

(2025) 02 GAU CK 0821
In the Gauhati High Court
Case No : CrI.A. Of 86 Of 2023

Kanaklata Das @ Kanakprabha And Anr. APPELLANT
Vs
State Of Assam And Anr. RESPONDENT

Date of Decision : 04-02-2025

Acts Referred:

Constitution Of India, 1950 — Article 21
Code of Criminal Procedure, 1973 — Section 313, 374(2)
Indian Penal Code, 1860 — Section 34, 302, 304(B), 306, 498(A)
Evidence Act, 1872 — Section 106

Citation : (2025) 02 GAU CK 0821

Hon'ble Judges : Sanjay Kumar Medhi, J; Mridul Kumar Kalita, J

Bench : Division Bench

Advocate : A. Ahmed, S. Jahan

Final Decision : Allowed

Judgement

Sanjay Kumar Medhi, J

1. The instant appeal has been preferred by two appellants under Section 374(2) of the Cr.P.C. against judgment and order dated 10.02.2023 passed by the learned Sessions Judge, Karimganj in Sessions Case No. 49/2017 convicting the accused/appellants u/s 302/34 of IPC and sentencing them to undergo R.I. for life and to pay a fine of Rs.30,000/- (Rupees Thirty Thousand) i/d to undergo R.I. for 1 year. While the appellant no.1 is the mother, the appellant no.2 is her son. The appeal involves the death of the wife of the appellant no.2.

2. The criminal law was set into motion by lodging of an ejahar by one Bikramjit Das - PW3 on 11.11.2014. It has been alleged that on the previous day, i.e., 10.11.2014 at about 7.30 a.m., his sister, who was the wife of the appellant no.2 was killed by poisoning. It may however be mentioned that on 10.11.2014 itself, the appellant no.2 had lodged an information on the death of his wife in connection with which Patherkandi PS UD Case No. 19/2014 was registered. Be that as it may, both the cases were amalgamated and the instant case was

registered under sections 498(A) / 302 / 304(B) / 34 of IPC. The initial charge against the appellant no. 2 was under Section 302 of the IPC. However, the charges were amended and 304(B) IPC was added and the appellant no.1, who is the mother of the appellant no. 2 was arraigned as an accused.

3. After completion of the investigation and laying of the charges, the charges were framed which had also undergone certain amendments as mentioned above and those being denied, the trial had begun in which the prosecution had examined eight numbers of witnesses.

4. PW1 is the Doctor, who had conducted the post-mortem on the body of the deceased. In his report (Ext.-1) as well as in his deposition, he had stated that there was no external injuries on the body and no definite opinion could be gathered on his examination for which the matter was referred to the FSL. After the said examination by the FSL, it turned out that the death was by poisoning by use of organo phosphorus pesticides (Ext.-4).

5. PW2 is a neighbour of the matrimonial home. In his cross-examination, however, he had stated that the parties were leading a conjugal peaceful married life. He had also stated that the Annaprashanna of the child was held at the matrimonial house and the last rites of the deceased were also performed by the appellants.

6. PW3 is the informant, who is the brother of the deceased in which he had stated that as per information received, the deceased had died out of poisoning administered by the appellants. The FIR has been proved as Ext.-5.

7. PW4 is a neighbour of the informant. In his examination, he had however stated that appellant no. 2 had touched the feet of the informant - PW3 and had confessed his guilt.

8. PW5 is a neighbour of the matrimonial house who had however stated that there was a happy married life. He had however stated that when he had asked the appellant no. 2 what had happened, he had replied that he did not know what had happened.

9. PW6 is a neighbour of the appellants who had reiterated that the appellant no. 2 and the deceased were living a happy married life. He has also stated that when he had asked the appellant no. 2 regarding the incident, he had replied that nothing had happened.

10. PW7 is a neighbour of the appellants who had also reiterated that the appellant no.2 and the deceased were leading a happy married life. He had also stated that he could see blue froth coming out from the mouth of the deceased who was lying near the bathroom and in the bathroom there was a Harpic bottle. He had also stated that the deceased was of stubborn nature.

11. PW8 is the I.O. who had stated that appellant no. 2 had lodged an F.I.R. which was proved as Ext. 7 resulting in registration of Patherkandi P.S. UD Case

No. 19/2014 and subsequently, PW3 had also lodged an FIR. He had also mentioned that the PW3 had informed about mental torture by the appellants on the deceased. However, there was no mention of any demand for dowry.

12. Based on the aforesaid evidence, the incriminating materials were put to the appellants in their examination under Section 313 of the Cr.P.C. which they had denied.

