

(2009) 07 GAU CK 0055
In the Gauhati High Court
Case No : Criminal Appeal No. 17 of 2005

Pradip Borgohain

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 30-07-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 201, 302

Citation : (2009) 4 GLT 852

Hon'ble Judges : Ranjan Gogoi, J;A.C. Upadhyay, J

Bench : Division Bench

Advocate : G.N. Sahewalla, A.K. Goswami, Pran Bora and Debojit Senapati, for the Appellant; Z. Kamar, for the Respondent

Final Decision : Allowed

Judgement

A.C. Upadhyay, J.—Heard Mr. G.N. Sahewalla, learned Sr. Advocate assisted by Mr. D. Senapati, learned Counsel appearing for the Appellant and also heard Mr. Z. Kamar, learned P.P., Assam.

2. The Criminal Appeal is directed against the judgment and order dated 4.1.2005 passed by the learned Addl. Sessions Judge, Sibsagar in Sessions Case No. 82 (S-C)/ 2004, by which the Appellant was convicted under Sections 302 IPC and sentenced to undergo imprisonment for life and to pay a fine of Rs. 5,000/ -, in default, to further R.I. for 6 (six) months for commission of offence u/s 302 IPC and further sentenced to R.I. for 3(three) years and to pay a fine of Rs. 1000/ - in default, to R.I. for another 1 (one) month for commission of offence u/s 201 IPC.

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

Shri Rajesh Das, P.W.1, President of Village Defence Party (for short,"V.D.P.") of No. 1 Kathiakunda Gaon, lodged a written F.I.R. with the Officer-In-Charge, Sapekhaiti P.S. stating therein that on 06.04.03, in the evening at about

8.30/9.00 P.M., while they were doing the patrolling duty at the Sapekhaiti Railway Station area, Bonamali Das, P.W.2, informed them that when a fishing net was cast by him in the abandoned Railway well, situated near the Railway quarters of Shri Badan Bora, a dead body was found. It is further stated in the FIR that the dead body was identified to be of Mrs. Lucky Dev Borgohain, wife of the accused.

4. On receipt of the ejahar from P.W.1, police registered a case and launched investigation. Inquest of the dead body was prepared by Shri Debananda Das, P.W.5, Executive Magistrate at Sibsagar, and thereafter it was sent to Civil Hospital for post mortem examination. The dead body was found wrapped in a blanket, as such the police also seized the blanket at the place of occurrence. The Investigating Officer-P.W.12, recorded the statements of the witnesses u/s 161 Code of Criminal Procedure and collected all such relevant documents in connection with the investigation of the case and on completion of investigation, submitted charge sheet, alleging commission of offence u/s 302/201 IPC, against the accused Shri Pradip Borgohain.

5. The case was committed to the Court of Sessions, Sibsagar by the learned Judicial Magistrate, Charaideo, Sonari for trial.

6. Learned Sessions Judge, Sibsagar transferred the case to the Court of learned Additional Sessions Judge, Sibsagar for trial. During the course trial, the learned Additional Sessions Judge, Sibsagar, considering the materials on record finding sufficient grounds for proceedings against the accused/Appellant framed formal charges under Sections 302/201 IPC against him.

7. On reading over and explaining the charges aforesaid, the accused/Appellants pleaded not guilty and claimed to be tried.

8. During the course of trial, the prosecution examined as many as 12 witnesses to bring home the charges u/s 302/201 IPC against the accused/Appellant. On completion of recording of prosecution witnesses, the Appellant was examined u/s 313 Code of Criminal Procedure. The accused/Appellant in defence statement made u/s 313 Code of Criminal Procedure, denied the charges levelled against him by the witnesses to the prosecution. The accused/Appellant declined to adduce evidence in defence.

9. Upon hearing the learned Counsel for the Appellant as well as the learned Public Prosecutor, the learned Additional Sessions Judge, Sibsagar convicted and sentenced the Appellant as mentioned above, giving rise to this appeal.

10. relevant facts necessary for the purpose of evaluating the evidence of the prosecution witnesses may summarised as follows:

11. In the instant case, nobody had seen the accused causing death of Lucky Deb Borgohain, who was missing from her house since 02.12.02. On 06.04.03 a decomposed dead body was recovered from an abandoned well near Sapekhaiti Railway station, which was suspected to be the dead body of Lucky Deb

Borgohain. Therefore, proof of complicity of the accused in causing the death and in concealment of the dead body of Smti. Lukcy Dev Borgohain is exclusively dependent upon circumstantial evidence.

