
(2019) 05 GAU CK 0034
In the Gauhati High Court
Case No : Criminal Appeal No. 212 Of 2016

Md Mujammil Hussain

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 10-05-2019

Acts Referred:

Indian Penal Code, 1860 — Section 302
Code Of Criminal Procedure, 1973 — Section 164

Citation : (2019) 05 GAU CK 0034

Hon'ble Judges : Achintya Malla Bujor Barua, J; Mir Alfaz Ali, J

Bench : Division Bench

Advocate : Sk Nargis, B. Sharma

Final Decision : Allowed

Judgement

1. Achintya Malla Bujor Barua, J Heard Ms. SK Nargis, learned counsel for the appellant. Also heard Mr. B Sharma, learned Additional Public Prosecutor, appearing for the State of North East, Assam as well as Mr. R Ali, learned counsel for the informant/respondent No.2.

2. An ejahar dated 24.09.2009 was lodged by Md. Mahabbat Ali before the Officer-in-charge of Mikirbheta PS inter-alia stating that at about 8.30 am on a given day, i.e., 24.09.2009, his only daughter Raihana Sultana was burnt to death by the members of her husband's family. It was also stated that since her marriage, her husband and his other family members had been assaulting her by demanding dowry. Although on earlier occasions similar attempts were made, but they had failed. The accused/appellant along with Md. Amir Hussain and Amina Khatun were charged of committing an offence punishable under Section 302 of Indian Penal Code for the reason that at about 8.30 am of 24th day of September, (without specifying the year), the accused had committed the murder by causing death of Raihana Sultana by pouring kerosene on her body and that before also, the accused had demanded dowry from her.

3. PW-1, Md. Mahabbat Ali, the informant as well as the father of the deceased in his deposition had stated that at about 8.00 am on 24.09.2009, his daughter told him over telephone that his son-in-law required his motor cycle but as the motor cycle was taken away by his second son Saiful, he told her that the motor cycle can be given only on the subsequent date, if needed. At 8.30 am, he received a telephone call from his third son stating that his elder sister was no more. Thereafter, he immediately proceeded to the house of the deceased and upon reaching there he saw that her dead body was lying in a sitting position in a chair in her room and the accused/appellant who was the son-in-law of the informant was standing on the doorway without uttering a word. He further deposed that he saw that the entire front portion of Raihana including her face was burnt to the extent that her face was not in a recognisable state.

4. PW-3 who happens to be the son of the deceased and the accused in his deposition stated that when the accused was informed that the motor cycle would not be available from his father-in-law, he became very angry, and that after the deceased had informed the accused that the motor cycle was not available, he rebuked her with filthy language and pushed her inside the house. At the same time, the accused asked the PW-3 to come out of the house. After he came out of the house, PW-3 had heard that his mother was crying and then he entered their kitchen and climbed over the rack "panichang" and saw that his father was assaulting his mother with fist blows on her chest. He further deposed that due to the assault his mother fell down on the ground and after that his father had pulled her up and kept her in a chair and poured kerosene on her body from a container and then set fire on her body.

5. PW-3 further deposed that thereafter his father i.e, the accused came out and asked him to bring an axe. Then PW-3 brought an axe and handed it over to his father who then started hitting the door with the axe and when Amir Hussain had pushed open the door, he saw the fire on the body of his mother. In cross-examination also PW-3 confirms that his uncle had pushed open the door from outside and his father had hit the door from outside in order to open it.

6. PW-4 in his deposition stated that her parent's house is near the house of the accused and upon hearing hue and cry she rushed to the house of the accused and that in the meantime, her uncle's son Mofidul also came and both of them arrived at the place of occurrence at the same time. Upon reaching the place of occurrence PW-3 saw that Raihana Sultana was completely burnt and that froth was coming out from her mouth. She further deposed that the deceased was trying to tell something and when asked, she told her that her husband, mother-in-law and her husband's brother had killed her by setting fire.

7. PW-5 in his deposition stated that upon him reaching the place of occurrence, he had seen that Amir Hussain, brother of the accused was hitting the door of the house with an axe and the door was opened. He further deposed that when he went near his deceased sister, he saw that her body and face were burnt. He also deposed that when he asked his sister as to how it occurred, she replied

that his brother-in-law Mujamil, his brother Amir Hussain and mother Amina Khatun had ruined her life. She further deposed that she had seen one kerosene container in the room and it was closed.

