who also very often threatened to kill her. On the date of occurrence at about 5 pm, when the informant was at Silchar, the appellant informed him over phone that fire broke out in his house. Immediately the informant came to the house of the appellant and found his sister and her child dead. Suspecting foul play by the appellant, Moloy Chakraborty, (PW-1) lodged the FIR (Ext.-1), on the basis of which, police registered Udarbond PS Case No. 1848/2008 and upon completion of investigation submitted charge-sheet against

the appellant under Section 304(B) IPC. The offence being exclusively triable by the court of Sessions, learned Magistrate after having taken cognizance, committed the case to the court of Sessions and eventually the appellant stood trial before the learned Sessions Judge.

3. In course of trial, charges under Section 304(B)/302 IPC were framed, to which the appellant pleaded not guilty. Prosecution examined 9 (nine) witnesses to bring home the charges against the appellant and the learned trial court also examined one witness as a court witness. After completion of the prosecution evidence, the accused/appellant was examined under Section 313 Cr.P.C., wherein he pleaded innocence.

4. Out of the nine witnesses examined by the prosecution, PW-7 was Dr. Y.N. Singha, who conducted the post mortem examination on the body of the victim Silpi Chakraborty and her child. The doctor found burns of 3rd degree, involving the abdominal and thoracic viscera over the thorax, abdomen and limbs. Condition of the flesh was found half-cooked in appearance. The burns covered 60% of the body surface, sparing the neck, face and scalp with the perineum, where the burns were of dermo-epidermal nature. All burns were confluent and the body was covered by thin film of soot. The doctor further stated that no sign of vital reaction were present on the periphery and surroundings of the burnt areas, which covers 100% of the total body surface area (post mortem). The doctor also found fracture of the corneal on the left side of hyoid bone.

5. According to the doctor, the child had deep burns, exposing the thorax co-abdominal vicera and luids bones over the extent of the body, sparing the scalp, face & upper neck, where the burns were of dermo epidermal in nature. Doctor also found demise measuring 1 x 1 cm present over the inner aspect of the upper lip, centrally.

6. In the opinion of the doctor, death of Silpi was caused due to asphyxia as a result of manual strangulation which was ante mortem and homicidal in nature. Burn injuries covering 100% of the total body surface were of mixed nature and was post mortem in nature. During cross-examination the doctor stated that the hyoid bone can be broken both before death and after death. The doctor further opined that there may be breaking of hyoid bone after death and create an impression that death has been caused by manual strangulation. The doctor also stated that there is possibility of breaking hyoid bone as a result of fall of wooden bar on the neck when the house caught fire. The doctor however, stated that such a possibility was unlikely in the instant case. According to the doctor, the death of the child was due to asphyxia as a result of suffocation during her life. Burn injuries were post mortem & covered 100% of the total body surface area.

7. PW-1, the informant stated in his evidence that after delivery of child, the victim had developed some gynaecological problem and she was treated at GMCH, Guwahati and thereafter they took the deceased to their house. The accused appellant arranged a rented house at Udarbond, where he stayed with

the victim and started a clinical laboratory. The accused/appellant tortured the victim and sent her back to the house of his brother (informant) and after mutual settlement, the victim was sent to the rented house of the appellant, where she stayed for 4/5 days and thereafter she was sent to the house of the PW-1, as the accused/appellant had to go out in connection with his business. On 16-11-2008 on request of the appellant, the informant sent the deceased to the rented house of the accused and on the day of occurrence the appellant invited him (PW-1) to attend Puja organised in his house. At about 3 O'clock, he came to the house of accused/appellant where, she was staying with the deceased and on enquiry he came to know, that Puja was organised in the house of Nitya Bhattacharjee and after attending Puja, he returned back to Silchar. He further stated that while he was at Silchar, he received a phone call from the accused/appellant that fire broke out in his house and that the deceased and her child died due to burn injury. After receiving the information, immediately he rushed to the place of occurrence and found the deceased and her daughter dead. During cross-examination, he stated that he reached Udharbond at 7 pm after getting the information.

