

**HIGH COURT OF TRIPURA
AGARTALA**

Crl.A.(J) 27 of 2022

Shri Badal Baishnab
S/o Late Gopi Ballav Baishnav,
Resident of Kishoreganj, PS: kakraban,
District: Gomati Tripura.

---Appellant(s)

Versus

The State of Tripura

---Respondent(s)

For Petitioner(s)	: Mr. S. Sarkar, Sr. Advocate Mr. V. Poddar, Advocate.
For Respondent(s)	: Mr. S. Debnath, Addl. PP.
Date of hearing & date of delivery of judgment and order	: 13.09.2023.
Whether fit for reporting	: No.

**HON'BLE MR. JUSTICE T. AMARNATH GOUD
HON'BLE MR. JUSTICE ARINDAM LODH**

Judgment & Order (Oral)

(T. Amarnath Goud), J

Heard Ms. V. Poddar, learned counsel appearing for the appellant as well as Mr. S. Debnath, learned Addl. PP appearing for the state-respondent.

[2] This is an appeal under Section 374 of the Cr.P.C, 1973 against the judgment and order of conviction and sentence dated 08.09.2022 & 12.09.2022 respectively passed by the Ld. Addl. Session's Judge, Gomati Judicial District, Udaipur in connection with Case No. S.T (T-I) 04 of 2019 against the instant accused person and thereby sentenced him to undergo rigorous imprisonment for life with fine of Rs.10,000/- under Section 302 of the IPC in default to pay the fine shall undergo further rigorous imprisonment for six

(6) months only for the commission of the offence under Section 302 IPC.

[3] The prosecution story as unfolded is that on 10.04.2018 an ejahar was lodged by one Shri Litan Das, S/O Shri Nitai Das Baishnab of Kishoreganj, PS: Kakraban, District: Gomati, Tripura stating inter alia to the facts that about 10 years back his younger sister namely Adari Das Baishnab was married to accused Badal Baishnab, S/O – Gopi Ballab Baishnab of Garjanmura as per Hindu rites & customs. After marriage the sister of informant led her conjugal life peacefully and begotten one daughter namely Miss Anindita Das aged about 8 years and one son namely Master Dweep Das aged about 3 years. Since one year back from the date of lodging the ejahar the accused Badal Baishnab started a bicycle and motor cycle repairing shop at Shilghati bazaar and there he developed an illicit relation with one neighbouring woman namely Smt. Sangita Das Majumder. After that accused started harassing both in mentally and physically and assaulting upon the sister of informant. The matter was informed by the sister of informant to her parents and other relative but harassment upon her continued. Lastly on 09.04.2018 during night time accused Badal Baishnab on being abetted by said Sangita Das Baishnab killed the sister of informant namely Adari Das Baishnab by strangulation. On that night at around 3.00 am one Kajal Das Baishnab informed the informant and other family members of deceased over phone that the sister of informant has died. Then informant and others rushed to the matrimonial house of deceased and found her dead on bed.

[4] The SI of Police namely Ranjit Kr. Datta received the ejahar on 10.04.2018 at around 1220 hours and self took up its investigation pending formal registration of case number as the offence designed was cognizable in nature. The O/C of Kakraban PS, Gomati District subsequently on that date at around 14.05 hours registered a formal case vide Kakraban PS Case No. 2018KKB054 under Sections 498A/120B/302 of IPC and directed the SI of police namely Ranjit Kumar Dutta to complete the investigation.

