

GAHC010104362018



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

Case No. : CRL.A(J)/60/2018

MOMI BORA
W/O. LT. DEBEN BORA, R/O. DAHIKHUR DOLAKASHORIA GAON, P.S.
JORHAT, DIST. JORHAT.

VERSUS

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

Advocate for the Petitioner : MS. RITUJA DUTTA, AMICUS CURIAE

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM
HONOURABLE MR. JUSTICE PARTHIVJYOTI SAIKIA

Date : 13-08-2021

Judgment and Order (Oral)

(Suman Shyam, J)

Heard Mr. M.K. Das, learned counsel for the appellant and Ms. R. Dutta, learned amicus curiae representing the appellant. We have also heard Mr. M. Phukan, learned P.P.

Assam assisted by Ms. B. Bhuyan, learned Addl. P.P. Assam appearing for the State. None has appeared for the informant.

2. By the impugned judgment and order dated 11-04-2018 passed by the learned Sessions Judge, Jorhat in connection with Sessions Case No. 147(J-J)/ 2017, the sole appellant Smti. Momi Bora was convicted under Section 302 of the IPC for committing the murder of her husband and sentenced to undergo rigorous imprisonment (RI) for life and also to pay a fine of Rs. 15,000/- with default stipulation.

3. The prosecution case, in a nutshell, is that in the evening hours of 23-06-2017, the appellant had struck her husband Deben Bora on his head with a piece of iron with the intent to kill him resulting into grievous injury caused on the victim. The victim was admitted to the Jorhat Civil Hospital in an injured condition but the doctors later declared him dead.

4. On 23-06-2017, an ejahar was lodged by the elder brother of the victim, viz. Sri.Biren Chandra Bora before the In-Charge of Bhogdoi Police Outpost, Jorhat, reporting the incident. The ejahar was then sent to the Jorhat Police Station after making G.D. Entry No. 394 in the Bhogdoi Outpost. Based on the ejahar, Jorhat P.S. Case No. 1334/2017 was registered under Section 302 of the IPC. The investigation in connection with the case was entrusted upon the S.I. Sri Pradip Khanikar. Upon completion of investigation, the Investigating Officer (IO) had submitted charge-sheet against the accused under Section 302 of the IPC. Based on the charge-sheet, charge under Section 302 of IPC was framed against the accused/ appellant. The charge was read over and explained to the accused but since she had pleaded not guilty and claimed to be tried, the

matter went up for trial.

5. In order to bring home the murder charge framed against the appellant, the prosecution side had examined as many as 8 (eight) witnesses. There is no eye witness in this case and the prosecution case is entirely based on circumstantial evidence.

6. PW-1 Biren Chandra Bora is the informant in this case and also the elder brother of the victim. This witness has deposed that on 23-06-2017 he had come to Jorhat and after his work was over he had returned back to Titabar at about 06:30 p.m. At that time his younger brother Sri Naren Bora had informed him over mobile phone that the accused had assaulted her husband Deben Bora with the help of an iron instrument and the condition of the victim was very serious. On receiving the information, he had instructed his brother to take the injured to the Jorhat Medical College & Hospital for treatment by saying that he would also proceed to the hospital within a short time. After sometime, he had reached Jorhat Medical College & Hospital. This witness has also stated that he had lodged an ejahar before the Bhogdoi Outpost reporting that his younger brother Deben Bora had been assaulted by his wife, i.e. the accused. However, in the meantime, his younger brother Naren Bora had telephoned him that Deben Bora had succumb to his injuries and therefore, he had mentioned in the ejahar that the accused had assaulted the deceased, as a result of which, he had succumb to his injuries at the Jorhat Medical College & Hospital. This witness has also stated that Exhibit- 1 was the ejahar and proved his signature therein as Exhibit- 1(1). During his cross-examination, PW- 1 has denied that there was strained relationship between himself and his deceased brother since he had married a woman from the Schedule Caste (SC) community. PW- 1 had also stated

that the deceased was a drunkard as per the information received by him from other people residing in that area.

7. PW- 2 Dipak Bora is a seizure witness and he has deposed before the court that the iron instrument was seized by the police in his presence vide Exhibit- 3 and Exhibit- 3(1) was his signature. During his cross-examination, this witness has stated that he did not know anything about the incident or under what circumstances the deceased had died and he could also not say whether the deceased used to consume liquor day and night.

