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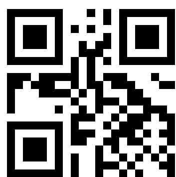

THE GAUHATI HIGH COURT

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

Case No. : Crl.A./295/2022

MOHAN KUMAR

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY P.P., ASSAM.

2:HALADHAR KUMAR

Advocates :

Appellant	:	Mr. S.C. Biswas, Advocate.
Respondents	:	Ms. B. Bhuyan, Additional Public Prosecutor.
Date of Hearing	:	18.10.2023
Date of Judgment	:	21.11.2023

:: BEFORE ::
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MRS. JUSTICE MALASRI NANDI

JUDGMENT (CAV)

(Malasri Nandi, J)

This appeal has been preferred against the Judgment and Order dated 13.09.2022 passed by the learned Sessions Judge, Baksa, Mushalpur, whereby, the appellant was convicted under Sections 302/326 IPC and sentenced to undergo rigorous imprisonment for life and fine of Rs. 1,000/-, in default of payment of fine, simple imprisonment for another two months for the offence under Section 302 IPC and sentenced to rigorous imprisonment for 5 years and fine of Rs. 1,000/-, in default, simple imprisonment for 6 months under Section 326 IPC. Both the sentences were directed to run consecutively.

2. The brief facts of the case is that the informant one Haldhar Kumar lodged an First Information Report (FIR) before the Officer-In-Charge, Barbari Police Station stating *inter alia* that on 09.08.2009 at abour 08-30 p.m., the appellant hacked his mother Padma Kumari and his own elder brother Binod Kumar over some domestic matter and caused grievous injuries on their persons. Although they were taken to Gauhati Medical College and Hospital (GMCH), Padma Kumari succumbed to her injuries.

3. On receipt of the complaint, a case was registered vide Barbari Police Station Case no. 42/2009 under Sections 326/302 IPC and an investigation was initiated. During investigation, the Investigating Officer visited the place of occurrence, recorded the statement of the witnesses, conducted inquest on the dead body of the deceased and thereafter, the dead body was sent for post-

mortem examination. After completion of investigation, charge-sheet was submitted against the appellant under Sections 302/326 IPC before the Court of SDJM(S), Nalbari. As the offence under Section 302 IPC is exclusively triable by the Court of Sessions, the case was committed accordingly.

4. During trial, on appearance of the accused-appellant before the Sessions Court, charges were framed under Section 302/326 IPC which was read over and explained to the accused-appellant, to which he pleaded not guilty and claimed to be tried. To prove the guilt of the accused-appellant, the prosecution examined 8 (eight) witnesses. However, the accused-appellant did not choose to adduce any evidence in support of his case. After completion of trial, the statement of the appellant was recorded under Section 313 Cr.P.C. wherein the incriminating material found in the statement of the witnesses were put to him to which he denied the same and pleaded his innocence. After hearing the argument advanced by learned counsel for the parties, the accused-appellant was convicted as aforesaid. Hence, this appeal.

5. The learned counsel for the accused-appellant has argued that there is no eye witness to the incident. The case is based on circumstantial evidence. Though it is alleged in the FIR that the accused-appellant inflicted injury towards his brother and mother, but while he deposed before the Court, he did not support the prosecution case and stated that he was not in a position to identify the person who assaulted him from behind. The other witnesses examined by the prosecution were admittedly not present when the incident occurred. As such, the conviction passed by the learned trial Court is bad in law and liable to be set aside.

6. It is also the submission of learned counsel for the accused-appellant that

the investigation of the case has suffered from many defects as there was no record of statement under Section 164 Cr.P.C. More so, the weapon of offence was not sent for serological examination. It is also pointed out by the learned counsel for the accused-appellant that the signature of the accused-appellant was not obtained in the seizure list which proves that the alleged weapon of offence has not been seized from the possession of the accused-appellant. According to the learned counsel for the accused-appellant, the lapses on the part of the Investigating Officer create doubt about the investigation which vitiates the trial.

7. In response, Ms. Bhuyan, learned Additional Public Prosecutor has fairly conceded that the witnesses examined by the prosecution has failed to prove the fact that the accused-appellant was the perpetrator of the crime. Though it is alleged in the FIR that the accused-appellant killed his mother and assaulted his brother causing injury on his person but subsequently they did not support the case of the prosecution. It is also noticed that the prosecution has not prayed before the trial Court to declare the witnesses hostile as a result of which, whatever stated by the witnesses before the Court has not been challenged and remained as such. The prosecution did not get the opportunity to cross-examine the said witnesses though they had resiled from their earlier statement recorded under Section 161 Cr.P.C. According to learned Additional Public Prosecutor, though the accused-appellant was convicted under Section 302 IPC, but there is ample scope to consider the matter for reducing the sentence under Section 304 Part I/Part II IPC.