12. P.W.9, Dr. Lalit Bora, S.D.M. and Health Officer, Sibsagar Civil Hospital, conducted the post mortem examination of the dead body on 9.4.03. The findings of this witness on the post mortem examination are as follows:

(1) External appearance - dead body of a woman with detached head in the process of decomposition. The head was wrapped in a Lilen. Almost all the muscles of the head and neck are severely decomposed. The sutures of the bone of the cranium are in the process of giving away with no brain matter inside the skull. The eyes sockets are empty. The hairs are very lightly attached to the skull. The rest of the body is wrapped in a sari, blouse and petticoat and the body is swollen.

(2) Cranium and spinal canal. The scalp is in the process of decomposition and the hairs are very lightly attached to it.

Multiple depressed fractures total 3 in numbers were found in the left parietal bone. No brain matter was their in the skull.

The skull is detached at the Atlanta axial joint from the remaining part of the body. When tried this part fits into the remaining part of the body.

(3) Thorax-Walls swollen, pleurae. Larynx and trachea in the process of decomposition. Both the lungs are pale. Both the chambers of the heart are empty.

(4) Abdomen - Walls are swollen and peritoneum is pale. On examination of stomach small and large intestines found empty and in the process of formation of adipocere. On examination of spleen liver, kidneys and bladder it were found pale and in the process of formation of adipoccle. Uterus is anteverted and normal in size and uterine cavity is empty. No injury to the private part could be detected.

(5) On examination of muscles, bones and joints, found multiple depressed factures total 3 in numbers over the left parietal bone

sizes are -(1) 1"x 1 1/2" -(2) 1 1/2" x 1/4" -(3) 1"x 1"

All the findings are ante mortem in nature. In my opinion the cause of death is due to shock and haemorrhage with coma as a result of the injuries sustained by the person. Ext. 4 is my report and Ext. 4(1) is my signature.

13. In his cross examination Dr. Bora, P.W.9, clarified that he presumed the dead body to be of Lucky Deb Borgohain, on the basis of inquest report and the statement of persons, who accompanied the dead body. The dead body was not in a skeleton form but it was a full body except the skull. However, Doctor Bora further stated that the viscera of the dead body was not preserved by him for

chemical analysis.

14. P.W.2 is Bonamali Das. Bonamali Das is a fisherman by profession and he knew Pradip Borgohain and Smt. Lucky Deb Borgohain from before. In the month of April/ May while casting a fishing net in the abandoned well at Sapekhaiti Railway Station a human finger got struck to his net and on seeing that he returned back and informed the Secretary and President of the V.D.P. and also showed the place, where the dead body was found by him. However, this witness was declared hostile by the prosecution. In cross-examination he stated that the dead body was not identifiable and he could not even ascertain, as to whether it was a male or female dead body. He also stated that since 6 (six) months before recovery of the dead body, Lucky Deb Borgohain was missing and when Pradip Borgohain came to know that the dead body was recovered, he ran away. P.W.2 further clarified that the dead body that had struck into his fishing net and recovered was only a skeleton form of a human body. The prosecution did not adduce evidence to show that the accused had fled away after the occurrence. Neither this question was put to the accused during his examination u/s 313 Code of Criminal Procedure by asking him that P.W. 5 had stated to have seen him fleeing away on recovery of dead body. The Investigating Officer did not state that accused absconded after detection of the dead body. For many reasons a normal man may run away by seeing a dead body, but it is the prosecution which will have to prima-facie establish that the accused had a guilty mind and therefore, ran away out of fear of being caught.

15. P.W.3 Smt. Niva Sabdakar is a housewife, who also could not ascertain as to whose dead body it was. She stated that after preparation of the inquest report and seizure memo, by which a blanket was seized by the police, the Investigation Officer took her thumb impression in the seizure memo. However, she was also declared hostile by the prosecution. In her cross-examination P.W.3 deposed that she found Lucky Deb Borgohain, her neighbour, maintaining a very good relationship with her husband i.e. the accused. P.W.3 found them co-habiting very well as husband and wife. The cross-examination of this witness by the prosecution side could not elicit anything substantial.

