THE HIGH COURT OF TRIPURA
AGARTALA

CRL. A(J) 38 OF 2017

Sri Bikash Munda,
son of Sri Gandra Munda of
Lankonda, P.S. Monuharpur
District Singbhan, Jharkhand.

....Convict-appellant

- Vs –

The State of Tripura

.... **Respondent**

BEFORE
HON'BLE MR. JUSTICE S.TALAPATRA
HON'BLE MR.JUSTICE ARINDAM LODH

For the appellant(s) : Mr. A. Acharjee, Advocate.

For the State-respondent : Mr. S. Ghosh, Addl. P.P.

Date of hearing and
delivery of Judgment
& Order. : **29.11.2019.**

Whether fit for reporting : **Yes**

JUDGMENT & ORDER(ORAL)

Heard Mr. A. Acharjee, learned counsel appearing for the appellant as well as Mr. S. Ghosh, learned Addl. P.P. appearing for the State.

2. A pregnant lady who was foetus of fourteen weeks had been alleged to have been killed by the appellant, her husband, in the night precisely between the night of 31.10.2008 and the morning of 01.11.2008. On the basis of a complaint filed by the Manager of the brick kiln namely Sunil Das [P.W.1] revealing that on 31.10.2008 when all other labourers of the brick kiln reported to the duty, one Sukhmati Munda, the wife of the appellant did not

report for the reason as disclosed later, that the appellant quarreled with his wife in the early part of the day. In the latter part of the day, none of them did report to the work. On the following morning also, i.e. on 01.11.2008, at about 8:00 am neither of them reported to the duty. As the Manager of the brick kiln, he went to their shanty to take information what had happened to them. The informant met the appellant when the appellant had informed him that he slept with his wife 'at night' but when he woke up from the sleep he found his wife was dead. Immediately, the informant entered into the shanty and found Sukhmati with bleeding injuries and her face was swollen. He asked the other labourers but they could not enlighten him on the episode. But, subsequently, he came to know that there was huge quarrel between the husband and the wife over the issue of not attending the work last day. When everybody was busy in the work, the appellant hit his wife by a piece of brick and killed her. On the basis of the said complaint, filed on 01.11.2008 the police registered the case being BRG P.S. case No.58/08, under Section 302 of the IPC. The due investigation was complete and the final report was submitted, the police papers were committed to the Court of the Sessions Judge, South Tripura, Udaipur as he then was.

Having taken cognizance, a charge was framed by the Sessions Judge against the appellant under Section 302 of the IPC for committing murder of his wife. The appellant pleaded innocence and claimed to be tried.

3. In order to substantiate the charge, the prosecution adduced 7(seven) witnesses including the informant (PW1) and the Postmortem Doctor (PW4). That apart, 5(five) documentary evidence including the postmortem examination report (Exbt.4) were introduced.

4. After recording the prosecution evidence, the appellant was examined under Section 313 of the CrPC and he dined all the incriminating evidence by stating that he had been falsely implicated. Moreover, he denied to lead any evidence in his defence. Thereafter, by the judgment dated 24.09.2009 delivered in ST 31(ST/S/A)/2009 the finding of conviction was returned convicting the appellant under Section 302 of the IPC for causing death of his wife.

5. The trial judge for returning the said finding of conviction has observed *inter alia* as under:

> *"Since I hold that circumstance namely on the night of 31.10.2008 accused slept with deceased Sukhmati inside the room and in the morning of 01.11.2008 at around 8 a.m. PW-1 & PW-2 saw that Sukhmati was lying dead with injury on her head and accused seen with the deceased till arrival of police, has been established, it was incumbent on the accused, as mandated by Section 106 of the Indian Evidence Act to explain how the deceased was killed. But the accused failed to give any explanation as to how the deceased was killed. Thus in the absence of any explanation given by the husband accused, and when husband and wife alone are in the house and the wife is found dead, presumption under Section 106 of the Evidence Act could be drawn that the husband accused is responsible for the death of his wife and I answer this point accordingly."*

6. Pursuant to the said conviction, the appellant has been sentenced to suffer rigorous imprisonment for life with and to pay

fine of Rs.5000/- with default stipulation for committing offence under Section 302 of the IPC.

