

GAHC010164262017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.A./240/2018

SRI BHADRESWAR PADI

VERSUS

THE STATE OF ASSAM and ANR
RREPRESENTED BY PP, ASSAM.

2:SMT. SANGITA PADI

Advocate for the Petitioner : MR B BURAGOHAİN

Advocate for the Respondent : MS. B BHUYAN(ADDL.PP, ASSAM)

BEFORE
HONOURABLE MR. JUSTICE LANUSUNGKUM JAMIR
HONOURABLE MRS. JUSTICE MALASRI NANDI

JUDGMENT

Date : 11-05-2023

(Malasri Nandi, J)

Heard Mr. A. Ahmed, learned counsel for the accused-appellant. Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor for the State/respondents.

2. This appeal has been preferred by the accused/appellant from jail challenging the judgment and order dated 17.07.2017 passed by the learned Sessions Judge, Dhemaji in Sessions Case No. 46(DH)/2016 convicting the accused/appellant under Section 302/201 IPC and sentencing him to undergo rigorous imprisonment for life and to pay a fine of Rs.5,000/- in default of payment of fine rigorous imprisonment for three months for the offence under Section 302 IPC. The appellant was further sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.1,000/- in default rigorous imprisonment for 15 days for the offence under Section 201 IPC. Both the sentences were directed to run concurrently.

3. To begin with the prosecution case, it has been revealed from the FIR that the informant Sangita Padi lodged an FIR on 04.09.2012 stating *inter alia* that she got married to the accused/appellant in the year 2010. After their marriage, they lived together as husband and wife and out of their wedlock, one male child was born. It is also alleged that since after three months of their marriage, the accused/appellant started to torture her both mentally as well as physically. It is also alleged that after the birth of the child, the accused/appellant tried to sell the child to some person but her mother resisted him from doing so and a chaotic situation arose and the nurses and other medical staff came to know about it and they prevented him from selling the child. After discharged from the hospital, the informant came back home along her child but the accused/appellant assaulted the informant and her child

and also killed her child by strangulating him on 30.06.2012. The accused/appellant also threatened her that if she disclosed the fact to anybody, she would be killed.

4. On receipt of the complaint, a case was registered vide Gogamukh P.S. Case No. 141/2012 under Sections 498(A)/302/506 IPC and the investigation was started. During investigation, the investigating officer visited the place of occurrence, recorded the statements of the witnesses and seized some articles on being shown by the informant. After completion of the investigation, charge-sheet was submitted against the accused/appellant under Section 498(A)/302/506 IPC before the court of learned Addl. CJM, Dhemaji. As the offence under Section 302 IPC is exclusively triable by the court of Sessions, the case was committed accordingly.

5. During trial, on appearance of the accused/appellant before the Court of Sessions, charge was framed under Sections 302/201 IPC, which was read over and explained to the accused/appellant to which he pleaded not guilty and came to be tried.

6. To prove the guilt of the accused, prosecution has examined twelve witnesses. On the other hand, the defence did not adduce any evidence. After completion of trial, the statement of the accused/appellant was recorded under Section 313 Cr.P.C. wherein he denied the fact by stating that he had not killed his child. It is also stated in his statement under Section 313 Cr.P.C., that he has been falsely implicated in this case. After hearing the argument advanced by the learned counsel for both sides, the learned Sessions Judge had convicted the accused/appellant as aforesaid.

7. Being highly aggrieved and dissatisfied with the judgment and order passed by the learned Sessions Judge, Dhemaji dated 17.07.2017, the accused/appellant has preferred this appeal.

8. Mr. A. Ahmed, learned counsel for the appellant has submitted that the buried dead body of the child had not been found. It is also submitted that there was no proof that the child of the informant and the appellant has actually died. He further submits that there was

no medical evidence on the death. It is further submitted that the other witnesses examined by the prosecution did not say anything regarding the death of the child of the informant and the accused/appellant.

9. It is also the submission of the learned counsel for the appellant that though the child was born out of the wedlock between the informant and the accused but the prosecution has failed to prove that the cause of death of the child was of strangulation. The learned counsel for the appellant also argued that as the dead body of the child has not been recovered during investigation and there was no post mortem examination report regarding the death of the child as such, the conviction under Section 302/201 IPC could not be sustained.

10. Another contention raised by the learned counsel for the appellant that as per FIR, the incident occurred on 23.05.2012 and 30.06.2012 but the FIR was lodged on 04.09.2012 i.e. after three months of the incident but there was no explanation from the side of the prosecution regarding delay of lodging the FIR. The seizure was also made after eight months of the incident. According to the learned counsel for the appellant, unexplained delay of lodging FIR is fatal to the prosecution case.

