

IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE

::::UDALGURI

**Present : Smti. N. Talukdar,
Addl. Sessions Judge,
Udalguri.**

Sessions Case No. 27/2017

U/S 302/34 IPC

GR Case No. 150/2017

State of Assam

-Vs-

1. Hanif Ali

2. Mazid Ali.....Accused persons.

For the Prosecution : Mr. R. Sarmah, Addl. Public Prosecutor.

For the Accused : Mr. M. C. Narzary, Learned Advocate.

Date of Evidence : 19-07-17: 22-11-17: 24-01-18: 10-10-18:
04-01-19.

Date of Argument : 16-08-2019.

Date of Judgment : 29-08-2019.

J U D G M E N T

1. The prosecution case as unfolded in FIR is that on 16-08-11, in the morning since 9 am, deceased Gajjur Rahman went missing from home. Next day morning i.e. on 17-08-11, he was found murdered and his dead body was lying in the field of thatch grass.

2. On the basis of the FIR, Kalaigaon P.S. Case No. 47/11 U/S 302 IPC was registered and after completion of investigation police had submitted charge sheet U/S 302/34 IPC, against the accused persons Hanif Ali and Mazid Ali.
3. Learned Chief Judicial Magistrate, Udalguri, after having complied with the provision U/S 207 CrPC found that the offences U/S 302 I.P.C., is exclusively triable by the Court of Sessions and accordingly, she committed the case to the Court of Sessions on 03-04-2017.
4. In consideration of the submission of the learned counsel for both the parties and on evaluation of materials on record having found sufficient grounds for presuming that the accused person had committed offence U/S 302/34 I.P.C., learned Sessions Judge framed charge there under and the ingredients of charge U/S 302/34 I.P.C., were read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried. Thereafter, the learned Sessions Judge vide Order dated 05-02-19, transferred the case to this court for disposal.
5. The prosecution in order to prove its case examined the following 08 (eight) witnesses.
 - PW 1- Sultan UI Warisin.
 - PW2- Kalamuddin.
 - PW3- Malengsha Begum.
 - PW4- Mazid Ali.
 - PW5- Dr. Chidananda Thakuria.
 - PW6- Musstt. Maziran Nessa.
 - PW7- S.I. Mansur Ali.
 - PW8- ASI Hiren Kr. Borah.

6. The statements of the accused persons had been recorded U/S 313 Cr.P.C. The defence case was of total denial and declined to adduce defence evidence.
7. In the light of the above facts and circumstances, the points for determination in the instant case are set up as follows:-
 - (I) Whether the accused persons in furtherance of common intention, committed murder intentionally causing the death of Gajiur Rahman?

DISCUSSION, DECISION AND REASON FOR DECISION:

8. I have heard arguments placed by learned counsel for both sides and carefully appraised the evidence on record in its proper perspective.
9. Learned Addl. P.P. Mr. R. Sarmah has argued that the incriminating circumstances appearing in the case are sufficient to bring home the guilt of the accused persons in committing murder of the deceased. The accused persons had land dispute with the family of the deceased and as such out of grudge the accused persons committed murder of the deceased. There is cogent and clear evidence that the accused Mazid Ali called the deceased to his home and thereafter the deceased did not return back his home. Next day in the morning the deceased's body was found lying in the field of thatch grass. Learned Addl. P.P. has further argued that the cloth with which the deceased was strangulated belonged to the son of accused Mazid Ali. The chain of circumstances appearing in the case is complete and it establishes that none other than the accused persons is the perpetrator of the offence of murder of deceased Gajiur Rahman.
10. Per contra learned defence counsel has argued that the contents of the FIR do not disclose that prior to the incident accused persons called the

deceased to their home and thereafter deceased went missing. The prosecution witnesses have improved their statements in their evidence and as such their evidence are not reliable and worthy of credence. There is no eye witness of the case, the case solely rests on circumstantial evidence. In a case based on circumstantial evidence the chain of circumstances must be complete and it must unequivocally consistent with the guilt of the accused. Learned defence counsel has also argued that suspicion however grave cannot take the place of legal evidence. In this case it is apparent from the evidence on record that the family members of the deceased have been adducing evidence against the accused persons only on suspect. Learned defence counsel has also argued that prosecution has failed to exhibit the 'Lungi' which was seized by the police in connection with this case. Learned defence counsel has relied on the decisions reported in **AIR 1982 SC 1157, Gambhir Vs. State of Maharashtra and AIR 1992 SC 669, Swinder Singh Vs State of Punjab.**