7. Mr. A. Acharjee, learned counsel appearing for the appellant has submitted that the entire prosecution case is structured on the statements of PWs 1, 2 and PW 4. According to Mr. Acharjee, PW 1 has claimed that the appellant has made a statement to him that on the previous night the appellant and his wife were sleeping inside the room and in the morning he found his wife dead. That apart, PW 1 has claimed that on entering the room he saw the wife of the appellant was lying in a pool of blood with injury. He has also stated that in his presence the police seized one brick from inside the shanty. He identified the seizure list [Exbt.P/3] and the material objects [Exbt.MO 1 series]. He was also witness to the inquest procedure and accordingly, in acknowledgement, he signed over the inquest report [Exbt. P/2].

8. Mr. Acharjee, learned counsel has further submitted that the PW 2 is a mere hearsay witness of seizure and that has not been controverted by the defence. That apart, the another witness who has been relied by the prosecution is PW 4, the Postmortem Doctor who has stated that he found throttling marks around the neck of the deceased and *petechial hemorrhage* over her brain and spinal cord. According to him, the cause of death was due to hemorrhage from the head injury. On examination, he found one dead foetus of 14 weeks in the uterus. Postmortem report [Exbt.P/4], according to Mr. Acharjee, does not hold whether the death was homicidal or accidental in nature. Therefore, in respect

of the death, there cannot be any conclusive inference. Mr. Acharjee to nourish his submission in this respect has relied on a decision of Madhya Pradesh High Court in ***Kalu Vrs. State of M.P.,*** reported in ***2005 CRI.L.J.4777*** wherein, it has been observed that the Doctor in his statement should specifically state in a case of injury leading to death that whether the injuries were antemortem and/or postmortem and whether the death was homicidal, accidental or suicidal. Generally, for inadequacy of opinion, sometimes a medical expert fails to record the specific observations. In such circumstances, it is the duty of the prosecution to establish the nature of the death. Even the trial Court should be more vigilant and try to unveil the truth by exercise of the power as provided under Section 165 of the Evidence Act.

9. Mr. Acharjee, learned counsel has submitted that the prosecution has totally failed to establish a case even by the circumstantial evidence that none but the appellant has committed the murder inasmuch as none other than the appellant was present inside the shanty when the offence was committed. Unless that part is established, the accused cannot be saddled with the liability to disclose the special knowledge if he had any. By taking this plea, the huge burden of proving the guilt of the accused, the appellant herein, cannot be diluted and the onus cannot be shifted on the accused to disclose the circumstances to prove how the death had occurred.

10. A celebrated decision of the Apex Court has been relied on for this purpose. In ***Shambhu Nath Mehra Vrs. State of Ajmer***, reported in ***AIR 1956 SC 404***, the Apex Court has laid down the circumstances in which the section 106 of the Evidence Act can be invoked and in what manner. The absence of explanation can be used against the accused person. For the purpose of reference, the following passages are reproduced from ***Shambhu Nath Mehra (supra)*****:**

> *"(11) This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience.*
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> *The word "especially" stresses that it means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not.*
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> *It is evident that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. The King,1936 PC 169 (AIR V 23)(A) and Seneviratne V. R. 1936-3 ALL ER 36 AT P.49 (B).*
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> *(12)Illustration (b) to section 106 has obvious reference to a very special type of case, namely to offences under sections 112 and 113, Indian Railways Act for travelling or attempting to travel without a pass or ticket or with an insufficient pass, etc.*
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> *Now if a passenger is seen in a railway carriage, or at the ticket barrier, and is unable to produce a ticket or explain his presence, it would obviously be impossible in most cases for the railway to prove or even with due*

diligence to find out, where he came from and where he is going and whether or not be purchased a ticket.

