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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 1064 of 2015

Santosh Kumar, Son of Ramgulam, aged about 32 years, Resident of Village Podi, Bairdand, Police Station Khadgawan, District Koriya, (Chhattisgarh)

---- Appellant

Versus

State of Chhattisgarh, through Station House Officer, Police Station Khadgawan, District Koriya (Chhattisgarh)

---- Respondent

For Appellant : Mr. Umakant Singh Chandel, Adv.
For Respondent-State : Mr. Sudeep Verma, Dy. G.A.

Division Bench

Hon'ble Shri Justice Sanjay K. Agrawal and
Hon'ble Shri Justice Radhakishan Agrawal

Judgment on Board
(31.08.2023)

Sanjay K. Agrawal, J

(1) This criminal appeal preferred by the appellant-accused under Section 374(2) of Cr.P.C. is directed against the impugned judgment of conviction and order of sentence dated 09.06.2015, passed by the 2nd Additional Sessions Judge, Manendragarh, District Koriya, in Sessions Case No.52 of 2014, whereby he has been convicted for offence under Section 302 of IPC and sentenced to undergo life imprisonment with fine of Rs.2000/- and, in default of payment of fine, sentenced to undergo

additional simple imprisonment for 06 months.

(2) The case of the prosecution, in short, is that between 16.01.2014 to 18.01.2014, at Village Podi, Bairdand, the accused-appellant herein assaulted his wife- Pramila (hereinafter referred to as the "deceased") by means of hand, fist and 'danda'/wooden cot ('khat'), due to which she suffered grievous injuries and died, and, thereby, the appellant is said to have committed offence under Section 302 of IPC.

(3) It is further case of the prosecution that on the date and time of the incident, on account of a dispute arose between the appellant and the deceased with regard to consuming liquor by the deceased, the appellant is said to have assaulted her by means of hand, fist and 'danda'/wooden stick due to which she suffered grievous injuries and died. The aforesaid incident was reported to the police by Motilal (PW-01) [who is father of the deceased], pursuant to which, the police registered dehati marg intimation (Ex.P/01), marg intimation (Ex.P/17) and FIR (Ex.P/18) against the appellant and wheels of investigation started running, in which, inquest proceedings were conducted vide Ex.P/04. Nazari naksha was prepared vide Ex.P/03. The dead-body of deceased was sent for postmortem examination and in the postmortem examination report (Ex.P/10), conducted by Dr. Nasir Ali (PW-04), it was opined that the cause of death of

deceased is asphyxia as a result of throttling and nature of death is homicidal. The appellant-accused was arrested vide Ex.P/14 and his memorandum statement was recorded vide Ex.P/05. Pursuant to the memorandum statement of the accused-appellant, one wooden cot ('khat') has been seized vide Ex.P/06. The aforesaid seized article was sent for FSL examination vide Ex.P/13, but no FSL report has been brought on record for the reasons best known to the prosecution. Thereafter statements of witnesses were recorded and after due investigation, the police filed charge-sheet against the appellant in the Court of Judicial Magistrate First Class, Chirmiri and, thereafter, the case was committed to the Court of Sessions for hearing and trial in accordance with law, in which the appellant/accused abjured his guilt and entered into defence by stating that he is innocent and has been falsely implicated.

(4) The prosecution in order to prove its case examined as many as 12 witnesses and exhibited 18 documents, whereas the appellant-accused in support of his defence has examined 02 witnesses and exhibited 01 document.

(5) The learned trial Court after appreciating the oral and documentary evidence available on record proceeded to convict the appellant for offence under Section 302 of IPC and sentenced him as mentioned herein-above, against which this appeal has

been preferred by the appellant-accused questioning the impugned judgment of conviction and order of sentence.

(6) Mr. Umakant Singh Chandel, learned counsel appearing for the appellant submits that the learned trial Court is absolutely unjustified in convicting the appellant for offence under Section 302 of IPC, as the prosecution has failed to prove the offence beyond reasonable doubt. He further submits that there is no direct evidence available on record against the appellant. Though, pursuant to the memorandum statement of the appellant, wooden cot (khat) has been seized but no FSL report has been brought on record to substantiate the fact that any blood stain has been found on it or not. Therefore, the recovery of aforesaid article is of no help to the prosecution. He also submits that there is no eye-witness to the incident and the case of the prosecution is based on circumstantial evidence. The plea of alibi putfourth by the appellant has not been considered by the learned trial Court at all, as the same has been duly proved by examination of DW-01, Rambai. The conviction of the appellant is totally based on conjecture and surmises and, thus, the present appeal deserves to be allowed and the appellant is liable to be discharged/acquitted of the charge.

