

5 SCOB [2015] HCD 84**High Court Division
(Criminal Appellate Jurisdiction)**Mr. Md. Ishrafil Hossain, Advocate
...For the Appellant.

Criminal Appeal No. 3358 of 2009.

Mrs. Rona Naharin, D.A.G with
Mrs. Monju Nazneen, A.A.G**Rahima Begum**

.....accused-appellant.

... For the Respondent.

Versus

Heard on 22.02.2015, 23.02.2015,
24.02.2015 and Judgment on: 04.03.2015.**The State**

.....Respondent.

Present**Mr. Justice Syed A.B. Mahmudul Huq****And****Mr. Justice Md. Farid Ahmed Shibli****Motive:**

There might be, as it appears, some animosity or hostility between the accused-appellant's husband Ali Haider and the deceased's father Abdur Rashid. But there was no such enmity between the accused-appellant and deceased's father or mother. In view of the facts above and evidence given by the prosecution, it is beyond our comprehension as to how and on the basis of which the learned Session Judge became convinced with and relied upon the prosecution case of killing Rabbi by the accused-appellant. Since there was no such reason for the accused-appellant to have any motive of killing an innocent minor boy of only 3 ½ years old, it seems to us hardly possible to believe in the alleged charge of causing death of Rabbi by the accused-appellant.

... (Para 26)

Penal Code, 1860**Section 201, 302/34:****And****Code of Criminal Procedure, 1898****Section 236 and 237:**

An accused appellant charged under section 302/34 could be found guilty under section 201 of the Penal Code on consideration of the evidence on record and in that case such conviction need be upheld by referring to sections 236 and 237 of the Code of Criminal Procedure.

... (Para 32)

Judgment**Md. Farid Ahmed Shibli, J.**

1. This Criminal appeal is directed against the Judgment and order of conviction dated 19.04.2009 passed by the learned Sessions Judge of Noakhali in Sessions Case No. 127 of 2006 arising out of Begumgonj P.S Case No. 46 dated 29.12.2005 corresponding to G.R Case No. 521 of 2005. Passing the impugned judgment and order the learned Sessions Judge found the accused Rahima Begum guilty under section 302 of the penal Code and sentenced her to

suffer life imprisonment and a fine of Tk. 10,000/= in default to suffer rigorous imprisonment for 1 (one) year more.

2. Case of the prosecution, in short, is as follows:-

On 29.12.2005, early in the morning, the informant Abdur Rhaman (P.W.-1) went out for work leaving his wife Rawshan Akter (P.W.-6) and son Abdur Rhaman @ Rabbi aged around 3½ years in his house at village Amanatpur under Police Station Begumgonj of Noakhali. In the morning P.W. 6 went to the Ghat of a nearby pond to clean her house-hold utensils leaving her son i.e. Rabbi in front of the house. After her return, P.W.-6 did not find her son Rabbi and at that time the accused Rahima Begum was saying that Rabbi had followed an Ice-cream Seller. PW-6 along with others then started search for Rabbi at and around the surrounding places. At last Shah Kamal (P.W.-7) accompanied by three others entered into the house of the accused Rahima Begum. At that time Rahima Begum was found sitting on a bedstead inside her house and the body of deceased Rabbi was found lying there covered with a Katha. Shah Kamal (P.W.-7) unveiled the body of Rabbi in a motionless condition pulling the Katha. P.W.-6 and other witnesses at that time noticed some injuries on neck, chest and beneath navel of the deceased Rabbi. The accused Rahima Begum was at that time feeding her suckling baby Zihad. Some Siddique Ullah taking Rabbi in his lap ran up to the Chamber of a doctor named Ahsanullah, who declared Abdur Rahman @ Rabbi as dead.

3. Subsequently the body of Rabbi was taken back to his house, where S.I. Kamruzzaman held inquest on the body of deceased and prepared the report dated 29.12.2009 (Ext.2) and seized the katha (Material Ext.-I) preparing a seizer list (Ext. 3) to that effect.

