

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRL.A. 650/2014

Judgment reserved on 08.04.2015
Judgment delivered on 15.04.2015

JOGINDER PAL BHATIA ...Appellant

Through : Mr. Ajay Verma , Advocate

Versus

STATE ...Respondent

Through : Mr. Sunil Sharma, APP for the State.

+ CRL.A. 260/2015

MANSHI & ANR.Appellants

Through : Ms. Anu Narula , Advocate

Versus

STATE ...Respondent

Through : Mr. Sunil Sharma, APP for the State.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. Both the appeals filed by the appellants arise out of one criminal case, hence, they have been heard together and are being disposed of by this common judgment.
2. Present appeals filed by the appellants under Section 374 (2) of Code of Criminal Procedure, are directed against the impugned judgment

dated 30.10.2013 and order on sentence dated 07.03.2014 passed by the learned Additional Sessions Judge, Delhi in Sessions Case No. 21/2008 whereby all convicts were sentenced with imprisonment for life for the offences punishable under Section 120B/302 of Indian Penal Code with fine of Rs.5000/- each, in default of payment of fine, they shall further undergo simple imprisonment for six months each. The said sentences shall run concurrently.

3. Brief facts of the case, as noticed by the learned Trial Court, are as under:

“1. The case of the prosecution is that on 07.12.2007, after taking meal and watching TV, complainant Kamrul went to sleep. At about 1:30 am night, he heard the noise of latch and whispering of some person coming from the adjoining house. Immediately, he woke up and came at the main gate and saw outside through the gali of gate but he didn't see anything. Thereafter, he went on the roof and saw in the gali that owner of the adjoining house namely Punjabi and two women were dragging one boy towards the house of that boy while Punjabi was holding his legs. Complainant immediately came down and asked Punjabi and those women as to where they were taking that person on the ground in front of house of Rakesh Tyagi. Complainant and Harbns Lal @ kale chased those persons and nabbed the women in front of Pal Electrician in the gali and her name was revealed as Manshi. Punjabi and the other women managed to flee away from there. Punjabi had bought the house about 1 ½ years back from one Raju used to come in that house seldom and he was not aware about his address. Thereafter, they look at the boy who was lying in front of house of Rakesh Tyagi from whose mouth froth was coming out and he was dead. Thereafter, complainant made a call at 100 number

from his mobile No. 9871797361 and PCR came at the spot. Other neighbour also gathered at the spot. One black colour chappal of left foot was also lying near the dead body. The nabbed accused Manshi disclosed the name of deceased as Bholu. Complainant raised suspicion that Manshi along with Punjabi and other woman had killed that boy by giving some poisonous substance and they were taking the dead body of deceased and Punjabi was holding the feet of deceased.

2. DD No. 6A was registered in PS Uttam Nagar and SI Rajbir Singh, Inspector Suresh Chand, HC Diwan Singh reached at the spot i.e H.No B-1/1B, Hastsal Vihar and a dead body of a boy aged 24-25 years was lying in the gali. Crime Team was called at the spot. One black colour slipper of right foot was found from inside the house No. B-1/1B of Punjabi. One half bottle of liquor make “ Litchi No.1” was found on the table which was having half quantity of liquor and one white colour paper pouch was found near the same having some tablets. One driving licence in the name of Prahlad Kumar s/o Nanak Chand was found in the said room. Some chapatti and cooked vegetable and one steel glass were also found in the kitchen out of which smell of liquor was coming. Crime Team tried to lift finger prints but they couldnot succeed. Inspector Suresh Chand sent the dead body to DDU hospital in the custody of HC Diwan Singh. The deceased was identified as Prahlad kumar @ Bholu resident of Nangloi. The driving licence, helmet and jacket of deceased were also recovered from the spot. The motorcycle, on which deceased had come from his godown along with Manshi, was also recovered from near the spot.

3) On 7-12-2007, the body of deceased Prahlad was handed over to its relative after post-mortem. Accused Manshi was arrested on 7-12-2007 and at the instance of accused Manshi, accused Geeta was also arrested. Accused Manju @ Geeta denied for TIP. NBWs were issued against accused Joginder Pal Bhatia. Gold chain, ICICI Bank credit card and some cash of deceased were also found missing. After completion of investigation, challan was filed against accused Manshi and Manju @ Geeta u/s 302/201/120B/34 IPC. During investigation, it was revealed that accused Manshi used to take goods from the junk godown of deceased Prahlad kumar @ Bholu and she used to take goods on loan basis. Manshi was having illicit relations with deceased Prahlad kumar @ Bholu and Joginder Pal Bhatia @ Punjabi. Joginder Pal did not like the dealings of Manshi with Prahlad Kumar. Joginder Pal along with Manju @ Geeta and Mnashi gave some poisonous substance in tea to deceased Prahlad kumar @ Bholu. Later on, accused Joginder Pal Bhatia was also arrested on 14-04-2008. Accused Joginder Pal Bhatia got recovered two ICICI bank credit cards of deceased Prahlad from the bushes in Holi Park, Hastal Vihar, Uttam Nagar. Supplementary challan was filed against accused Joginder Pal Bhatia @ Punjabi u/s 302/201/120B/34 IPC.