8. PW-2, who is also the brother of the deceased stated that deceased was in their house and on 16-11-2008 the appellant took the deceased to his house for the purpose of puja to be performed on the next day, i.e. 17-11-2018. The accused also invited the PW-1 to attend the puja. After coming back from the house of the appellant, PW-1 called him over phone and informed that the accused/appellant had killed the deceased and her baby and thereafter set fire to the house. Upon getting the information, he reached the place of occurrence and found the body of his sister and the child.

9. According to PW-3, the PW-1 went to the house of the appellant to attend Puja arranged by the appellant and after having returned from the house of the appellant, PW-1 gave him a call and informed that the deceased and her child died due to fire. He accompanied the PW-1 to the house of the deceased and found the body of the deceased Silpi and her child lying there. During cross-examination he stated that his residence was at a distance of 30km from the house of the PW-1.

10. PW-4, Anu Adhikari deposed that when fire broke out in the house of the appellant, the land lady (CW-1) came out raising alarm. Having noticed the fire, he made a call to accused Kajal Chakraborty and asked him to come home. In the meantime, neighbouring people assembled and extinguished the fire. He also stated in cross-examination, that when he arrived at the place of occurrence, he heard the land lady crying "fire, fire" and therefore, he called the accused/appellant over phone and informed about the occurrence and asked him to come immediately.

11. PW-5 was a witness to the inquest conducted over the body of the victim and PW6 was a witness to the seizure list, by which, some burnt articles were seized and they were not witnesses to the occurrence.

12. CW-1 deposed that on the date of occurrence at dusk, suddenly she noticed fire in the rented house of the appellant. Seeing the incident she came out of her room and raised alarm. Hearing alarm raised by her, neighbouring people came. She further stated that the people, who assembled at the place of occurrence, broke open the door and tried to extinguish the fire. He further stated that fire brigade also arrived. According to her, as a result of fire, the deceased and her minor daughter died. She further stated that she had no knowledge as to how the house caught fire. After 15/20 minutes of the occurrence, she noticed the accused at the place of occurrence. This witness further stated that the accused had cordial relationship with his wife (deceased). It was elicited during the cross-examination of CW-1, that the rented house, where the deceased was residing with the appellant, had only one door for entry and exit and three windows fitted with grills. She also stated to have seen the accused/appellant going out of his house with his brother-in-law (PW-1).

13. PW-8, the investigating officer stated that a GD Entry was made on the basis of a telephonic information, that fire broke out in a house near Kalibari Road and on the basis of such GD Entry, he proceeded to the place of occurrence, extinguished the fire and found a lady and her child completely burnt in the gutted house. PW-9, another investigating officer stated that the fire broke out inside the house of the accused. He also stated that the house, which was gutted in the fire had only one door, which was bolted from inside and the people broke open the door. The PW-9 further deposed that the bolt of the door became bend due to the forceful pressure from outside to open it.

14. On the basis of the above evidence, learned trial court convicted the appellant and awarded sentence as indicated above.

15. We have heard Mr. B.K. Mahajan, learned counsel for the appellant and Ms. B. Bhuyan, learned Additional Public Prosecutor, Assam.

16. Apparently there was no direct evidence in the instant case. However, learned Sessions Judge convicted the appellant basically relying on the circumstantial evidence. The prime circumstances relied by the learned Sessions Judge were that the victims died homicidal death within the residential house, there was no other member residing in the house except the victims and the appellant and failure of the appellant to explain as to how the death was caused.

17. Learned counsel Mr. Mahajan submits that the circumstances relied by the learned trial court was not conclusively proved, nor the prosecution could prove beyond doubt any fact, to be within the special knowledge of the accused, so as to shift the burden to accused u/s 106 of the Evidence Act to prove such fact, and as such, the conviction of the appellant on the ground of his failure to explain as to how death was caused was erroneous and cannot be sustained. Per contra, learned Addl. Public Prosecutor, supporting the conviction and sentence of the appellant submitted that there is no reason to interfere with the impugned judgment. In order to bolster his submission, Mr. Mahajan placed reliance on a

decision of the Apex Court in Jaydev Patra and Ors.-Vs.- State of West Bengal, (2014) 12 SCC 12.

