
(2019) 11 GAU CK 0054
In the Gauhati High Court
Case No : Criminal Appeal No. 150 Of 2016

Md Yashin Ali And Anr

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 18-11-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 314
Code Of Criminal Procedure, 1973 — Section 161, 313, 313(1)(b), 313(4)
Constitution Of India, 1950 — Article 21

Citation : (2019) 11 GAU CK 0054

Hon'ble Judges : Rumi Kumari Phukan, J

Bench : Single Bench

Advocate : R Rahman, A Barua

Final Decision : Allowed

Judgement

1. Heard Mr. P.K. Munir, learned counsel for the petitioner and Mr. D. Das, learned Additional Public Prosecutor, Assam for the State.

2. Deceased, Hasnara Begum was married to the accused Yashin Ali. and they had three children out of the wedlock. The said Hasnara became pregnant for the fourth time and while carrying pregnancy of five months (approx.) she died. The accused Anowara Begum is the mother-in-law of the deceased. The father of the victim lodged an FIR on 21.04.2011 that the accused persons Anowara Begum forcibly administered local medicine to terminate the pregnancy and as a result of which his daughter died. It is stated in the FIR that he was informed about the said incident by Ms Rupsana Begum and Ms Manjila Begum who resides nearby and saw the incident and also tried to prevent the accused person from doing so. On the basis of the said incident, an FIR was lodged and the same was registered under Section 302 IPC. During the course of investigation, the dead body was sent for medical examination and post-mortem examination was made along with FSL examination of liver, stomach and kidney. At the conclusion of the investigation charge sheet was submitted against two accused persons under

Sections 302/314/34 IPC.

3. The accused persons faced the trial and denied the charges under Sections 302/314/34 IPC and claimed to be tried. In support of the case, the prosecution examined 9 witnesses and defence also examined two witnesses in support of the case. At the conclusion of the trial, the learned trial Court held both the accused persons as guilty under Sections 314/34 IPC and convicted and sentenced them to rigorous imprisonment for 10 years and also to pay fine of Rs. 5,000/- in default, SI for another 1 month.

4. Challenging the aforesaid findings, the present appeal has been preferred on the ground that the findings of the learned trial Court is not just and proper as the learned trial Court failed to appreciate oral as well as the medical evidence in proper perspective. It has been contended that the oral evidence of PW-5 that she saw the accused/ appellant administering herbal medicine is not supported by medical evidence and forensic report. That apart, the evidence on record is not corroborative on material aspect and totally inconsistent with each other which has shaken the authenticity of the allegation.

5 I have gone through the evidence on record, which needs to be appreciated.

6. In the present case, the informant/the father of the deceased is a reported witness and not an eye-witness to the occurrence. According to informant/PW-1, he came to know about the occurrence from Manjila Begum (PW-4) and Rupsana Begum (PW-5), who reported him that accused Anowara Begum administered medicine to Hasnara at their home in order to terminate her pregnancy and as a result of which she died about ½ hours of consuming the medicine and husband of Hasnara also lived in the same house. According to him, he went to their house and found his daughter lying inside their house and also found accused Anowara, who replied that she does not know anything about the matter but he did not meet Yasin Ali in the house.

7. As referred by the PW-1, he was informed by the PWs-3 and 4 so, let us examine their evidence. According to PW-4, on the day of occurrence, when she went to the house of the accused nearby to pay visit to Hasnara as she was carrying pregnancy of five months then she saw husband of Hasnara, Yasin Ali and the other accused Anowara were compelling Hasnara to consume local medicine to terminate her pregnancy and although she and Hasnara dissuaded them from doing so but accused person did not listen to them. After a short while the foetus got aborted and Hasnara died and on arrival of Police, accused Anowara said that foetus was buried in the betel-nut garden. On seeing the occurrence, she informed the matter to PW-1. She has denied the suggestion of the defence side that she did not state before Police that child delivered by the deceased had some life left in it. She also stated in cross-examination that the accused Yasin worked in Kerala but he was present at the time of the incident. It is also stated that deceased was suffering from some sort of illness.

8. The other witness, PW-5 in her statement stated that prior to the occurrence,

accused Anowara took Hasnara to a doctor to abort the child but doctor expressed the inability to do the abortion. On the following day, both the accused persons forced Hasnara to consume medicine in spite of her protest and after ½ hours Hasnara's foetus got aborted and she died. According to her, she only saw the occurrence and PW-4 was at her house at that time and she informed the PW-4 after the incident. She also stated that she and PW-4 did inform the informant.