8. PW- 3 Sri Premadhar Bora is another seizure witness who, in his deposition, had also confirmed that the police had seized the iron instrument vide Exhibit- 3 and Exhibit- 3(2) was his signature in the seizure list. This witness was, however, declared as a hostile witness. During his cross-examination by the defense side, PW- 3 has stated that the deceased was a habitual drunkard and he used to consume liquor throughout the day. He has also stated that the deceased was a mason by profession.

9. PW- 4 Dr. Swaraj Phukan was the doctor on duty at the Jorhat Medical College & Hospital on 24-06-2017 and he had conducted autopsy over the dead body of Deben Bora. As per the post mortem report, following injuries were found in the dead body.

Injuries:-

- i. “Lacerated wound of size 8 cm x 1 cm is present over the right parietal scalp, 10 cm above the mastoid process. The injury is oblique in position.*
- ii. Lacerated wound of size 10 cm x 1 cm is present over the right parietal scalp, 9 cm above the mastoid process. The injury is oblique in position.*
- iii. Lacerated injury of size 5 cm x 1 cm is present over the right parietal scalp, 7.5 cm above the mastoid process. The injury is oblique in position.*
- iv. Lacerated injury of size 4 cm x 1 cm is present over temporal scalp, 4 cm*

above the mastoid process. The injury is vertical in position.

The margins of all the injuries are irregular. Anti-mortem blood clots adherent to the margins of wounds which resist washing under tap water.

On reflection of the scalp, scalp is found contused over right parieto-temporo-occipital region with underlying depressed comminuted fracture of right parietal, right temporal and occipital bones. Meninges are lacerated, brain lacerated and parts of brain matter coming out."

The doctor had opined that the cause of death was due to coma following the head injuries sustained as described. All the injuries were ante-mortem and caused by blunt weapon and were homicidal in nature.

During his cross-examination, the PW- 4 had stated that the age of the injury is not mentioned in the report and that such type of injuries are unlikely to be caused by falling on hard substance.

10. PW- 5 Sri Naren Bora is one of the elder brothers of the deceased. This witness had deposed that on the day of the incident he was present in his house. Then he had heard a 'hulla' in the house of Deben Bora. Accordingly, he had proceeded towards the house of his younger brother Deben Bora which was located about two houses away from his residence. There, he had witnessed Deben Bora lying on the floor with blood oozing out from his body. Immediately, he had telephoned 108 ambulance and took the injured to the Jorhat Medical College & Hospital for better medical treatment. According to the PW- 5, at that time, Deben Bora was unable to speak anything. This witness has also mentioned that he had seen accused Momi Bora in the verandah of the house with an iron plate in her hand. She was striking the iron plate on the ground. He did not question the accused anything about the incident. In the hospital, his younger brother had succumbed to his injuries on the same day after about one hour of the incident. Material

Exhibit- 1 was the iron plate. This witness has also deposed that Executive Magistrate, Sri D. Borah had conducted the inquest on the dead body and submitted inquest report (Exhibit- 2) and Exhibit- 2(2) was his signature. During his cross-examination, PW- 5 had stated that he did not witness the incident nor did he know under what circumstances, his younger brother had died. He had also stated that his younger brother used to consume alcohol and he used to create disturbance in the locality. PW- 5 had also stated that his brother used to assault the neighbors after consuming alcohol.

11. PW- 6 Smti. Aruna Bora is a neighbor and she has deposed that the incident occurred on 23-06-2017. On that day, she was present inside the bathroom when she heard 'hullah' in the house of Deben Bora. Accordingly, she came out of her house and proceeded towards the house of Deben Bora. She witnessed Deben Bora lying on the floor of the house, he was uttering some words. Then she left the house of Deben Bora and returned back home. PW- 6 has stated that she had witnessed the accused crying along with her children. She was present when the police had seized one iron plate from the house of the accused vide seizure list Exhibit- 3 and Exhibit- 3(3) was her signature. This witness has also confirmed that Material Exhibit- 1 was the seized iron plate. During her cross-examination, PW- 6 had reiterated that she had arrived at the residence of the accused and had found the accused crying along with her children and saw that the deceased was lying on the floor, uttering some words.