[5] During investigation the IO visited the place of occurrence, prepared hand sketch map with index, examined the available witnesses by recording their statements under Section 161 of Cr.P.C., prepared inquest report over the dead body of deceased Adari Das Baishnab, arranged for PM examination of the dead body of deceased and seized saree, blouse, tulsi mala, bangles, plastic jars containing viscera of deceased. On 10.04.2018 accused Badal Baishnab was arrested and forwarded to the court on the next date but before forwarding to the Court the IO has recorded the declaratory statement of accused Badal Baishnab in presence of one Executive Magistrate and other independent witnesses. The second IO collected the Toxicology report from the SFSL and Histopathology report of deceased, seized one DVD-R in compact disc by preparing seizure memo containing disclosure statement of accused Badal Baishnab with one certificate as per section 65(B) of the Evidence Act from one Pranoy Debnath, obtained the final report from the concerned Doctor namely Nani Gopal Das in the PM report after collecting report from the SFSL

and after completion of investigation he laid down the CS vide KKB PS CS No. 74 of 2018 dated 25.09.2018 u/sec. 302 of IPC against accused namely Badal Baishnab.

[6] On 05.10.2018 the learned Judicial Magistrate First Class, Udaipur, Gomati Judicial District received the charge sheet and on 19.11.2018 the learned Chief Judicial Magistrate, Gomati District, Udaipur has taken cognizance of offence under section 302 of IPC. On 22.01.2019 the case has been committed to the Court of Learned Sessions Judge, Gomati Judicial District, Udaipur and subsequently, this case has been transferred to this Court vide order dated 29.01.2019 for trial according to law.

[7] After receiving the case record, the court below has framed the charge on 19.03.2019 for commission of offence punishable under Section 302 of IPC against the accused person namely Badal Baishnab to which he pleads not guilty.

[8] The charge against the accused Badal Baishnab is as follows:-

"That you on 09.04.2018 any time at night did commit murder by intentionally or knowingly causing the death of your wife Adari Das Baishnab at your house at Garjanmura, under PS – Kakraban, Gomati, Tripura and that you thereby committed an offence punishable under section 302 of IPC and within the cognizance of this Court."

[9] To prove the charge, prosecution has examined as many as 21 (twenty one) witnesses including the IO of this case. After the closure of prosecution evidences the accused person namely Badal Baishnab was examined under Section 313 Cr.P.C to which he claimed to be innocent and also declined to adduce any DW's on his behalf.

[10] After hearing arguments and on examining the evidences and materials on record, the Additional Sessions Judge, Gomati Judicial District, Udaipur had convicted and sentenced the appellant for committing offence, as aforestated. Hence, this appeal before this court.

[11] It is contended by Ms. V. Poddar, learned counsel for the appellant that that PW-1 the informant of this case i.e the brother of the deceased victim one of the material witness, who during his cross examination has categorically stated that the appellant Badal Baishnab was not present on the date of incident and also stated that the contents of the Ezahar was not read over to him as well as the Scribe of the Ejahar was not Known to him and nowhere in his examination he stated that the accused person has committed murder of his sister, which tends to prove that the allegations in the FIR was nothing but a misconception of the PW-1 i.e. the informant of this case but the Ld.

[12] P.w.5 (Sri Nimai Das), P.W.7 (Gita Rani Das), P.W.14 (Smt. Sajal Rani Baishnab) (these witnesses who were hostile by the prosecution) in their cross examination they did not disclose anything regarding the involvement of the appellant but the Ld. Trial Court considering the version of the statement recorded u/s 161 Crpc statement convicted the appellant which is totally perverse and not admissible in the eye of law. It is crystal clear in the catena of judgments that statement of the witness recorded u/s 161 Crpc does not fall within the ambit of evidence and in fact the Hon'ble apex court has reiterated that a statement recorded under

section 161 CrP.C is inadmissible in evidence and cannot be relied upon or used to convict the accused.

[13] For that, PW-20, the I.O. of the case in his cross examination accepted the fact that after arrest accused on 10.04.2018 at around 17.10 hrs and before forwarding the accused on 11.04.2018 he recorded the disclosure statement of the accused in presence of one Executive Magistrate and other independent witness and without any permission from the Ld. Court and without written consent from the accused that he wants to make any disclosure statement which proves any that the statement was made under threat and coercion and was made in a hurry on the next date of arrest before production in the Ld. Trial Court as the same was a false case and without such a statement under threat, the police will never be able to make out any case against the accused on the basis of no evidence against him and hence, the finding of the Ld-trial Court is highly illegal & perverse in nature and hence the order of conviction and sentence is liable to be set-aside/quashed.

