

Rahim Badsha Vs. State of Assam

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Court : Guwahati

Decided On : Nov-12-2007

Judge : Aftab Hussain Saikia and H. Baruah, JJ.

Appellant : Rahim Badsha

Respondent : State of Assam

Advocate for Pet/Ap. : Mr. R. Ali, Sri. R. Ali

Disposition : Appeal allowed

Judgement :

H. Baruah, J.

1. Appellant Rahim Badsha was tried by the learned Sessions Judge, Barpeta under Section 302 IPC and convicted and sentenced him to undergo imprisonment for life and to pay fine of Rs. 5,000/-, in default of payment of fine to undergo R.I. for 1 (one) year.
2. Being aggrieved by the Judgment and order of conviction appellant Sri Rahim Badsha filed this instant appeal challenging the legality of the judgment.
3. Before entering into the merit of this appeal, it would be appropriate for this court to project the case of the prosecution in nutshell:

Appellant Rahim Badsha and accused Hazrat Ali are both father and son. The informant Atowar Rahman is the father-in-law of the appellant Rahim Badsha. Deceased Anujawara Khatun was the daughter of first informant Atowar Rahman. She was given in marriage with the appellant on 16.4.1998 by executing a registered deed No. 269/98. Since the date of the marriage, it is alleged that the deceased Anjuwara Khatun was tortured by the appellant, her husband, both physically and mentally. On 23.10.1998 at about 11.30 A.M. deceased Anjuwara Khatun was called by the appellant inside a room of their house at the instance of the accused No. 2 Hazrat Ali, Appellant's father. The room was closed from inside and poured kerosene oil and set on fire by the appellant. Deceased Anjuwara Khatun sustained burn injuries, she lost her senses. Father of the deceased, Atowar Rahman, thereafter, lodged FIR (Ext.2) with the officer-in-charge, Kalgachia Police Out post. The contents of the FIR (Ext. 2) were entered in the general diary of the police station. FIR was thereafter forwarded to the O/C Sorbhog Police Station for registering a case. At this stage, it would be apposite for this Court to state that the officer-in-charge, Kalgachia Police Out Post in anticipation of entrustment of the investigation to him, taken up the investigation of the case by himself. S.I. Dilip Kr. Baruah, Officer in-charge of Sorbhog Police Station registered a case under Section 442/307 IPC. On the same day of lodgment of the FIR, deceased Anjuwara Khatun died and the dead body was taken to Kalgachia Police Out Post where inquest on the dead body was conducted by Krishna Kanta Medhi, S.I. In-Charge Kalgachia Out Post in presence of the witnesses and prepared the inquest report Ext. 3. Thereafter the dead body was sent to Barpeta Civil Hospital for postmortem examination. During the investigation witnesses were examined and one burnt blue striped cotton saree and one empty red bottle having smell of kerosene oil were seized in presence of the witnesses, vide Ext-4. Having completed the investigation of the case, charge sheet Ext.5 was laid against the appellant Rahim Badsha, accused Hazrat Ali and Sarbhanu Khatun under Section 302/34 of the IPC.

4. The case being committed to the court of Session, a charge under Section 302/34 IPC was framed against the appellant and other two accused persons. The trial commenced, during the course of trial 10 witnesses were examined including the Doctor and the Investigating Officer.

5. Accused was examined under Section 313 Cr.P.C. No defence evidence was adduced either oral or documentary. Defence case is of one denial. At the conclusion of the trial, learned Sessions Judge convicted the appellant Rahim Badsha and awarded punishment as hereinabove stated. Having found no clinching evidence as against the other two accused namely Hazarat Ali and Musstt. Sarbanu Khatun, both husband and wife were acquitted and set at liberty.

6. We have heard Mr. R. Ali, learned Counsel for the appellant and Mr. Mahanta, learned P.P., Assam on behalf of the Respondent.

