

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.829 of 2014

Arising Out of PS.Case No. -268 Year- 2012 Thana -MOTIPUR District- MUZAFFARPUR

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1. Rajeshwar Rai S/o Late Mukha Rai, Resident of Village- Morsandi, P.S.-
Motipur, District- Muzaffarpur.

..... Appellant/s

Versus

1. The State of Bihar

..... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ajay Kumar Thakur, Adv.
Mr. Amit Kumar, Adv.

For the Respondent/s : Mr. Ajay Mishra, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

CAV JUDGMENT

Date: 30 -06-2015

This appeal is directed against the judgment dated 14.08.2014 and the order dated 21.08.2014 passed by the learned 5th Additional Sessions Judge, Muzaffarpur in Sessions Trial No. 818 of 2013, whereby and whereunder the sole appellant having been found guilty under section 302 of the Indian Penal Code (for short 'IPC') has been sentenced to undergo R.I. for life and to pay fine of Rs.10,000/- and in default thereof to suffer simple imprisonment for one year.

2. At the very outset, let it be mentioned that the appeal had been heard by a Division Bench of this Court but the learned Judges were divided in their opinion as to the result of the appeal. The matter has thus been referred to this Bench by the Hon'ble Chief Justice in

terms of Section 392 of the Code of Criminal Procedure (for short 'Cr.P.C.'), and that is how, this Bench has been called upon to decide, determine and adjudicate the appeal as mandated by Section 392 Cr.P.C.

3. It is to be noted here that after going through the evidence led on behalf of the prosecution and hearing the arguments advanced by the respective counsel for the parties, learned Brother Aditya Kumar Trivedi, J. dismissed the appeal and upheld the judgment of the trial court. But, having gone through the opinion of Brother Trivedi, J., learned Brother V.N. Sinha, J. expressed his inability to agree with his views and after discussing the facts and law involved in the case, Brother V. N. Sinha, J. set aside the judgment of conviction and order of sentence passed by the trial court and gave the appellant benefit of doubt.

4. Mr. Ajay Kumar Thakur, learned counsel for the appellant has submitted that the impugned judgment and order of conviction and sentence passed against the appellant is bad in law as well as on facts and is fit to be set aside. According to him, not even a single witness has stated that during the relevant time the appellant was present in his house being the alleged place of occurrence. In that view of the matter, the court below ought to have acquitted the appellant of the charge under section 302 of the Indian Penal Code. He has further contended



that it would appear from the statement of the witnesses examined during trial that no family member was present in the house when the victim Soni Kumari entered the house and was subsequently found dead. The inquest report would show that the body of the deceased was found in a room attached to the Verandah which was independently accessible even when the house was locked from inside. He has further contended that the Investigating Officer of the case has categorically stated that the house of the appellant vis-à-vis that of the accused is intervened by a road and the body was not found inside the house. Under such circumstances, the trial court erred in convicting the appellant. He has further contended that in view of the statement of the Investigating Officer, it would appear that no incriminating material was found where the dead body was allegedly lying and not even a single drop of blood was found at the place of occurrence.

5. On the other hand, Mr. Ajay Mishra, learned Additional Public Prosecutor has contended that the prosecution has proved its case by leading cogent evidence before the court. The body of the deceased was found in the house of the appellant. There is evidence that the deceased Soni Kumari was caught by the appellant and two others and was assaulted by them and thereafter she was confined inside the house. He states that though no witness has seen the occurrence but the circumstances under which the dead body was



found clearly suggest that the appellant had killed the deceased. He has further contended that the death of the deceased had occurred inside the house of the appellant and therefore it was for him to explain as to how the victim died. Since the appellant has failed to give any plausible explanation, the trial court rightly drew adverse inference against the appellant and convicted him for the offence punishable under section 302 IPC.