[14] In course of submission, Ms. V. Poddar, learned counsel for the appellant has placed her reliance on a judgment of the apex court in **Satye Singh And Another vs State of Uttarakhand** reported in **(2022) 5 SCC 438**, the relevant portion of which is extracted hereunder:

"6. However, the learned advocate Mr Krishnam Mishra appearing for the respondent State of Uttarakhand submitted that there being concurrent findings of the facts recorded by the two courts, this Court exercising limited jurisdiction under Article 136 of the Constitution of India may not reappreciate the evidence and come to a different conclusion. Mr Mishra further submitted that the prosecution had examined the witnesses to prove that there was a harassment to the deceased by the accused and on the previous day of the incident also a quarrel had taken place between the deceased and the accused, which had resulted into the deceased

Shashi leaving the house. According to him, the accused had tried to mislead the investigating officer by propounding the story that Shashi had committed suicide, however, from the evidence of the doctor viz. Sanjay Kavdwal (PW 9) and the injuries mentioned in the post-mortem report, it was duly proved that the injuries found on the dead body of Shashi were ante-mortem, and her death was caused due to haemorrhage and shock on account of ante-mortem injuries. He, pressing into service Section 106 of the Evidence Act, submitted that there was no explanation given by the accused in their further statement as to why did Shashi leave their home the previous day and what they did they do for the whole night, when Shashi was not found."

[15] On the other hand, Mr. S. Debnath, learned Addl. PP appearing for the state-respondent has submitted before this court that the impugned order of conviction is just and proper and needs no interference from this court. To support his contention, counsel for the respondent has placed his reliance on a judgment of the apex court in ***State of Rajasthan vs. Jaggu Ram*** reported in **(2008) 12 SCC 51**. The relevant portion of which has been extracted herein under:

27. In our considered view, this was a fit case for invoking Section 106 of the Evidence Act, which lays down that when any fact is especially within the knowledge of the any person, the burden of proving that fact is upon him. In Ram Gulam Chaudhary vs. State of Bihar [2001 (8) SCC 311] this Court considered the applicability of Section 106 of the Evidence Act in a case somewhat similar to the present one. This Court noted that the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for the absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they had murdered the boy. It was further observed that 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 accused by virtue of their special knowledge must offer an explanation which might lead the court to draw a different inference.

28. In Trimukh Maroti Kirkan vs. State of Maharashtra [2006 (1) SCC 681], a two judge-bench of which one of us (G.P.Mathur,J.) was a member, considered the applicability of Section 106 of the Evidence Act and observed:

"13. The demand for dowry or money from the parents of the bride has shown a phenomenal increase in the last few years. Cases are frequently coming before the courts, where the husband or in-laws have gone to the extent of killing the bride if the demand is not met. These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. No member of the family, even if he is a witness

of the crime, would come forward to depose against another family member. The neighbours, whose evidence may be of some assistance, are generally reluctant to depose in court as they want to keep aloof and do not want to antagonise a neighbourhood family. The parents or other family members of the bride being away from the scene of commission of crime are not in a position to give direct evidence which may inculcate the real accused except regarding the demand of money or dowry and harassment caused to the bride. But, it does not mean that a crime committed in secrecy or inside the houses should go unpunished.

14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions* [1944 AC 315] quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh* [2003 (11) SCC 271]. The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

'(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him.'

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

Similar view has been expressed in *State of Punjab vs. Karnail Singh* [2003 (11) SCC 271], *State of Rajasthan vs. Kashi Ram* [2006 (12) SCC 254], *Raj Kumar Prasad Tamakar vs. State of Bihar* [2007 (10) SCC 433].