7. Sri R. Ali, learned Counsel for the appellant contended that the Judgment and order of conviction cannot be maintained on the basis of the evidence both oral and documentary available on record. Sri R. Ali in support of his contention further submitted that P.W. 3 & P.W. 5 claimed to have witnessed the occurrence, who are brother and mother respectively of the deceased Anjuwara Khatun. It is also submitted by him that if the evidence of P.W. 3 is believed to be true, evidence of P.W. 5, the mother of the deceased is to be disbelieved. In view of such inconsistent evidence appearing in the face of the record, conviction rendered cannot be maintained, he argued. Evidence of Anowar Hussain, P.W. 3 is also found self contradictory. There is no consistency between the evidence reflected in chief and cross examination. This witness claimed that on the date of occurrence at about 11 A.M. he was in his reading table. At that time he heard some alarm in the house of the appellant. It is to be noted at this stage that the house of the appellant is continuous north to their house, in other words, adjacent to their boundary. On hearing the alarm he came to the house of the appellant and had seen that the appellant Rahim Badsha setting of fire to his sister after pouring Kerosene oil. He, however, could not intervene, as, the appellant was more stronger than him. He tried to put off the fire. On being asked, the deceased told him that it was her husband who set fire on her person after pouring Kerosene. We have found that this witness had seen setting of fire on the person of his sister, deceased Anjuwara Khatun by the appellant and more over he had been informed by the deceased that the appellant did so. But, if look into his consider the evidence appearing in cross-examination we would find that he did not actually witness the occurrence as claimed and narrated by him. It is his categorical

statement that the moment he arrived in the house of the appellant, he had seen appellant fleeing away from his house. Had there been such a circumstances as stated in his cross-examination then certainly he would not have seen the appellant setting fire on the person of the deceased. So there appears a conflict in between the evidence in-chief and the cross-examination of this particular witness (P.W. 3). In such a acclamation, the evidence of P.W. 3 cannot receive any acclamation from the court and inspire confidence in the mind of the court. That he was the witness of the occurrence and had seen the acts that resorted by the appellant on the alleged date of occurrence is beyond the scope acceptance. Learned Counsel for the appellant, therefore, taking these inconsistencies in the evidence of P.W. 3 argued that this court perhaps can not repose any confidence in his evidence.

8. Now let us scrutinize the evidence of P.W. 5 Musstt. Amona Khatun, the mother of the deceased, who also claimed to have witnessed the occurrence. Her evidence is available on the record is that on the relevant date she was in her residence doing some household works. We have already stated hereinbefore that the house of the appellant is contiguous north to their house. While she was busy in discharging her household works, she heard alarm and accordingly came to the house of the appellant and had seen her son-in-law, the appellant setting fire on the persons of her daughter deceased Anjuwara Khatun after pouring kerosene. Having witnessed the scene she immediately lost her senses. She regained her senses and on being asked Anjuwara told her that appellant had set fire on her person. This witness in her cross-examination stated that she regained her senses after half an hour. Her son Anwar Hussain (P.W.3) according to her arrived on the spot that is in the house of the appellant much later her arrival. Her elder son Aftab also followed Anwar. Accused Hazrat Ali and others took the deceased Anjuwara to Kalgachia PHC for treatment. Anjuwara, the deceased at that time was in a position to talk for some time. So, from her evidence it is found that P.W. 3 came to the house of the appellant much later her arrival. P.W. 3 Anwar in his evidence never divulged that he found his mother in the house of the appellant on his arrival.

9. So in view of the facts and circumstances appearing in the evidence of P.W. 3 and P.W. 5, entire situation has gone into a complete darkness in regard to witnessing of the actual occurrence. There is no whisper in the evidence of P.W. 3 that he did find his mother in the house of the appellant on his arrival. We have already stated hereinbefore that the moment P.W. 3 arrived on the spot the appellant fled away. If we believe the evidence of P.W. 3 as true, we ought to have disbelieved the evidence of P.W. 5 and vice-verse. Composite reading of the evidence of P.W. 3 and P.W. 5 gives an inference that neither of them witnessed the occurrence.

