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HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL NO. 1309 OF 2016

- Paras Ram Sahu, S/o Gyani Ram Sahu, aged about 40 years, R/o Village Singarghat, Police Station Khairagarh, District Rajnandgaon (C.G.)

... Appellant(s)

Versus

- State of Chhattisgarh, through: Police Station Khairagarh, District Rajnandgaon (C.G.)

... Respondent(s)

For Appellant	:-	Mr. Hemant Kesharwani, Advocate.
For Respondent/State	:-	Mr. Afroz Khan, Panel Lawyer.

Division Bench

Hon'ble Shri Justice Sanjay K. Agrawal
Hon'ble Shri Justice Sanjay S. Agrawal

Judgment on Board
[30.11.2023]

Sanjay K. Agrawal, J.

1. This criminal appeal preferred by the appellant, under Section 374(2) of CrPC, is directed against the judgment of conviction and order of sentence dated 12.7.2016 passed by Additional Sessions Judge, Khairagarh, District Rajnandgaon in Sessions Case No.7/2014, by which the appellant herein has been

convicted for the offence punishable under Section 302 of IPC and sentenced to undergo Imprisonment for Life and fine of Rs.1000/- and in default of payment of fine amount, to undergo additional S.I. for one month.

2. Case of the prosecution, in short, is that on 6.1.2014 at about 12:00 p.m. in the afternoon at Village Singarghat under Police Station Khairagarh, the appellant is said to have firstly assaulted his wife Parniya Bai with iron pipe and thereafter he strangulated her to death. On the report of the incident at Police Station Khairagarh by Pusau Ram (PW-3), brother of deceased Parniya Bai, Dehati Merg Intimation and Dehati FIR were recorded vide Exhibits P-7 & P-6 and the wheels of investigation started running. Subsequently, Merg Intimation was recorded vide Exhibit P-15 on the basis of which a named FIR was registered vide Exhibit P-16 against the appellant for the offence punishable under Section 302 of IPC. Spot Map of the place of incident was prepared vide Exhibit P-5. Inquest proceeding was conducted vide Exhibit P-1 and the dead body of deceased Parniya

Bai was sent for post-mortem which was conducted by Dr. Jitendra Tamrakar (PW-7) vide Exhibit P-11 in which the cause of death has been shown to be asphyxia due to choking of upper respiratory tract, and the cause of death was homicidal in nature as per Query report (Exhibit P-13). Pursuant to memorandum statement of the appellant recorded vide Exhibit P-8, an iron pipe was recovered vide Exhibit P-9 and was sent for chemical examination to the F.S.L. Raipur and blood was found on the said iron pipe (Ex. 'A') in the F.S.L. report (Exhibit P-17). Statements of the witnesses were recorded and the appellant was arrested.

3. After completion of the investigation, the appellant was charge-sheeted for the offence punishable under Section 302 of IPC before the concerned jurisdictional Criminal Court from where the case was committed to the Additional Sessions Judge, Khairagarh, District Rajnandgaon for trial and its disposal in accordance with law, in which the appellant abjured his guilt, took a plea of false implication and entreated for trial.

4. During the course of trial, in order to bring home the offence, the prosecution has examined as many as 8 witnesses and exhibited 17 documents. In defence, though no witness has been examined but the statements of Shishupal, Manthir Das Sahu, Pusau Ram Sahu and Homlal have been exhibited respectively as D-1 to D-4. Accused/appellant was examined under Section 313 of CrPC in which he denied the circumstances appearing against him in the evidence brought on record by the prosecution, pleaded innocence and false implication.

5. After conclusion of the trial, the Trial Court, by impugned judgment dated 12.7.2016, on appreciation of the oral and documentary evidence available on record, convicted the appellant herein for the offence punishable under Section 302 of IPC and sentenced him to undergo Imprisonment for Life and fine of Rs.1000/- with default stipulation, against which the present appeal has been filed by the appellant calling in question the legality, validity and correctness of the impugned judgment.

6. Mr. Hemant Kesharwani, learned counsel appearing for the appellant, would submit that though the appellant has been convicted with the aid of Section 106 of the Evidence Act but the prosecution has failed to establish that the appellant and deceased both were found living together on the date of offence. Further, it has not been clearly put to the appellant in his examination under Section 313 of CrPC that the appellant and his wife, Parniya Bai, were living together and the dead-body of Parniya Bai was found in the house of the appellant and the explanation of the appellant thereto. Furthermore, the F.S.L. report (Exhibit P-17) has not been put to the appellant by the Trial Court as one of the incriminating circumstances to explain in his examination under Section 313 of CrPC. As such, the Trial Court is absolutely unjustified in convicting the appellant for the offence punishable under Section 302 of IPC and therefore the appellant is liable to be acquitted on the basis of benefit of doubt and the appeal deserves to be allowed accordingly.

7. Per contra, Mr. Afroz Khan, learned State Counsel, would submit that the conviction of the appellant is founded on the strong circumstantial evidence on the basis of the fact the wife of the appellant was found dead in his house. He would further submit that the prosecution has been able to bring home the offence beyond reasonable doubt and the Trial Court is absolutely justified in convicting the appellant for the said offence and therefore the appellant is not entitled to be acquitted on the basis of benefit of doubt and appeal deserves to be dismissed.

8. We have heard learned counsels for parties, considered their rival submissions made herein-above and have also gone through the records with utmost circumspection.