11. Before appreciating the argument put forward by learned Addl. P.P. for the State as well as the rival submission advanced by the learned defence counsel I would like to discuss the evidences adduced by the prosecution.
12. PW1 is Sultan UI Warisin, informant of this case. PW1 is the uncle of deceased Gajiur Rahman. In his evidence PW1 had deposed that one day prior to the occurrence the deceased went missing. Then they made search for him. Next day morning at about 7 AM, PW1 saw gathering of people near the house of accused persons. He then went there and saw the dead body of deceased lying with injury on his head and blood was oozing out from his ear. PW1 also noticed a piece of cloth was hanging in his neck. According to PW1, accused Abdul Mazid confessed before him and villagers that the cloth which was hanging in the neck of the deceased was the cloth of his son. PW1 lodged ejahar at Ranipukhuri O.P. Ext.1 is the ejahar and Ext.1(1) is the signature of PW1. In cross-examination, PW1 had stated

that the accused had mental illness. He did not notice when the deceased went out from his house. On being informed by his younger brother Kalamuddin he went to the place where the dead body of his nephew was lying. The dead body was lying in the midst of thatch grass which was situated at a distance of about 200 meters from the house of the deceased. PW1 had revealed that he did not suspect any one.

13. PW2 is Kalamuddin, brother of the deceased. In his evidence PW2 had deposed that on the day of occurrence the deceased went to the house of accused persons. Next day he was found lying dead in the midst of thatch grass. The accused and the deceased had land dispute. PW2 went to the place where dead body was lying. He noticed injury on the head of deceased and blood was oozing out from the ear. A Lungi was hanging in the neck of the deceased which belongs to son of accused Mazid. Accused Abdul Mazid confessed that the Lungi which was hanging in the neck of the deceased belonged to his son. In cross-examination, PW2 had stated that the length of Lungi was about 1 foot and the colour was sky colour. PW2 had denied the suggestion that accused Mazid did not confess that the Lungi belongs to his son. After the death of PW2's father accused Mazid divided the land himself. PW2 had denied the suggestion that he did not state before the police that on the day of occurrence his deceased brother went to the house of accused Mazid. His brother was treated by the doctor but he did not recover. They had left their village after the incident and used to reside at another place after selling land. He did not see the incident but he suspect that accused persons killed his brother.

14. PW3 is Malengsha Begum, mother of the deceased. In her evidence PW3 had deposed that prior to incident they had land dispute with the accused persons. Her son Gajiur had mental illness. Since the accused persons are the paternal uncle of his son, so she requested them to provide treatment to her son. But they did not provide medical treatment to her son. One day before the incident accused Mazid called her son to his house. But her son

did not return. Later when accused Mazid asked her where her son was, she told him that he went to his house. Though she requested them to search for her son, but the accused scolded her instead of doing search. PW3 had deposed that after making search she found her son lying dead near the house of accused persons in thatch grass with injury on his head and blood was oozing out from the nose. The "Lungi" belongs to son of accused Mazid was found below the dead body. Abdul Mazid confessed before her. After the death of her son she left for another place out of fear of the accused. In cross-examination, PW3 had stated that when Mazid called her son to his house none accompanied him. She was residing in the same boundary with the accused persons at the time of occurrence. The house of Mazid was situated 100 meters away from her house. PW3 had denied the suggestion that she did not state before the police that accused Mazid called her son. Land dispute between them and accused was not settled during the life time of her husband. Same type of "Lungi" which was found on the neck of the dead body is available in the market. PW3 had denied the suggestion that they killed their own son, and thereafter, the village people did not allow them to stay in the village.

15. PW4 is Mazid Ali. In his evidence PW4 had deposed that before five/six years ago the occurrence took place. At the time of incident, he was sleeping in his residence at night. In the morning, he heard that Gajjur Rahman had died. Then PW4 went to the place of occurrence, where he saw the dead body of Gajjur Rahman. In cross-examination, PW4 had stated that he had no knowledge how Gajjur Rahman died and who killed him.
16. PW5 is Dr. Chidananda Thakuria. In his evidence PW5 had deposed that on 17.8.11, while he was working as Sr. M & HO at Udalguri Civil Hospital, he had performed post-mortem upon the dead body of Gajjur Rahman and on examination, he found the following:-

EXTRANAL APPEARANCE:-

A male dead body with black hair, black complex wearing Lungi, white half Ganji, three Tabis on neck.

CRANIUM AND SPINAL CANAL:-

All organs are normal.

THORAX:-

All organs are intact.

MUSCLES, BONES AND JOINTS

Injury- laceration on left elbow.