(7) *Per-contra*, learned State counsel supported the impugned judgment of conviction and order of sentence and submits that

the prosecution has proved the offence beyond reasonable doubt by leading evidence of clinching nature. In view of statements of various prosecution witnesses especially Motilal (PW-01), Smt. Phuleshwari (PW-05), Manmati (PW-08) and Patiram (PW-09) it is clearly born out that the appellant and the deceased both used to live together and their relationship was not cordial and they used to quarrel frequently and, as such, on the date of offence also, on account of some dispute arose between the appellant and the deceased with regard to consuming of liquor by the deceased, the appellant assaulted her by means of hand, fist and danda/wooden cot (khat), due to which she suffered grievous injuries and died. Further, it is a case of house murder and the appellant has not explained anywhere in his statement recorded under Section 313 of CrPC that as to how his wife sustained injuries or died. The plea of alibi putforth by the appellant has rightly been rejected by the learned trial Court as the same is not corroborated by any evidence/substantive proof. Thus, the present appeal deserves to be dismissed.

(8) We have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.

(9) The first and foremost question is as to whether the death of the deceased was homicidal in nature, which the learned trial

Court has recorded in affirmative by taking into consideration the postmortem report (Ex.P/10), wherein it has been opined that cause of death of deceased is asphyxia as a result of throttling and nature of death is homicidal, which is duly proved by the statement of Dr. Nasir Ali (PW-04). Accordingly, taking into consideration the postmortem report (Ex.P/10) and the statement of Dr. Nasir Ali (PW-04), who has conducted the postmortem of the dead-body of the deceased, we are of the considered opinion that the death of the deceased is homicidal in nature, as the same is correct finding of fact based on evidence and same is neither perverse nor contrary to the record. We hereby affirm the said finding.

(10) Now, the next question would be whether the accused-appellant herein is the author of the crime or not, which the learned trial Court has recorded in affirmative on the basis of circumstantial evidence.

(11) Before proceeding further, it is profitable here to note following five golden principles laid down by their Lordships of the Supreme Court in the matter of **Sharad Birdhichand Sarda vs. State of Maharashtra**[1] which constitute the 'panchsheel' of proof of a case based on circumstantial evidence and same reads as under:

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1 (1984) 4 SCC 116

> "153. .... **(1)** the circumstances from which the conclusion of guilt is to be drawn should be fully established.
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> It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra, (1973) 2 SCC 793* where the following observations were made:
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> "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
>
> **(2)** The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty,
>
> **(3)** the circumstances should be of a conclusive nature and tendency.
>
> **(4)** they should exclude every possible hypothesis except the one to be proved, and
>
> **(5)** there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

(12) This bring us to the facts of the case. The learned trial Court has convicted the appellant basically on the finding that the deceased and the appellant both were living together and death of

the deceased occurred in the house of the appellant and he was required to explain in his statement recorded under Section 313 of CrPC as to how his wife (deceased) suffered injuries and died by virtue of Section 106 of the Indian Evidence Act, 1872, which he has not explained and finding his plea of alibi not proved, the learned trial Court proceeded to convict him for offence under Section 302 of IPC.

(13) Now, the question would be, whether Section 106 of the Evidence Act would be applicable or not ?

(14) Section 106 of the Indian Evidence Act, 1872, states as under: -

> "**106. Burden of proving fact especially within knowledge.**—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

(15) This provision states that when any fact is specially within the knowledge of any person the burden of proving that fact is upon him. This is an exception to the general rule contained in Section 101, namely, that the burden is on the person who asserts a fact. The principle underlying Section 106 which is an exception to the general rule governing burden of proof applies only to such matters of defence which are supposed to be especially within the knowledge of the other side. To invoke Section 106 of the Evidence Act, the main point to be established by prosecution is that the accused persons were in such a

position that they could have special knowledge of the fact concerned.

(16) In the matter of **Shambhu Nath Mehra v. The State of Ajmer**[2], their Lordships of the Supreme Court have held that the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 of the Evidence Act 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. The Supreme Court while considering the word "especially" employed in Section 106 of the Evidence Act, speaking through Vivian Bose, J., observed as under: -

> "11. ... The word "especially" stresses that it means facts that are preeminently 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. It is evident that 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.