9. The first question as to whether the death of the deceased Parniya Bai was homicidal in nature, has been answered by the Trial Court in affirmative relying upon the statement of Dr. Jitendra Tamrakar (PW-7) who has proved the post-mortem report (Exhibit P-11) in which the cause of death has been shown to be asphyxia due to choking of upper

respiratory tract and the cause of death has been stated to be homicidal in nature as per the Query report (Exhibit P-13), which, in our considered opinion, is correct finding of fact based on evidence available on record and it is neither perverse nor contrary to the record. Accordingly, we hereby affirm the said finding of the Trial Court.

10. As regards the next question as to whether the appellant is the author of the crime in question, the Trial Court has relied upon the fact that the appellant and his wife, deceased Parniya Bai, were living together in the house of the appellant and the dead-body of Parniya Bai was found in his house. Thus, applying the provision contained in Section 106 of the Evidence Act, the appellant has been convicted for the said offence, as the appellant's younger son Tuman who was present in the house at the time of incident has not been examined and his elder son Homlal (PW-6) had gone to the school who had come after the incident.

11. Now, the question would be, whether Section 106 of the Evidence Act would be applicable or not?

12. Section 106 of the Evidence Act 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."

13. The said 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 the prosecution is that the accused persons were in such a position that they could have special knowledge of the fact concerned.

14. In the matter of **Shambhu Nath Mehra** v. **The State of Ajmer**[1], 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

1 AIR 1956 SC 404

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. 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.

15. 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**[2] 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

2 (2021) 10 SCC 725

> 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.**"**

16. Similarly, the Supreme Court in the matter of **Gurcharan Singh** v. **State of Punjab**[3], 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.

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3 AIR 1956 SC 460

17. 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**[4] 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.

18. Now, the question is, whether the prosecution has discharged its initial or general burden or primary duty of proving the guilt of the accused beyond reasonable doubt?

19. From the facts and evidence available on record, it is quite established that in the instant case the prosecution has been able to establish the fact that the death of deceased Parniya Bai was homicidal in nature. However, in order to invoke Section 106 of the Evidence Act, the prosecution was required to establish that on the date of offence, the appellant and deceased both were living together and which the prosecution has failed to establish, except showing that the relationship between the appellant and

4 AIR 2005 SC 2345

deceased was not cordial and 3-4 months prior to the date of incident, deceased Parniya Bai had come to the appellant's house and for the last five years she was residing separately from the appellant in her parents' house, as per the statement of Homlal (PW-6). Further, there is no evidence available on record that on the date of offence, the appellant and deceased Parniya Bai both were living together. The relationship of the appellant and deceased Parniya Bai was admittedly not cordial one, as per the prosecution case and evidence available on record. Furthermore, on the date of offence, the younger son of the appellant, namely Tuman (his age is not available on record) was also present in the house, as per the statement of his elder brother Homlal (PW-6). Though there is evidence available on record that the dead-body of deceased Parniya Bai was found in the house of the appellant but in the examination of the appellant under Section 313 of CrPC he has not been put clear question to explain and state that on the date and time of offence he and his wife, deceased Parniya Bai, both were present in his house and the

dead-body of Parniya Bai was found in his house and what is his explanation thereto, so as to invoke Section 106 of the Evidence Act. In the examination of the appellant under Section 313 of CrPC, only vague questions have been put to him and no question has been clearly put to him to the effect that he and his wife, deceased Parniya Bai, both were living together and the dead-body of Parniya Bai was found in his house and what is his explanation to that regard, which he could have explained if asked clearly as to whether he was present in the house or not, which has not been put to him.

20. As such, in our considered opinion, the prosecution has failed to discharge its initial burden of proving its case beyond reasonable doubt and the Trial Court has wrongly invoked Section 106 of the Evidence Act to hold the appellant guilty for the offence punishable under Section 302 of IPC, coupled with the fact that in the F.S.L. report (Exhibit P-17), blood was found on the iron pipe seized pursuant to the memorandum statement of the appellant vide Exhibit P-8, but while putting the F.S.L. report to the appellant to explain

under Section 313 of CrPC, only question No.90 was asked to him to the effect that the F.S.L. report (Exhibit P-17) is received from the Forensic Science Laboratory, Raipur and what is his explanation. Whereas, the Trial Court could have clearly asked him that in the F.S.L. report (Exhibit P-17) blood has been found on the iron pipe which was seized from his possession and what is his explanation thereto, and in that case he could have stated clearly or given an explanation and since it was not clearly put to the appellant requiring him to explain, the F.S.L. report cannot be taken into consideration and it has to be excluded from consideration as an incriminating piece of evidence. As such, the F.S.L. report also is of no use to the prosecution as an incriminating circumstance to base conviction. In that view of the matter, the appellant is entitled to be acquitted from the offence punishable under Section 302 of IPC on the basis of benefit of doubt.

21. Accordingly, the impugned judgment dated 12.7.2016 passed by the Trial Court convicting and sentencing the appellant for the offence under Section 302 of IPC,

is hereby set-aside/quashed and the appellant is acquitted from the said offence. Appellant is stated to be in jail since 7.1.2014. He be released from jail forthwith, if his detention is not required in connection with any other offence.

22. This criminal appeal, accordingly, stands allowed.

23. Let a certified copy of this judgment along with the original record be transmitted to the concerned Trial Court and the Superintendent of Jail where the appellant is presently lodged and suffering his jail sentence, for information and necessary action.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Sanjay S. Agrawal)
Judge

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