12. PW- 7 Sri Pradip Khanikar, S.I. was entrusted with the responsibility of conducting investigation in the police case. PW- 7 has deposed that on 23-06-2017, he was working at the Bhogdoi Police Outpost as attached officer. On that day, the IO of the Outpost had

received an ejahar from Biren Chandra Bora and accordingly, made G.D. Entry No. 394 dated 23-06-2017 and forwarded the same to the Jorhat Police Station for registering a case. PW- 7 had stated that he had conducted the investigation in connection with Jorhat P.S. Case No. 1334/2017. During the investigation, he had recorded the statements of the witnesses, examined the informant, drew sketch map. PW- 7 had also stated that he had put a lady police constable in the house of the accused on the date of receipt of the ejahar and on the next morning, he had recorded her statement. Before taking the accused to the police station, he had seized one iron plate on being produced by the accused, by which she had assaulted the deceased. Exhibit- 3 is the seizure list of the iron plate and the Exhibit- 3(4) was his signature. The iron plate was material Exhibit- 1. On completion of investigation, he had submitted charge-sheet against the accused person. The IO has also stated that witness PW- 3 Premadhar Bora had stated before him that on the date of the incident the wife of the deceased, viz. Momi Bora had assaulted her husband Deben Bora with the help of iron instrument for which he received grievous injuries and later on succumbed to his injuries in the hospital; that the aforesaid instrument was handed over by the accused before the police which was seized in his presence.

13. PW- 8 Sri Dhiren Borgohain was the ASI who was posted at the Jorhat Medical College & Hospital Police Outpost on 23-06-2017. He has deposed that on that day, Dr. P. Baruah had informed the Outpost that one person, viz. Deben Bora had been admitted to the hospital in an injured condition and he came to know that the said person had succumb to his injuries on 23-06-2017.

14. In her statement recorded under Section 313 Cr.P.C. the accused had denied her involvement and had stated that the deceased had fallen down in the floor and received head injuries. She had also denied of having assaulted her husband and claimed that she has been falsely implicated in the case. Taking note of the evidence brought on record by the prosecution side, the learned Sessions Judge, Jorhat was of the view that the prosecution had succeeded in establishing the chain of circumstances including the last seen together circumstances so as to prove the murder charge. The fact that the accused has failed to offer any reasonable explanation as to the circumstances under which her husband had died had also been treated as an additional link in the chain of circumstances so as to establish the guilt of the appellant.

15. By referring to the impugned judgment and order dated 11-04-2018, Mr. M.K. Das, learned counsel for the appellant has argued that there are serious omissions and contradictions in the testimony of witnesses examined by the prosecution side. Moreover, submits Mr. Das, one of the key witnesses, viz. the PW- 3 did not support the prosecution case and was declared a hostile witness. There is no eye witness to the occurrence and the prosecution has also failed to establish the circumstances under which the deceased had died. Since the accused had denied her involvement in the incident it was incumbent upon the prosecution to establish the murder charge brought against the accused/ appellant beyond reasonable doubt which they have failed to do in this case. There is serious doubt as regards the circumstances under which the deceased had died as well as involvement of the appellant in the incident. As such, submits Mr. Das, the impugned judgment and order dated 11-04-2018 passed by the learned Trial Court is liable to be set

aside and the appellant be acquitted by giving her the benefit of doubt.

16. As an alternative submission, Mr. Das has argued that there is evidence available on record to indicate that the deceased was a habitual drunkard and he used to regularly quarrel not only with the people in his neighborhood but also with his wife. It is on account of such quarrel that the appellant had lost her self-control and on being provoked by the deceased, had assaulted him. Mr. Das submits that there is no pre-meditation in this case and the appellant has also not taken any undue advantage of the situation. As such, the conviction of the appellant deserves to be converted to one under Section 304 Part- II of the IPC and the jail sentence be correspondently reduced. Mr. Das has also submitted that on the date of the occurrence the minor son of the appellant was aged about 10 years and her daughter was aged about 06 years. Considering the facts and circumstances of the case as well as the future of her minor children, the appellant be awarded the minimum sentence as permissible under the law. In support of his above argument, Mr. Das has relied upon a decision of this court rendered in the case of ***Smti. Suljina Dhan Vs. State of Assam & Anr.*** reported in ***2018 SCC Online Gau 645.***

17. Responding to the above arguments, the learned P.P. Assam has submitted that the evidence available on record leaves no room for doubt that the incident took place in the house of the deceased and besides the appellant no other adult member was present inside the house at that time. Therefore, it is apparent that none other than the appellant had fatally assaulted her husband and injured him, leading to his death. Mr. Phukan has, however, submitted in his usual fairness that the materials available on record indicates the possibility of an altercation between the deceased and his wife before the incident

and therefore, grave and sudden provocation on the appellant cannot be altogether ruled out in this case.