[16] Reliance has also been placed by counsel of the state-respondent on another judgment of the apex court in ***Trimukh Maroti***

Kirkan vs. State of Maharashtra reported in **(2006) 10 SCC 681**. The relevant portion is extracted herein under:

4. Since the present appeal has been filed under Section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 and the High Court has reversed the order of acquittal and has convicted the appellant under Section 302 IPC, it will be appropriate to briefly consider the evidence on record. PW.1. Dattarao is the father and PW.2 Rukmabai is the mother of the deceased Revata and they are residents of village Umatwadi. Both of them have deposed that the marriage of the deceased with the appellant took place nearly 7 years back in which they had given Rs.20,000/- in cash besides clothes and utensils. Whenever deceased came to her parental home, she used to complain that she was being harassed and ill-treated on account of demand of money. They have further deposed that last time the deceased came to their house on the occasion of Panchami festival when she told them that the appellant wanted to purchase a tempo and, therefore, her in-laws and also the appellant were asking her to get Rs.25,000/- from her parents. The deceased also informed that occasionally she was not provided food and was beaten on account of non-fulfilment of the demand of Rs.25,000/-. They have further deposed that the deceased stayed with them for about 15 days and thereafter PW.1 Dattarao escorted her to her matrimonial home and informed her in-laws that he was not in a position to give Rs.25,000/- and further requested them not to ill-treat her. A few days before the Diwali festival a person came from village Kikki and informed that Revata had died on account of snake bite. Thereafter, PW.1, PW.2 and their sons and two daughters-in-law went to village Kikki which is about 25 kilometers from their village Umatwadi. On reaching there they saw that the body of Revata had been placed in a sitting posture with her back resting on the wall and a strip of cloth had been tied along her mouth. PW.1 has further deposed that subsequently he lodged an FIR on 5.11.1996 at the police station. Though a suggestion was given to both the witnesses that the marriage of the deceased had taken place about 10 years back, but both of them specifically denied and stated that the marriage had taken place 5-6 years back. PW.1 has further deposed that he removed the cloth which was tied along the mouth of the deceased and noticed marks of injury around the neck and cheek and there were no bangles on her hands. PW.3 Balasaheb, who is cousin of PW.1 and is resident of village Umatwadi, has deposed that whenever Revata came to her parental home, she always came to his house as well. She used to narrate about the ill-treatment meted out to her by the appellant and her in-laws as they were demanding an amount of Rs.25,000/- for purchasing a tempo for the appellant. He has further deposed that in the evening of 4.11.1996 two persons from village Kikki came to his village and informed PW.1 and others that Revata had died on account of snake bite. The witness has further deposed that next day in the morning he went to village Kikki along with several other persons of his village and saw the body of the deceased. There were injury marks around the neck, cheek, hand and other parts of the body. PW.4 Chander is another cousin of PW.1 and is resident of the same village Umatwadi. His statement is almost similar to that of PW.3 Balasaheb. PW.5 Girjabai is a resident of village Kikki and her house is very close to the house of the accused in the same village. She has deposed that the deceased Revata used to visit her and she had often told her that on account of non-fulfilment of demand of money by her parents, she was being ill-treated by her in-laws and husband (appellant). She has further deposed that she used to console the deceased and tell her that the ill-treatment being meted out to her would gradually stop. She has further stated that at about 3-3.15 p.m. on the date of the incident she was informed that Maroti's daughter- in-law had died due to snake bite. She immediately rushed to the house of Maroti and saw the body of the deceased. There were marks of injury on the neck and cheek and there were

no bangles on her hands. This witness is no doubt distantly related to the deceased as her husband's mother is sister of PW.2 but nothing material has come out in her cross-examination which may discredit her testimony regarding the demand of Rs.25,000/- by the appellant and his parents and also the ill-treatment being meted out to the deceased. It was suggested to her in her cross-examination that the deceased was suffering from T.B. and asthma and also that she used to have occasional chest pain but it was emphatically denied by her.