On the other band, it would be comparatively simple for the passenger either to produce his pass or ticket or, in the case or loss or of some other valid explanation, to set it out; and so far as proof is concerned, it would be easier for him to prove the substance of his explanation than for the State to establish its falsity.

(13) We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused.

This is a section which must be considered in a common sense way; and the balance of convenience and the disproportion of labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that save in a very exceptional class of case, the burden is on the prosecution and never shifts.

(14)Now what is the position here. These journeys were performed on 8-9-1948 and 15-9-1948. The prosecution was launched on 19-4-1950 and the appellant was called upon to answer the charge on 9-3-1951; and now that the case has been remanded we are in the year 1956. The appellant, very naturally, said on 27-4-1951, two and a half years after the alleged offences:

"It is humanly impossible to give accurate explanations for the journeys in question after such a lapse of time".

(15) And what of the prosecution? They have their registers and books, both of the railway and of the department in which the appellant works. They are in a position to know and prove his official movements on the relevant dates. They are in a position to show that no vouchers or receipts were issued for a second class journey by the guard or conductor of the trains on those days.

This information was as much within their "especial" knowledge as in that of the appellant; indeed it is difficult to see how with all the relevant books and other material in the possession of the authorities, these facts can be said to be within the "especial" knowledge of the appellant after such a lapse of time however much it may

once have been there. It would, we feel, be wrong to allow these proceedings to continue any longer. The appellant has been put upon his trial, the prosecution has had full and ample opportunity to prove its case and it can certainly not complain of want of time to search for and prepare its material.

No conviction could validly rest on the material so far produced and it would savour of harassment to allow the continuance of such a trial without the slightest indication that there is additional evidence available which could not have been discovered and produced with the exercise of diligence at the earlier stages."

11. Appearing for the State, Mr. S. Ghosh, learned Addl. P.P. has stated that by the circumstantial evidence, the charge has been proved. He has placed emphasis on the evidence of the PWs 1 & 2. The circumstances as relied by the prosecution are that after the appellant and his wife left their work, they had passed night in the said room and they did not meet with anyone else. The appellant and his wife were in the same room. In the morning, the dead body of Sukhmati was found by the appellant, but he did not inform anyone neither he disclosed how the death occurred. When PW 1 came to take their information then the appellant informed that he woke up in the morning, he found his wife dead. PW-1 entered in the room and found Sukhmati lying in a pool of blood and she was dead. Her face was swollen. According to Mr. Ghosh, this part of the evidence of entering into the room and finding the dead body of Sukhmati lying in a pool of blood is not even contested in the cross-examination. That apart, in presence of PW 1 the police seized one brick and PW 2 has stated that the brick was blood-stained and lying closer to the bedstead. Any labourer from the nearby shanties could state anything.

Mr. Ghosh, learned counsel has further submitted that from the evidence of PW 4, the postmortem doctor, it is clear that first Sukhmati was throttled to death and to confirm her death the brick was used to hit her. That is why nobody could know what happened inside the room. PWs 1 and 2 have also stated that the inquest was carried out in their presence and they signed over the inquest report. In the inquest report [Exbt.P/2], it has been categorically stated that on the head of the deceased, there were bleeding injuries. There are other material descriptions in the inquest report dated 01.11.2008. The description are in tune with the description of the injury in the postmortem examination report, as PW 4 has observed that on the *fronto temporal region* one injury measuring 5" X 3" in the *scalp and depth* was found. In his opinion the 'death' is due to head injury. PW 4 has admitted in his cross examination that he did not mention the age of the injury or whether the injury over the dead body is homicidal or suicidal. He has stated that after examining the dead body of Sukhmati, he prepared the postmortem examination report [Exbt.P/4]. Therefore, there cannot be any ambiguity in respect of the cause of death. It is apparent on the face of the opinion of PW 4 that death is homicidal one. According to Mr. Ghosh, the circumstances as laid by the prosecution are of such nature to form a complete chain to indicate the guilt of the appellant in exclusion of the hypothesis of the evidence on innocence. The appellant had the opportunity being the person present in the place and time of occurrence to explain, for purpose of exculpating him from the charge, how death had occurred but he has not taken such step. According to Mr. Ghosh, learned Addl. P.P. that for not revealing the knowledge with

the appellant, there can be no other hypothesis but the inference of the guilt of the appellant. Therefore, the judgment is not vitiated by any form of infirmity and as such no interference is called for.