8. In cross PW-13 had stated that his cousin Nasrin Halim is an advocate by profession and she is practising in the Morigaon Court and that after Nasrin Halim and Julfi Begum had arrived at the place of occurrence, he also arrived. In cross, PW-13 also stated that it is a fact that Nasrin is an advocate and they prepared their statements after discussion with her as the case was a tight one and therefore, her name was also mentioned before the Magistrate while the statement of PW-13 was recorded under Section 164 Cr.P.C., which again was exhibited as Exhibit-7.

9. When we look into the statement of PW-13 under section 164 Cr.P.C., it is seen that he had firstly stated that Amir Hussain was banging on the door with an axe in order to open it and after the door was opened, PW-13 had gone inside the room and saw that the body of his elder sister was in flames and she was lying on the ground in burnt condition and that appearance of her face was as if she was wearing a mask. She further deposed that the deceased had told him that Mujamil, Amir Hussain and Amina Khatun had assaulted her thereby finishing her life.

10. The medical evidence showed the following injuries on the body of the deceased.

"I - EXTERNAL APPEARANCE

1. Condition of subject stout : A young lady of approximately 32 yrs old with whole body burn (more than 90%) was lying in the morgue. No any external injury could be detected. A pool blood was seen inside the thoracic cavity.

2. Wounds - position and character :

3. Bruise - position, size and nature : "Specimen of heart, liver, left kidney, stomach and its contents, and uterus were sent to forensic laboratory for expert opinion.

4. Mark of ligature of neck dissection etc.

II - CRANIUM AND SPINAL CANAL

5. Scalp skull, vertebrae : completely burn, skull and vertebrae intact.

6. Membrane : NAD

7. Brain and spinal cord : NAD.

Note : The spinal canal need not be examined unless any indication of disease or injury exist.

III - THORAX

1.

Walls ribs and cartilages

: Healthy

2.

Pleurae

: Healthy

3.

Larynx and trachea

: Congested

Right lung

: Congested

Left lung

: Congested

Pericardium

: Healthy

Heart

: NAD

Vessels

: NAD

IV- ABDOMEN

1.

Walls

2.

Peritoneum

: Completely burnt outside.

3.

Mouth, pharynx, oesophagus

: NAD

4.

Stomach and its contents

: NAD

5.

Small intestine and its contents

: NAD

6.

Large intestine and its contents

: NAD

7.

Liver

: NAD

8.

Spleen

: NAD

9.

Kidneys

: NAD

10.

Bladder

: Empty

11.

Organs of generation, external and internal

: NAD

V- MUSCLES, BONES AND JOINTS

1.

Injury

: Nil

2.

Disease of deformity

: Whole body is completely burnt approximately more than 90% burn

3.

Fracture

: Nil

4.

Dislocation

: Nil"

11. PW-12 stated that having heard a shouting from the house of the accused Mujammil Hussain that there was a fire, he and Mofidul rushed to the house of the accused and saw that smoke was coming out from the room where the accused and the deceased used to live. The accused went to the backside of the house and forced open the door, while Jantu Ahmed tried to open the door from the front side. Thereafter PW-12 saw that Mofidul caught the deceased with burn injuries and thereafter he went out in search of a vehicle and took her to the hospital.

12. As regards dying declaration, we also take note of that the defence had also examined four witnesses and the accused DW-1 Mojammil Hussain in his deposition had stated that on the given day at 8.30 am, he was doing certain household activities in the backyard of his house. When he heard a cry, he rushed towards his house. He saw that smoke was coming out of the house. When he tried to push open the door he found that it was bolted from outside. Failing to open the door, DW-1 had shouted and upon hearing his shouting, his mother, brother, Badrul Islam @ Bakul Ali (DW-3), Moina etc came there. Then someone gave him an instruction to break open the door and upon breaking open the door he entered inside. Upon entering he found his wife was in a badly burnt condition and was lying on the ground and at that time she could not communicate.