6. I have heard respective counsel for the parties and with their assistance, perused the evidence on record.

7. The prosecution case is based on the written report of the informant Bachchi Devi (P.W.5), wife of Asarfi Mahto (P.W.4). She had submitted the written report to the Officer-in-Charge, Motipur Police Station on 01.12.2012 at 3.00 p.m. asserting therein that on 01.12.2012 at about 10.00 a.m. her daughter Soni Kumari aged about 14 years had taken the goats to the outer area of the village to feed them. Having seen sweet potatoes in the field of the appellant, she could not stop her intense desire for them and started uprooting some sweet potatoes out of greed. In the meantime, Kanchan Kumari, aged about 18 years, daughter of the appellant and Chandan Devi wife of late Thakur Rai, came there and caught Soni Kumari. They assaulted her as also took her to their house where the appellant not only assaulted her but also hanged her with a ridge pole attached to the roof



with a rope and she died. When the informant and others went to the house of the appellant while looking for Soni Kumari, her dead body was found on the floor in the room east of the Verandah facing west. It is further stated in the written report that the occurrence was seen by co-villagers Santosh Mahto, Sanjay Mahto, Dilip Kumar (all not examined), Harendra Mahto (P.W.1) and others. It is also stated in the written report that the informant and others also saw a rope hanging from the ridge pole and the accused persons had left the house and absconded.

8. In the written report, the informant further claimed that her daughter Soni Kumari was first assaulted by the three accused persons, who also hanged her with the ridge pole causing her death. Besides the informant, Harendra Mahto (P.W.1) and Sanjay Mahto (not examined) put their thumb impression over the written report. Santosh Mahto and Dilip Kumar (both not examined) also witnessed the written report by putting their signatures. On the basis of the aforesaid written report, Motipur Police drew up a formal First Information Report and registered the case being Motipur P.S. Case No. 268 of 2012 against the appellant, his daughter Kanchan Kumari and Chandan Devi under section 302 read with 34 of the Indian Penal Code.

9. Having received the written report of the informant, the Officer-in-Charge, Motipur Police Station conducted the inquest on the



dead body of Soni Kumari on 01.12.2012 at 16 hours in the eastern room of the appellant's house in presence of Harendra Mahto (P.W.1) and Rajendra Mahto (not examined). He found black mark around the neck of the deceased. In the same afternoon at about 16.30 hours, Officer-in-Charge seized the incriminating materials, namely, Rassi (Munze rope) of about 3 ft. length, broken bangles of black colour, blue skirt (school uniform) and hair clip from the room in which inquest report of the deceased was prepared. After conducting the inquest proceeding and seizure of incriminating materials, the Officer-in-Charge of Motipur Police Station, namely, Nawal Kishore Rai returned to the Police Station and registered Motipur P.S. Case No. 268 of 2012 dated 01.12.2012 at 21.30 hours for the offence punishable under section 302 read with 34 of the Indian Penal Code. He entrusted the investigation of the case to the Sub Inspector of Police Ashok Kumar Das (P.W.8). The FIR was received in the court of learned Sub Divisional Judicial Magistrate, West, Muzaffarpur on 03.12.2012. In between registration of the FIR and its transmission to the court of learned Sub Divisional Judicial Magistrate, West, Muzaffarpur, the post-mortem examination of the deceased was conducted on 02.12.2012 at 11.30 a.m. by P.W.7 Dr. Bipin Kumar, vide post-mortem report (Ext.-1). The Investigating Officer in the light of the contents of the inquest report, seizure list, post-mortem report and after recording

the statement of the prosecution witnesses under section 161 Cr.P.C. found the case true against the appellant Rajeshwar Rai and Chandan Devi and submitted charge sheet no. 24/2013 dated 26.02.2013 against them but kept the matter of investigation pending against Kanchan Kumari.

10. In the light of the charge sheet submitted under section 173(2) Cr.P.C., the learned Sub Divisional Judicial Magistrate, West Muzaffarpur took cognizance of the offence under section 190(1)(b) Cr.P.C. and after supply of police paper, in terms of section 207 Cr.P.C., committed the case to the court of Sessions under section 209 Cr.P.C. The trial court framed charges under section 302 read with 34 of the Indian Penal Code against the appellant and Chandan Devi under order dated 15.01.2014 to which both the accused pleaded not guilty and claimed to be tried.

