



IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

Criminal Appeal No.136 of 2018

Amit Kaushal

..... Appellant

Vs.

State of Uttarakhand

.....Respondent

Presence:

Ms. Mamta Bisht, learned counsel for the appellant.
Mr. Siddhartha Bisht, learned AGA for the State.

Coram: Hon'ble Ravindra Maithani, J.
Hon'ble Siddhartha Sah, J.

Hon'ble Ravindra Maithani, J. (Oral)

The instant appeal has been preferred against judgment and order dated 20.04.2018/21.04.2018, passed in Special Sessions Trial No.01 of 2014, State Vs. Amit Kaushal, by the court of Fast Track Court/Special Judge (POCSO)/Additional Sessions Judge, Dehradun. By it, the appellant has been convicted and sentenced under Sections 377, 302 & 201 of IPC and Section 5/6 of Protection of Children from Sexual Offences Act, 2012 (in short "POCSO Act").

2. The deceased, Punnu, son of PW1 Sabir Hussain, aged 7 years, was found missing from his home on 23.08.2013 at 3:00 p.m. onwards. Police was informed about it. On 24.08.2013 at 3:30 p.m., the dead body of deceased Punnu was spotted in a Maruti Esteem car bearing registration No. UA 07A 9406 ("the car"). An FIR, Exhibit A-3, was lodged by PW1 Sabir. The FIR records that the car belongs to the appellant and his brother, Bharat Bhushan. Based on this FIR, Chick FIR, Exhibit A-6, was recorded and a Case Crime No.129



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of 2013 under Sections 302, 201 IPC at Police Station Doiwala, District Dehradun. The extract of the General Diary Entry is Exhibit A-7. Investigating Officer proceeded on the spot. He took into possession the car and prepared its recovery memo, Exhibit A-1. He also took a piece of the seat of the car and prepared recovery memo, Exhibit A-2. Inquest of the dead body was prepared, which is Exhibit A-4. On 25.08.2013, PW3 Dr. Manoj Upreti conducted post-mortem of the dead body of the deceased. According to the post-mortem report, the eyes were closed and bulging; anus was protruding out; rest orifices closed; penis and scrotum swollen up; whole body had become swollen up; skin peeled off; hair became loose and easily pulled out; nails were loose and lungs were congested. According to the Doctor conducting post-mortem, the time of death was 2 to 3 days and the cause of death was asphyxia due to strangulation. The Investigating Officer prepared site plan, Exhibit A-9. Certain articles were sent for forensic examination. The Forensic Science Laboratory report is Exhibit A-14. It did not detect either blood or semen on the seat cover or material.

3. After investigation, charge-sheet, Exhibit A-13 was submitted against appellant for the offence punishable under Sections 302, 201 & 377 of IPC. On 22.01.2014, charges under Sections 377, 302, 201 IPC, and on 05.11. 2016, charge under Sections 5/6 of POCSO Act were framed against appellant to which, he denied and claimed trial.

4. In order to prove its case, the prosecution examined eleven witnesses, namely, PW1 Sabir, PW2 Israr, PW3 Dr. Manoj Upreti, PW4 Constable Yudh Veer Singh, PW5 Lady Constable Sulekha,



PW6 Chandra Prakash, PW7 Ram Singh, PW8 Jamaluddin Ansari, PW9 Jakir, PW10 S.I. Pradeep Rawat and PW11 S.I. Mukesh Tyagi

5. After prosecution evidence, the appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 ("the Code"). According to him, he has been falsely implicated and wrongly charge-sheet has been submitted against him. He is innocent. In his defense, the appellant examined DW1 Constable Ram Dutt Pandey.

6. After hearing the parties, by the impugned judgment and order, the appellant has been convicted and sentenced, as stated hereinbefore. Aggrieved, the appellant has preferred the instant appeal.

7. Heard learned counsel for the parties and perused the record.

8. The learned counsel for the appellant submits that there is no eyewitness of the case and the prosecution has utterly failed to prove its case beyond reasonable doubt. She also raises the following submissions in her arguments:

- i. It is a case based on circumstantial evidence, but the chain is quite incomplete, therefore, conviction cannot be held in the instant case.
- ii. Prosecution has not even attributed any motive to the appellant for killing the deceased.



- iii. The prosecution has utterly failed to prove as to in what manner and when the deceased was killed.
 - iv. The ownership of the car has not been proved.
 - v. In the instant case, provision of Section 106 of Indian Evidence Act, 1872 (the “Evidence Act”) is not applicable.
 - vi. It is argued that in order to make the provision of Section 106 of the Evidence Act applicable, first and foremost, prosecution has to prove the entire chain of circumstantial evidence. Once it is established and proved that the fact is especially within the knowledge of the accused, only then this provision could be invoked.
 - vii. It is argued that in the instant case, the prosecution has utterly failed to prove the circumstances leading to any especial knowledge to the appellant.
 - viii. In support of her submission, she has placed reliance on the judgments of Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116, Shambu Nath Mehra v. State of Ajmer, (1956) 1 SCC 337 and Anees v. State Government of NCT (2024) 15 SCC 48.
9. In the case of Sharad Birdhichand Sarda (*Supra*), the Hon'ble Supreme Court discussed the principles that are applicable in the case of circumstantial evidence and in paragraphs 153 and 154, the principles have been summed up by the Hon'ble Supreme Court as follows:-



“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

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 v. State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 CrL LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

“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.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.”

