
(2015) 07 GAU CK 0034
In the Gauhati High Court
Case No : Criminal Appeal No. 128 of 2015

Mohibul Haque

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 24-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313
Penal Code, 1860 (IPC) — Section 302, 304

Citation : (2015) 3 GLT 659

Hon'ble Judges : C.R. Sarma, J

Bench : Single Bench

Advocate : N. Ahmed, A. Jahid and S.I. Ahmed, for the Appellant; K. Munir, APP, A.Y. Choudhury, M.R. Hazarika and S. Buragohain, Advocates for the Respondent

Final Decision : Allowed

Judgement

C.R. Sarma, J—This appeal is directed against the judgment and order, dated 06.05.2015, passed by the learned Sessions Judge, Darrang, Mangaldai, in Sessions Case No. 114(DM)/2012, whereby and whereunder the learned Sessions Judge convicted the appellant, under Section 304 (Part-II) of the Indian Penal Code (hereinafter called "IPC") and sentenced him to suffer rigorous imprisonment for 5 (five) years and pay fine of Rs. 5,000/-, in default, suffer simple imprisonment for 6 (six) months. Aggrieved by the said conviction and sentence, the convicted person, as appellant, has come up with this appeal.

2. I have heard Mr. N. Ahmed, learned Counsel, appearing for the appellant and Mr. K. Munir, learned Additional Public Prosecutor, Assam and Mr. M. Haque, learned Counsel for the private respondent.

3. The prosecution case, in brief, may, be stated as follows:-

On 23.08.2011, in the evening, Mustt. Badarun Nessa (hereinafter called "the deceased"), was assaulted by her husband i.e. the appellant, as a result of which she became unconscious and she was shifted to Mangaldai Civil Hospital,

wherefrom she was referred to Gauhati Medical College and Hospital (for short GMCH). But, the deceased died on 24.08.2011, at about 3 P.M.

4. The brother of the deceased (P.W. 1) lodged an FIR with the Police.

On receipt of the said FIR, Police registered a case under Section 302 IPC and launched investigation into the matter. During the investigation, Police conducted inquest in respect of the dead body and sent the same for post mortem examination.

5. At the close of the investigation, Police submitted charge-sheet, against the accused person, under Section 302 IPC. The offence being exclusively triable by the Court of Sessions, the learned SDJM committed the case to the Court of Sessions. Accordingly, the learned Sessions Judge, Darrang, Mangaldai, considering the materials, on-record, framed charge under Section 302 IPC. The charge was explained and read over to the accused to which he pleaded not guilty. He claimed to be tried.

6. In order to prove its case, the prosecution examined as many as 7 (seven) witnesses, including the Medical Officer (P.W. 6), who performed the autopsy on the dead body of the deceased and the Investigating Officer (P.W. 7).

7. After examination of the prosecution witnesses, the accused person was examined under Section 313 Cr.P.C. He denied the allegations brought against him and declined to adduce defence evidence. His plea was a denial one. Considering the evidence, on-record, the learned trial Judge convicted and sentenced the appellant, as indicated above.

8. Mr. N. Ahmed, learned Counsel, appearing for the appellant, referring to the evidence, on record, has submitted that there is no substantive evidence against the appellant and that the learned Sessions Judge committed error by recording the conviction on the basis of the evidence, given by the prosecution witness No. 5, who was declared hostile and the 164 statement (Ext. 3) given by her, during the investigation.

9. The learned Counsel for the appellant has submitted that none of the witnesses, except P.W. 5, who was daughter of the deceased, was present at the time of the occurrence and as such there is no eye witness to the said occurrence except P.W. 5.

10. The learned Counsel for the appellant, referring to the evidence of P.W. 5, has submitted that the said eye witness clearly stated that her mother, who was ailing at the relevant time, had fallen down in the kitchen and she became unconscious. She denied the involvement of her father with the death of her mother. It is submitted that the P.W. 5 did not state anything incriminating against the appellant.

11. The learned Counsel for the appellant, referring to the post mortem report and the medical evidence, given by P.W. 6, has submitted that, as per the

medical evidence, the deceased died due to cerebral hemorrhage and that it was not possible to cause cerebral hemorrhage due to assault on head.

It is also submitted that absence of any external injury, on the head, rules out the prosecution version that the deceased was assaulted by her husband i.e. the appellant.

12. In view of the above, the learned Counsel for the appellant has submitted that the conviction and sentence, recorded by the learned Sessions Judge, on the basis of the statement, recorded under Section 164 Cr.P.C. (Ext. 3) and the hearsay evidence, given by P.W. 1, 2, 3 and 4, is not maintainable in the eye of law and as such, the appellant is entitled to be acquitted and set at liberty.