11. In support of his submission, learned counsel for the accused/appellant has placed reliance on the following case law-

(i) *Madho Singh vs State of Rajasthan* reported in (2010) vol. 15 SCC 588

(ii) *Rishipal vs State of Uttarakhand* reported in (2013) vol. 12 SCC 551.

12. On the other hand, Ms. B. Bhuyan, learned Additional Public Prosecutor has argued that except P.W.1, the informant, there was no other eye witness to the incident. It is true that there was delay in lodging the FIR which was not properly explained and other witnesses also did not support the case of the prosecution regarding the death of the child of the informant due to strangulation caused by the accused/appellant. Though the learned Addl.P.P. has not

prayed for acquittal of the accused/appellant but from her submission, it reveals that she has no objection if the accused is acquitted due to the failure on the part of the prosecution to prove the case against him beyond reasonable doubt.

13. Before examining the evidence of the witnesses, we would like to point out some laws on the point when *corpus delicti* is not available but the accused/appellant was convicted.

14. In the case of ***Ram Chandra v. State of U.P.***, reported in ***AIR (1957) SC 381***, it was held that even though it was not necessary for conviction that a *corpus delicti* should be found still there must be other clear and reliable evidence of murder.

15. In the case of ***Rama Nand v. State of Himachal Pradesh***, reported in ***(1981) 1 SCC 511***, it has been held that discovery of a dead body was not a *sine qua non* for a conviction. It was held that a homicidal death could be proved even on the basis of circumstantial evidence provided that the circumstances were of a clinching and definitive character unerringly leading to the inference that victim concerned had met a homicidal death at the hands of the accused.

16. In the case of ***Kali Ram v. State of H.P.***, reported in ***(1973) 2 SCC 808***, it was observed by the Hon'ble Supreme Court that one of the cardinal principles which has always to be kept in mind in our system of administration of criminal justice is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of the burden, the Court cannot record a finding of the guilt of the accused. It is also held that if two views are possible one pointing to the guilt of the accused and the other to his innocence the view which is favourable to the accused has to be accepted.

17. In the case of ***State of Rajasthan v. Sardara*** reported in ***(1974) Cri. LJ. 43***, it was

held that conviction need not necessarily depend upon the *corpus delicti* being found. It is held that there should be reliable evidence of murder before a conviction can take place. It must be mentioned that in this case the bodies of the two children who had disappeared were not found but the clothes and the Chappals had been recovered. On the basis of such recovery the Court held that the children had been murdered.

18. In the case of ***Sevaka Perumal v. State of Tamil Nadu***, reported in **(1991) 3 SCC 471**, it was held that it is not necessary or essential to establish *corpus delicti*. It was held that the fact of death must be established like any other fact. It was held that in some cases it may not be possible to trace or recover *corpus delicti*. It was held that a conviction for murder could, even in absence of *corpus delicti*, be based on reliable and acceptable evidence.

19. Based on the principles laid down in the authorities even though it is not necessary that *corpus delicti* be found, still the prosecution must prove that the child of the informant had died. According to the learned counsel for the appellant, the prosecution had failed to prove this fact by producing reliable evidence.

20. There can be no dispute with the proposition of law set out above. As is set out in the various authorities (referred to above) it is not at all necessary for a conviction for murder that the *corpus delicti* be found. Undoubtedly, in the absence of the *corpus delicti* there must be direct or circumstantial evidence leading to the inescapable conclusion that the person had died and that the accused is the person who had committed the murder.

21. We have read the evidence of all the witnesses. We have given a careful consideration to the material on record.

22. P.W.1 is the informant i.e. mother of the child who alleged to be died on the incident. She deposed in her evidence that she has not been residing with her husband for a year. She got married to him two years back. Since after the marriage, her husband used to torture her

both physically as well as mentally. Out of their wedlock, a male child was born. After one month and twelve days while her child was sleeping at night, the accused-appellant killed him by strangulation. Thereafter, the accused went out of the house. As she was unwell, there was delay in lodging the FIR vide Ext. 1. The dead body of their child could not be recovered but police seized some clothes of her child vide Material Exhibit 1.

23. In her cross-examination, P.W.1 replied that before filing this case, she also lodged a case against her husband due to torture her but she did not lodge any case over the matter of the killing of her child. The case which she had lodged was settled in the police station and her husband took her back to his house. But the police of Gogamukh Police Station carried out the investigation over the matter for the killing of their child.