More detailed description of injury or disease:-

Abrasion on back of the left elbow, abrasion on right hand,, one piece of cloth is encircle around the neck with an knot in front of the neck causing strangulation mark is found after removal of the tie and the mark is not oblique and limelight around the neck which indicates homicide.

PW5 had deposed that in his opinion, death is due to asphyxia. Ext.2 is the post-mortem report and Ext.2(1) is the signature of PW5.

In cross-examination, PW5 had stated that at the time of post-mortem examination he found one cloth being wrapped on the neck tied with a knot. Except the injury mentioned he found no other injury in post-mortem examination. Every injury on the dead body has already been stated in his post-mortem examination.

17. PW6 is Musstt. Maziran Nessa. In her evidence PW6 had deposed that the occurrence took place in the year 2011. Prior to the incident her uncle Hanif Ali had land dispute with accused Mazid. On the day of occurrence in the afternoon, her brother Gajjur, who was suffering from mental illness, after taking his meal went to the house of accused Mazid Ali which was situated near their house. Her mother went in search of her brother Gajjur and found him playing at the house of Mazid with some children. Accused Mazid on seeing her mother told her that let her brother Gajjur play with the children and asked her to go back home. Till in the evening when her brother Gajjur did not return from the house of Mazid her mother again

went there and at that time it was drizzling. Her mother when did not find her brother Gajiur asked Mazid about his whereabouts and also asked Mazid to search him but Mazid replied that as he worked for the whole day and it was also raining at that time her son Gajiur would come by himself. Accused Mazid also asked her mother to return her home. On the next day in the morning one person informed PW6 over phone that the dead body of her brother Gajiur was found lying in the midst of "Kahuwa" [wild grass] in a field. On getting the information she alongwith village people proceeded to that place and saw the dead body of her brother lying on the ground with injury on his head, face and he was bleeding from nose. The neck of the deceased was tied with a cloth belonging to the son of accused Mazid. The place from where the dead body of her brother was recovered was at a distance of half kilometer from her house. Before her arrival at the place of occurrence many people already gathered there. Police also came and took away the dead body. She suspected that the accused persons had committed murder of her brother due to land dispute for which frequent quarrel took place between the deceased and the accused persons. In cross-examination, PW6 had stated that she reside with her husband at Pachim Padoghat. The incident took place at No.1 Jhargaon. Her father's house is at No.1 Jhargaon. At the time of occurrence she was at her husband's house. Her husband's house is at a distance of 2/3 KM away from the place of occurrence. As she was staying at her husband's house and not being the eye witness of the case, only after the incident she came home and her mother narrated about the incident. PW6 had denied the suggestion that she had not stated before the police U/S 161 Cr.P.C. that when she went to see the dead body of her brother lying under wild grass at that time she saw injury on the head and face of her brother and his neck was tied with a cloth. Prior to the incident her family members had land dispute with the accused. Since before her marriage she saw land dispute of the accused with her parent. She was married 15 years ago. PW6 had denied the suggestion that the neck of her deceased brother was not tied with one cloth belongings to the son of accused

Mazid. PW6 had denied the suggestion that accused persons had not committed murder of her brother Gajjur.

18. PW7 is Retd. S.I. Mansur Ali, Investigating Officer of this case. In his evidence PW7 had deposed that on 17-8-11, he was posted as IC at Ranipukhuri PP under Kalaigaon PS. On that day at about 8.30 AM one Sultan Waris came to Ranipukhuri police post and informed him verbally that on 16-8-11 at about 7.30 AM Gajibur Rahman was found missing from his house. On 17-08-11 he found the dead body of Gajibur Rahman lying inside a jungle and he suspected that Gajibur Rahman was murdered by some miscreants. On getting this information PW7 recorded GD entry No. 212 date 17-08-11 and proceeded to the place of occurrence with his staff. On the place of occurrence he saw the dead body was lying there on the ground and the wearing shirt was stained with blood. PW7 also found the deceased was wearing a lungi. He informed the executive magistrate to conduct inquest on the dead body. Accordingly inquest was held in his presence and local witnesses. PW7 prepared a site plane of the place of occurrence and recorded the statements of the available witnesses U/S 161 CrPC. The dead body was sent for post-mortem examination. On the same day one formal FIR was lodged by Md. Sultan Waris. On receipt of the FIR he forwarded the same to the OC Kalaigaon PS to register a case and accordingly Kalaigaon PS case No. 47/11 U/S 302 IPC registered and entrusted PW7 to investigate into it as he had already conducted preliminary investigation of the case on the basis of GD entry recorded by him. In the meantime he was transferred and as such he handed over the case diary to OC Kalaigaon PS for necessary action in this regard. Ext. 3 is the GD entry No. 212 dated 17/08/2011. Ext. 3(1) is the signature of PW7. Ext. 4 is the seizure list of lungi and blood stained shirt. Ext. 4(1) is the signature of PW7. Ext. 5 is the sketch map. Ext. 5(1) is the signature of PW7. In cross-examination, PW7 had stated that he had not seen the seized materials before the court today. He had not cited one Mazom Ali as one of the witness of the case though his house is shown near the place of

occurrence in the site plan. PW7 recorded the statement of the witnesses on the basis of the GD entry recorded by him.