11. The prosecution in support of its case has examined altogether nine witnesses, namely, P.W.1 Harendra Mahto, P.W.2 Jhigan Mahto, P.W.3 Ram Pravesh, P.W.4 Asrafi Mahto, P.W.5 Bachchi Devi, P.W.6 Asarfi Thakur, P.W.7 Dr.Bipin Kumar, P.W.8 Ashok Kumar Das (Investigating Officer) and P.W.9 Gita Devi. Besides, the prosecution also exhibited certain documents in support of its case.

12. As noted above, P.W.5 Bachchi Devi is the informant of



the case. In her evidence, she has stated that she left her house at about 10.00 a.m. and returned in the evening at 4.00 p.m. and saw her daughter lying dead at the Darwaja of the appellant. She has categorically stated that she is not a witness to the occurrence. She, however, admits that she had got a case instituted and her thumb impression is there on the written report. At this stage, she has been declared hostile by the prosecution and with the leave of the court, the prosecutor cross-examined her. In cross-examination, she has completely denied the factum of occurrence as alleged in the FIR.

13. P.W.1 Harendra Mahto, uncle of the deceased has not only put his thumb impression on the written report but is also a witness to the inquest report. He has stated that Soni Kumari had died about 13-14 months back and he is witness to the inquest report, but he does not know as to how she died. He further stated that the Investigating Officer of the case had never recorded his statement during investigation. At this stage, the prosecutor was granted permission to cross-examine him, after having been declared hostile. He also denied the prosecution case as narrated in the FIR.

14. P.W.7 Dr. Bipin Kumar had conducted the post-mortem examination on the dead body of the deceased Soni Kumari at 11.30 a.m. on 02.12.2012. He found ligature mark over middle of neck just below thyroid cartilage passing transversely and encircling the neck



completely. On dissection of neck of the deceased, he found subcutaneous tissues and muscles of the neck lacerated. Trachea was congested with fracture of tracheal rings with blood clots. He also found abrasion on the upper back of the deceased. In his evidence, he has stated that the type of injury found on the person of the deceased can also be caused by assault. According to him, the deceased died due to asphyxia as a result of ante-mortem strangulation and the injuries were caused by impact of hard and blunt object. He has further opined that the death had occurred within 12-14 hours from the time of examination. He has proved the post-mortem report, which has been marked as Ext.-1. In cross-examination, he has admitted that if a person is hanged by rope, the type of injury found on the person of the deceased cannot occur. According to him, if one presses the neck by hard and blunt object, mark will appear in the light of size, length and breadth of the substance. He has further admitted that the type of injury found on the person of the deceased would have been caused by assault.

15. P.W.3 Ram Pravesh, P.W.4 Asrafi Mahto, P.W.6 Asarfi Thakur, and P.W.9 Gita Devi were declared hostile by the prosecution. Though they have been declared hostile, I think it apt to discuss the evidence adduced by them in brief.

16. P.W.3 Ram Pravesh Ram stated in his evidence that the



deceased was his neighbour and the occurrence took place about one year earlier. He also stated that the deceased was a mentally challenged girl and he learnt that she had committed suicide. He further deposed that the accused persons named in the FIR had neither confined the deceased in their house nor did they kill her. He stated that the police had never recorded his statement during investigation. At this stage, the prosecution declared him hostile and subjected him to cross-examination in which he completely denied the prosecution case.

17. P.W.4 Asarfi Mahto is father of the deceased and husband of the informant. He has stated that on the date of occurrence he was at Delhi. He came to the P.O. village after being telephonically informed about the occurrence and learnt from his wife that the deceased had gone to the house of the appellant but he could not get any clue about the cause of her death. He also stated that his statement was never recorded by the police during investigation. At this stage, the prosecution declared him hostile and the prosecutor was granted permission to cross-examine him. However, nothing tangible could come out in his cross-examination as he has completely denied the prosecution case.

18. P.W.6 Asarfi Thakur has expressed his complete ignorance about the prosecution case. He too was subjected to cross-examination by the prosecution. But his evidence is also of no help to

the prosecution.