8. We have considered the submissions of the learned counsel for the parties, perused the judgment of the learned Sessions Judge, Baksa, Mushalpur as well as the record and the documents available thereon.

9. Before further proceeding with the case, we have to ponder over the evidence of the witnesses recorded by the learned trial Court.

10. P.W.1 is the informant who deposed in his evidence that the incident took place in the year 2009. On the day of the incident, he came to know about the incident when he was around 4 furlongs away from his house at Anandpur Chowk. When he came back home, he came to know that the accused-appellant hacked his mother and his elder brother. He is the adjacent neighbor of the accused-appellant. He did not make entry into their house, as they were taken to Barama Hospital and thereafter shifted to Nalbari Hospital. On the same day, they were referred to GMCH. On the following day, when he was informed that Padma Kumari had died, he lodged the FIR vide Ext. 1. During investigation, police seized a sharp *dao* on being produced by the accused-appellant vide Ext. 2 (Seizure List). The injured Binod Kumar sustained grievous injuries on his head and he was hospitalized for 7 (seven) days.

11. In his cross-examination, P.W.1 replied that he did not lodge the Ejahar on the day of the incident. The incident took place in the house of the accused-appellant. The house of the deceased is situated about 3 furlongs away from the house of the accused-appellant. The deceased used to stay with the injured Binod Kumar. He could not say from where the police brought the seized *dao*. The police stated that they had recovered the *dao.*

12. P.W.2 is the village headman of Debachara village. The two villages, namely, Lakhipar and Anandpur fall under his lot. The house of the accused-appellant is situated at Lakhipar village. He deposed in evidence that during investigation police seized one *dao* from Mohan's house in front of him and he put his signature in the seizure list vide Ext. 2. Subsequently in his cross-examination,

P.W.2 stated that police did not read over to him as to what was written in the seizure list. He did not know from whom the police seized the said *dao*.

13. P.W.3 is the relative of the accused-appellant and the injured. From his deposition, it reveals that at the time of incident, he was at Guwahati. In the evening hour, on the date of the incident, he met the injured and the deceased at GMCH. On being asked, the injured Binod Kumar disclosed that the accused-appellant had hacked him and his mother.

14. P.W.4 was also not present when the incident occurred. According to him on the date of the incident, at around 9 – 9-30 p.m., while he was proceeding towards his farm house at Ananda Bazar, some persons enquired about the fact of the incident which took place in the house of the accused-appellant. Then he replied that he did not hear about any incident. After that, he came to the house of the accused-appellant to enquire about the incident but he did not find anybody in the residence of the accused-appellant. Then he went back in his farm house and his farm house worker informed that the deceased, Padma Kumari and Binod Kumar sustained injury and they were taken to the hospital. On the following day, Haladhar Kumar and Bhupen Kumar came to him and he along with them went to the police station. Haladhar Kumar lodged the FIR. Later on, he came to know that Padma Kumari died at Guwahati and Binod Kumar was admitted into GMCH for his treatment.

15. P.W.5 is the injured who is the brother of the accused-appellant. From his deposition it discloses that the incident took place at about 8/8-30 p.m. At the relevant time, he was residing at a distant place from the house of his deceased mother. His mother came and informed his wife, during his absence, about a meeting to separate the accused-appellant from them and also asked his wife to

attend her in that meeting. On that day at about 8-30 p.m., he went to the place of occurrence. Then he went to the residence of his mother. Prior to his arrival at the residence of his mother, there was hue and cry at the residence of his mother. When he entered into the house of his mother, somebody caused injury on him and his mother. On receiving injury he lost his senses immediately. He and his mother were shifted to GMCH at Guwahati. After 8-9 days of the incident, he regained his senses at GMCH. After complete recovery, he came to know that his mother died at GMCH on the next day of the incident. He came to know that the accused-appellant inflicted injury to his mother as well as upon him. P.W.5 replied in his cross-examination that the incident occurred in the courtyard of the house of his mother.