19. PW8 is ASI Hiren Kr. Borah. In his evidence PW8 had deposed that on 10-4-14, he was posted as SI of Kalaigaon PS. On that day the OC of Kalaigaon PS handed over him the case diary of the Kalaigaon PS case No. 47/11 U/S 302/34 IPC to further investigate into it due to transfer of former investigating officer. After perusal of the case diary it was seen that the investigation of the case was almost completed by the former investigation officer of the case and as such with the approval of the Superintendent of Police Udalguri PW8 laid the charge-sheet against the accused persons Md. Hanif Ali and Mazid Ali U/S 302/34 IPC. Ext. 6 is the charge sheet Ext. 6(1) is the signature of PW8. Cross-examination of PW8 had been declined by the defence.
20. On careful scrutiny of evidence on record it appears that there is no eye witness of the incident. The prosecution case solely rest on circumstantial evidence. There are the following three circumstances on the strength of which the prosecution is trying to establish the guilt of the accused persons, first, previous day of the incident the deceased was called to the house of the accused persons and since then he was found missing and later on, his body was found in the midst of thatch grass near the house of the accused, secondly, a piece of cloth was found around the neck of the deceased which allegedly belong to the son of accused Abdul Mazid, thirdly, there is land dispute between the accused persons and the parents of the deceased.
21. Now the question is whether these three circumstances are proved by the prosecution by adducing cogent and reliable evidence and whether these circumstances irresistibly lead to the conclusion of the guilt of the accused persons in commission of murder of deceased Gajiur Rahman, who was suffering from mental ailment.

22. In this case, the mother of the deceased has been examined as PW3. According to PW3 they had land dispute with the accused persons. One day before the incident accused Mazid called the deceased to his house but thereafter he did not return back home. Later on, accused Mazid asked her where the deceased is on which she told him that he went to his house and she also made request to search for her son but the accused scolded her instead of making search. Finally on search she found the dead body of her son lying in the midst of thatch grass with injury on his head. PW2, the brother of the deceased deposed that previous day of the incident the deceased went to the house of the accused persons and next day he was found lying dead in the midst of thatch grass. PW2 has not corroborated the evidence of his mother that accused Mazid called the deceased to his house. Similarly PW1, the informant of the case has not adduced evidence substantiating the evidence of PW3 that before the incident the deceased went to the house of the accused Mazid on being called by the accused. According to him one day before the incident when the deceased went missing they made search for him and on the next day morning, the deceased was found lying dead with injury on his head in the midst of thatch grass which was situated at a distance of about two hundred meters from the house of the deceased.

23. The elder sister of the deceased has been examined as PW6. According to PW6, on the date of occurrence in the afternoon after taking his meal the deceased went to the house of the accused Mazid Ali and her mother also found him playing in the house of Mazid with some children when she went there in search of the deceased. PW6 had stated that accused Mazid insisted her mother to let the deceased play with the children and asked her to leave. In cross-examination, PW6 had revealed that at the time of incident she was in her matrimonial home and only after the incident she came home and then her mother narrated about the incident to her. But what has been transpired from the evidence of PW3, the mother of PW6, is

that she did not state in her evidence that she found the deceased playing in the house of the accused Mazid and that the accused Mazid insisted her to let the deceased play with the children and asked her to leave for home. Therefore, no weightage can be given to the deposition of PW6 as her mother has not corroborated the facts narrated by her. Moreover, the evidence of PW3 is also not clear and specific as to when her son went to the house of the accused and when she started searching for him. The contents of the FIR do not disclose that the deceased went missing after he went to the house of the accused Mazid on being called by the accused Mazid. It has been noticed that there is material improvement in the version of the PW3 inconsistent with the contents of the FIR and that has not even corroborated by other prosecution witnesses. Therefore it is unsafe to rely the uncorroborated statement of the PW3 that accused Mazid called her son to his home and thereafter he went missing.