18. We have meticulously scrutinized the evidence and materials brought on record. On our assessment of the evidence, we find that according to the doctor, 100% of the body surface was burnt. However, the doctor further opined that the death was caused due to manual strangulation and the inference of strangulation of the deceased Silpi was drawn from the fracture or breaking of hyoid bone. It is also in the evidence of the doctor, that possibility of breaking the hyoid bone by falling any hard substance like wooden bar on the neck and giving the impression that such death was caused by manual strangulation cannot be ruled out in case of fire. The doctor also stated, that such a possibility was unlikely in the instant case. What therefore, appears from the evidence of the doctor is that though, the doctor opined that the cause of death was manual strangulation the possibility of breaking of hyoid bone for some other reason was not totally ruled out.

19. From the evidence of PW- 4, PW-8, PW-9 and CW-1, it is evident that the fire caught inside the house of the accused in the evening hours and the villagers broke open the door by pushing from outside, which was bolted from inside. It was also in their evidence, that the house had only one door for entry and exit and three windows fitted with grills. It is also in the evidence of PW-4, that the appellant was not present at the place of occurrence, when the fire broke out and he came to the place of occurrence on being informed by PW-4 over phone. CW-1 also stated that the appellant arrived at the place of occurrence after 15/20 minutes of the occurrence. What is therefore evident from the oral testimonies of PW-4 and CW-1 is that the appellant was not present at the place of occurrence when the fire broke out. It is also in the evidence of PW-1 that he was present in the house of the appellant in the afternoon, as he came to attend Puja and after returning from there, he came to know about the occurrence. The evidence of CW-1 that he had seen the appellant going out with the PW-1, the brother of the deceased, also lent support to the oral testimony of PW-4, that at the time of occurrence or immediately before the fire broke out, the appellant was not present in the house, which was bolted from inside. Evidently the occurrence took place in the evening and there was no evidence at all to show, that immediately before the house caught fire, or the death of the victim was caused, the accused/appellant was present in the house with the victims. Rather, the positive evidence of the prosecution as deposed by PW-4 supported by CW-1 demonstrated that the appellant was not present in the house at the relevant time. Had the occurrence taken place inside the dwelling house late at night, perhaps, there could be a reasonable presumption of the appellant, husband of the deceased being in the house with the deceased. But this was not the case here. This apart, evidently PW-1 was present in the house of the appellant from 3 pm for attending Puja and thereafter the appellant went out from the residence with PW-1. We have noticed that the learned trial court took a view, that failure of the appellant being the third member of the house, to explain as to how fire

broke out in his house or under what circumstances death of the accused was caused, was a strong incriminating circumstance for raising an inference, that it was the accused/appellant, who caused the death of the victim.

20. In a criminal trial, it is the burden of the prosecution to prove the guilt of the accused beyond all reasonable doubt and the accused has a right to remain silent. However, when the prosecution discharges its burden by proving all the incriminating circumstances to prove the guilt of the accused or establishes certain facts which tend to inculcate the accused or an inference of guilt of the accused can be drawn from such facts, unless the accused put forward reasonable explanation to neutralise such inculcating circumstances against him; in such a situation, the accused owe an explanation in respect of the facts, which are within his special knowledge, inasmuch as, Section 106 of the Evidence Act provides that when any fact is specially within the knowledge of any person, the burden of proving that fact is on him. If the accused fails to or does not throw any light explaining the circumstances by exercising his right to keep silent, court cannot be blamed for drawing an adverse inference against the accused. Section 106 of the Evidence Act, however, does not cast any burden on the accused to prove his innocence. Unless the prosecution proves the necessary incriminating facts against the accused beyond reasonable doubt, burden cannot be shifted to accused. Therefore, before shifting the burden to the accused/appellant u/s 106 of the Evidence Act to explain any circumstance or any fact within the special knowledge of the accused/appellant, prosecution must established beyond all reasonable doubt, the guilt of the accused or all the necessary inculcating facts and circumstances, which, unless explained by the accused, inference of guilt can be drawn against the accused.