24. P.W.2 is Smti. Jyotimaya Handique. From her deposition it reveals that about two years back, the informant Sangita Padi discloses that her husband Bhadreswar had killed their child. The child was one month old.

25. From the evidence of P.W.3 and P.W.4 Sri Lakhinandan Borgohain and Sri Anu Panging, it reveals that the incident took place about two years back. A child of the accused died at night. On the following day, they came to know about the death of the informant's child but they did not know how the child died.

26. P.W.5 Smti. Rupawati Narzary, according to her, the informant Sangita told her that the accused-appellant had strangled their child as a result of which he died.

27. P.W.6 Sri Ghana Kt. Pegu who stated that a small child of the accused died and a case was lodged over that matter. Police came and he stated before police that he did not know anything about the incident.

28. P.W.7 Sri. Engti Borua who deposed before the court that the incident took place in the year 2013. The informant Sangita told that the accused had killed their son. In his cross-

examination P.W.7 replied that he did not witness the incident. He did not ask the accused anything in connection with the incident.

29. P.W.8 Sri Raj Kumar Penging, from his deposition it appears that he came to know from the informant Sangita that the accused had killed her son and buried it. The police came to investigate the matter. The Circle Officer and the police suspected that the dead body of the child might be buried there but the dead body was not found there. Baby power and baby clothes and gamocha were seized vide Ext. 2 wherein he put his signature.

30. P.W.9 Smti. Jibanti Pa nging, she also stated that she came to know from the informant that accused had killed her son by strangulation. She knew that Sangita lodged an FIR in the police station.

31. P.W.10 Smti. Chenidoi Kutum, who is the mother of the informant. She deposed in her evidence that her daughter got married to the accused and they had a male child. After one month twelve days of his birth, her daughter i.e informant told her that accused killed her son by strangulation. Her daughter lodged an FIR in connection with the incident.

32. In her cross-examination P.W.10 replied that Sangita had married another person, before her marriage with the accused. It was suggested that Sangita has three children namely, Ranjan, Maikel and Kamal, father by her former husband and they were living along with accused and the informant.

33. P.W.11 Sri Keshab Changmai is the Investigating Officer who deposed before the Court that on 22.10.2012 he was on duty as Attached Officer at Gogamukh Police Station. On that day, the Officer-in-Charge of the police station entrusted him to complete the remaining part of the investigation of Gogamukh P.S. Case No. 141/2012. Earlier, SI Tuchen Chutia investigated the case. After going through the case diary, he found some parts of the investigation are yet to be completed. He arrested the accused and forwarded him to the Court. On being shown by the informant, he made effort to recover the dead body in

presence of the magistrate from the place where it had been buried but they did not find the dead body. He recovered two *gamochas*, some baby clothes and baby power and accordingly he seized those articles vide Material Ext. 1, 2 and 3. He recorded the statement of witnesses and after completion of investigation, he submitted charge-sheet against the accused-appellant under Section 498A/302/506 IPC vide Ext.3 .

34. In his cross-examination P.W. 11 replied that earlier the informant had married another person. The place to which the informant led them saying that her child had been buried there which about one k.m. away from the house of the informant. The informant did not disclose that who had buried the dead body in that place. The informant did not state that from whom she could learn that the dead body had been buried in that place.

35. P.W.12 Sri. Tuchen Chutia is another investigating officer. He deposed in his evidence that on 06.09.2012 , he was working as attached officer at Gogamukh Police Station. On that day the informant Sangita Padi lodged a complaint before CJM, Dhemaji and the same was forwarded to Gogamukh Police Station by the Court to investigate the case. The Officer-in-Charge of Gogamukh police station had registered a case vide Gogamukh P.S. Case No. 141/2012 and entrusted him to investigate the same. During investigation, he recorded the statement of the informant and other witnesses, visited the place of occurrence and drew the sketch map. Thereafter, he was transferred and handed over the case diary to the O/C, Gogamukh police station. The cross of P.W.12 was declined.

36. After going through the evidence of the aforesaid witnesses, it appears that except P.W.1, there is no eye witness to the incident occurred. According to P.W.1, she lodged the FIR as she was being tortured by the accused-appellant since after the marriage but she did not lodge any complaint over the matter of killing of their child. It appears from the record that other witnesses examined by the prosecution had categorically stated that the accused/appellant and the informant are husband and wife and out of their wedlock one male child was born. According to P.W.2, P.W.5, P.W.7, P.W.9 and P.W.10, they came to know from Sangita that accused/appellant had killed their child by strangulation. Admittedly, the dead

body of the child was not recovered during investigation. One place was shown by the informant that her husband i.e. accused/appellant had buried the child on a place after his death. Though the police and Circle Officer suspected that the dead body might be recovered from the place which was shown by the informant but after digging the said area, the dead body of the child was not recovered but some baby clothes, baby powder and *gamochas* were recovered which was seized accordingly.