13. Based on the aforesaid evidence and the materials on record, the impugned judgment has been passed. It may however be mentioned that the conviction and sentence is under section 302/34 of the IPC and not under the other Sections of law, namely, 498(A) and 304(B) of the IPC.

14. Shri Ahmed, the learned counsel for the appellants has submitted that in the present case there is no direct evidence and the conviction and sentence is based on circumstantial evidence. He has submitted that there are no materials on record which would build a chain of circumstances which is complete and leads to the guilt of the appellants and no other hypothesis is possible. He has submitted that the conviction is mainly based on the alleged non-explanation of conduct by the appellants under Section 106 of the Evidence Act. He has submitted that the learned Judge was swayed away by the fact that the FSL report projected that the poison used was organo phosphorus pesticide and not Harpic. He has submitted that the learned Judge has committed grave error in law in coming to a conclusion that a wrong projection was tried to be given by the defense by introducing the aspect of use of Harpic to commit suicide. He has submitted that the deceased was found in a precarious condition at the bathroom and blue colour froth was coming out from her mouth and there was indeed a Harpic bottle in the bathroom. The aforesaid fact is also stated by PW7.

15. The learned counsel for the appellants has also drawn the attention of this Court to the Inquest Report (Ext.-2) wherein against Sl. No. 12, there is a mention of Harpic which was thought to be consumed which was mentioned. It is submitted that the conviction is based mainly on suspicion which cannot be the principles in adjudicating a criminal case. In support of his submissions, the learned counsel has relied upon the following case laws.

(i) Kanhaiya Lal vs. State of Rajasthan [(2014) 4 SCC 715]

(ii) Anjan Kumar Sarma and Ors. Vs. State of Assam [(2017) 14 SCC 359]

(iii) Reena Hazarika vs. State of Assam [(2019) 13 SCC 289]

(iv) Anil Nath vs. State of Assam [2018 (1) GLT 579]

16. In the case of Kanhaiya Lal (supra), it has been laid down by the Hon'ble Supreme Court that mere non-explanation by the accused cannot be held to be a proof of guilt. For ready reference, the relevant portions are extracted herein below.

"8. The prosecution case is that the appellant –accused Kanhaiya Lal committed

the murder of Kala by strangulation and threw the body in the well. Nobody witnessed the occurrence and the case rests on circumstantial evidence. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

15. The theory of last seen- the appellant having gone with the deceased in the manner noticed herein before, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in *Madho Singh vs. State of Rajasthan*."

17. In the case of *Anjan Kumar Sarma (supra)*, by relying upon the earlier case of *Kanhaiya Lal (supra)* and the landmark case of *Sharad Birdhichand Sarda v. State of Maharashtra* reported in (1984) 4 SCC 116, it has been reiterated that non-explanation by the accused cannot be construed as a sufficient material for conviction. For ready reference, the relevant portions are extracted herein below.

"14. Admittedly, this is a case of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by this Court are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any

reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (See *Sharad Birdhichand Sarda v. State of Maharashtra* [*Sharad Birdhichand Sarda v. State of Maharashtra*, (1984) 4 SCC 116 : 1984 SCC (Cri) 487] , SCC p. 185, para 153; *M.G. Agarwal v. State of Maharashtra* [*M.G. Agarwal v. State of Maharashtra*, AIR 1963 SC 200 : (1963) 1 Cri LJ 235] , AIR SC para 18.)

19. The circumstance of last seen together cannot by itself form the basis of holding the accused guilty of the offence. In *Kanhaiya Lal v. State of*

Rajasthan [*Kanhaiya Lal v. State of Rajasthan*, (2014) 4 SCC 715 : (2014) 2 SCC (Cri) 413] , this Court held that :

"12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

15. The theory of last seen—the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in *Madho Singh v. State of Rajasthan* [*Madho Singh v. State of Rajasthan*, (2010) 15 SCC 588.

21. This Court in *Bharat v. State of M.P.* [*Bharat v. State of M.P.*, (2003) 3 SCC 106 : 2003 SCC (Cri) 738] held that the failure of the accused to offer any explanation in his statement under Section 313 CrPC alone was not sufficient to establish the charge against the accused. In the facts of the present case, the High Court committed an error in holding that in the absence of any satisfactory explanation by the accused the presumption of guilt of the accused stood un rebutted and thus the appellants were liable to be convicted."