21. In the instant case, on the day of occurrence in the afternoon, at 3 O'clock, the PW-1 was admittedly present in the residence of the appellant to attend Puja. According to PW-1, he left the house of the appellant after attending the Puja and he got the information regarding the occurrence at 5 O'clock. It is also in the evidence of CW-1 that she had noticed the accused going out of his house along with the PW-1. PW-4 clearly stated that appellant was not present in his house when the fire caught and he informed the appellant about the occurrence over phone and asked him to come home. The evidence of CW-1 and PW-4 established, that at the time when the fire broke out or immediately before the occurrence the appellant was not present in the house and he came there on being informed by PW-4 after about 15/20 minutes. It is also evident that the house had only one door, which was bolted from inside and was broken by the people. All the above facts and circumstances clearly established, that the appellant was not present, when the occurrence took place or immediately before that. Unless the prosecution proves, beyond reasonable doubt that only the appellant was in the company of the deceased at the time of occurrence, accused cannot be saddled with the responsibility to explain as to how the death of the victim was caused.

22. The Apex Court in Jaydeb Patra and Ors. VS- State of West Bengal, (2014) 12 SCC 444 dealing with provision of Section 106 of the Evidence Act and the burden of the accused to explain the facts within his special knowledge held as under :-

"We are afraid, we cannot accept this submission of Mr. Ghosh. This Court has repeatedly held that the burden to prove the guilt of the accused beyond reasonable doubt is on the prosecution and it is only when this burden is discharged that the accused could prove any fact within his special knowledge under Section 106 of the Indian Evidence Act to establish that he was not guilty. In Sucha Singh Vs. State of Punjab (2001) 4 SCC 375, this Court held:

"We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference." Similarly, in Vikramjit Singh Vs. State of Punjab (2006) 12 SCC 306, this Court reiterated:

"Section 106 of the Indian Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule, e.g., where burden of proof may be imposed upon the accused by reason of a statute."

23. When the evidence brought on record clearly established that the prosecution has failed to prove beyond doubt that it was within the special knowledge of the appellant as to how the occurrence took place, burden could not be shifted to the appellant u/s 106 of the Evidence Act to explain as to how the death of the victim was caused. Therefore, in the facts and circumstances of the present case, the failure of the appellant to explain the circumstances, as observed by the learned trial court, in our considered view, cannot be considered to be an incriminating circumstance against the accused/appellant. We also take note of, that although, the body of the victims were found inside the house, which was gutted in fire and the doctor opined that the death was due to strangulation, as already indicated above, according to the doctor, the possibility of the death being cause by reason, other than the manual strangulation also could not be totally ruled out in the facts and circumstances of the present case.

24. It is the trite law, that a criminal case solely resting on the circumstantial evidence, prosecution needs to prove each and every circumstances conclusively and solidly beyond all reasonable doubt and the circumstances so proved, taken cumulatively must form a complete and unbroken chain of events leading to the inescapable conclusion, that it was none but the accused/appellant, who

committed the offence. In other words, chain of circumstances must be consistent only with the guilt of the accused and inconsistent with his innocence. In the facts and circumstances, we are of the considered opinion that neither the circumstances relied by the learned trial court have been proved conclusively beyond reasonable doubt, nor the chain of events was complete so as to lead to the irresistible conclusion that it was none else, but the appellant was the perpetrator of the offence. Therefore, in our considered opinion, at least the appellant ought to have been given the benefit of doubt. Accordingly, we set aside the conviction and sentence of the appellant giving him the benefit of doubt and allow the appeal.

25. The appellant be set at liberty forthwith, if not required in any other case.

26. We have taken note of that the learned Sessions Judge has not passed any order with regard to payment of compensation to the victim or dependant/dependants of the deceased under Section 357-A of the CrPC. In that view of the matter, we direct that the matter may be placed before the District Legal Services Authority, who shall examine the necessity of providing compensation to the dependant (s) of the deceased, if any.

27. Send back the LCR.