19. P.W.9 Geeta Devi deposed in her evidence that the occurrence took place about one and a half years earlier when she had gone to harvest paddy. At about 2.00 p.m., she found a mob collected in the village. She went near the mob and found Soni Kumari lying dead. She stated that she is not aware as to how Soni Kumari died. This witness was also declared hostile. In cross-examination, she categorically stated that she herself had not seen the occurrence.

20. Before proceeding ahead, I think it appropriate to record that attention of all the hostile witnesses examined in the case was drawn towards their previous statement by the prosecutor while cross-examining them, but they all denied having made any such statement as suggested by the prosecution.

21. P.W.2 Jhigan Das is the only independent witness, who has not been declared hostile by the prosecution. In his deposition, he has stated that the occurrence took place about one year two months earlier. The deceased Soni Kumari was a mentally challenged girl. She had gone into courtyard of the appellant when there was none in the house. He did not know as to what happened in the courtyard after Soni Kumari went there but she died in the house of the appellant. On hue and cry having been raised, he went to the place of occurrence and saw the dead body of the deceased. He has stated that on that day she had

not dug sweet potato. He has further stated that his statement was never recorded by the Investigating Officer of the case. In the cross-examination, he has admitted that he himself did not see the occurrence.

22. The only other witness examined in the case is P.W.8 Ashok Kumar Das, the Investigating Officer of the case. He has stated in his evidence that on 01.12.2012 he was posted in Motipur Police Station and at that time one Nawal Kishore Rai was the Officer-in-Charge of the Police Station. It was Nawal Kishore Rai, who had instituted the FIR on the basis of written report of Bachchi Devi. He has proved the writing and signature of Nawal Kishore Rai over the formal FIR, which has been marked as Ext.-2. He has also proved the writing and signature of Nawal Kishore Rai on the endorsement made in the FIR, which has been marked as Ext.-3. He has stated that after institution of the FIR he went to the place of occurrence and prepared inquest report. He has proved the writing and signature on the inquest report, which has been marked as Ext.-4. According to him, the place of occurrence was a brick built asbestos roofed house of the appellant in village Morsandi situated on the eastern side of village road having northern frontage. The dead body of the deceased was found lying on the ground in the eastern room of the said house having western frontage. He has stated that he prepared the inquest report of the



deceased Soni Kumari over which he also obtained thumb impression of two independent witnesses, namely, Harendra Mahto (P.W.1 and Rajendra Mahto (not examined). He has further stated that he recorded further statement of the informant and the statement of Harendra Mahto (P.W.1), Santosh Mahto, Sanjay Mahto (both not examined), Geeta Devi (P.W.9), Asarfi Mahto (P.W.4), Asarfi Thakur (P.W.6), Jhigan Das (P.W.2), Binod Rai and Ram Pravesh Ram (both not examined), who supported the prosecution case. He received post-mortem report, completed the investigation and finding the case to be true against the appellant and Chandan Devi submitted charge sheet for the offence under section 302 read with 34 IPC keeping the investigation pending against Kanchan Kumari. In cross-examination, he has admitted that during the entire investigation none of the prosecution witnesses supported the prosecution case as an eye witness of the occurrence. He has further admitted that he did not find blood oozing out from eyes, nose and ears of the deceased. He has admitted that he has not mentioned in the case diary that at the time of inspection of the place of occurrence, belongings kept in the room were in organized/disorganized manner. He further admits that there was no rope found near the dead body of the deceased but the same was found hanging with the ridge pole. The length of the rope was found about 3 ft. He also admits that he did not enquire about the mental condition of

the deceased. According to him, the house of the deceased was on the western side of the road and the house of the accused was on the eastern side. He declined that the investigation conducted by him was defective.