4. Md. Hafiz Ullah (P.W.-2) identified his signature in the inquest report as Ext. 2/1 and in the seizer list as "Ext. 3/1". Pursuant to the instruction of S.I Kamruzzaman, Constable Kazi Shajahan (PW-3) carried the body of deceased Rabbi to the Morgue of Noakhali Sadar Hospital, where Dr. A.B.M Abdul Motaleb (P.W.-4) held autopsy and prepared the report (Ext. 4)

5. Being assigned with the responsibility, S.I. Kamruzzaman conducted the investigation visiting the place of occurrence, recording statement of witnesses under section 161 of the Code of Criminal Procedure and procuring available documents and incriminating materials in support of the accusation against the accused Rahima Begum. S.I Kamruzzaman concluded the process of investigation submitting the charge-sheet bearing No. 147 dated 09.05.2006 against the accused Rahima Begum wife of Ali Haider for the offences under section 302/201 of the Penal Code.

6. On receipt of the record from the court of learned Magistrate, the learned Session Judge took cognizance of offences fixing a date for framing of charge. On framing a charge under section 302 of the Penal Code, the same was read over to the accused Rahima Begum, who pleaded not guilty and claimed to be tried as per law.

7. In order to prove the charge framed, the prosecution has examined 9 witnesses and produced available incriminating materials and documents including Post Mortem Report, Seizer-list, Inquest Report, etc.

8. On conclusion of the prosecution witnesses, the learned Session Judge examined the accused Rahima Begum under section 342 of the Code of Criminal Procedure. During such

examination, the accused-appellant pleaded not guilty. She mentioned that she had nothing to say any more and would not adduce any witness on her defence.

9. On analysis of the evidence, given by the prosecution and materials on record, the learned Session Judge was convinced with the accusation of killing the victim Rabbi and found the accused-appellant Rahima Begum guilty under section 302 of the Penal Code and awarded a sentence of life imprisonment with fine of taka 10,000/- in default to suffer R.I for 1 (one) year more.

10. Being aggrieved by and dissatisfied with the said judgment and order of conviction the accused-appellant Rahima Begum has filed the instant petition of appeal contending inter-alia that the prosecution has miserably failed to prove its case beyond all reasonable doubt and as such the order of conviction passed by the trial Court is not legal and not based on the evidence on record and that is why the decision of the Trial Court recording the order of conviction under section 302 of the Penal Code against the accused-appellant deserves this Court interference.

11. In course of hearing of the appeal, learned Advocate Md. Israfil Hossain appearing on behalf of the accused-appellant contends that the witnesses adduced by the prosecution and statements made by them are contradictory and just by building the castles on the basis of some concocted facts, the prosecution has made some attempts to establish the charge under section 302 of the Penal Code levelled against the accused-appellant. According to the learned advocate for accused-appellant, being a mother of another child i.e. Zihad, it was not at all possible for the accused Rahima Begum to cause the death of an innocent minor boy Rabbi and the prosecution story cannot be relied upon on the basis of evidence given by the prosecution witnesses, who did not even see the alleged occurrence of killing Rabbi.

12. In reply, learned Deputy Attorney General Mrs. Rona Naharin retorts stating that the very fact of recovery of the body of deceased Abdur Rahman @ Rabbi from the house of accused-appellant Rahima Begum and her failure to give any satisfactory explanation on that account has made the task for prosecution easy to vindicate the alleged charge of causing the death of deceased Rabbi by the accused-appellant. It is evident that the husband of the accused-appellant Ali Haider was at that time out of his house for work and that is why the Investigating Officer did not find his involvement with the alleged occurrence. So, he was not implicated in the case.

13. At the very outset, it would be incumbent for us to ascertain as to who caused the death of deceased Rabbi and whether the accused-appellant had any intention or participation in causing his death or not.

14. In this case, P.W. 1 Abdur Rashid is the informant and the father of deceased Rabbi. P.W. 2 Md. Hafizullah is a witness to the Inquest Report and the Seizure-list. P.W. 3 Constable Kazi Shahajahan carried the body of deceased Rabbi to the Morgue for autopsy. P.W. 4 Dr. A.B.M. Abdul Motaleb performed autopsy on the body of the deceased, P.W. 5 Mahmud Ullah is a neighbour having his house in the southern side of the accused-appellant's dwelling hut i.e. the P.O. After hearing a hue and cry, P.W. 5 rushed towards the place of occurrence at around 10.30 to 10.45 a.m. and participated in the drive for searching Rabbi along with others. P.W. 6 Rawshan Akhter is the mother of deceased Rabbi, P.W. 7 Shah Kamal is a cousin of both Abdur Rashid (P.W. 1) and Ali Haider (i.e the husband of the accused-appellant). P.W. 7, in true sense, is a common relative of Ali Haider and Abdur