4) After compliance of Section 207 Cr.P.C., the case was committed to Session Court. Charge under Section 120 B IPC, 302 r/w 120B IPC and 210/120B IPC was framed against all three accused to which they pleaded not guilty and claimed trial.

4. The prosecution, in the course of the trial, relied upon the testimonies of 34 witnesses and several exhibits placed on record.
5. The learned Trial Court, after scrutiny of the evidence, held that prosecution had been able to prove the case against the appellants and accordingly convicted them for the offences and imposed the sentence as has been stated hereinabove.

Common arguments raised by the counsel for the Appellants

6. Learned counsel for the appellants contended that the judgment of the learned Trial Court is wrong, illegal and contrary to the facts and law and same is based on surmises and conjectures. It is contended that PW1 Kamrul, the star witness of the prosecution is a planted witness and his presence at the spot of the incident is highly suspicious. It is contended that his testimony is unreliable as the alleged incident took place at about 1:30 a.m. in the dead of the night where there was no street light and there is every possibility that he could not see the incident due to weak eye sight. It is further contended that no finger prints were found on the glasses, helmet, jacket, vegetables, chappals etc. which were seized from the house of the appellant/Joginder Pal Bhatia.

Arguments raised by counsel for the Appellant/Joginder Pal Bhatia

7. Shri Ajay Verma, Advocate appearing on behalf of appellant/Joginder Pal Bhatia contended that there were several material contradictions in the testimony of PW1 Kamrul which proves

that he was a planted witness; that PW1 failed to recognize whether the persons who were dragging the body was a man or woman due to fog; that the place from where PW1 Kamrul saw the deceased has not been mentioned in the site plan; that the testimonies of PW2 Harbans Lal and PW3 Rakesh Tyagi is hearsay evidence, hence their testimonies cannot be relied upon; that as per the testimony of PW1, that he saw the appellants dragging the body of the deceased but PW15 HC Diwan Singh failed to notice any dragging marks either on the body of the deceased or on the earth, therefore the theory of dragging is false; that there was lack of legal evidence as neither finger nor foot prints were found on the spot; that the tablets recovered from the spot cannot be termed as poisonous to cause death of Prahlad @ Bholu; that there is no direct eye witness to the incident, also PW4 Deenu, brother of deceased failed to identify the helmet of his brother which was lying at the house of appellant/Joginder Pal Bhatia but interestingly he identified the jacket of the deceased; that accused Manshi remained in the custody of Inspector Suresh Chand till the arrival of two lady constables which creates a serious doubt in the case of the prosecution because it is well settled law that no female is allowed to be detained in the custody of male police officer during night; that the case property is doubtful and has been planted upon the accused in order to crack the present case; that the place of recovery is accessible to the public at large, therefore this evidence is inadmissible in law and cannot be relied to convict the appellant/Joginder Pal Bhatia. In support of his submissions, learned

counsel for the appellant has relied upon the case of **Akhilesh Hajam v. State of Bihar 1995 (2) CCC 122 (SC)**, wherein it has been held by the Hon'ble Supreme Court that:

“As regards the seizure of blood stained iron angle on the basis of disclosure statement said to have been made by the appellant the same is also not free from doubt. According to the prosecution the appellant made the disclosure statement that he had kept the iron angle in the room concealed beneath the fuel wood which was used as a weapon of offence but according to the statement of PW 6 the witness of disclosure and seizure of the alleged iron angle the same was not found concealed beneath the fuel wood in the room but the iron angle was found in the varanda which is an open and accessible place. Such a seizure from an open and accessible place can hardly be said to be a recovery on the basis of disclosure statement. It is therefore difficult to accept that the seizure of iron angle was on the basis of the disclosure statement made by the appellant. Even if the iron angle would have been recovered from a concealed place then also on the basis of this circumstances of recovery alone in the absence of any report of Serologist as to the presence of human blood on the same the conviction of the appellant could not be founded.”

8. Learned counsel for the appellant/Joginder Pal Bhatia further contended that there is lack of scientific and forensic evidences to corroborate the story of the prosecution; that the appellant/Joginder Pal Bhatia has been falsely implicated in the present case and has not been convicted in a judicious manner; that the exhibits have not been recovered in a legal manner.