2 AIR 1956 SC 404

R. 1936-3 ER 36 AT P. 49 (B)."

Their Lordships further held that Section 106 of the Evidence Act 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.

(17) The decision of the Supreme Court in **Shambhu Nath Mehra** (supra) was followed with approval recently in the matter of **Nagendra Sah v. State of Bihar**[3] in which it has been held by their Lordships of the Supreme Court as under: -

> "22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the court can always draw an appropriate inference.
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> 23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused."

3 (2021) 10 SCC 725

(18) Similarly, the Supreme Court in the matter of **Gurcharan Singh v. State of Punjab**[4], while considering the provisions contained in Sections 103 & 106 of the Evidence Act, held that the burden of proving a plea specially set up by an accused which may absolve him from criminal liability, certainly lies upon him, but neither the application of Section 103 nor that of 106 could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It was further held by their Lordships that it is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a *prima facie* case, that the question arises of considering facts of which the burden of proof may lie upon the accused. Their Lordships also held that the burden of proving a plea specifically set up by an accused, which may absolve him from criminal liability, certain lies upon him.

(19) The principle of law laid down by their Lordships of the Supreme Court in **Gurcharan Singh** (supra) has been followed with approval by their Lordships in the matter of **Sawal Das v. State of Bihar**[5] and it has been held that burden of proving the case against the accused was on the prosecution irrespective of whether or not the accused has made out a specific defence.

(20) Now, the question is, whether the prosecution has

4 AIR 1956 SC 460
5 AIR 1974 SC 778

discharged its initial or general burden or primary duty of proving the guilt of the accused beyond reasonable doubt?

(21) Admittedly and undisputedly, the deceased and the appellant both used to live together under one roof. Motilal (PW-01), who is father of the deceased has clearly stated before the Court that on the eve of 'cherta' festival (local festival), he had gone to the house of the appellant herein (son-in-law) as to invite him and his daughter (deceased), but he found the door of the house locked, thus returned back and, thereafter, after sometime, when he again visited the house of the appellant, he again found the door locked, consequently, he inquired in the 'basti', where unfortunately and accidentally he met the appellant and, when he asked the appellant about his daughter (deceased), he told him to go to house and see his daughter, upon which, when he reached to the house, he suspected some foul smell and, immediately, informed to the police. Thereafter, in the presence of the Station House Officer concerned, when the appellant opened the door of the house, he found the dead-body of his daughter lying on the cot (khat) covered with double bed-sheet. Motilal (PW-01) was subjected to cross-examination, but nothing has been brought on record to state that he is telling lie or falsely implicating the appellant. However, in his cross-examination, he has stated that on the next day when the police officials visited the house of the appellant, he was present in the house and has also stated that

the deceased was addicted to liquor.

(22) Similarly, Smt. Phuleshwari (PW-05) has stated before the Court that on the eve of 'cherta' festival, she has gone to the house of her 'nanand' (deceased) to call her for lunch, but she did not find her and her husband (appellant herein) was present in the house and he informed her that the deceased had gone to Village Korbi. Similarly, Manmati (PW-08) has stated before the Court that the deceased and her husband (appellant) used to stay together in one house. But, she has also stated that the deceased was addicted to liquor. Patiram (PW-09) has also stated before the Court that the appellant and the deceased both used to stay together. As such, from the statements of aforesaid witnesses, it is clearly established that the appellant and the deceased both used to stay together and on the date of offence the conduct of the appellant was found suspicious and upon opening the house of the appellant, the deceased was found lying dead and the appellant was also present in the same house and further in his statement recorded under Section 313 of CrPC, he has not explained as to how the deceased (his wife) died in suspicious condition and suffered number of injuries over the body, which he is required to explain being the husband of the deceased. The defence set up by the appellant that he was not in the house, has not been found established by the learned trial Court and after going through the material available on record, we are also

convinced that finding so recorded by the learned trial Court that the plea of alibi putfourth by the appellant is not established and it is vacillating. As such, the prosecution has been able to bring home the offence beyond reasonable doubt by establishing the fact that the death of the deceased was homicidal and the death occurred in the house of the appellant, which he has not explained as to how his wife (deceased) sustained injuries or died in his statement recorded under Section 313 of CrPC.

(23) In that view of the matter, we are of the considered opinion that the learned trial Court is absolutely justified in convicting the appellant for offence under Section 302 of IPC. We do not find any merit in this appeal. It deserves to and is accordingly **dismissed**.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Radhakishan Agrawal)
Judge

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