16. P.W.4 Smt. Sila Baidya, who was a housewife was a witness to the inquest of the dead body and also proved her signature in the report. However, together with the inquest report of the dead body, she was also a witness to the seizure of blanket, which was recovered with the dead body. P.W.4 proved her signature in the inquest report and the seizure documents. However she was declared hostile by the prosecution. In her cross-examinations she stated that she could not ascertain whether the skeleton was of a male or female.

17. P.W.5 is Debananda Das, Executive Magistrate, Sibsagar, is an official witness, who conducted the inquest of the dead body deposed that the dead body which was recovered in a skeleton form, as its flesh had decomposed, and the blanket which was recovered with the dead body was also in tatters. The pond from which the dead body was recovered was an abandoned railway well

and was full of garbage and water hyacinth. P.W.5 ascertained with certainty that it was difficult for common people to identify, whether the skeleton recovered was of man or a woman.

18. P.W.6 - Jagat Sarmah had stated that he did not go near to see the skeleton which was recovered in the well.

19. P.W.7 is Smt. Basanti Das, a housewife and a neighbour of the accused stated that she knew Pradip Borgohain and Lucky Deb Borgohain, who were her next door neighbour. On getting information that a skeleton was found in the abandoned well of the Railways she also went to see. It was wrapped in a blanket. P.W.7 who was a seizure witness also proved her signature in the seizure memo by which the police seized the blanket. Though P.W.7 stated to have seen similar type of blanket at the residence of the accused, however in cross-examination clarified that such blankets may be available in other houses. P.W.7, in her cross-examination contradicted her own statement in chief and stated that she was not sure if the dead body was wrapped with the same blanket. She further stated in her cross-examination that the seized blanket was not in tatters and thus contradicted the version of the official witness, P.W.5 the deposition of P.W.7, only reflected confusion, instead of inspiring confidence as she tried to maintain no specific knowledge about smaller details.

20. P.W.8 Smt. Amala Deb Nath knew both the accused Pradip Borgohain and Smt. Lucky Deb Borgohain. She proved her signature in the seizure memo by which the police seized the blanket at the place, where skeleton was found. P.W.8 deposed that she could not identify the colour of the blanket as she did not go near the place where it was found.

21. P.W.10 Shri Manik Das is a witness to the inquest of the dead body. He proved his signature in the inquest report prepared by the Executive Magistrate, P.W.5, P.W.10 is also a next door neighbour of the accused, but certified and confirmed the accused as a good neighbour and a good family man, P.W.10 could not identify the blanket.

22. P.W.11 Shri Santanu Bhattacharjya stated that he knew the accused Pradip Borgohain but did not know the wife of the accused. P.W.11 as a Secretary of the local Village Defence Party (V.D.P.), who had informed the police upon recovery of the dead body.

23. P.W.12 Reba Kanta Deka, S.I. of Police was the I.O. in this case. He stated that after getting information from one Rajesh Das, P.W.1, in writing, a police case was registered in the Sapekhaiti police station and thereafter investigation followed. He stated in his deposition that during the course of investigation he requisitioned the service of the Executive Magistrate, Sibsagar to prepare the inquest report and also forwarded the dead body to the Civil Hospital, for post mortem examination. P.W.12 stated that he also seized the blanket which was found near the dead body, and on completion of the investigation submitted charge sheet against the accused. The accused in his defence stated that his wife

has been missing since 2nd December 2002. On that day after returning from market he found both his son and daughter at home. However, wife was not at home, as such Appellant searched for her and could not find her. He could not gather any information after searching for 5 days in the houses for his relatives. Thereafter, lodged written Ejahar in Sapekhaiti Police Station on 08.12.02. The Appellants stated that he has not got any information from anybody about his missing wife till date.

