

*Studio Nilima: Collaborative Network for Research and Capacity Building*

**Report on Amicus Curiae/Legal Aid Counsel Interaction Program**

*Organised by Studio Nilima: Collaborative Network for Research and Capacity Building in collaboration with Assam State Legal Services Authority and Gauhati High Court Legal Services Committee*

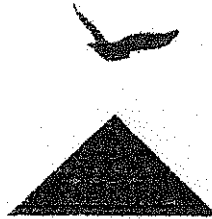
**18.05.2019**

**Resource Persons:**

1. Hon'ble Mr. Justice (Retd.) B.P. Katakey, Former Judge, Gauhati High Court
2. Hon'ble Mr. Justice (Retd.) C.R. Sharma, Former Judge, Gauhati High Court and Upa-Lokayukta, Assam
3. Mr. Nilay Dutta, President, Studio Nilima and Senior Advocate, Gauhati High Court
4. Mr. S.N. Sarma, Member Secretary, Assam State Legal Services Authority
5. Mr. Ziaul Kamar, Senior Advocate, Gauhati High Court
6. Mr. Angshuman Bora, Senior Advocate, Gauhati High Court

**Name of Advocates:**

1. Mr. Ujjal Choudhury
2. Ms. Krishnamoni Phukan
3. Ms. Bijita Sarma
4. Ms. Mridula Deori
5. Mr. Jasadhir Das
6. Mr. Uday Singh Borgohain
7. Ms. Dipanjali Deka Borpujari



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8. Ms. Sangeeta Khataniar
9. Mr. Bhaskar Baruah
10. Ms. Rita Das Mazumdar
11. Ms. Purnima Boruah Bordoloi
12. Mr. Jahidul Islam
13. Mr. Anup Ranjan Tahbieldar
14. Mr. Hareesh Gupta
15. Mr. Malabya Pathak
16. Ms. Runumi Dutta Bhuyan
17. Ms. Dulumoni Das
18. Mr. Mrinmoy Dutta

Mr. Nilay Dutta, President, Studio Nilima welcomed all the participants to the session and requested Mr. Justice (Retd.) B.P. Katakey to deliver the inaugural address. Mr. Justice (Retd.) Katakey commenced his address by stating that this initiative is a continuous process and the aim is that the good work that the Amicus panel of the Gauhati High Court Legal Services Committee (hereinafter referred to as "GHCLSC") has been doing can be augmented through this process of knowledge sharing.

It our duty to ensure that the framework for legal aid as enshrined in the Constitution of India and the Code of Criminal Procedure, 1973 does not remain a mere ideal or namesake. It is worthwhile to reflect upon the era of judges such as Justice K.N Lahiri who would always have a proactive and cooperative effort in dealing with legal aid criminal appeals many of which would be argued by fresh junior counsel. But there was an intervening period where the quality of representation in legal aid matters had deteriorated. But the new generation of legal aid counsel and Amicus have been putting in a lot of effort in providing effective legal representation in their respective briefs. However, there are issues in the lower courts where legal aid counsel do not take adequate efforts in performing examinations and cross-examinations. Therefore, our whole objective must be to ensure that free legal aid must also mean quality legal aid.

When a Paper Book is handed to an Amicus/legal aid counsel, there is the absence of any prior interaction with the client which is generally very helpful in understanding the context as well as the factual circumstances of a case. Secondly, the depositions in the Paper Book are generally translated versions many of which will contain contradictions which must be verified with the original record to prevent translation mistakes from creeping in to the record. It is therefore extremely important that all lawyers inspect the original records.

Mr. Justice (Retd.) Katakey concluded his address with these remarks and conveyed his best wishes to the Amicus/legal aid counsel present in continuing their services.

Mr. Dutta then began the session by informing that the scheme of the program will be different than the previous sessions noting that the panel contained a Prosecutor, a Defence counsel and also a Judge. So it would be a good idea to test the issues in the instant Paper Book with all three angles. He then invited the participants to initiate the discussion by giving a brief overview of the facts and the issues in the case.