12. For purpose of appreciating the submissions of the learned counsel for the parties, a short survey of the evidence is reviewed to be taken.

PW 1 Sri Sunil Das, who lodged the information to the police has stated that Sukhmati Munda and 12 other persons were brought from Ranchi to work in the brick kiln as the labourers. There was a temporary shed made for their shelter. The labourers of their brick kiln were to work in the brick kiln from 11 am to 4 pm. On 31.10.2008, PW-1 noticed that Bikash (appellant) and his wife did not turn up for work. On the following day, in the morning, he went in front of the room of Bikash and asked him, when he was found standing outside his shanty, why they did not report to work on the previous day. Bikash told him that- *"as there was a scuffling in between he and his wife on the previous day for which they did not go to the brick kiln to work. Bikash also told me that on the previous day he and his wife were sleeping inside the room and in the morning he found his wife dead."* On hearing the same, PW 1 entered inside the room out of suspicion and found the dead body of Sukhmati lying in a cot made of bamboo with bleeding injury on her head. After sometimes, the labourers of the brick kiln came there. He reported the matter to the police officer in writing [Exbt.P/1] narrating the entire incident. The police officer visited the brick kiln in the evening and removed the dead body of

Sukhmati to Amarpur Hospital. The police officer carried out the inquest, prepared the report and he had signed on that report [Exbt.P/2]. PW 1 has further stated that the police officer seized the wearing apparels of the deceased and one brick by preparing a seizure list. As the witness, he had signed on the seizure list [Exbt.P/3]. He identified the articles those were seized [Exbt.MO 1 series].

13. In the cross-examination carried out by the defence, he did not fumble at all and stood by what he had stated in the examination-in-chief. He has denied all the suggestions made in the statements of his examination-in-chief.

14. PW 2 is the owner of the brick kiln namely Subhash Saha. He has also corroborated that the victim and her husband were brought from Ranchi to work in their brick kiln. He found the dead body of Sukhmati, wife of Bikash was lying inside the room with bleeding injury on her head. Having received the information, he had rushed to the place of occurrence. He has admitted that he witness to the seizure of the material objects [Exbt. MO 1 series]. He had signed on the seizure list [Exbt.P/3]. He has stated that on query, from the other labourers he could learn that the appellant had killed his wife. This part of the evidence beyond any doubt is hit by Section 60 of the Evidence Act and cannot be admitted in the evidence. But other statements for obvious reasons were not confronted by the defence.

15. PW 4 is Dr. Siddhartha Deb whose evidence has been discussed already while recording the submission of Mr. A. Acharjee, learned counsel for the appellant.

16. PW 5, Adi Kumar Jamatia, PW 6 Rakesh Jamatia and PW 7 Ashit Ch. Das are the investigating officers in the phase one, the phase two and the final phase of the investigation. It appears from their statements how they conducted the investigation, prepared site map, recorded the statements of the witnesses, caused the seizure, sent the material objects seized by them for forensic examination. PW-7 has categorically stated that he had collected the report from the Forensic Science Laboratory. But to our surprise that report was not placed in the record. Now, the solitary question that comes for consideration is that whether the prosecution has proved the case beyond reasonable doubt or not.

17. As ancillary question that may emerge is that whether non production of the forensic science laboratory report is fatal for the prosecution case. According to our considered opinion, if without production of the Forensic Science Laboratory's report, the prosecution is able to prove their case that cannot be treated as a fatal however, the defence had the opportunity to call for that report from the prosecution to establish anything contrary to their basic contention in the case but the defence did not make such endeavour.