10. In the case of *Shambu Nath Mehra* (Supra), the Hon'ble Supreme Court discussed the scope of Section 106 of the Act and observed as follows:-

“9. Section 106 is an exception to Section 101. Section 101 lays down the general rule about the burden of proof:

“**101. Burden of proof.**—Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.”

10. Illustration (a) says:

“A desires a court to give judgment that *B* shall be punished for a crime which *A* says *B* has committed.

A must prove that *B* has committed the crime.”

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. 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. 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. R.* [*Attygalle v. R.*, 1936 SCC OnLine PC 20 : AIR 1936 PC 169] and *Seneviratne v. R.* [*Seneviratne v. R.*, 1936 SCC OnLine PC 57 : (1936) 44 LW 661].”

11. In the case of *Anees (supra)*, the Hon'ble Supreme Court interpreted the provision of Section 106 of the Act and traced the history and the law laid down in different judgments of the Hon'ble Supreme Court. In paragraphs 45 and 46, the Hon'ble Supreme Court observed as follows:-

“**45.** Section 106 of the Evidence Act cannot be invoked to make up the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. This section cannot be used to support a conviction unless the prosecution has discharged the onus by proving all the elements necessary to establish the offence. It does not absolve the prosecution from the duty of proving that a crime was committed even though it is a matter specifically within the knowledge of the accused and it does not throw the burden on the accused to show that no crime was committed. To infer the guilt of the accused from absence of reasonable explanation in a case where the other circumstances are not by themselves enough to call for his explanation is to relieve the prosecution of its legitimate burden. So, until a *prima facie* case is established by such evidence, the onus does not shift to the accused.

46. Section 106 of the Evidence Act obviously refers to cases where the guilt of the accused is established on the evidence produced by the prosecution unless the accused is able to prove some other facts especially within his knowledge, which would render the evidence of the prosecution nugatory. If in such a situation, the accused offers an explanation which may be reasonably true in the proved circumstances, the accused gets the benefit of reasonable doubt though he may not be able to prove beyond reasonable doubt the truth of the explanation. But, if the accused in such a case does not give any explanation at all or gives a false or unacceptable explanation, this by itself is a circumstance which may well turn the scale against him. In the language of Prof. Glanville Williams:

“All that the shifting of the evidential burden does at the final stage of the case is to allow the jury (Court) to take into account the silence of the accused or the absence of satisfactory explanation appearing from his evidence.”

12. On the other hand, learned State counsel would submit that the dead body of the deceased was found in a car which



belongs to the appellant; he would submit that to attract the provision of Section 106 of the Evidence Act, they were to show as to how the deceased died and was laid in the car. It is argued that PW3 Dr. Manoj Upreti has proved that the death was due to ante-mortem strangulation. Hence, it is argued that the prosecution has been able to prove its case beyond reasonable doubt.

13. Before arguments are appreciated, it would be apt to examine as to what the witnesses have stated.

14. PW1 Sabir is the informant, who is father of the deceased. He has reiterated the contents of FIR. According to him, his son was found missing at 3:30 p.m. on the date of incident. He was 7 years of age on that day. In the evening, when he was told that the deceased is not traceable, they made a search for him. Next date, deceased was found from the house of the appellant in a car. This witness has proved the recovery memo of the car, Exhibit A-1. Exhibit A-2 is the recovery memo of a piece of seat of the car. According to him, he has lodged the report, Exhibit A-3 at the police station. This witness is also a witness of inquest. He has stated about it. In his evidence, PW1 Sabir has also proved the seat cover which was taken by police into custody. He has proved those articles, Exhibits 1, 2, and 3.

15. PW2 Israr has not supported the prosecution case. He has been declared hostile. As per prosecution, during investigation, this witness has stated that the appellant did confess before him about the gruesome act. Fact remains; he has not supported the prosecution case at trial.



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16 PW3 Dr. Manoj Upreti has proved the post-mortem report, Exhibit A-5. He has stated that the cause of death is strangulation, which was possible on 23.08.2013 at 3:30 p.m.

17 PW4 Constable Yudh Veer Singh has recorded Chick FIR and made its entry in the general diary of the police station.

18. PW5 Constable Sulekha had taken the articles to the Forensic Science Laboratory, so she has stated about it.

19. PW6 Chandra Prakash, PW7 Ram Singh and PW8 Jamaluddin Ansari have not supported the prosecution case. They have been declared hostile.