This was followed by a discussion of the facts and the relevant documents like the postmortem report by one of the participants. This led to a discussion on the importance of understanding anatomical terms such as larynx, pharynx etc. which are generally of relevance in cases of this nature. It was noted in the instant case there were two ligature marks on the neck of the deceased due to hanging and it needed to be ascertained if two ligature marks would necessarily entail homicidal hanging.

The issue identified in the impugned judgment in the case was that it was completely based on circumstantial evidence. Mr. Ziaul Kamar stated that circumstantial evidence essentially involves a complete chain of events which prove the guilt of the accused. There is a catena of case law on the subject and reference may be particularly had to the decision of the Hon'ble Supreme Court in *Sharad Birdi Chand Sarda v. State of Maharashtra* 1984 SCC Cri 487 where principles on application of circumstantial evidence have been laid down. It must unerringly point to the guilt of the accused in the case. In the instant case, three-four circumstances have been used in this case. However, in the present case, defence witnesses have demolished their own case which serves to bring in an element of doubt. Ultimately, prosecution evidence has to stand on its own feet and not merely rely on defence witnesses.

With respect to the charge relating to dowry, it is important to keep in mind the Hon'ble Supreme Court had ruled initially that in all cases under S. 304B IPC, an alternative charge under S. 302 IPC must be imposed. However, this was later overruled. In this case, along with the charge under S. 304B IPC, there was also another charge under S. 302 IPC. But the crux of the issue finally lies in distinguishing whether the hanging was homicide or suicide. The fact that there is a contradiction in husband's (accused) version in his statement under S. 313 CrPC might also be interpreted in an adverse manner by the High Court.

Mr. Dutta referred to paragraph 60 at page 131 of the Paper Book which contains the circumstances based on which the Learned Court has found the accused guilty. For a proper defence, one of these circumstances have to be broken. According to the Ld. Court, these three circumstances make out the actual case. One must identify all the circumstances and then go into the respective debates. The circumstances in the instant case were then discussed threadbare. In this it is important to note discrepancies in the findings of the Ld. Court where for example, in the instant case charge S. 304B has been rejected but dowry has also figured as a motive. In going forward with the discussion, we must focus on how the prosecution would establish these circumstances and how the defence would break them.

Mr. Justice (Retd.) C.R. Sharma discussed the depositions of the witnesses in detail and provided an analysis of the points which support both the prosecution and the defence. However, he reiterated that presumption howsoever high cannot be used for conviction. Hypothesis should be consistently revealing that the accused and no other person was involved. This followed a disagreement on factual points relating to evidence of marital discord and what amounts to a presumption.

Mr. A.M Bora, Senior Advocate, pointed to how the first FIR in the present case had been registered by the accused himself. Noting that there are very strong circumstances against the accused in the present case, how will the second FIR filed by the brother of the deceased be treated? Will it be treated merely as further statement of the PW1 under S. 161 CrPC? It cannot be an FIR if we have considered the first FIR as the one outlining the offence. The facts of the defence must always coexist. From facts of the case, was it corroborated that if deceased was

suffering from Diarrhoea, did the accused take her to the doctor? Was she given any medicine, etc.

There exists presumption of fact and law. It is important to remove presumption of law and to show that sections 104 & 106 of The Indian Evidence Act, 1872 are not applicable. Thereafter proceed towards factual presumption. The charges which have been labeled also need to be looked into because that helps in framing the defence.

A detailed discussion was held around the FIR of the accused as well as that of the deceased's brother. He pointed out that an FIR must satisfy the requirements of S. 154 CrPC. So whether the FIR lodged met these requirements and whether it is hit by S. 162 CrPC have to be confirmed. In course of the discussion, it was also stated that conduct of the accused in light of S.8 of the Indian Evidence Act, 1872 needs to be meticulously observed. Reference was made to a judgment of Hon'ble Justice Ranjan Gogoi (*Tapas Shil v. State of Tripura* as reported in 2006 CriLJ 3984) on pre and post occurrence conduct.

Further he pointed out that to fulfill the requirements of charge under S. 304 B IPC., it is vital to understand the meaning of 'dowry' under the Dowry Prohibition Act, 1961. Also, deceased died within 7 years of marriage. In such cases, 'presumption' is taken as 'shall' as stated under section 114 of the Indian Evidence Act, 1872 and is a legal presumption as well as a rebuttable presumption. Mention was also made on various ways of rebutting a legal presumption.