23. After examination of the witnesses in support of the prosecution case, the statement of the appellant was recorded by the trial court under section 313 Cr.P.C. In answer to the first question put by the trial court, as to whether the witnesses were examined in his presence, the appellant replied in the affirmative. The second circumstance put forth by the trial court to the appellant was that the witnesses have stated that on 01.12.2012 in village Morsandi when Soni Kumari had taken the goats to the outer area of the village to feed them, she had uprooted the sweet potatoes from the field of the appellant to which the appellant answered in the negative. The third question put to the appellant by the trial court was that there is evidence against him that he along with other co-accused persons apprehended Soni Kumari, assaulted her and dragged her to their house and after closing the door of the house, hanged her with the ridge pole attached to the roof with a rope as result of which she died. The appellant pleaded innocence and denied the circumstances enumerated above in his reply to the court. Identical questions were put to co-accused Chandan Devi by the trial court during her examination under

section 313 Cr.P.C. Though the accused persons pleaded innocence in the matter but no evidence was adduced on their behalf in defence.

24. On conclusion of trial, the trial court acquitted the co-accused Chandan Devi from the charge but convicted the appellant in the manner described hereinabove. For convicting the appellant, the trial court held that the prosecution has proved that the deceased died in unnatural circumstances in the house of the appellant and the informant has also deposed in her evidence before having been declared hostile that she lodged the case with the police and gave her thumb impression on the application. On such assumption and presumption the trial court has held that the informant has proved the facts given in the written report (FIR). According to the trial court, the Investigating Officer of the case has also corroborated the case of the prosecution and since death had taken place inside the house of the appellant, the onus was upon him to explain as to how the victim died. The trial court has further held that from the evidence of the doctor, it would be evident that it was not a case of suicide by the victim but was the result of forcible strangulation with the help of some hard and blunt object, and since the death of the deceased was within special knowledge of the appellant, it was his responsibility to explain as to how the deceased died in his house, and since he failed to give any plausible explanation, the chain of circumstances proves that the appellant was responsible for

the death of the deceased.

25. Having discussed the prosecution case, as set out in the written report of the informant, evidence adduced in the court by the prosecution witnesses, statement of the accused recorded under section 313 Cr.P.C., Brother Trivedi, J. has come to a finding that the prosecution has conclusively proved the following circumstances :

- (a) The deceased was seen inside the house of the appellant;
- (b) She was not seen alive thereafter;
- (c) Her dead body was found inside the room of the appellant's house;
- (d) Death was due to asphyxia as a result of ante-mortem strangulation and injuries were caused by impact of hard and blunt object; and
- (e) As per the evidence of the Investigating Officer, during course of his visit at the place of occurrence, the house was found locked.

26. Brother Trivedi, J. was also of the view that the evidence of hostile witnesses cannot be rejected in toto merely because the prosecution declared them hostile and cross-examined them. In this regard, he has placed his reliance on the decision of the Supreme Court in *Paulmeli Vs. Tamil Nadu Tr. Inspector of Police [2014 Cr.L.J. 3240]*. He has further opined that inability of the accused during his



examination under Section 313 Cr.P.C. to explain the circumstances under which the deceased died would also be a factor which would go against the appellant. Another circumstance which weighed in his mind while dismissing the appeal is that when the Investigating Officer went to the place of occurrence, he found the house locked. Brother Trivedi, J. has held that the abscondence is not always fatal to the defence but some times it may prove so. He has further held that the appellant being head of his family failed to explain the circumstances mentioned above which he was legally required to explain in terms of section 106 of the Evidence Act, 1872. In respect of the applicability of section 106 of the Evidence Act in the facts of the present case, Brother A. K. Trivedi, J. has placed reliance on the decision of the Supreme Court in State of Rajasthan Vs. Thakur Singh [2014 Cr.L.J. 4047]. He has also placed reliance on the decision of the Supreme Court in the case of Yanob Sheikh @ Gagu Vs. State of West Bengal [(2013) 6 SCC 428 for the proposition that the acquittal of co-accused Chandan Devi wife of Late Thakur Rai per se would not be sufficient to result in acquittal of the appellant.

27. Having gone through the opinion of Brother A. K. Trivedi, J., Brother V. N. Sinha, J. expressed his inability to agree with the same. According to him, the decisions on which reliance has been placed by Brother A. K. Trivedi, J. for upholding the conviction of the



appellant have no application to the facts of the present case. According to Brother V. N. Sinha, J., it would be evident from the evidence of P.W.2 itself that when Soni Kumari went inside the courtyard of the appellant, there was none in his house. As such it was not for the appellant to explain the circumstances in which she met with an unnatural death in the courtyard and after her death, the dead body was found in the room east of the Verandah facing west which was accessible from outside.