10. In this context, learned P.P. failed to lead us through any other reliable evidence to show that it was the appellant Rahim Badsha who did cause of death of his wife Anjuwara Khatun by pouring kerosene and setting fire on her person. Ocular evidence on record being found inconsistent, no reliance can be put to it.

11. Dr. Suresh Ch. Sarma (P.W. 1) conducted the postmortem examination on Anjuwara Khatun on 24.10.1998 at Barpeta Civil Hospital. During autopsy he discovered one deep bruise over the front and back of the chest and also discovered superficial burn injury over the neck and face of the deceased which looked blackening. The deep burn over the front and back of the chest and the appearance of the same being dull and white, according to him, all go to show that injuries were postmortem in nature preceded by death due to suspected strangulation. This witness further stated that since he could not detect any superficial burn over the neck and face, he could not discover the sign of strangulation. According to him, cause of death was suspected to be respiratory and cardiae arrest due to asphyxia. This witness seemed to have blown hot and cool together in the same breath. At one stage of his evidence he stated that he discovered one superficial burn injury over the neck and face of the deceased at another stage this witness stated that he was unable to detect any superficial burn over the neck and face of the deceased. The evidence of Dr. Suresh Ch. Sarma also failed to inspire confidence in the mind of this court since he was found flexible in discovering the injuries (burn) on the dead body of the deceased.

12. Now another pertinent question to be looked into is in regard to the nature of the injuries discovered on the dead body of the deceased. P.W. 1 Dr. Suresh Ch. Sarma categorically stated in his evidence that injuries were postmortem in nature preceded by death due to suspected strangulation. If that is so, the evidence of P.W. 3 & P.W. 5 are liable to be discarded at once. Both the witnesses testified that the deceased did not immediately succumb to her burn injuries and before her death she had taken to Kalgachia PHC. In the face of evidence of P.W. 3 & P.W. 5 that they witnessed pouring of Kerosene oil and setting of fire on the person of the deceased cannot be believed, in the face of the evidence of P.W. 1. Evidence of P.W. 3 & P.W. 5 go to show that deceased was alive at the time of their arrival cannot be believed if we believe the evidence of P.W. 1. In view of the facts and circumstances appearing in the face of the evidence on record death of the deceased Anjuwara Khatun is shrouded/circumscribed with conflicts. Neither the evidence of P.W. 3 and P.W. 5 nor the evidence of P.W. 1 can be taken into confidence.

13. P.W. 1 in his evidence gave a hint that death was due to suspected strangulation but he was unable to discover the sign of strangulation over the neck of the deceased. Again Md. Saritulla Gaon Burah who has been examined as P.W. 4 by the prosecution testified that the deceased Anjuwara Khatun told him that she tried to commit suicide as she was unable to bear the torture meted to her by her husband and parent-in-laws. This testimony of this witness also goes against the evidence of P.W. 1.

14. We have also scrutinized the evidence of other witnesses namely Atowar Rahman, the informant, Azizur Rahman, Rafikul Islam, Fakaruddin and Aftabuddin. On marshalling of their evidence, we do not find anything that they could improve the case of the prosecution against the appellant.

15. Evidence of the prosecution witnesses makes the case of the prosecution doubtful which compels this Court to adopt a different view than that of the view adopted by the learned trial court.

16. Sri R. Ali, learned Counsel for the appellant submitted that no attempt was made either by PW 3 or PW 5 who posed themselves to have witnessed the

occurrence to resist the appellant from resorting to such acts nor there is evidence on record to show that either of them received any burn injuries while trying to save the deceased Anjuwara Khatun from clutch of the appellant which enhances suspicion as to their presence at the time of incident. Shri R. Ali submitted that P.W. 3 and P.W. 5 both the brother and mother respectively ramshd a silent spectator and allowed the appellant to do the job at his whims. According to Sri Ali, P.W. 3 and P.W. 5 being to closed to the deceased ought to have tried to save the deceased from being burnt. The explanation offered by both the P.W. 3 and P.W. 5, according to him cannot be believed. There is no evidence that both raised hue and cry which a human behaviours in such situation. Sri R. Ali in support of his arguments relied on the decision reported in : 2002 CriLJ1022 (Hasan Murtaza, appellant v. State of Haryana, Respondent). The Hon'ble Supreme Court in Paragraphs 9, 10 and 11 of the Judgment held as under:

