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Court : Guwahati

Decided On : Mar-15-2002

Judge : D. Biswas and P.G. Agarwal, JJ.

Acts : [Evidence Act, 1872](#) - Sections 25, 26 and 27

Appeal No. : Criminal Appeal No. 263 of 1998

Appellant : Abul Hasem

Respondent : State of Assam

Advocate for Def. : B. Banerjee, PP

Advocate for Pet/Ap. : A.S. Choudhury, R. Majumdar and A.R. Sikdar, Advs.

Disposition : Appeal allowed

Judgement :

P.G. Agarwal, J.

1. In Session Case No. 38(B)/1995 of the Court Sessions Judge, Barpeta, accused Abul Hasem and Mokshed AH were charged for commission of offence Under Section 302/201/34, IPC. On conclusion of trial in which as many as nine witnesses were examined, the trial court acquitted accused Mokshed Ali and convicted accused appellant Abul Hasem for the offence Under Section 302/201,

IPC and sentenced him accordingly.

2. The prosecution case in brief is that Musstt. Majirun Nessa, daughter of the informant was given in marriage to accused appellant Abul Hasem @ Hasem Ali. However, the family members of Hasem Ali did not accept the marriage and as such the couple was not allowed to reside in their house whereupon Hasem Ali brought her to his rented house at Barpeta. The wife Majirun Nessa became untraceable whereupon after futile search, the father lodged the FIR suspecting foul play. During the course of investigation, the dead body was recovered and thereafter the charge sheet was submitted.

3. PW 1 is Dr. Golap Hussain who held the autopsy over the dead body of the deceased found the following injuries :

'External appearance :

The body was decomposed. No injury could be detected from any part of the body. The dead body could be identified as female dead body with the following points.

External injuries :

(i) Long hair

(ii) Sign of developed breast present.

(iii) There was red coloured sari on the dead body.

(iv) Body structure and bones were of female character.

Abdomen, lung and heart were decomposed. However, skull and vertebrae were intact.

As the entire body was decomposed no injury or dislocation could be detected. Left hand from the elbow was separated from the upper arm.

No opinion could be given as regards the cause of death. The

viscera was not preserved and the same was also damaged.

Ext. 1 is the Post Mortem report and Ext. 1 (1) is my signature thereon.

Earth and mud was found strucked on the dead body and from this fact it can be presumed that the body was kept buried underground. Considering the mature of decomposition the death must have taken place more than one month prior to the examination.

The dead body was identified by one Sayed Ali, uncle of the deceased.'

4. Although the learned counsel for the appellant has made an attempt to submit that in view of decomposition of the dead body as stated by the doctor there was no scope for identification of the dead body as claimed by the witnesses, a large number of witnesses have deposed that at the time of recovery of the dead body one could identify it to be that of Majirun Nessa and the defence failed to cross examine the witnesses even. Hence, in view of the unchallenged testimony of the witnesses, the trial court rightly held that the dead body recovered was that of the deceased Majirun Nessa.

5. In this case there is no eye witnesses to the occurrence, that is, none of the witnesses saw the deceased being killed. The trial court also entered into an order of conviction of the appellant on the basis of the following circumstances :-

'(1) That the accused Abul Hasem got married with Majirun Nessa.

(2) That Abul Hasem after marriage took Majirun Nessa to Barpeta twon to live together.

(3) That during that time, suddenly Majirun was missing.

(4) That while the father of Majirum came to meet Majirum the accused protested and did not allow.

(5) That on beeing arrested, the accused disclosed the fact.

(6) That the accused himself led to recover the dead body of Majirun.'

6. So far the circumstances Nos. 1 to 4 as stated above are concerned, there is evidence on record and the prosecution has established those circumstances as required under the law. However, the order of conviction is based mainly on the ground of discovery of the dead body on the basis of the information given by the accused appellant Abul Hasem. In this connection Section 27 of the Evidence Act reads :

'27. How much of information received from accused may be proved. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.'

7. In the case of *Earabhadrapa v. State of Karnataka*, reported in AIR 1903 SC 446 the Apex Court held that for the applicability of Section 27 of the Evidence Act, two conditions are pre-requisite ; namely (1) the information must be such as has caused discovery of the fact and (2) the above information must relate distinctly to the fact of discovery.

8. The admissibility of information Under Section 27 of the Evidence Act is exception to Sections 25 and 26 of the Evidence Act. Further, Section 27 overrides the provisions of Section 162, Cr PC. which prohibits

use of statement, made before police. The law is also well settled that in case of long statement only if a fact is deposed to as discovered in consequence of the information.