Mr. Dutta emphasised to the panel of speakers to frame the legal propositions and principles underlying the points of discussion which they think the Amici Curiaes/legal aid counsel need to know. Moving back to the facts of the case in hand, he asked if the report filed by the accused is an FIR? Did the information state a cognizable offence? Did the F.I.R. under S. 154 CrPC get converted to an FIR. under S. 174 CrPC also known as 'Zero F.I.R. or NOC or UD case (information which does not disclose a cognizable offence but discloses death due to suicide is registered under S. 174 CrPC). Now for preparing the defence, respective Amicus Curiae has to look into the entire process, for example, the discrepancy in the way the post mortem was examined. Mr. Justice (Retd.) C.R. Sharma pointed out that to meet the requirements of section 304B, soon before the incident, instance of torture/harassment should be shown. In the instant

case, such facts were not brought before the notice of the Trial Court. He further apprised the group that burden of the Prosecution is heavier than that of the Defence.

Mr. Dutta mentioned that as a Defence lawyer, one has to look and study at the meanings of throttling (homicidal in nature) and hanging. Throttling eliminates hanging. It has been defined in courts of law that throttling is by hands and never by a rope. Ligature marks can never be caused by throttling. Ligature mark here could not have been caused by throttling which in turn could not be with a rope. Amicus Curiae have to study what are the various types of hanging and also always look at the marks. In the instant case, if there was throttling, then there would have been marks of the hand; especially of the thumbs which were not present here. Ocular evidence as well as Inquest Report spoke about one mark. Law demands that the report must be verified by a District Magistrate which was not done here.

Therefore, the Post Mortem report which was the base of the S. 304B IPC charge becomes weak. It must be examined whether the seizures were done in accordance with law and were there any discrepancies. Discussion was held at length on what is the law when there is a difference between the Ocular evidence and medical evidence?

In *Mahavir Singh v. State of Madhya Pradesh* as reported in 2016 10 SCC 220, it was held at para 22:

*"The position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallized to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved."*

Mr. Dutta reiterated that the discussion is not to accord conviction or acquittal to the accused but the main purpose is to guide the Amici Curiae to know how the case should be prepared. Mr. A.M Bora mentioned that the case needs to be prepared independently so as to not be prejudiced by Trial Court findings or the errors committed therein. In first appeal, the Court looks into all aspects. Justice (Retd.) C.R. Sharma stated it should be vetted whether homicidal act was carried out by the husband. Medical report is also vital in the instant case and it needs to

be ascertained whether it was throttling or hanging. If none apply, then guilt of accused cannot be proved beyond reasonable doubt. Mr. A.M Bora suggested to check some vitalities like - whether ingredients for self hanging were seized or not, can the presence of the ingredient be justified by the defence.

Section 33 of Indian Evidence Act was also discussed and learned Senior Counsel expressed their respective views. In case of non-appearance of witness subsequently, if proved in court of law to be at the behest of the accused or due to restraint caused by the accused, benefit under this section cannot be extended. Expunged witness was also discussed.

During the course of the discussion it was also stated that Opinion has to be supported by reasons. Mere exhibit of a document does not prove its contents. References were made to S. 59, 61 and 64 of the Indian Evidence Act. Thereafter the line of discussion was again drawn back to what is the difference between throttling, hanging and strangulation. Mr. Dutta mentioned two authorities on medical jurisprudence, viz., Modi's Medical Jurisprudence and Toxicology and P.B. Mukherjee's book on medical jurisprudence which are good reference sources for providing effective legal representation in cases involving forensic and medical issues and may be helpful to the Amicus/legal aid counsel in their respective briefs.

The meeting concluded with a resolution that such continued efforts in the form of knowledge sharing sessions with resource persons and experts would be continued to augment the quality of legal services being provided through the Legal Services framework as envisaged by the Constitution of India.

At the end, Mr. S.N. Sharma, Secretary, Assam State Legal Services Authority, stated that he would provide copies of Witness Protection Scheme, 2018 to the Amicus Curiae.