37. It appears from seizure list that two number of *gamochas*, some baby clothes and one baby powder were recovered from the place on being shown by the informant Sangita Padi which were found at Chatia Goan adjacent to railway track on 27.02.2013 i.e. after eight months of alleged death of the child of the informant. It is an admitted fact that the place from where the articles were found are accessible to all. P.W.1, nowhere stated that accused/appellant had buried the child on the place from where the said articles were recovered. The other witnesses also totally silent about the fact that the informant also told them that after killing of the child, the accused/appellant had buried the child near railway track from where the police had recovered baby powder and some baby clothes. The investigating officer clearly stated that the informant did not disclose the fact before him that who had buried the dead body of the child in that place. It is also not known from the witnesses or P.W.1 that from whom she came to know that the dead body of the child had been buried in that place.

38. The informant i.e. wife of the accused claims that she was an eye witness to the incident. She had seen that her husband had killed her son by strangulation. But the dead body of the child was not found. The informant during her examination did not disclose that where the dead body was kept by the accused/appellant. She never stated that after killing of her child, her husband took away the dead body of the child out of their house. From her statement, it reveals that she had no knowledge where the dead body of the child was kept. After eight months of death of her child, the informant had shown a place where the dead body of her child was alleged to be buried. But after unearthing the place, the dead body of her child was not discovered but the investigating officer of the case also stated that the

informant did not disclose anything before him who had buried the dead body of the child on the place.

39. The law in absence of *corpus delicti* is well-settled. To prove a charge of murder it is not necessary to produce the corpus rather what is required for the prosecution is that if clinching evidence, direct or circumstantial, is produced during the trial which would establish death of a person, conviction of an accused on the charge under Section 302 of the Indian Penal Code can be recorded. The law on the subject has been summarized by the Hon'ble Supreme Court in "Rishipal Vs. State of Uttarakhand"(supra), which was cited by the learned counsel for the appellant in para No.14:-

"14. In the absence of corpus delicti what the court looks for is clinching evidence that proves that the victim has been done to death. If the prosecution is successful in providing cogent and satisfactory proof of the victim having met a homicidal death, absence of corpus delicti will not by itself be fatal to a charge of murder. Failure of the prosecution to assemble such evidence will, however, result in failure of the most essential requirement in a case involving a charge of murder. That is precisely the position in the case at hand. There is no evidence either direct or circumstantial about Abdul Mabood having met a homicidal death. The charge of murder leveled against the appellant, therefore, rests on a rather tenuous ground of the two having been last seen together to which aspect we shall presently advert when we examine whether the two being last seen together is proved as a circumstance and can support a charge of murder."

40. In the case at hand, it is true that the circumstances proved on the basis of the evidence on record give rise to a suspicion against the appellant but suspicion howsoever strong is not enough to justify conviction of the appellant for murder. The trial court has, in our opinion, proceeded more on the basis that the appellant may have murdered the child of the informant. In doing so the trial court overlooked the fact that there is a long distance between "may have" and "must have" which distance must be traversed by the prosecution by producing cogent and reliable evidence. No such evidence is unfortunately forthcoming in

the instant case.

41. The legal position on the subject is well settled and does not require any reiteration. The decision of the Hon'ble Supreme Court has on numerous occasions laid down the requirements that must be satisfied in cases resting on circumstantial evidence. The essence of the said requirement is that not only should the circumstances sought to be proved against the accused be established beyond a reasonable doubt but also that such circumstances form so complete a chain which leaves no option for the court except to hold that the accused is guilty of the offences with which he is charged.

42. In the above facts, we find that on the basis of the evidence led by the prosecution, it can be said that the prosecution has not been able to prove the place of occurrence, manner of occurrence and participation of the accused/appellant in the crime and therefore, we hold that the prosecution has failed to prove the charge under Section 302/201 IPC against the appellant beyond all reasonable doubt.

43. In the result, the appeal is allowed. The accused/appellant is acquitted on benefit of doubt. The accused is in jail, he shall be released immediately, if not wanted in any other case.

44. Send back the LCR.

JUDGE

JUDGE

Comparing Assistant