Rashid (i.e. P.W. 1). P.W. 7 has deposed that he found the accused Rahima Begum feeding her suckling baby sitting on a bedstead in her house and at that time the body of Rabbi was found inside the house of the accused-appellant lying in a motionless condition and covered by a katha. P.W. 7 has claimed that along with Abdur Rashid (P.W. 1) he went to Dr. Ahsanullah who declared Rabbi as dead. P.W. 8 Abul Khair, an owner of a Tea-stall and Battle-nut Shop, has stated that he heard the occurrence through a Rickshaw puller. P.W. 8 has deposed that on the date of occurrence at 10.30 a.m. he reached the house of Abdur Rashid and at around 12.00 to 12.30 p.m. found the body of deceased Abdur Rahman there.

15. Investigating Officer S.I. Kamruzzaman was not adduced by the prosecution because of his stay in a foreign country as a member of the United Nation's Peace Keeping Team. Inspector A.K.M. Mohiuddin (P.W.-9), who is a departmental colleague of S.I. Kamruzzaman and acquainted with the signatures of the letter, got the Inquest Report, Seizure-list, Sketch-Map, Index, etc. exhibited identifying signatures of S.I. Kamruzzaman.

16. Now, let us analyze the testimony of the witnesses and sift the evidences on record to see whether the prosecution materials are sufficient for believing in the alleged charge under section 302 of the Penal Code against the accused-appellant Rahima Begum or not.

17. Admittedly the deceased's father (P.W. 1) or mother Rawshan Akter (P.W. 6) did not see the alleged occurrence of killing of Rabbi by the accused-appellant or anybody else. The prosecution, as it is noted, could not produce any eye-witness in that respect. P.W. 1 Abdur Rashid has stated the followings in clear terms:-

“29.12.2005 ঊঔ ZwiঔL NUbvi ঊ b mKvj tejv Avmg ewo nBtZ Kv†R Puj qv hvB| `gʒy 12:30 NuUKvq ewo†Z Awmqv i'ub th, Avgvi tQ†j †K cvl qv hvBtZ†Q bv| miv†x Kvgyj , gvingyʒ- in, nıwdR Dj - vnt` i ubKU nBtZ i'ub th, Avgvi gZ tQ†j i jvk GKB ewo†Z Aew†Z Avgvi eo fıvB†qi N†i cvl qv ‡Mqv†Q| Avgvi tQ†j i jvk ‡Kfv†e eo fıvB†qi N†i ‡Mqv†Q evj †Z cvıe bv| ‡Kfv†e Avgvi tQ†j gvi v ‡Mqv†Q, A_ev †Kn Zıv†K Lly K†i †Q ‡Kbv evj †Z cvıe bv|”

18. The above testimony of P.W. 1 has mark-ably emaciated the credibility of the prosecution story to a large extent. At one stage of his examination P.W. 1 has further stated that he could not say by whom or how his son Rabbi was killed.

19. During his cross examination, P.W. 1 has also stated:-

“Avmg Avmıgxı ‡ei ††x †Kvb ‡Pvi PıB bv|”

20. Deceased Rabbi's mother P.W. 6 Rawshan Akter has testified that on the date of occurrence after her return from a nearby pond her son Rabbi, who had been in front of her dwelling hut, was not found. P.W. 2 Md. Hafizullah, P.W. 5 Mahmud Ullah and P.W. 7 Shah Kamal during their respective examinations also failed to narrate as to how or by whom the deceased Rabbi was killed. All those witnesses, as claimed, rushed to the homestead of the informant P.W. 1 and on hearing the alleged disappearance of Rabbi participated in the drive for searching the victim Rabbi.

21. Being requested by the learned Advocate Mr. Md. Israfil Hossain we have gone through the testimony of P.W. 7 Shah Kamal, who is a common relative of both informant and the accused-appellant. P.W. 7 has stated that along with others he had made the search for Abdur Rahman @ Rabbi but did not find him anywhere and at one stage with others he

entered into the dwelling hut of the accused Rahima Begum, who was feeding her baby sitting on a bedstead and at that time the body of Rabbi was found in motionless condition and lying there covered with a Katha.