9. The informant/PW-1, Md Abdul Rouf, in his deposition has stated that son of the accused Anowara, Yashin Ali married his daughter 7 years back before her death and they have three children. He came to know about the occurrence from Manjira (PW-4) and Ruksana (PW-5), that the accused persons compelled his daughter Hasnara to consume medicine who was pregnant at that time as a result of which, she died. His house is about 3 kms away from the house of accused and he went to their house immediately and found the dead body of Hasnara lying inside the room. He found accused Anowara at home but Yashin Ali was not in the house. He filed the FIR on the next day of occurrence.

In his cross-examination, he has stated that at the time when PW-4 informed him about the incident, the PW-5 was not with her.

10. The village headman, Mr. A.B. Siddique as PW-2 has stated that on the day of occurrence at about 03:30 pm, PW-1 went to his house and reported that his daughter Hasnara Begum has died and asked him whether he knew about the same. He also told that accused killed Hasnara by compelling her to consume some local herbal medicine. He accompanied PW-1 to the house of Hasnara and found that she had died. He enquired the neighbours whether anybody has seen they administering the local medicine to Hasnara. Then PW-5 Ruksana told that she had seen the accused administering herbal local medicine to Hasnara, who was present at that time. The PW-4, Manjira also told the same thing. The accused Anowara told him that Hasnara did not want to carry her pregnancy.

In his cross-examination, he has stated that he was reported by Ruksana (PW-5) that she had seen the accused administering such medicine. Further she stated that deceased Hasnara Begum was suffering from illness since before. As the accused Yashin Ali was not at home, the deceased's father-in-law and mother-in-law provided treatment to Hasnara. It is further stated that accused Yashin Ali was at Kerala at that time and came within 2 months of the occurrence and OC called him over phone.

11. The PW-3, Askor Ali/ the neighbor of the deceased has deposed that prior to two days of the occurrence he saw the accused and her daughter-in-law in a bus and on being asked she (indicates Anowara) replied that Hasnara was pregnant and she took her daughter-in-law to the hospital to abort the child but as the foetus has become proportionately bigger, the doctor expressed his inability to abort the same. Later, she came to know that as the accused persons made her daughter-in-law consume the local medicine so later on she died. On being asked

by the police, accused Anowara replied that she had buried the foetus in the betel-nut garden but as the foetus was not found she said that it was floated in the Doiyang river.

In cross-examination, he has however stated that he did not tell before the Police the above statement.

12. The post-mortem examination over the dead body of Late Hasnara Khatun Begum was conducted by the PW-6, who has stated that there was no injury on the body and all other parts of the body looked healthy and a dead foetus of 12 weeks' size was found on incising the uterus.

According to him, no apparent cause of death was found and viscera (kidney, stomach and liver) was preserved for FSL examination. In his opinion, person died due to sudden cardiac death syndrome occurring in the state of pregnancy. He has put the post-mortem report vide Exhibit-2 and vide Exhibit-3 is the supplementary PM report after getting the report of viscera from FSL.

13. The officer of the FSL appearing as PW-7 has stated that they received the parcel containing viscera in connection with the present case and on examination of the Exhibit (viscera) sent to them by indicating that no poison was found. Exhibit-4 is the forwarding report and Exhibit-5 is the report of the Director of FSL, Mr K C Sarma.

14. PW-8, Mr M Bey and PW-9, Mr N Buragohain are the officers relating to the investigation of the case. They have stated all about the investigation like examination of witnesses, preparation of sketch-map, collection of PM report as well as the report of viscera and after completion of the investigation they filed the charge sheet against the accused persons. PW-8 vide Exhibits- 6, 7 and 8 are the relevant documents.

PW-8 has contradicted the statements of certain witnesses as follows-

- PW-1, A. Rouf did not state before Police that Ruksana Begum did not ask the accused not to administer the medicine to Hasnara.
- PW-3, Askor Ali did not state before IO that accused stated that foetus had been kept buried in the betel nut garden and Police and Magistrate went there and then it was told that it was thrown into the Doiyang river.
- PW-4, Manjira Begum did not state before IO that Anowara told Police that baby (foetus) had been buried in the garden. She also did not state that when the accused had been trying to make Hasnara consume the medicine she prevented the accused from doing so.

PW-8 further stated that no medicine was seized in connection with the incident and Yashin Ali was not found at home after the incident and he had been absconding.

15. The defence also examined two witnesses, namely, Md. Saiyaddin Ahmed

and Abu Bakkar Siddique. Both of them had stated that the wife of the accused, Yashin Ali, Hasnara died of illness and she was provided treatment occasionally for such ailment and the accused Anowara prior to two days of occurrence told DW-2 that Yashin went to Kerala for work and his wife was lying ill.