28. Having discussed the prosecution case, as set out in the written report of the informant, evidence adduced in court by the prosecution witnesses including the statement of the appellant recorded under section 313 Cr.P.C. and having gone through the erudite opinion of my esteemed brethren, V. N. Sinha, J. and A. K. Trivedi, J., I would proceed to analyze and scrutinize the material on record.

29. As noted above, in the present case none of the witnesses has stated during trial that the deceased was seen in the company of the appellant or the appellant was present in the house on the alleged date of occurrence. The informant (P.W.5) has stated that she had left her house at 10.00 a.m. and returned in the evening at 4.00 p.m. and saw her daughter lying dead at the Darwaja of the appellant. Even she has not stated that the appellant was found present in the house either in the morning or in the evening. The only independent witness, who has not



been declared hostile by the prosecution, is P.W.2. In his deposition, he has clearly stated that when the deceased died, there was none in the house of the appellant and how the deceased died is not known to him. P.W.3 (Ram Pravesh Ram) has stated that the deceased was mentally challenged. He has stated that the appellant or anyone else had neither assaulted the deceased nor killed her. The father of the deceased (P.W.4) has also stated that at the time of occurrence he was at Delhi and on receipt of telephonic information he came to know about the occurrence and came to his village. No other witness examined on behalf of the prosecution could throw any light as to how the victim died. The initial story given in the FIR is to the effect that the deceased was hanged to death by the accused persons but the said fact has not been corroborated by the doctor, who conducted post-mortem examination on the body of the deceased. The doctor has opined that the death took place due to asphyxia as a result of ante-mortem strangulation. The Investigating Officer has categorically admitted that when he inspected the place of occurrence, the house was locked from inside. Though he claims that he prepared the inquest report of the deceased by carbon process but on perusal of the inquest report (Ext.-4), it would be evident that it was prepared on 01.12.2012 at about 4.00 p.m. by one Nawal Kishore Rai, Officer-in-Charge of Motipur Police Station, whereas the FIR of the case was registered at 9.30 p.m. on



01.12.2012, and after drawing formal FIR, the aforesaid Nawal Kishore Rai had entrusted the investigation of the case to P.W. 8 Ashok Kumar Das, the Investigating Officer of the case. The Investigating Officer has admitted in his cross-examination that when he inspected the place of occurrence the door of the house was found locked from inside and the dead body of the deceased was found in the outer eastern room which was accessible from outside.

30. From the evidence adduced on behalf of the prosecution, it would be obvious that when Soni Kumari visited the house of the appellant, the appellant and other family members were not present in the house. Moreover, apart from the doctor, who conducted the post-mortem examination, the Investigating Officer of the case and P.W.2 Jhigan Mahto, all other witnesses examined during trial were declared hostile by the prosecution. Though they were cross-examined by the prosecutor but nothing tangible could come out in the cross-examination.

31. It is settled in law that the evidence of a hostile witness is not to be rejected in toto. In ***Rameshbhai Mohanbhai Koli and others Vs. State of Gujarat [(2011) 11 SCC 111]***, reiterating the principle, the Supreme Court observed as under in paragraphs 16 and 17 :-

“16. It is settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine



him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (vide Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848 and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853).

17. In State of U.P. v. Ramesh Prasad Misra and Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia and Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb and Ors. v. State of U.P., AIR 2006 SC 951; Sarvesh Naraian Shukla v. Daroga Singh and Ors., AIR 2008 SC 320 and Subbu Singh v. State, (2009) 6 SCC 462.”

32. In *State of Rajasthan Vs. Bhawani & Anr. [(2003)7 SCC 291]*, the Supreme Court observed that the fact that the witness was declared hostile at the instance of the public prosecutor and he was allowed to cross examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence

has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness; normally, it should look for corroboration to his testimony.