13. DW-2, Hasina Begum, in her deposition, stated that she heard a sound from the house of the accused and upon reaching she saw that smoke was coming out from the house and the accused had broken open the door. When they entered they had seen that the victim was badly burnt and she was dead at that time.

14. DW-3, Badrul Islam @ Bakul Ali, whose presence was also stated by DW-1 in his deposition that upon hearing a sound from the house of the accused, he rushed to the spot and upon reaching, he had seen that Hasina, Amina, Amir and Moina had also reached the place. Upon reaching, he further saw that the accused Mojammil Hussain was trying to break open the door, which was bolted from inside and he had broken the door by means of an axe. When they entered the house, they saw that the deceased Raihana was lying on the ground and thereafter she was taken out of the house in a burnt condition and that she was not communicating.

15. DW-4, Haziron Nessa, whose residence is located adjacent to the house of the accused also stated that upon reaching the place of occurrence, she saw that

smoke was coming out from the house and it was bolted from inside and the accused Mozammil broke open the door. After entering the house, they saw that the deceased was lying on the ground and she was dead at that time and thereafter her dead body was taken out.

16. Based on the aforesaid materials on record, the eye witness account of PW- 3 and the dying declaration made before PW-4 and PW-13 it is the case of the prosecution that it had established beyond reasonable doubt that it is the accused alone, who had caused the burn injuries to the deceased resulting in her death. On the other hand, it is the case of the defence that at the time of occurrence, the room, where the burning of the deceased had taken place was bolted from inside, which was required to be broke open which by itself shows that the accused was not present inside the room, when the occurrence had taken place.

17. To examine the contention of the prosecution that there was a dying declaration by the deceased based upon the deposition of PW-4 and PW- 13, we again examine as to what the two witnesses had stated. PW-4 in his deposition had stated that he deceased was trying to tell something and when she was asked, she told that her husband, mother-in-law and her husband's brother had killed her by setting her on fire. On the other hand, PW-13 in his deposition stated that when he asked his sister as to how it all occurred, she replied that the accused Mojammil Hussain, his brother Amir Hussain and mother Amina Khatun had ruined her life. Again his statement under Section 164 Cr.P.C., which is exhibited as Ext.7, PW-13 had stated that the deceased had told him that her husband, mother-in-law Amina Khatun and brother Amir Hussain had assaulted her thereby finishing her life. We also take note of that PW-4 had stated about the dying declaration for the first time in her examination before the court and had not stated about it before the investigating officer, which is revealed from the evidence of PW-14, who says that the prosecution witness Nasrin Halim had not stated before him that the deceased Raihana had told her that the offence was committed by her husband, mother-in-law and brother-in-law Amir Hussain. Although PW-4 in her examination-in-chief had stated about the dying declaration which again had also been stated by PW-13 in his examination-in-chief and also in his statement under Section 164 CrPC, what we notice is that there is a variance of the depiction of the dying declaration as made by the deceased purportedly before PW-4 and PW-13 and also in her statement under Section 164 CrPC., where again in respect of PW-4 there is a definite improvement as it was not stated before the investigation officer at that time.

18. We also take note of the deposition of PW-13 in his cross-examination, wherein he had stated that PW-4 Nasrin Halim is an advocate by profession, who practices in the Morigaon court and that as Nasrin Halim is an advocate, so the statement given by them were prepared after a discussion with her as the case appeared to them to be a tight case. The said statement of PW-13 in cross-examination that the statement was given by them were prepared after a

discussion with PW-4 Nasrin Halim, who again is an advocate, further leads us to disbelieve the dying declaration purportedly made before PW-4 and PW-13. We also take note of the deposition of PW-1, the father of the deceased, who had stated in his examination-in-chief, that the face of the deceased was so burnt that it was not in a recognizable state. In his statement under Section 164 Cr.P.C. also PW-13 had stated that the face of the deceased was so burnt that it looked completely black as if she was wearing a mask. The inquest report showing the injuries also shows that the face of the deceased was completely burnt. We also take note of the evidence of DW-2 and DW-3 in their examination-in-chief, wherein it is stated that when they saw the deceased, she was already dead, which again appears to be in conformity with the evidence of PW-12 as well as that of PW-12 and PW-13 that when the 108 ambulance arrived, they found upon examination that the deceased had already died.