18. It is apparent that the circumstances as relied by Mr. Ghosh, learned Addl. P.P. stand proved by the prosecution. On a

cumulative reading it surfaces that presence of the appellant at the time and place of the occurrence cannot be doubted. If the appellant does not reveal his knowledge and explain his conduct, that circumstance may be used against him. If such inference is drawn in the case in hand, that will not be inconsistent with the view as expressed by the Apex Court in ***Shambhu Nath Mehra (supra)***. That apart, we may refer to a few decisions [in this regard] of the Apex Court in ***Ram Gulam Chaudhary & Ors. Vrs. State of Bihar,*** reported in ***(2001) 8 SCC 311***, where it has been observed as under:

> *"24. Even otherwise, in our view, this is a case where Section 106 of the Evidence Act would apply. Krishnanand Chaudhary was brutally assaulted and then a chhura blow was given on the chest. Thus Chhura blow was given after Bijoy Chaudhary had said " he is still alive and should be killed". The Appellants then carried away the body. What happened thereafter to Krishnanand Chaudhary is especially within the knowledge of the Appellants. The Appellants have given no explanation as to what they did after they took away the body. Krishnanand Chaudhary has not been since seen alive. In the absence of an explanation, and considering the fact that the appellants were suspecting the boy to have kidnapped and killed the child of the family of the appellants, it was for the Appellants to have explained what they did with him after they took him away. When the abductors withheld that information from the court, there is every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference. We, therefore, see no substance in this submission of Mr. Mishra."*
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> *[Emphasis added]*

19. In **State of West Bengal Vrs. Mir Mohammad Omar & Ors.**, reported in **(2000) 8 SCC 382,** the Apex Court has quite unambiguously interpreted the ambit and extent of Section 106 of the Evidence Act. It has been unambiguous that the burden of proof is on the prosecution to prove the guilt of the accused but that should not be taken as a fossilized doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to the burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty. Presumption of a fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule of law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches as a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the Court to presume the existence of any fact which it thinks likely to have happened. In that process, the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

20. In this context the principle embodied in Section 106 of the Evidence Act can be utilized. The section is not intended to

relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts unless the accused by virtue of his special knowledge regarding such facts, offered any explanation which might drive the court to draw a different inference.

21. Finally, we would rely on another decision of the Apex Court in ***Sucha Singh Vrs. State of Punjab***, reported in ***(2001) 4 SCC 375.*** Without reiterating the settled propositions as regards Section 106 of the Evidence Act, we would refer the crux of what has been decided in that report.

22. It has been held in **Sucha Singh** on approving ***Mir Mohammed Omar (supra)*** that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts offered any explanation which might drive the court to draw a different inference.

23. Thus the law has been settled in this regard that the Court has to examine whether the prosecution has discharged the primary burden of proving the relevant facts based on which the presumption can be drawn regarding the involvement of the

appellant in committing the offence. Only thereafter, the final inference can be drawn on consideration of explanation based on the special knowledge available to the accused person. In this case we have seen that the dead body of the wife of the appellant was found on the cot in bleeding condition and the accused without doing anything was just waiting inside or outside the shanty and later on the police recovered a blood-stained brick. But we are not certain whether the brick was used in committing the murder or not as the forensic report has been withheld from the Court. But the circumstance is as such that none, other than the appellant, was present in the place and time of the occurrence. At least there had been no endeavour from the end of the accused to show that this place and time of the occurrence was open for commission of offence by some other persons. In such circumstances, the prosecution has been able to establish to the guilt of the accused person convincingly. The accused could have been successful in rebuttal if he would have revealed the special knowledge, within his knowledge, that it was not him but some other else has committed, the Court has come to a different conclusion. Unfortunately no such attempt has been made by the defence at any point of time. Their case was all of simple denial. As such, the absence of the explanation, structured on the special knowledge be taken us another piece of circumstantial evidence. Failure to explain his role would definitely embolden this case to come to interference that he but none else has committed the murder of his wife.

24. As such we do not find any reason to interfere with the judgment and accordingly, the impugned judgment and order of conviction and sentence stand affirmed.

25. In the result, the appeal stands dismissed.

L.C.Rs be returned forthwith.

JUDGE **JUDGE**