22. The Post Mortem Report (Ext. 4) has been exhibited by Dr. A.B.M. Abdul Motaleb (P.W. 4). The said report provides us that the death of deceased Rabbi was due to asphyxia which was due to throttling and head injury and that was anti-mortem and homicidal in nature. During the autopsy, P.W. 4 found the clotted blood in the injury which remained on washing and the external organs found congested. The said report of the autopsy has made it clear like anything that the death of deceased Rabbi was caused by squeezing his throat and at one stage due to failure of breathing he was done to death.

23. Crux of the problem to be resolved is whether the accused Rahima Begum throttled the victim Rabbi by his neck and killed him or not. No such evidence to that effect was led by the prosecution. The prosecution has not adduced even a single witness, who has last seen Rabbi with accused Rahima Begum before his disappearance. Even the deceased Rabbi's mother P.W. 6 has not made any such claim. Rather P.W. 6 during her deposition has stated that she went to the pond to clean some utensils leaving Rabbi with 2 apples in his hand in front of her (P.W-6) house. Had there been any participation by the accused-appellant Rahima Begum in the alleged offence of killing the victim Rabbi, it would then not be possible for her i.e. the accused to remain engaged in feeding her suckling baby. Again had the accused been involved in killing, she would then supposed to try to hide herself or flee away. Prosecution witnesses like P.W. 2, 5 or 7 did not notice any sign of fatigue or abnormality on the face of the accused Rahima Begum. In such a circumstance, how could we believe in the charge of killing Rabbi by her i.e. the accused Rahima Begum.

24. The entire prosecution story, as it appears, is dependent on some circumstantial facts and evidence. In such a crucial position, it was incumbent for the prosecution to see whether there was any motive or animosity of the accused with Rabbi's mother or father. The prosecution has failed to do anything in this regard.

25. On this point except P.W. 7 no other witness has made any statement. In his cross examination P.W-7 has said:-

“Avj x nıq`vi Avgvi Avcb †RV†Zı fıB| Zıvıvı fıB†`ı g†a`ıe†ıva Av†Q, Z†e Avgvi m†_ bıB|ŵ

26. There might be as it appears some animosity or hostility between the accused-appellant's husband Ali Haider and the deceased's father Abdur Rashid. But there was no such enmity between the accused-appellant and deceased's father or mother. In view of the facts above and evidence given by the prosecution, it is beyond our comprehension as to how and on the basis of which the learned Session Judge became convinced with and relied upon the prosecution case of killing Rabbi by the accused-appellant. Since there was no such reason for the accused-appellant to have any motive of killing an innocent minor boy of only 3 ½ years old, it seems to us hardly possible to believe in the alleged charge of causing death of Rabbi by the accused-appellant.

27. The learned Judge of the court below, so far we understand, was misconceived the evidence on record and misdirected himself by arriving at a decision of finding the accused-appellant guilty under section 302 of the Penal Code, which immensely deserves the interference of this Court of Appeal. So, we are inclined to hold that the impugned order of

conviction and sentence under section 302 of the Penal Code against the accused-appellant seriously suffers from material legal infirmity and liable to be set aside accordingly.

28. Informant Abdur Rashid (P.W. 1) has heard the fact of recovering the body of deceased Rabbi from the house of his elder brother Ali Haider (the husband of the accused Rahima Begum). P.W. 1 has claimed that he heard the said fact from Shah Kamal, Mahmud Ullah and Md. Hafizullah. Shah Kamal (P.W. 7) has testified in clear terms that after making an intensive search at and around the surrounding places including a pond, at one stage with other witnesses he entered into the house of the accused Rahima Begum, where the body of deceased Rabbi was found lying beneath a Katha and at that time Rahima Begum was feeding her suckling baby. P.W. 7 has claimed himself as a cousin of the accused's husband Ali Haider. Md. Hafizullah (P.W. 2) and Mahmud Ullah (P.W. 5) have deposed in explicit terms that the body of Rabbi was found inside the dwelling hut of the accused-appellant in a motionless condition and at that time she was feeding her baby sitting on a bedstead. P.Ws. 2, 5 & 7, as it appears, are the most vital witnesses for the prosecution. All of them have deposed that the body of Rabbi was recovered from the dwelling hut of the accused-appellant Rahima Begum and at that time she was inside the house feeding her baby. Wherefrom and how the body of the deceased Rabbi had been taken to the dwelling hut of the accused-appellant Rahima Begum and why it was kept inside her house concealed beneath a Katha:- in this respect the defence has failed to give any plausible account even during accused-appellant's examination under section 342 of the Code of Criminal Procedure.