18. In the case of *Reena Hazarika* (supra), the Hon'ble Supreme Court has laid down the following.

"9. The essentials of circumstantial evidence stand well established by precedents and we do not consider it necessary to reiterate the same and burden the order unnecessarily. Suffice it to observe that in a case of circumstantial evidence the prosecution is required to establish the continuity in the links of the chain of circumstances, so as to lead to the only and inescapable conclusion of the accused being the assailant, inconsistent or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused. Mere

invocation of the last-seen theory, sans the facts and evidence in a case, will not suffice to shift the onus upon the accused under Section 106 of the Evidence Act, 1872 unless the prosecution first establishes a prima facie case. If the links in the chain of circumstances itself are not complete, and the prosecution is unable to establish a prima facie case, leaving open the possibility that the occurrence may have taken place in some other manner, the onus will not shift to the accused, and the benefit of doubt will have to be given.”

19. Section 313 CrPC cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2) CrPC. The importance of this right has been considered time and again by this Court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313(1)(b) CrPC the Court is duty-bound under Section 313(4) CrPC to consider the same. The mere use of the word “may” cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available, is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 CrPC, in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 CrPC and to either accept or reject the same for reasons specified in writing.

20. Unfortunately neither the trial court nor the High Court considered it necessary to take notice of, much less discuss or observe with regard to the aforesaid defence by the appellant under Section 313 CrPC to either accept or reject it. The defence taken cannot be said to be irrelevant, illogical or fanciful in the entirety of the facts and the nature of other evidence available as discussed hereinbefore. The complete non-consideration thereof has clearly caused prejudice to the appellant. Unlike the prosecution, the accused is not required to establish the defence beyond all reasonable doubt. The accused has only to raise doubts on a preponderance of probability as observed in *HateSingh Bhagat Singh v. State of Madhya Bharat* [*Hate Singh Bhagat Singh v. State of Madhya Bharat*, 1951 SCC 1060 : AIR 1953 SC 468 : 1953 Cri LJ 1933] observing as follows:

“26. We have examined the evidence at length in this case, not because it is our desire to depart from our usual practice of declining to re-assess the evidence in an appeal here, but because there has been in this case a departure from the rule that when an accused person puts forward a reasonable defence which is likely to be true.... then the burden on the other side becomes all the heavier

because a

reasonable and probable story likely to be true when pitted against a weak and vacillating case is bound to raise reasonable doubts of which the accused must get the benefit. ...”

19. A Division Bench of this Court in the case of Anil Nath (supra) after taking into account the aforesaid case laws had reiterated the principles.

20. Per contra, Ms. Jahan, the learned Addl. Public Prosecutor, Assam has submitted that the PW3 in his FIR as well as in his deposition had mentioned about torture meted out to his sister which can be construed to be a material against the accused persons. She has also highlighted upon the conduct of the appellants and more specifically the appellant No.2 who had stated before the PW5 and PW6 that he did not know what had happened to his wife who was lying in a precarious condition on the fateful morning. She has also highlighted the aspect that the incident had happened at 7.30 am inside the house wherein there were three principal occupants and therefore, it was incumbent upon the appellants to explain their conduct satisfactorily.

21. As regards the contradiction in the cross-examination, the learned Addl. Public Prosecutor, Assam has relied upon the judgment of V.K. Mishra & Anr. vs. State of Uttarakhand & Anr. reported in (2015) 9 SCC 588 wherein it has been laid down that while contradicting a prosecution witness from a previous statement, the entire statement has to be put before him. In this connection, she has also referred to Section 145 of the Indian Evidence Act. She has reiterated that the materials against the appellants which emerged from the evidence of the PWs were placed against them, which included the aspect of mental torture, and the reply which was given in the examination under Section 313 of the Cr.P.C. is not satisfactory and therefore, the provisions of Section 106 of the Indian Evidence Act would come into operation. She submits that the conviction has been done on the basis of the materials on record and would not require any interference.

22. The rivals submissions have been duly considered and the materials placed before this Court including the LCR have been carefully examined.

23. In the instant case, it is not in dispute that there is no direct evidence and the evidence available is circumstantial. It is also to be kept in mind that initially the FIR was registered under Section 302 of the IPC against appellant no.2 and after examination of the PW1- Doctor, additional charges were framed under Section 498(A) / 304(B) / 34 of the IPC and the appellant no. 1 was made an accused. It is seen that the FIR lodged by PW3 was registered under Section 306 of the IPC and the charge sheet was also laid under Section 306 of the IPC. However, based on the materials, the charges were framed by the learned Court under Section 302 of the IPC. We have also noted that the conviction is under Section 302/34 of the IPC which is evident from paragraph 20 of the impugned judgment. Though charges were also framed under Section 498(A) and 304(B) of

the IPC, the conviction is not on those charges and admittedly there is no cross appeal by the State on the aforesaid aspect.