16. P.W.6 is the Investigating Officer who deposed in his evidence that on 10.08.2009, he was posted as Officer-In-Charge of Barbari Police station. On that day, one Haladhar Kumar lodged a FIR alleging *inter alia* that on the night of 09.08.2009 on account of domestic tussle, accused-appellant, Mohan Kumar assaulted his mother Padma Kumari and brother Binod Kumar by means of a *dao* and caused grievous injuries to their persons. Subsequently, Padma Kumari died during treatment and GMCH. On the basis of the FIR, a case was registered vide Barbari P.S. Case no. 42/2009 under Sections 326/302 IPC. During investigation, he interrogated the accused-appellant, Mohan Kumar at the police station. Thereafter, he took the accused-appellant to the place of occurrence on expressing his intention on leading to discovery. He led them to his house at Lakhipur. Baganpara. At the said place, accused-appellant, Mohan Kumar pointed out the weapon of offence which is a *dao* within his house. The said *dao* was seized in presence of gaonburah and other witnesses vide Ext. 2 (Seizure List). Thereafter, he recorded the statements of the witnesses,

prepared the sketch map of the place of occurrence vide Ext. 3. According to the P.W.6, the guardian of the injured had taken him on their own to the hospital. Subsequently, he collected the post-mortem examination report of the deceased. He arrested the accused-appellant and subsequently on his transfer, he handed over the case diary to the O.C. Barbari Police Station. In his cross-examination, P.W.6 replied that he did not send the seized *dao* for serological examination. On Ext.2 (Seizure List), there is no mention of the time of seizure nor there is any signature of the accused-appellant on the Seizure List.

17. P.W.7 is the Medical Officer who examined the injured Binod Kumar. He deposed in his evidence that on 10.08.2009, he was working as a Registrar at GMCH and examined Binod Kumar on police requisition. On examination, he found the following injuries :

(i) Head injury with soft tissue. Injury following alleged physical assault.

Local examination –

(1) 7 cm sharp cut injury with exposed skull bone over left the fronto parietal area.

(2) Peri orbital swelling at left exhymosis (eye).

18. P.W.8 is another Medical Officer who conducted autopsy on the dead body of the deceased. He deposed in his evidence that on 11.08.2009, he was posted as Professor and Head of the Department of Forensic Medicine, GMCH. On that day, he conducted post-mortem examination on the dead body of the deceased, Padma Kumari on police requisition and found the following –

I. External appearance- A female dead body about 65 years wearing saaree, blouse, mekhala and petticoat. Body is blood stained. Bandage tied.

Eyes and mouth are closed. Natural orifices are healthy. Rigor mortis is present in both Upper and lower limbs.

Wounds-position, and character:

1. A stitched wound over the right scalp occipital region.
2. A stitched wound over left frontal region.
3. A cut fracture over the left frontal bone 7 x 1 cm.

Mark of ligature on neck dissection, etc,- No ligature mark seen. On dissection neck tissues are healthy.

II. Cranium and Spinal Canal:

Scalp, skull and vertebrae- Scalp/skull- Vertebrae- Healthy, Membrane: Cut injury of left frontal region. External haemorrhage left frontal region. Subdural haemorrhage left side. Brain and Spinal cord: Brain-cut injury left frontal side. Internal haemorrhage left side. Spinal cord- Not external.

III. Thorax: Wall, ribs and cartilages: healthy, Pleurae: congested, Larynx and trachea: congested, Right lung: congested, Left Lung: congested, Pericardium: Healthy, Heart: Empty and healthy, Vessels: Healthy.

IV. Abdomen: Walls: healthy, Peritonium: healthy, Mouth, pharynx and oesophagus: healthy, Stomach and its contents: empty and healthy, Small intestine and its contents: healthy and empty. Large intestine and its contents: healthy contains faecal matters, Liver: congested, Spleen: congested, Kidneys: congested, Bladder: empty and healthy, Organs of generation, external and internal: healthy.

V. Muscles, bones and joints: Injury: as aforesaid, Disease or deformity: Nil, Fracture: as described and dislocation: Nil.

The Doctor opined that the death was due to coma as a result of the injuries to the head. The injuries were ante mortem being caused by heavy sharp cutting weapon and are homicidal in nature. Time since death 24-36 hrs. P.W.8 proved the post-mortem examination report vide Ext. 6.

19. P.W. 9 is another I.O. who collected the medical examination report of the injured Binod Kumar. Thereafter, he submitted the charge-sheet against the accused-appellant under Sections 326/302 IPC vide Ext. 8.

20. Admittedly, there is no eye-witness to the incident. The incident occurred in the courtyard of the residence of the deceased. According to the injured, he could not say who had inflicted injury to him and his mother. There is no explanation from the side of the prosecution why the injured i.e. P.W.5 was not declared hostile. It has not come to light whether his statement before the I.O. was same as what he deposed before the Court. P.W.3 stated that he met the injured at GMCH. On being asked, he disclosed that the appellant inflicted injury towards him and his mother. But P.W.5 the injured did not support the statement of P.W.3. According to him, he came to know that accused-appellant inflicted injury to his mother as well as upon him. P.W.5 has not specifically stated who informed him that the accused-appellant had assaulted him and his mother.