16. The learned counsel for the appellant has urged before this Court that the prosecution case suffers from serious infirmities which has shaken the credibility of the witnesses and the authenticity of the allegation. It has been contended that starting from the content of the FIR and the so called eye witness including the medical evidence is full of inconsistencies and the learned trial court has failed to appreciate the matter in proper perspective of law and facts. The learned trial court has relied upon the evidence of the star witnesses i.e. PW.4 and PW.5 which are contradictory with each other and has also relied upon the evidence which is contrary to the medical evidence.

17. Relying upon the decision of Bhimapa Chandappa Hosamani and other vs. State of Karnataka reported in (2006) 11 SCC 323 , it has been submitted that conviction can be based on solitary witness when such evidence is of sterling quality and court finds it safe to base a conviction upon such evidence. It has been held that credibility of the witness is to be tested by reference to the quality of his evidence which must be free of any blemish or suspicion, must impress the court as wholly truthful, must appear to be natural and so convincing that the court has no hesitation in recording a conviction solely on that basis.

18. Further, it has been contended that learned trial court has failed to appreciate the plea of alibi taken by the defence by adducing defence evidence which is also supported by the prosecution witnesses, which has occasioned the failure of justice. It has been pointed out that the accused (Yasin Ali) in his statement u/s 313 Cr.P.C. has also taken the same plea which finds support from the evidence on record and relying on the decision of the Hon'ble Supreme Court in AIR 2003 SC 5361 , it has been contended that Section 313 Cr.P.C. conferred a valuable right upon the accused to establish his innocence and could be considered being a statutory right, as a constitutional right to a fair trial under Article 21 of the Constitution, even if it was not to be considered as a piece of substantial evidence, not being on oath u/s 313 (2) of Cr.P.C. It has been further that if an accused raise a defence after prosecution evidence was closed u/s 313 (1)(b) of Cr.P.C., the court is duty bound u/s 313 (4) Cr.P.C. to consider the same. If there had been no consideration at all of defence taken u/s 313 CrPC in the given facts of the case, the conviction stand vitiated. A solemn duty is caste upon the court in dispensation of justice to adequately consider the defence of the accused taken u/ 313 CrPC and either to accept or to reject the same for reasons specified in writing.

19. Another serious contentions that has been raised is that the ocular evidence being quite contradictory to the medical evidence in the given facts and circumstances, cannot be accepted in evidence. Reliance has been placed on the decision of the Hon'ble Supreme Court in 2010(10) SCC 259 (Abdul Sayeed vs.

State of Madhya Pradesh) where it has been held that where there is a contradiction between a medical evidence and ocular evidence then it can be crystallized to the effect that though ocular testimony of a witness has greater evidential value vis-à-vis medical evidence, but where the medical evidence makes the ocular testimony improbable, that evidence became a relevant factor in the process of evaluation of evidence. Further, it has been held that whether medical evidence goes far that it completely lose out all possibility of ocular evidence being true, the ocular evidence may be disbelieved.

20. The learned Addl. PP, Mr. D. Das, has however, made a submission that a life of a woman has been finished in the hands and house of the accused and there appears no illegality on the part of the trial court while accepting the evidence of PW.5 (by discarding the evidence of PW.4), as the evidence of said PW.5 remains constant throughout the trial including her statement u/s 161 Cr.P.C. It has been contended that only because of discrepancies in ocular evidence and medical evidence, the entire case cannot be thrown out. The ocular evidence must prevail upon the medical evidence and according to the learned Addl. PP from the totality of the evidence, the prosecution has been able to prove the charge against the accused persons.

21. Bearing in mind the above rival submission as well as the decision referred, let us appreciate as to whether the appreciation of evidence made by the learned trial court is in proper perspective, calling for any interference.

22. On careful scrutiny of the entire materials on record, the following vital aspect come to the notice of this Court:

- According to the informant/PW.1, on being informed by PW.4 and PW.5 he filed the FIR otherwise he has no personal knowledge of the occurrence nor he is an eye witness to the same. It is to be noted that FIR contains only the name of accused Anowara Begum, not the other one.
- The said PW.4 and PW.5 claimed to be eye witness to the occurrence and they have stated that after seeing the occurrence have informed the informant. If that be so, why the name of the both the accused persons did not appear in the FIR, is a serious matter of concern.
- There appears vital inconsistency in the evidence of PW.4 and PW.5 on material aspect. According to PW.5, she has seen the occurrence and at that time PW.4 was in her house and after the incident, she informed PW.4. In her cross-examination, PW.5 has stated that she and PW.4 did not went to the house of informant to inform him. Such contradictory evidence of PW.4 and PW.5 not only destructive of the credibility of their evidence but has also shaken the authenticity of the FIR, which is the foundation of a prosecution case.
- As per the evidence of PW.3, PW.4 and PW.5, the foetus of the deceased woman got aborted and accused Anowara stated before the police that she has buried the foetus in the beetle nut garden but it was not found on search made

by the police. PW.3 further stated that the accused Anowara Begum told police that she has floated the foetus in the Doiyang river.