9. Our doubt as to PW-4's presence is further compounded by the fact that the incident in question took place in a house where a tenant was living in one portion of the house and there were other houses nearby which were all occupied. Still the prosecution has not been able to cite any one of these persons to support its case or at least to show that the incident in question took place at a time when PW-4 was present at the scene of occurrence. The fact that PW-4 suffered no injury in the process of protecting her daughter from burning to death, further enhances the suspicion as to her presence at the time of the incident. In such a situation, in our considered view, it is not safe to rely upon the sole testimony of PW-4 to base a conviction on the appellant.

10. It is true from the evidence brought on record by the prosecution that the appellant was not a person with whom the finances of the family could be trusted with. We say this from the material on record which shows that the appellant's own father when he purchased the house, he purchased the same in the name of the deceased and not in the name of the appellant. Even the FDs, made for the benefit of the children were made in the name of the deceased and not in the name of the appellant. This itself goes to show that even the father of the appellant did not trust the appellant with the monies which he wanted to contribute for the benefit of the family, more particularly for that of the children, unfit as he is to look

after his family. Even then the mere fact that the appellant is proved to be not a good husband or father would not ipso facto lead to the conclusion that he would commit the murder in question. No person other than PW-4 claims to have seen the appellant at the scene of occurrence. No incriminating evidence e.g. any material like burns or even soot from the burning of the body to which the appellant must have suffered standing close, was noticed in the person or the clothes of the appellant. In the absence of any such material which would corroborate the evidence of P.W.4, we think it highly unsafe to rely on the sole testimony of P. W. 4 to convict the appellant, as has been done by the two Courts below. The Courts below totally lost sight of these vitally material aspects which completely undermines the credibility of the prosecution case in its entirety.

11. For the reasons stated above, we are unable to place reliance on the evidence of P.W. 4. If the said evidence is eschewed then we do not find any other material to base a conviction. The improvements found in the evidence of P. W. 4 being material, the Courts below erred in relying upon the same to convict the appellant. For the afore reasons, this appeal succeeds and the same is allowed. The conviction and the sentence imposed by the Courts below are set aside. The appellant shall be set at liberty forthwith, unless required in any other case.

17. Evidence is also found wanting in regard to strangulation of the deceased by the appellant. P.W. 1 Dr. Suresh Ch. Sarma testified that the injuries were postmortem in nature preceded by death due to suspected strangulation. It is stated by the Doctor that he failed to discover the sign of strangulation on the neck of the deceased. Had the deceased been died as a result of strangulation and thereafter the appellant poured kerosene oil on her body and set fire, P.W. 3 and P.W. 5 could not have testified that they found the deceased Anjuwara Khatun in alive condition having burn injuries on her person.

18. The learned Trial Court did not make any endeavour to scan the evidence in its true perspective. The learned trial court is found to have superficially scrutinized the evidence on record and thus arrived at erroneous findings that it was the appellant who did cause death to his wife. Learned trial court also put reliance and acted upon on the evidence of P.W. 3 Anowar Hussain, P.W. 5 Musstt. Aimon

Khatun in particular while arriving at the conclusion that the appellant committed the murder.

19. Having considered the facts and circumstances of the case appearing in the face of the record and the evidence both oral and documentary and the reasonings so offered by the learned trial court, we are of the opinion that there is no plausible evidence to record a finding of conviction. Learned trial court misread the evidence and thus arrived at this erroneous finding which in our opinion cannot sustain in law. We are of the considered view that the appellant is entitled to acquittal from the charge under Section 302 IPC.

In the result, the appeal succeeds. The impugned Judgment and order of conviction is set aside. Appellant is acquitted. He be set at liberty, if he is not wanted in any other criminal case.

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