24. In this case there is no doubt that death of deceased Gajjur Rahman is homicidal. As per medical evidence one piece of cloth is found encircled around his neck with a knot in front of the neck causing strangulation mark and the strangulation mark is not oblique and limelight around the neck indicating homicidal death. The piece of cloth found around the neck of deceased is measuring about one foot in length. According to PW2 accused Mazid had confessed that the said piece of cloth which has been described as 'Lungi' by PW2 belong to his son. In absence of any other evidence regarding guilt of the accused persons the mere fact that the cloth of his son had been used to strangle the deceased does not irresistibly lead to the conclusion that accused Mazid had committed murder of the deceased. As discussed above the prosecution has failed to establish by adducing consistent and cogent evidence that deceased was called to his house by accused Mazid Ali and since then deceased was found missing.

25. The prosecution has also tried to attribute the motive upon the accused persons to commit the murder of the deceased urging that there is a land

dispute between the accused persons and the parents of the deceased. In this regard, the PW6, the sister of the deceased deposed that she suspected that the accused persons had committed murder of her brother due to the land dispute for which frequent quarrel took place between the deceased and the accused persons. In this regard it has to be noted suspicion however grave cannot take the place of legal evidence.

26. In the decision reported in **AIR 1992 SC 669, Swinder Singh Vs State of Punjab** relied on by the learned defence counsel, the Hon'ble Supreme Court has observed that "although there may be grave suspicion against an accused person, still the prosecution is bound to establish facts from which the Court can reasonably arrive at a conclusion that the offence was committed by the accused. It may be recalled that this Court repeatedly observed that the suspicion however grave cannot take the place of legal proof."

27. Even if there is land dispute but unless and until prosecution succeeded to establish the circumstances fully that they are conclusive in nature and tendency excluding every possible hypothesis except the one to be proved, and a complete chain of evidence not to leave any reasonable ground for the conclusion consistent with the innocence of the accused, the accused cannot be held guilty.

28. In the decision reported in **AIR 1982 SC 1157, Gambhir Vs. State of Maharashtra**, the Hon'ble Supreme Court has observed as follows:

"It has already been pointed out that there is no direct evidence of eye witness in this case and the cause is based only on circumstantial evidence. The law regarding circumstantial evidence is well-settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests: (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established (2) those

circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

29. On cumulative assessment of the evidence on record it has been found that prosecution has failed to establish the circumstances appearing against the accused persons fully that exclude every possible hypothesis except the one to be proved. Moreover, the circumstances are not conclusive in nature and tendency which unerringly pointed towards the guilt of the accused.
30. In view of above discussion it appears that the prosecution has failed to prove the charges under Section 302/34 IPC against the accused persons beyond all reasonable doubt.
31. Situated thus the points for determination are decided in the negative and against the prosecution.

ORDER

32. In the result, the accused Hanif Ali and Mazid Ali are found not guilty under Section 302/34 IPC and acquitted of charge under Section 302/34 IPC and set with liberty forthwith.
33. Bail bond executed by the accused persons and the sureties shall remain in force for another six months under the purview of provision under section 437-A Cr.P.C.

34. Send back the original case record of GR Case No. 150/2017 to the learned Chief Judicial Magistrate, Udalguri, alongwith a copy of the Judgment, forthwith.

35. Judgment is signed, delivered and pronounced in the open court today the 29th day of August, 2019.

Dictated and Corrected

(N.Talukdar)
Addl. Sessions Judge
Udalguri

(N.Talukdar)
Addl. Sessions Judge
Udalguri

IN THE COURT OF ADDL. SESSIONS JUDGE:.....UDALGURI.
SESSIONS CASE NO. 27/2017
APPENDIX

(A) Prosecution Exhibits:

Ext.1: FIR.

Ext.2: Postmortem Report.

Ext.3: GD entry no. 212 dated 17-08-11.

Ext.4: Seizure list.

Ext.5: Sketch map.

Ext.6: Charge-sheet.

(B) Materials Exhibits : Nil.

(C) Defence Exhibits : Nil.

(D) Exhibits produced

by witnesses : Nil.

(E) Court Exhibits : Nil.

(F) Prosecution witnesses:

PW 1- Sultan UI Warisin.

PW2- Kalamuddin.

PW3- Malengsha Begum.

PW4- Mazid Ali.

PW5- Dr. Chidananda Thakuria.

PW6- Musstt. Maziran Nessa.

PW7- S.I. Mansur Ali.

PW8- ASI Hiren Kr. Borah.

(G) Defence witnesses : Nil.

(H) Court witnesses : Nil.

(N.Talukdar)
Addl. Sessions Judge.
Udalguri