24. In view of the evidence of the witnesses discussed above we are of the considered view that in order to establish a charge against the accused based completely on circumstantial evidence the prosecution is required to satisfy the following test enumerated by the Hon"ble Supreme Court, reported in Sharad Birdhichand Sarda Vs. State of Maharashtra, wherein 5 golden principles, "punchsheel", were laid in order to establish and prove a case based solely on circumstantial evidence. The relevant extract of the aforesaid decision of the Apex Court reads as follows:

151. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant Vs. The State of Madhya Pradesh, This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail v. State of U.P., (1969) 3 SCC 198 and Ram Gopal Vs. State of Maharashtra, It may be useful to extract what Mahajan, J. has laid down in Hanumant's case (at pp. 345-46 of AIR) (supra):

it is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established: (1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, where the following observations were made : "certainly, it is a primary principle that the

accused must be and not merely may be guilty before a Court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions." (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.

153. These five golden principles, if we may say so, constitute the punchsheel of the proof of a case based on circumstantial evidence.

25. In order to arrive at a finding to convict the Appellant u/s 302/201 IPC and to award sentence aforementioned, the learned Sessions Judge, primarily based reliance on the testimony of all the witnesses so discussed hereinabove and held that the prosecution could successfully prove the case against the Appellant on circumstantial evidence. Admittedly, there was no eyewitness to the occurrence. More so the dead body was reportedly found in skeletal form, and no body what so ever categorically identified the dead body to be that of the wife of the accused. The only expert witness P.W.9, the Doctor, who performed the post mortem examination of the dead body identified it to be of Lucky Dev Borgohain on the basis of the conjectures expressed by the person, who accompanied the dead body. Very unfortunately, it never occurred in the mind of the investigating officer, to carry out any other scientific investigation to identify the dead body, when only a decomposed dead body in skeletal form was recovered. In this situation if the garments or any other wearing apparel of the deceased could have been recognized by any member of the family or the co-villager, for the purpose of identification of the dead body, it would have been acceptable.

26. A sari and two bangles were found with the dead body, which finds mention in the inquest report, were also not seized by the Investigating Officer. Very surprisingly in such an important investigation, not a single modern day forensic examination of the dead body or any available scientific method was resorted to in order to identify the dead body. Superimposition technique which was applied in famous case reported from Assam in Henry Westmuller Roberts Vs. State of Assam, was not applied to identify skeletonised dead body. Superimposition method could have helped to easily identify a skeletonised dead body. Viscera of the dead body was admittedly not collected and no DNA test was carried out during investigation in order to identify the dead body. The end result being, no expert was examined to identify the dead body with forensic technique. Finally, it could not be deciphered with certainty whether the dead body was of a male or female.

27. From the deposition of prosecution witnesses it is abundantly clear that a

blanket was also found together with the decomposed dead body. But the evidence laid by the witnesses do not inspire confidence as the witness did not specifically and with certainty affirm that the blanket belonged to the accused. If such blankets can be found in every household, it would be too risky to presume the blanket found near the dead body to be of the accused. Very surprisingly, the Investigating Police Officer did not even attempt to search the house of the accused, to find out if at all such similar blankets were available at his residence.

28. P.W.2, 3 and 4, who were declared hostile by the prosecution were also confronted with their statement made before the Investigating Officer. However, the prosecution could not bring forth and salvage anything substantial from their testimony which would have helped the prosecution to prove the charge levelled against the accused.

29. Having scrupulously analyzed the deposition of all the witnesses and after having given thoughtful considerations on the entire gamut of facts placed by the prosecution, we are of the considered view that the evidence of prosecution witnesses, which are full of contradictions and inconsistencies, failed to rope in the Appellant for alleged commission of the offence of murder of his wife. We do not find the chain of evidence so complete as to indicate that in all human probability the acts alleged must have been committed by the Appellant and nobody else. The circumstances sought to be proved against the accused were not conclusive in nature and tendency. Accordingly, having regard to the decision rendered by Hon''ble Supreme Court of India in *Sharad Birdhichand Sarda v. State of Maharashtra*, (supra), we are of the firm view that the conviction and sentence recorded by the learned Additional Judge, Sibsagar warrants interference and the Appellant is entitled to given the benefit of doubt.

30. In view of what has been discussed and observed above the impugned conviction of the accused u/s 302/201 IPC and sentences awarded thereto cannot be sustained, and accordingly the same stands quashed and set aside.

31. Consequently, it is ordered that the Appellant be set at liberty forthwith, if he is not otherwise wanted in any other case.

32. In the result, appeal succeeds and stands allowed. Send down the LCR forthwith.