18. We have considered the arguments advanced by the learned counsel for both the parties and have also carefully gone through the materials available on record. From the testimony of PWs- 5 and 6 it is established that the incident took place in the evening hours of 23-06-2017 and the victim was found lying on the floor in an injured condition with blood oozing out from his body. The IO, i.e. PW- 7 had deposed that he had recorded the statement of the accused and had also seized an iron plate on being produced by the accused by saying that she had assaulted the deceased with the same. The Postmortem Report Exhibit- 4 also establishes beyond doubt that the deceased had suffered a homicidal death due to injuries sustained in the head. It has also come out from the evidence available on record that save and except the deceased, his wife, i.e. the appellant and the two minor children, no one else was present inside the house when the incident had occurred. Although the appellant had taken a plea in her statement recorded under Section 313 Cr.P.C. to the effect that the deceased had suffered injuries by falling down on the floor, such a plea does not find support from the medical evidence available on record. Save and except the above, the accused could not give any plausible explanation as to the circumstances under which the deceased had suffered fatal injuries. Taking note of such evidence available on record and also the circumstance of last seen together, the learned Sessions Judge had convicted the appellant under Section 302 IPC. We do not find any justifiable ground to disturb such finding of facts recorded by the learned court below.

19. Coming to the alternative plea raised by the appellant's counsel to the effect that there was no premeditation in this case and the appellant had acted under grave and sudden provocation. Hence, the present case would come under Exception IV of Section 300 IPC, it would be pertinent to mention herein that the witness PW- 2 has stated during his cross-examination that the deceased was a drunkard. The aforesaid evidence adduced by the PW- 2 finds due corroboration from the testimony of PW- 3. Although the PW- 3 was declared as a hostile witness, yet, we find that his testimony to the effect that the deceased was a habitual drunkard is duly corroborated by the PW- 2 and therefore, appears to be truthful. From the testimony of PWs- 2 & 3 it can be safely presumed that the deceased was a habitual drunkard.

20. During his cross-examination by the defense side, the IO has denied the proposition to the effect that the accused did not tell him that she assaulted her husband due to atrocities committed on her by him. The effect of such evidence adduced by the IO would be that the accused had in fact stated before him that her husband used to torture the family members after consuming liquor. On a careful scrutiny of the Case Diary, we also find that the accused had in fact stated so before the IO in her statement recorded under Section 161 Cr.P.C.

21. From a conjoint reading of the testimony of PWs- 2, 3 and 7, we find that there is sufficient evidence on record to conclude that the deceased was a habitual drunkard and in a state of intoxication he used to torture his wife, i.e. the appellant.

22. The witnesses PWs- 5 & 6 have both deposed that on the day of occurrence they heard a "hulla" from the house of the deceased and immediately upon reaching there,

found the deceased lying on the floor in an injured condition. The "hulla" was also loud enough for the neighbors to hear. On reaching the house of the deceased they found the appellant in the varandah. PW- 6 has also stated that she had seen the appellant crying along with her children. The above evidence brought on record by the prosecution strongly suggests that there was some altercation between the deceased and the appellant just before the occurrence which had caused the "hulla". From the above, it also appears that there was an altercation between the deceased and his wife just before the occurrence which had provoked the appellant to hit the deceased under sudden provocation, having lost her sense of self-control.

23. Coming to the nature of injuries sustained by the deceased, although the Postmortem Report (Exhibit- 4) gives an impression that there are as many as 04 (four) lacerated injuries found on the dead-body, yet, on a close scrutiny of the medical evidence made with the assistance of Mr. Phukan, learned P.P. Assam, we find that the injuries were in all probability caused by only two different impacts. The injuries found in the right parieto-temporo-occipital area appear to have been caused by blunt weapon, which in all likelihood was the iron plate seized by the IO. From the location and size of the injuries caused in the parietal scalp, it also appears that the same were the result of only one blow, for the simple reason that the appellant could not have possibly struck the deceased with the iron plate multiple times on the same place.