29. On the above matter, learned D.A.G. has argued that if this Appellate Court be not convinced with the charge of an offence under section 302 of the Penal Code, on that plea the accused-appellant shall not be allowed to get rid of her liability of committing an offence by causing the disappearance of the body of deceased Rabbi, and there was an intention of screening the offender from punishment, which clearly comes under the garb of section 201 of the Penal Code.

30. Learned Advocate Mr. Md. Israfil Hossain has tried to controvert the above submission stating that learned Session Judge had already framed a charge against the accused-appellant only under section 302 excluding section 201 of the Penal Code and in such a situation it would not be proper for this Court of Appeal to record any decision finding the accused-appellant guilty under section 201 of the Penal Code.

31. We have given our anxious consideration to the submission advanced by the learned Advocate for defence and learned D.A.G. for the State and the facts and evidence on record. It is true that the principal offender responsible for the alleged offence of causing the death of the deceased Rabbi has not been detected by the prosecution and it has failed to adduce any ocular tangible evidence to that effect. But the fact remains is that the prosecution has succeeded in proving the fact of recovery of the body of deceased Rabbi, which was found inside the dwelling hut of the accused-appellant. At that time, the body of the deceased was found in a motionless condition and covered with a Katha. In course of holding the inquest, S.I. Md. Kamruzzaman has seized the Kath measuring 5' X 4' square cubits and got the same marked as "Material Ext. I." It becomes transparent to us that the accused-appellant by causing the disappearance of the body of deceased Rabbi has manoeuvred her ill intention of screening the actual offender from the legal punishment and thereby committed an offence punishable under section 201 of the Penal Code.

32. It is true that the learned Judge of the trial Court in framing the charge excluded the offence under section 201 of the Penal Code. In this context, we may refer to the decision reported in 1 B.C.R. 1981 (AD) at page 129 in the case of Kalu & another –Vs- The State, where their Lordships have observed that an accused appellant charged under section 302/34 could be found guilty under section 201 of the Penal Code on consideration of the evidence on record and in that case such conviction need be upheld by referring to sections 236 and 237 of the Code of Criminal Procedure.

33. Having regard to the facts and attending circumstances and the decision referred to above, we are inclined to hold that the learned Judge of the trial Court ought to find the accused-appellant guilty of an offence under section 201 in place of 302 of the Penal Code and the order of conviction and sentence passed under section 302 of the Penal Code are not maintainable in the eye of law.

34. By finding the accused-appellant guilty under section 302 of the Penal Code, as it appears, the learned Judge of the Trial Court has committed an error of fact and of law and thereby made the impugned order of conviction and sentence liable to be set aside. In case of a punishment of an offence punishable with death, the offender is liable to a sentence of imprisonment, which may be extended to 7 years and a fine as per section 201 of the Penal Code.

35. On perusal of the record, it is noted that the accused-appellant has been in jail since 13.04.2009 and her period of custody till to date will be around 5 years 8 months. Being an woman and mother of a minor boy named Zihad, the accused-appellant deserves a compassionate view of this Court of Appeal. Taking the above facts, and other extenuating circumstances into consideration, we are of the opinion that a sentence of Rigorous Imprisonment for 5 (five) years and a fine of Tk. 1,000/= in default to suffer simple imprisonment for 1(one) month will squarely meet the demand of justice.

36. In the result, the appeal is allowed in part with modification. The impugned order of conviction and sentence dated 19.04.2009 passed by the learned Sessions Judge, Noakhali in Sessions Case No. 127 of 2006 is hereby set aside in part. We find the accused-appellant Rahima Begum guilty of an offence under section 201 of the Penal Code and sentenced her to suffer rigorous imprisonment for 5(five) years and fine of Tk. 1,000/= in default to suffer simple imprisonment for 1(one) month.

37. The period of sentence already spent by her in jail will be deducted according to the provision of section 35A of the Code of Criminal Procedure.

38. Let copies of the order be transmitted to all concerned.

39. Send down the Lower Court's Records.