- Such evidence of PW.3 to PW.5 is wholly inconsistent with the evidence of medical officer, PW.6 and PW.7. At the time of post-mortem examination, the PW.6 found the dead foetus inside the uterus of the deceased and he has never stated that it is one part of foetus and other part has been aborted. No apparent cause of death was detected at the time of post-mortem examination and hence the viscera was preserved and sent for FSL examination. He opined that deceased died of sudden cardiac syndrome.

- The evidence of PW.7, who examined the viscera also reveals that there was no poison found in the viscera. Even if it is not a case of poisoning but as per the allegation, deceased died due to administering of certain medicine resulting immediate abortion of the child. In that view of the matter, such medicine would be of serious nature having strong impact on the body then certain extraneous materials should have been found in the body/viscera, but no such finding from the evidence of medical officers has sufficiently belied the allegation. As per the medical evidence, it is not a case of miscarriage, but death due to cardiac death syndrome.

- The I.O. has contradicted the evidence of PW.1, PW.3 and PW.4 as mentioned above, which raised the occasion to believe that they have exaggerated the case in the course of trail and their evidence is not fully reliable, being not truthful version of the case.

- As regards the plea of alibi, the defence has adduced two witnesses to establish that at the time of occurrence Yashin Ali was working at Kerala and the deceased woman was suffering from illness since before and she occasionally took treatment for such ailment. The plea of defence finds support from the evidence of PW.2/Gaonburah who immediately arrived at the place of occurrence and did not found accused Yashin in home who is stated to be working at Kerela at that time. The PW.5 also stated that the accused worked at Kerala and deceased was providing treatment for her illness.

23. In the instant case, there are sharp inconsistencies in the ocular evidence as well as the medical evidence. The Hon'ble Supreme Court in *Ram Narayan Singh vs. State of Punjab* (1975(4) SCC 497), *State of Haryana vs. Bhagirath* has elaborately dealt with about the medical evidence versus ocular evidence and held that where the evidence of witnesses for prosecution is totally inconsistent with the medical evidence or the evidence of ballistic expert evidence, it amounts to a fundamental defect to the prosecution and unless reasonably explained, it is sufficient to discredit the entire case. In *State of Haryana (supra)* it has been held that the opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If

one doctor forms one opinion and another doctor forms a different opinion on the same facts then it is open to the Judge to adopt the view which is more objective or probable. Similarly, if the opinion given by one doctor is not consistent with probability, the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject.

24. It has been held in Abdul Sayeed (supra) where the eye witnesses accounts credible and trustworthy, the medical opinion alternative possibilities cannot be accepted as conclusive. Eye-witnesses account requires a careful independent assessment and evaluation for its credibility which should not be adversely prejudice on the basis of any other evidence including the medical evidence as the sole caste for the test of such credibility.

25. The decision rendered in 2008(2) SCC 151 (Kunju vs. State of Tamilnadu), has reiterated the view taken in Vadivelu Thevar vs. State of Madrass wherein the nature of witnesses has been categorized in three categories, namely, i) wholly reliable, ii) wholly unreliable and iii) neither wholly reliable nor wholly unreliable. It has been held that court is concerned with the quality and not the quantity of evidence for proving and disproving a fact and the first category of prove, the court should have no difficulty in coming to its conclusion either way - it may convict or acquit on the testimony of a single witness if it is found to be re-approached or suspicion of interestedness, incompetence or subornation. In second category, the court has no difficulty in coming to its conclusion. It is in the third category, the court has to circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. It is further held that there is no legal impediment in convicting a person on the sole testimony provided it is wholly reliable.

26. In view of the discussion above, the evidence of PW.5 who is the sole witness relied by the trial court is found to be not wholly reliable as her evidence is totally inconsistent with the medical evidence and contrary to the FIR itself. The court is not duty bound to make a conjecture of facts and evidence of its own unless the fact is properly brought on record with clear and convincing evidence. The learned trial court has not appreciated the above vital discrepancies in the ocular as well as medical evidence as well as the content of the FIR. As has been discussed above, the very basis of the prosecution i.e. the FIR is not proved and different story has been projected in course of trial. The case is full of exaggeration, suppression of material facts by the prosecution witnesses and in the given facts and circumstance, the medical evidence will prevail over the ocular evidence. Plea of alibi taken by the defence has not been properly addressed by the learned trial court which has vitiated the findings arrived by the learned trial court.

27. Resultantly, appeal is allowed and the impugned judgment and order is hereby set aside and the accused person is acquitted on benefit of doubt and set at liberty forthwith.

28. Return the LCR.