33. In ***Radha Mohan Singh @ Lal Saheb & Ors. Vs. State of U.P., [(2006) 2 SCC 450]***, the Supreme Court observed as under :-

".....It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof..."

34. In ***Rajendra & Anr. Vs. State of Uttar Pradesh, [(2009)13 SCC 480]***, the Supreme Court observed that merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. The Supreme Court reiterated a similar view in ***Govindappa & Ors. Vs. State of Karnataka, [(2010) 6 SCC 533]***.

35. In view of the decisions of the Supreme Court in respect of hostile witnesses, it is evident that the evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out the extent to which he has supported the case of the prosecution. It is well

settled that there is no legal bar to pass conviction on the testimony of hostile witnesses if it is corroborated by other reliable witnesses.

36. Coming back to the facts of the present case, I find that not only the independent witnesses including the informant have turned hostile but there is no other material to connect the appellant with the alleged offence. Though the attention of the witnesses examined on behalf of the prosecution, who have turned hostile, has been drawn towards their previous statements made under section 161 Cr.P.C., it is strange why the prosecution has chosen not to seek clarification from the Investigating Officer when he was deposing before the court in respect of the previous statement of the witnesses.

37. I am further of the view that on the facts and in the circumstances of the present case, reliance on section 106 of the Evidence Act would not be apposite for holding the appellant guilty. It is a settled legal position that section 106 of the Evidence Act does not abrogate the well established rule of criminal jurisprudence that the burden lies on the prosecution to prove its case and that section 106 of the Evidence Act does not relieve the prosecution of that burden. It is not sufficient for the prosecution to establish the facts which only give rise to suspicion and then by reason of section 106 of the Evidence Act throw the onus upon the accused to prove his innocence.

38. Section 106 of the Evidence Act and the illustrations

appended thereto read 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.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

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

39. The Section provides, inter alia, that when any fact is especially within the knowledge of any person, the burden to prove the fact is upon him.

40 As back as in 1956, in *Shambhu Nath Mehra Vs. State of Ajmer* [AIR 1956 SC 404], the Supreme Court dealt with the interpretation of Section 106 of the Evidence Act and held that the section is not intended to shift the burden of proof in respect of a crime on the accused but to take care of a situation where a fact is known only to the accused and it is well-nigh impossible or extremely difficult for the prosecution to prove that fact. In paragraph 11, the Court held as under : -

“11. This [Section 101] 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."

41. It would be most apposite to refer to the observations made by the Supreme Court in *Trimukh Maroti Kirkan Vs. State of Maharashtra [(2006) 10 SCC 681]*, in paragraph 22, which reads as under :-

"22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

42. In *Sucha Singh Vs. State of Punjab [(2001) 4 SCC 375]*, in paragraph 19, the Supreme Court observed as under :-

"19. We pointed out 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 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 failed to offer any explanation which might drive the court to draw a different inference.”

43. Similarly in *Vikramjit Singh alias Vicky Vs. State of Punjab [(2006) 12 SCC 306]*, in paragraph 14, the Supreme Court observed as under:-

“14. Section 106 of the Indian Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule, e.g., where burden of proof may be imposed upon the accused by reason of a statute.”

44. Having noticed the decisions of the Supreme Court in respect of application of section 106 of the Evidence Act, if I look to the facts of the present case, the prosecution has been able to prove the following facts :-

(a) The deceased died a homicidal death, (b) The dead body of the deceased was found in a room attached with the verandah of the house of the appellant, which was accessible by anyone even when the house was locked, and (c) None was present in the house when the

deceased entered it.

45. The trial court has come to the conclusion that since the death took place in the house of the appellant, the burden was on the appellant to prove how the death of the deceased took place. It was further of the view that the deceased died in mysterious circumstances and it was the onus of the appellant, being head of the family, to explain how the deceased died.

46. I am afraid I cannot accept the reasoning given by the trial court. The law is well settled on the point that the burden to prove the guilt of the accused beyond reasonable doubt is on the prosecution in the light of section 101 of the Evidence Act and it is only when this burden is discharged the accused can prove any fact within his special knowledge under section 106 of the Evidence Act to establish that he was not guilty.