19. From the aforesaid medical state of the deceased when the various prosecution as well as defence witnesses had found her to be not in a physical state to talk, it does not inspire confidence that at that stage the deceased was in a physical state to make any dying declaration and such conclusion of ours also finds support from the inconsistency of the dying declaration as depicted by PW-4 and PW-13, both in examination-in-chief as well as in the statement under Section 164 Cr.P.C.

20. As regards the contention that from the evidence of PW-3, who is an eye witness, it can be said that it was the accused, who poured kerosene over the deceased and set her on fire, we have examined the deposition of PW-3, whose evidence is projected as an eye witness account. PW-3 in his statement had stated that the accused had pushed the deceased inside the house and had asked the PW-3 to come out from it. After coming out, he had heard that the deceased was crying and when he entered the kitchen and climbed over the rack, he had seen that the accused was assaulting the deceased with fist blows on her chest. Due to the assault, the deceased fell down on the ground and thereafter the accused had pulled her up and kept her in a chair and thereafter poured kerosene on her body from a container and set her on fire.

21. PW-3 thereafter states that the accused after setting fire came out and asked the witness to provide him with an axe and after the axe was brought and handed over to the accused, he started to hit the door with the axe and Amir Hussain pushed the door open. It is an inherent consistency that if the accused came out from the house where the deceased was set on fire, why immediately, thereafter, he required an axe to break open the door and thereafter re-enter the room again. The said inconsistency itself reflects that the deposition of PW-3 that he saw the incident by climbing upon the rack in the kitchen is dis-believable. The said conclusion gets further credence from the evidence of PW-12, who had clearly stated that the door of the room, where the incident took place, was bolted from inside and Mofidul went to the backside of the house to force open the door, whereas the accused/appellant made his endeavor to open the front

door. In fact, the evidence of PW-12 is in conformity with the evidence of PW-3 that the accused broke open the door of the room, where the occurrence had taken place by hitting it with an axe. If the door of the room was bolted from inside and it was the accused, who had broken open the door along with Amir Hussain, it is dis-believable that the accused was inside the room so as to pour kerosene on the body of the deceased and set her on fire. The evidence of PW-12 regarding the opening of the door is also in conformity with the evidence of all defence witnesses, who stated that the accused had broken open the door, which was bolted from inside. In view of the aforesaid glaring inconsistencies in the evidence of PW-3, we are unable to accept that the PW-3 was an eye witness and had seen the accused pouring kerosene over the deceased and setting her on fire. A further inconsistency is also revealed from the evidence of PW-12 who in his cross-examination had stated that there is no burning sign on the wooden chair. If the deceased was made to sit in a chair and then kerosene was poured over her body and set on fire, we see no reason as to why kerosene would not spill on the wooden chair and why the chair would not burn.

22. In view of the above, we are unable to accept both the contentions of the prosecution that there was an eye witness to the occurrence which took place inside the room of the accused, where he had poured kerosene over the deceased and set her on fire and further that there was a dying declaration made before PW-4 and PW-13. On the other hand, the evidence on record including some of the prosecution witnesses, more particularly, PW12 supports the case of the defence that the room, where the occurrence took place was bolted from inside and it is the accused who had broken open the door and thereafter, went in, which again shows that the accused has to be outside the room when the occurrence took place and therefore, it cannot be the case of the prosecution as sought to be projected that it is the accused who had poured kerosene over the deceased and set her on fire. In view of the aforesaid conclusion, we are unable to accept with the reasonings given in the judgment and order dated 09-05-2016 of the learned Sessions Judge, Morigaon in Sessions Case No. 3 of 2012 convicting the accused/appellant under Section 302 of the Indian Penal Code. Accordingly, the conviction of the accused/appellant under Section 302 of the Indian Penal Code as per the judgment and order dated 09-05-2016 of the learned Sessions Judge, Morigaon in Sessions Case No.3 of 2012 and the sentence of rigorous imprisonment for life with a fine of Rs. 10,000/-, in default, thereof, another rigorous imprisonment of 6(six) months are set aside.

23. The accused is set at liberty forthwith, provided he is not required with any other offence.

24. Appeal stands allowed.

25. Send back the LCR.