24. In so far as the lacerated injury of 4 cm x 1 cm found over the temporal scalp is concerned, the same appears to have been the outcome of the deceased falling on the ground after the initial impact in the parietal scalp. From a closer scrutiny of the medical

evidence available on record, we are inclined to conclude that the injuries caused in the peritoneal region of the head was due to impact made by the "iron plate" which had resulted into as many as three lacerated wounds but the injuries on the temporal scalp was caused due to falling on the floor. Moreover, it also appears to be a case of "single blow" dealt on the deceased on his parietal region by a blunt instrument.

25. In the above context, it would also be significant to note herein that the instrument (iron plate) used by the appellant to give the blow on the deceased is not one like a "knife" or a "dao" which is usually used to cause grievous injury. On a reading of the evidence available on record in its entirety, we are of the view that the appellant had struck a "single blow" in the head of the deceased which fell on the right parietal scalp. Therefore, it cannot be said that she did not have the intention to cause death. However, such assault was presumably the outcome of the torture which appears to have been meted out by the victim to his wife in a state of inebriation. Such behavior of the deceased in inflicting torture upon his wife under state of inebriation, appears to have reached its culmination on 23-06-2017 and a quarrel broke out between the deceased and the appellant which had provoked the appellant sufficiently and in a heat of passion she ended up striking her husband on his head. The evidence available on record also go to show that the appellant was crying in the verandah with her two children which clearly goes to show that there was deep remorse on the part of the appellant after the occurrence.

26. It may not be completely out of place to observe here that the prosecution has failed to establish any motive behind the crime. In the absence of any motive, it would be

difficult for this Court to presume that ordinarily, an Indian house-wife, having two minor children, would fatally assault her husband, save and except acting under grave and sudden provocation. We are, therefore, of the unhesitant opinion that although it cannot be said that the appellant did not have the intent to cause death to the deceased, yet, she had acted under grave and sudden provocation and had inflicted the blow on her husband having lost her self-control.

27. Insofar as the failure of the appellant to offer proper explanation in her statement recorded under Section 313 Cr.P.C. as regards the circumstances under which the deceased had received injuries is concerned, we find that while maintaining her stand that she had been falsely implicated in the case, the accused had stated that her husband had received injuries after falling down on the floor under the influence of liquor. For the reasons indicated above, this statement of the accused appears to be true. This witness had also stated in response to Question No. 4 that she has lost her sense when she saw blood on the injuries of her husband. However, the version of the accused does not explain as to how the deceased could have sustained grievous injuries, both on the right parietal scalp as well as on the temporal scalp merely by falling on the floor. The appellant has not denied her presence inside the house. Under the circumstances, it is evident that the appellant was not disclosing the entire truth pertaining to the occurrence.

28. In ***Suljina Dhan (Supra)*** the accused was the wife of the deceased who was convicted under Section 302 of IPC for committing the murder of her husband. Here also, the incident took place inside the house and the victim was found lying in the floor in a pool of blood and an axe was lying by his side. The prosecution case was based on

circumstantial evidence. In her statement recorded under Section 313 Cr.P.C the accused had admitted her presence inside the house but took a stand that the deceased had suffered injuries by falling upon the axe. Taking note of the evidence lead by the prosecution as well as the law laid down in the case of ***Trimukh Maroti Kirkan Vs. State of Maharashtra*** reported in ***(2006) 10 SCC 681***, the learned Sessions Judge had convicted the accused and sentenced her to suffer R.I. for life. Noticing that there was evidence to suggest that a quarrel took place between the accused and the deceased immediately before the incident and therefore, it was clear case of the accused acting under grave and sudden provocation, this court had converted the conviction of the accused under Section 304 Part-II of IPC by observing that in the absence of any other motive, a women would not ordinarily fatally assault her husband save and except acting under grave and sudden provocation. Having regard to the nature of evidence available on record, we are inclined to adopt a similar approach in the present case as well.

29. For the reasons stated hereinabove, we set aside the conviction of the appellant under Section 302 of the IPC and convict her under Section 304 Part- I of the IPC.

Considering the overall facts and circumstances of the case and taking note of the fact that the appellant has two minor children to look after, we award her the sentence of rigorous imprisonment (RI) for 05 (five) years, which period shall, however, stand adjusted against the jail sentence already undergone by her. The fine imposed by the learned Sessions Judge would, however, remain undisturbed.

With the above observation, this appeal stands partly allowed.

Send back the LCR.

JUDGE

JUDGE

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Comparing Assistant