47. In the present case, there being no evidence to prove that the appellant was inside his house when the death of Soni Kumari took place by no stretch of imagination can it be said that the appellant had any special knowledge in respect of death of the deceased.

48. I am also of the view that under the circumstances, inability of the appellant to explain the presence of the body of Soni Kumari in the eastern room of his house in answering the question put under section 313 Cr.P.C. cannot be used against him, as under section



313 Cr.P.C., the accused is required to explain the incriminating materials and the circumstances proved against him. In the instant case, the factum of presence of the appellant and his family members in the house at the time of entry of Soni Kumari into the house of the appellant having not been proved, Brother V. N. Sinha, J., in my opinion, has rightly observed that the appellant was not at all required to explain the circumstances under which dead body was found in the outer eastern room, which was accessible from outside.

49. Further, an accused can be questioned under section 313 Cr.P.C. only for the purpose of enabling him personally to explain any circumstances appearing in the evidence against him. It is the duty of the court to examine the accused and seek his explanation on incriminating materials which have surfaced against him. Section 313 Cr.P.C. is based on the fundamental principle of fairness. It is not meant to nail the accused to his disadvantage but is meant for his benefit. The provisions are based on salutary principles of natural justice and the maxim *audi alteram partem* is enshrined in them. Therefore, an examination under section 313 Cr.P.C. has to be conducted with utmost fairness and not to detriment of the accused.

50. Keeping in view the aforesaid position of law, I find that the trial court has put two pertinent questions to the appellant while being examined under section 313 Cr.P.C. Though no witness has



come forward to state that the deceased had taken the goats to the field of the appellant to feed them and had uprooted sweet potatoes from the field of the appellant, such question was erroneously put to the appellant during his examination under section 313 Cr.P.C. Further, there is no evidence during trial that the deceased Soni Kumari was apprehended, assaulted, dragged, confined and killed by the appellant, but the trial court has confronted the appellant with such question. Apparently, the trial court has treated the allegations made in the FIR as substantive piece of evidence. True, the FIR contains such allegation. However, it is well settled that the FIR is not a substantive piece of evidence. It is merely a piece of information on the basis of which criminal law is set into motion. In that view of the matter, I am of the opinion that the trial court has put such questions which are not there in the evidence, with a view to nail the appellant to his disadvantage. It is well settled that an improper examination/inadequate question under section 313 Cr.P.C. amounts to serious lapse on the part of the trial court and is a ground for interference with the conviction. In any case, in the present matter, in my opinion, non-explanation during appellant's examination under section 313 Cr.P.C. of the circumstances under which Soni Kumari died would be of no consequence. In no circumstance, can that form a basis for conviction of the appellant.

51. I further find that as the prosecution has not been able to discharge its burden of establishing beyond reasonable doubt that the appellant was in any way responsible for the death of Soni Kumari, in my view, the trial court should not have held the appellant guilty just because he has not been able to explain under what circumstances the deceased died.

52. On a scrutiny of the entire material on record, I find that there is neither any direct nor any circumstantial evidence against the accused persons. There is nothing on record on the basis of which the case of the appellant could have been distinguished in any manner with co-accused Chandan Devi, who faced trial along with the appellant and has been acquitted by the trial court. I am at a loss to understand how, when the charges are same and evidence led during trial is identical against both the accused, the trial court could acquit Chandan Devi but convict the appellant. Under such circumstances, the trial court could not have applied a separate yardstick for appreciating the evidence in case of the appellant. In my opinion, the appellant was also entitled to the same treatment as that of co-accused Chandan Devi.

53. In the absence of any kind of clinching evidence to connect the appellant with the crime, I am of the opinion that it would not be appropriate to sustain the conviction. Accordingly, the appeal is allowed. The judgment of conviction dated 14.08.2014 and order of

sentence dated 21.08.2014 recorded by the learned 5th Additional Sessions Judge, Muzaffarpur in Sessions Trial No. 818 of 2013 are set aside and the appellant be set at liberty forthwith unless his detention is required in connection with any other case.

(Ashwani Kumar Singh, J)

Pradeep/-

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