21. Admittedly, this is a case based on circumstantial evidence. It is a trite law that to convict an accused on the basis of circumstantial evidence, the prosecution must prove beyond reasonable doubt each of incriminating circumstances on which it proposes to rely. The circumstance relied upon must be of a definite tendency unerringly pointing towards accused's guilt and must form a chain so far complete that there is no escape from conclusion that within

all human probability it is accused and no one else who had committed the crime and it must exclude all other hypothesis inconsistent with his guilt and consistent with his innocence.

22. The argument of the learned counsel for the accused-appellant that since there was no proven enmity between the accused-appellant and the witnesses, therefore, there was no reason to disbelieve them, would be of much help to the appellant because this is a case based on circumstantial evidence. In a case based on circumstantial evidence not only each of the incriminating circumstances have to be proved beyond reasonable doubt, but those incriminating circumstances must constitute a chain so far complete that there is no escape from the conclusion that within all human probability it is the accused-appellant who has committed the crime and further, cumulatively, they must exclude all hypothesis consistent with the innocence of the accused-appellant and inconsistent with his guilt. As we have found that the incriminating circumstances were not proved beyond reasonable doubt and otherwise also the circumstance of last seen was inconclusive, in our view, the order of conviction recorded by the Trial Court is not justified.

23. In these circumstances, there was no occasion to place burden on the accused with the aid of Section 106 of the Evidence Act to prove his innocence.

24. Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, the question arises of considering facts of which the burden of proof would lie upon the accused.

25. In the instant case, the allegation against the accused-appellant is that he committed murder of his mother and inflicted injury on his brother. The mother of the accused-appellant died in the hospital on the next day of the incident. The injured, who was alive, did not support the prosecution case. As we have already discussed about his evidence before the Court that when he entered into the house of his mother where the incident took place, somebody assaulted him and his mother. Immediately after the incident, he became unconscious and regained his sense in the hospital after five days of the incident. Then he came to know that his mother died on the following day of the incident. According to P.W.5 the injured, he came to know that the accused-appellant inflicted injury to his mother as well as upon him. But it is not clear from the evidence of the witnesses recorded by the trial Court who had informed the injured or other witnesses that the accused-appellant assaulted his mother and the injured Binod Kumar. The Investigating Officer admitted in his evidence that he did not send the seized weapon of assault for serological examination. As such, there was no serological report to connect the seized weapon with the crime.

26. As discussed above when the case of the prosecution totally rests on circumstantial evidence, the normal principle is that, in a case based on circumstantial evidence, circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established that those circumstances should be of a definite tendency unerringly pointing towards guilt of accused-appellant that the circumstances taken cumulatively should form chain so complete that there is no escape from the conclusion that within all human probability crime was committed by the accused-appellant and they should be incapable of explanation of any hypothesis other than that of the guilt of accused-appellant and inconsistent with their innocence.

27. Here, as we have discussed above, firstly, the incriminating circumstances were not proved beyond all reasonable doubt, and secondly, they do not form a chain so complete from which it could be inferred with a degree of certainty that it is the accused-appellant and no one else who, within all human probability, committed the crime.

28. In the case of ***Sharad Birdhichand Sarda vs. State of Maharashtra***, reported in ***(1984) 4 SCC 116***, it has been held by the Hon'ble Supreme Court of India that – "While dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are –

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;

(ii) 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;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) they should exclude every possible hypothesis except the one to be proved; and

(v) 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."

29. A similar view has been reiterated by the Hon'ble Supreme Court in the case of ***State of U.P. vs. Satish***, reported *in* ***(2005) 3 SCC 114*** and ***Pawan vs. State of Uttaranchal***, reported in ***(2009) 15 SCC 259***.

30. In the case of ***G. Parshwanath vs. State of Karnataka***, reported in ***(2010) 8 SCC 593***, it has been observed by the Hon'ble Supreme Court of India as under :

> *"23. In cases where 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. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on one hand and inference of facts to drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural reasons and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.*
>
> *24. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proof facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or*

more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be."

31. For all the above reasons, while keeping in mind the view taken by the learned Sessions Judge, Baksa is not a plausible view, we do not agree with the explanation given by the Learned Sessions Judge, Baksa to convict the accused-appellant under Sections 302/326 IPC. Hence, the accused-appellant is acquitted on benefit of doubt and set at liberty forthwith. The accused-appellant is in jail. He be released forthwith if not wanted in any other case.

32. In the result, the appeal is allowed. Send back the LCR.

JUDGE **JUDGE**

Comparing Assistant