5. PW.8 Madhvrao is the real brother of accused Maroti and the appellant is his nephew. In his examination-in-chief he stated that he did not know how Revata had died and he had not witnessed any incident. The witness was declared as hostile and in his cross-examination by State counsel he admitted that the appellant Trimukh used to ply a tempo. PW.6 Maroti son of Ramrao Telange and PW.7 Venkat, both residents of village Kikki, have deposed that while in the custody of the police the appellant said that he would show the spot where the incident had taken place. Thereafter he had taken the police party and the witnesses to the field of his father Maroti and on his pointing out a pair of ladies chappal, broken pieces of bangles and a sickle lying there were recovered and the appellant had further said that the ladies chappal belonged to his wife. The aforesaid articles were taken into possession by the Police Inspector and a panchnama was prepared which was signed by them. PW.7 has further deposed that on the pointing out of the appellant his shoe was recovered which was taken in possession by the police and panchnama was drawn on which he has put his signature. PW.9 Digamber who was a witness of inquest turned hostile, but in his cross-examination he stated that he went to the house of accused Maroti at about 9.00 a.m. and had seen the body of the deceased with a piece of cloth tied around her mouth. He further admitted that when the police was recording the panchnama, he had said that there was no mark of snake bite on the body of the deceased and that he had put his signature on the inquest panchnama. PW.11 Vilas and PW.12 Nilawati whose agricultural land is situate near the agricultural land of Maroti accused turned hostile. PW.13 Digamber son of Madhavrao who is also a resident of village Kikki, also turned hostile. However, he admitted that he had heard that Revata had died due to snake bite and further that a tempo is owned by Maroti which is plied by the appellant Trimukh.

[17] This court thinks it apposite to extract here in below the relevant portion of the disclosure statement which says there was hot altercation between the appellant and the deceased wife prior to her death.

"On 09/04/2018 at about 2000 hours I came in my resident from my shop in a drunken condition. I have completed dinner at about 2100 hr. After dinner I along with my wife and son went to my room and closed the door. Then my son fall asleep soon after. Me and my wife took some alcohol drink. After a while at about 2230 hrs a hot altercation started between me and my wife regarding repairing of ornaments and to purchase a new mobile phone. My wife didn't understand me. During altercation, my wife suddenly pushed me back. After that moment out of anger I grabbed my wife's neck with both hand, for a while. Firstly she resisted me and then she became quite and then I released my grasp from her neck. Then I slept beside her. At that moment I could not understand that my wife has already died. On that night at 0230 hrs my son started crying and then I called my wife. But, she was not responding and then I switched on the light and found that she already expired. Out of fear I then called my family members who

came to my room and after seeing the she is dead informed my in-laws and others."

[18] From the deposition of PW10, Dr. Nanigopal Das, a Medical Officer, it also surfaces that the cause of death could be asphyxia due to throttling (manual strangulation).

[19] In view of the above, this court has no hesitation to hold that the counsel for the respondent has made out his case in establishing that none but appellant has committed the crime. But a bare perusal of the records also shows that the appellant had no intention to cause death to his wife. It is evident that the appellant did grab his wife's neck in a fit of anger but not with the intention to cause her death. The fact that the appellant committed the act of grabbing his wife's neck in inebriated condition cannot be neglected. Therefore, we are of the view that present case may be viewed under Exception 4 of Section 300 of the IPC.

Exception 4- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation- It is immaterial in such cases which party offers the provocation or commits the first assault.

[20] None but the children of the appellant are the ones who have been affected a lot by this incident. We, looking at the future of the children, also cannot shut our eyes towards the fact that who would be looking after them in the absence of their parents. After the demise of their mother, it is only the father who can be the best support for them. It is evident from the records that the appellant has two minor children (a daughter and a son).

[21] Having considered the aspect discussed above and also considering the exception 4 of Section 300 of IPC, we are treating

the crime under Section 304 Part-B of the IPC. Therefore, the judgment and order of conviction and sentence dated 08.09.2022 sentencing the appellant to undergo rigorous imprisonment for life may be converted to 5 (five) years of imprisonment only, if not found guilty in any other case. Accordingly, it is ordered. The period of detention undergone by the appellant shall be set off as per procedure.

[22] Accordingly, the appeal stands allowed in part to the extent as indicated above.

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