9. In the instant case we find that the trial court proceeded under the impression that the accused had made statement which is admissible Under Section 27 of the Evidence Act on the basis of which the dead-body was recovered. However, on perusal of the oral evidence on record and the documents exhibited and proved, we find that no such statement was brought on record or proved as required under the law. Neither the Investigating Police Officer nor other witnesses have deposed or proved the alleged statement. Thus, we find that there is no statement Under Section 27 of the Evidence Act. Hence, in the absence of the information before

us, it cannot be said that any fact was discovered or proved on the basis of the statement. Moreover, in the case of *Pohalya Motya Valvi v. State of Maharashtra*, reported in AIR 1979 SC 1949 the Apex Court held as follows:-

'Where two persons are charged of murder and the information given by one of the accused leading to the discovery of the murder weapon is capable of two interpretations, i.e. (1) he was the person who concealed the weapon, or (2) that he had the knowledge of the place where it was hidden, the accused could not be convicted for murder on basis of such information. The recovery of murder weapon becomes incriminating not because of its recovery at the instance of the accused but the element of criminality tending to connect the accused with the crime lies in the authorship of concealment, namely, that

the appellant who gives information leading to its discovery was the person who concealed it. But where two accused are charged for murder and the information given by one leading to the discovery of murder weapon is capable of two constructions the one beneficial to the accused will have to be adopted.'

10. We are, therefore, constrained to hold that even if oral evidence of the prosecution witnesses as regards pointing out of the place wherefrom the dead body was recovered is accepted as true it cannot be said that the accused person was involved in the killing of the deceased.

11. Learned counsel for the appellant on the other hand submits that the place wherefrom the dead body was recovered was an open field and as such exclusive knowledge of the appellant cannot be attributed. Learned counsel has placed reliance on the observations of the Apex Court in the case of *Makhan Singh v. State of Punjab*, reported in AIR 1988 SC 1705 wherein the evidence Under Section 27 of the Evidence Act in the above circumstance was not considered as circumstance against the accused.

12. On the other hand, learned P.P. has placed reliance on the observations of the Apex Court in the case of *State of Maharashtra v. Suresh*, reported in (2000) 1 SCC 471 wherein it is held :-

'It is regrettable that the Division Bench had practically nullified the most formidable incriminating circumstance against the accused spoken to by PW 22 Dr. Nand Kumar. We have pointed out earlier the injuries which the doctor had noted on the person of the accused when he was examined on 25.12.1995. The significant impact of the said incriminating circumstance is that the accused could not give any explanation whatsoever for those injuries and therefore he had chosen to say that he did not sustain any such injury at Kumar. A false answer offered by the accused when his attention was drawn to the aforesaid circumstance renders that circumstance capable of inculcating him. In a situation like this such a false answer can also be counted as providing 'a missing link' for completing the chain.'

13. The above observations of the Apex Court were in view of the statement proved in that case wherein the accused stated 'her dead body can be concealed in mud ; I will take it out and produce the same ; come with me.' In this case there is no such statement on record. Hence, there was no obligation on the part of the accused appellant to offer any explanation as regards discovery of the dead body. The required statement Under Section 27 must be proved. We find no

force in the statement of the P.P. that this may be due to the fault of the P.P. conducting the case before the trial court and for this the entire prosecution case cannot be thrown out. From the judgment it is seen that one Shri D. Taiukdar was the P.P. who conducted the Sessions trial. It seems that the learned P.P. failed to discharge his duty in bringing on record the information or statement required to be proved for proving the case Under Section 27 of the Evidence Act. Even the learned Sessions Judge also remained a mere spectator without involving himself in the conduct of the trial. In the case of P. Barman v. State of Assam, reported in 1970 Cri LJ 1599 this court had observed :

'The case diary is a very important document which has to be maintained in a faithfully regular manner. The contents of the diary cannot be treated as evidence in a trial but the court is entitled to peruse the same under Section 172(2) of the Criminal Procedure Code to aid it in the trial. This duty, is incumbent upon a public Prosecutor and almost always so upon a court trying a serious offence of this

nature. Where prosecution and defence are both inadequate it will enable the court to rise up to the occasion and discover for itself the material facts and circumstances from the case diary, which can be brought to light through the witnesses examined in the case to arrive at the truth in the interest of justice.'

14. As the entire prosecution is based on the circumstantial evidence and the circumstance nos. 5 and 6 have not been established as required under the law, the accused appellant is entitled to benefit of doubt.

15. In the result, the appeal is allowed. The conviction and sentence of the accused appellant is set aside and he is acquitted and set at liberty forthwith. He may be released from jail, if not wanted in any other case.

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