13. Mr. K. Munir, learned Additional Public Prosecutor, referring to the evidence, on-record, has fairly submitted that, except P.W. 5 i.e. daughter of the deceased, none was present at the place of occurrence and that P.W. 5, while giving evidence, during trial, refused to support her earlier statement, made under Section 164 Cr.P.C.

14. Having heard the learned Counsel, appearing for both the parties and considering the evidence, on-record, I find that none of the prosecution witnesses, except P.W. 5, was present at the time of the occurrence i.e. in the house of the appellant. Hence, none except P.W. 5 saw the occurrence.

15. P.W. 1, who lodged the FIR, P.W. 2, who was sister of the deceased, P.W. 3, who was a relative of the deceased and P.W. 4, a Cousin of the deceased, stated that they were informed by P.W. 5 that her mother was assaulted by her father i.e. the appellant. So, from their said evidence, it appears that they came to know about the involvement of the appellant from P.W. 5.

P.W. 5 stated that at the relevant time, when her mother was working in the kitchen, her father was preparing Iftar and she was studying in the veranda. She stated that, hearing a sound in the kitchen, she rushed to the kitchen and found her mother lying near the filter in the kitchen. She further stated that she lifted her mother and took her to the bed. She also stated that she informed her maternal aunt about the incident and on being asked by her father, she took her mother to the hospital. She also stated that her father had told her that he would go to hospital after performing namaj. This witness further stated that her mother was shifted to Gauhati Medical College & Hospital and she came to know that she expired on the next date.

She has stated that she did not state before the Police that her mother was assaulted by her father. She also stated that, on being threatened by Police, she had stated about the involvement of her father, in her statement, recorded under Section 164 Cr.P.C. Her said evidence remained undemolished. Though P.W. 5 was declared hostile and cross-examined by the prosecution, no incriminating evidence, against the appellant, could be elicited from her cross-examination.

16. The evidence, given by P.W. 5 i.e. the only eye witness to the occurrence,

negates the prosecution version regarding involvement of the appellant. The statement made under Section 164 Cr.P.C. is not a substantive piece of evidence. Such statement can be used in support of other convincing evidence, no conviction can be based on the basis of a statement recorded under Section 164 Cr.P.C. That apart, in the present case, the maker of the said 164 statement, has retracted her said statement and she has given explanation for making such statement. Her said explanation can not be brushed aside.

17. In view of the said evidence, given by P.W. 5, it can not be safely believed that P.W. 5 had reported the PWs-1, 2, 3 and 4 regarding the involvement of the appellant.

18. The Medical Officer, who performed the autopsy on the dead body of the deceased, has deposed as P.W. 6. The said Medical Officer has stated that he did not find any external injury or ligature mark around the neck of the deceased. The absence of any external injury rules out the prosecution version that the appellant had assaulted the deceased causing the fatal injury.

19. The said Medical Officer further stated that, on examination, he found cerebral hemorrhage in the brain of the deceased. As per the said medical evidence, the deceased survived with her left kidney, inasmuch as her right kidney was found missing. However, all the organs of the deceased were found to be healthy.

20. The Medical Officer opined that the death of the deceased was caused due to comma as a result of cerebral hemorrhage.

21. The said Medical Officer, in his cross-examination, stated that in case of spontaneous hemorrhage, there is possibility of bleeding from one ear or both and that in the event of smashing the head against a wooden door, there could not be cerebral hemorrhage inasmuch as in such case there would be subdural hemorrhage. The said Medical Officer clearly stated, during his cross-examination, that he did not find any such scalp injury on the head of the deceased.

The above discussed medical evidence negates the possibility of causing any injury or assault by the appellant.

22. From the above discussed evidence, I find that the prosecution failed to adduce substantive evidence showing the involvement of the appellant with the death of the deceased. In my considered opinion, the learned trial Court committed error by recording the conviction on the basis of the retracted 164 statement (Ext. 3), made by P.W. 5 and the hostile evidence of P.W. 5.

23. Hence, I find that the prosecution failed to prove the case against the appellant, beyond all reasonable doubt. Therefore, the appellant is entitled to be acquitted. I find sufficient merit in this appeal.

24. Accordingly, the appeal is allowed. The conviction and sentence, awarded to

the appellant, are set aside. The appellant be set at liberty forthwith, if not required in any other case(s). Return the LCR.