24. Keeping those aspects in mind, let us examine the present challenge. As observed above, there are 8 numbers of prosecution witnesses. We have also noticed that prior to lodging of the FIR by PW3, who is the brother of the deceased an information was also lodged by the appellant no. 2 on the date of the incident itself i.e., 10.11.2014 that the wife had consumed Harpic and based on the aforesaid information, Patherkandi PS UD Case 19/2014 was registered. It was only after lodging of the FIR by PW3 that both the cases were amalgamated and the case was tried.

25. We have seen that the conviction is mainly on the aspect of non-explanation by the appellants under Section 106 of the Evidence Act. We have also noted that there is no clear evidence with regard to the fact whether the death was homicidal or suicidal. In fact, the medical evidence does not suggest that it was a homicidal death. This observation of ours is fortified by the fact that in the deposition of the Doctor as PW1 as well as the post-mortem report, there are no external injuries found on the body of the deceased.

26. The death is due to poisoning and according to the FSL report, the poison found is organo phosphorus which is a pesticide. The evidence on record would show that there is a projection that the death was by suicide by consuming Harpic in the bathroom.

27. Apart from the information which was lodged by the appellant No. 2 on 10.11.2014 in highlighting the aforesaid aspect, we have seen that even the PW7 in his deposition had stated that he saw blue froth coming out from the mouth of the deceased who was at the bathroom in a precarious condition and there was indeed a Harpic Bottle in the bathroom. The learned counsel has also pointed out from the Inquest Report that a Harpic bottle was mentioned against SI. No. 12. Under those circumstances, it cannot be held to be wholly unreasonable on the part of the defence to bring in the aspect of consuming Harpic by the deceased. We have also noticed that while the learned Judge has given much stress on the aforesaid aspect, there is no material on record if the chemical composition of Harpic which is a toilet cleaner was also before the Court and admittedly such examination was not done.

28. Be that as it may, the aforesaid aspect has to be tested with the other materials on record. We have seen that PW2, PW5, PW6, PW7 who are neighbours of the matrimonial home had stated that there was a happy married life and the couple was blessed with a child. PW2 had also stated that the Annaprashanna of the child was duly solemnised at the house of the appellants and even the last rites of the deceased was performed by the appellants and not by the informants or the family members of the deceased. These facts would also have some bearing on ascertaining the conduct of the appellants who are accused in this case.

29. There is one aspect of this matter which is required to be discussed and the same is a statement made by PW4 who is a neighbour of the informant. He had stated that the appellant No. 2 had touched the feet of the informant and confessed his guilt. Though this fact has not been discussed in details in the impugned judgment, what is intriguing is that the PW3 before whom such alleged extrajudicial confession has been said to be made has not stated anything about the same either in his FIR or his deposition. Therefore, irrespective of the fact that the aforesaid statement was not put to contradiction before the I.O., the same cannot be taken into consideration as it is merely hearsay. As mentioned above, the aforesaid aspect of any extrajudicial confession has not even been mentioned by the PW3 in his deposition. The case law cited by the learned counsel for the appellants clearly lays down that mere non-explanation by the accused cannot lead or be held to be a proof of guilt. As observed above, the case was tried not under Section 306 of the IPC under which provision the FIR was registered but under the other provisions of law as mentioned above. The conviction is also not on Section 498(A)/304(B) and therefore, that part is not required to be gone into in absence of any appeal by the State. In fact, we have noticed that there is no material on record to show that there was any demand for dowry. We also find force in the submission of the learned counsel for the appellants who, by relying upon the case of Jayedeesinh Pravinsinh Chavda & Ors. vs. State of Gujarat [SLP(Crl.) No. 7957/2024] had submitted that mere harassment would not be sufficient as the aspect of mens rea is also required to be established in such a case.

30. In view of the aforesaid facts and circumstances, we are of the considered opinion that the materials in this case would not be sufficient to come to a conclusion of guilt and that the same has been proved beyond all reasonable doubt. We are therefore of the opinion that the benefit of doubt is to be given to the appellants. Accordingly, we set-aside the impugned judgment and order dated 10.02.2023 passed by the learned Sessions Judge, Karimganj in Sessions Case No. 49/2017 convicting the accused/appellants u/s 302/34 of IPC and acquit the appellants. The appellants are accordingly directed to be released forthwith unless they are wanted in any other case.

31. Let a copy of this judgment be communicated to the learned Sessions Judge, Karimganj along with the LCR.