20. PW9 Zakir is a witness of inquest. He has stated accordingly.

21. PW10 Pradeep Rawat is the first Investigating Officer. After lodging of the investigation, he proceeded at the spot and took the car in custody and prepared recovery memo, Exhibit A-1. He also took into custody a piece of seat cover prepared its recovery memo, Exhibit A-2. This witness has prepared site plan, Exhibit A-9.

22. Finally the investigation was concluded by PW11 Mukesh Tyagi. He has arrested the appellant and submitted charge-sheet, Exhibit A-13 in the court. This witness has also stated about the Forensic Science Laboratory report.

23. DW1 Constable Ram Dutt Pandey has stated that on 25.08.2013 at 11:25 a.m., he along with his dog proceeded in an area of Doiwala. There, the dog sniffed the rear seat of the car, and



immediately he came on the road. He has stated that the dog did not reach to the appellant after its sniffing the rear seat of the car. This may not be a scientific or conclusive evidence to prove innocence. This Court leaves it at this stage.

24. The impugned judgment in paragraph 20 records discussion about 106 of the Evidence Act. It records that the appellant was owner of the car and it was in his campus, therefore, the burden was upon the appellant to prove as to how dead body was kept in the car because the car was locked.

25. In the last line of paragraph 20 of the impugned judgment, it is recorded that though there was no evidence with regard to ownership of the car, but the documents on record prove that the appellant was owner of the car.

26. In so far as circumstances are concerned, the only circumstance that is proved against the appellant by the prosecution is that a dead body was found in a car which was parked in the premises of the appellant. Admittedly, the appellant was not the sole resident of his house; there were many persons in his house. In fact, FIR records Bharat Bhushan, another brother of the appellant.

27. PW10 Pradeep Rawat has proved the Exhibits A-1 and A-2 by which the car and seat cover were taken into custody by the police. Both of these document records that the car was in the premises. It was locked, and the keys were given by the mother of Bharat Bhushan, Smt. Gita Kaushal, which means that, in fact, at the time when the dead body was recovered from the car, the keys



were in the custody of Gita Kaushal. Keys were not in the custody of either Amit or Bharat Bhushan.

28. PW10 Pradeep Rawat has been cross-examined. At page 3, second paragraph, PW10 Pradeep Rawat has admitted that he did not take into custody the documents pertaining to ownership of the car. He also did not verify as to in whose name the car was registered. Similarly, PW11 Mukesh Tyagi has also stated in the last but one paragraph of his cross-examination that he did not take the registration certificate of the car into custody.

29. Prosecution has not proved the ownership of the car. In fact, prosecution in the instant case has utterly failed to even establish into whose possession the car was when the dead body was recovered from it. As stated, according to PW10 Pradeep Rawat, when he visited the spot, the keys of the car were handed over to him by the mother of Bharat Bhushan, Smt. Gita Kaushal. Undoubtedly, Gita Kaushal is also mother of the appellant. Does it mean the car was with many persons in the family including the mother of the appellant?

30. Therefore, merely because the dead body was found in a car locked and parked in the family campus of appellant, it cannot be said that the factum of death or the manner in which the deceased Punnu died was especially within the knowledge of the appellant. This knowledge cannot be attributed to the appellant under the facts and circumstances of the case.

31. In so far as circumstances are concerned, there is no other circumstances as such except as stated hereinbefore that the dead



body was found in a locked car parked in the family campus of the appellant. This does not infer that it is the appellant and appellant alone who had killed the deceased.

32. In view of the above discussions, this Court is of the view that the prosecution has not been able to prove its case beyond any reasonable doubt against the appellant and the appellant ought to have been acquitted of the charge levelled against him. Learned court below has committed an error in convicting and sentencing the appellant. Therefore, the appeal deserves to be allowed.

33. The appeal is allowed.

34. The judgment and order dated 20.04.2018/21.04.2018, passed in Special Sessions Trial No.01 of 2014, State Vs. Amit Kaushal, by the court of Fast Track Court/Special Judge (POCSO)/Additional Sessions Judge, Dehradun is set aside.

35. The appellant Amit Kaushal is acquitted of the charge under Sections 377, 302 & 201 of IPC and Section 5/6 of the POCSO Act.

36. The appellant Amit Kaushal is in jail. Let he be set free forthwith, unless wanted in any other case.

37. The appellant shall furnish a personal bond and two reliable sureties, each of the like amount, to the satisfaction of the court concerned under Section 437 A of the Code within a period of one month from his release.



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38. Let a copy of this judgment along with the trial court record be sent to the court concerned.

(Siddhartha Sah, J.)
11.08.2026

(Ravindra Maithani, J.)
11.08.2026

Shiv/BS