9. Learned counsel for the appellant/Joginder Pal Bhatia further contended that the case of the prosecution rests on the circumstantial evidence and the circumstantial evidence should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by accused and none else. It is argued that guidelines have been laid down in the case of ***Padala Veera Reddy V. State of A.P & Ors. 1990(2) RCT(Crl.) 26: (AIR 1990 SC 79)***, wherein it has been held that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

- a) *The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.*
- b) *Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused:*
- c) *The circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.*
- d) *The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.*

10. Learned counsel for the appellant/Joginder Pal Bhatia contended that learned Trial Court has ignored the fact that DW1 Hukam Chand

disclosed that there was a property dispute between the appellant/Joginder Singh and PW1 Kamrul and therefore there is every reason for PW1 Kamrul to depose falsely .

Arguments raised by counsel for the Appellants/Manshi and Manju

11. Ms. Anu Narula, Advocate appearing on behalf of appellants Manshi and Manju argued that the prosecution has wrongly relied upon the testimony of PW5 Dinesh, brother of deceased Prahlad @ Bholu who identified the black colour jacket of his brother with orange colour stripes and black colour helmet with a mark 'Sainik'; that as per testimony of PW7 Komal Singh, the death of the deceased was caused by intake of excessive sleeping pills therefore the burden shifted on the prosecution to prove that blood and urine of the deceased contained the quantity of lorazepam which was sufficient to kill the deceased; that prosecution failed to examine material witness Satnam Kaur who lived in a house adjacent to the appellant/Joginder Pal Bhatia.
12. It is submitted that though appellant/Manshi apprehended at the spot, but there is no evidence against appellant/Manju to show that she had meeting of mind or common intention to kill the deceased by administering the poisonous substance to the deceased and at best, her case falls within the purview of Section 201 of Indian Penal Code and not under Section 302 read with Section 120B of Indian Penal Code. It is argued that appellant/Manju was not aware whether sleeping pills

were given to the victim because she was sent away by the appellant/Joginder Pal Bhatia to buy Tea and Mathis from the tea stall though appellant/Manshi was got introduced to appellant/Joginder Pal Bhatia through appellant/Manju; that appellant/Manju is in custody for more than 8 years.

13. Learned counsel for the appellant/Manju relied upon ***P. Sugathan Vs. State of Kerala AIR 2000 SCC 3323***, wherein it has been held that:

*“10. Criminal conspiracy is defined under Section 120(A) of the Indian Penal Code as under:
Definition of criminal conspiracy. When two or more persons agreed to do, or cause to be done.*

(1) an illegal act, or

*(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:
Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.*

Explanation -- it is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

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12. We are aware of the fact that direct independent evidence of criminal conspiracy is generally not available and its existence is a matter of inference. The inferences are normally deduced from acts of parties in pursuance of purpose in common between conspirators.....There must be a meeting of minds resulting in ultimate decision taken by the conspirators regarding the commission of an offence and where the factum of conspiracy is sought to be

inferred from circumstances, the prosecution has to show that the circumstances giving rise to an conclusive or irresistible inference of an agreement between the two or more persons to commit an offence. As in all other criminal offences, the prosecution has to discharge its onus of proving the case against the accused beyond reasonable doubt. The circumstances in a case, when taken together on their face value, should indicate the meeting of the minds between the conspirators for the intended object of committing an illegal act or an act which is not illegal, by illegal means. A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy. It has to be shown that all means adopted and illegal acts done were in furtherance of the object of conspiracy hatched. The circumstances relied for the purposes of drawing an inference should be prior in time than the actual commission of the offence in furtherance of the alleged conspiracy.

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17. After perusing the whole record, scanning the evidence of the prosecution witnesses and hearing lengthy arguments from both sides, we are satisfied that the High Court was right in holding that charge of criminal conspiracy against A2 had not been proved beyond doubt. She was, therefore, rightly acquitted of the charge under S. 302 read with S. 120-B of the IPC. However, as she was found to have actively participated in causing disappearance of the dead body of the deceased knowing and having reason to believe that his murder has been committed by A was convicted and sentenced under S. 201 of the IPC.”

and in ***P. K. Narayanan Vs. State of Kerala, 1995 SCC (Cri.) 215***, it has been held that:

9. *It is pertinent to note that the accused were also charged under Section 120B read with Section 201 alleging that in pursuance of the criminal conspiracy the accused*

tempered with the evidence of murder after the occurrence to screen the offenders and that a false information was given to the police. Both the courts below have held that there is no material whatsoever to establish the same. It can thus be seen that there is no material whatsoever to show that the accused who are alleged to have conspired did anything to cover up the crime. therefore the only evidence relied upon by the prosecution in proof of the conspiracy is with reference to the few above mentioned circumstances prior to the murder and the only other subsequent circumstance relied upon by the prosecution is the conduct of A-1 in not consoling the father of the deceased. An offence of conspiracy can not be deemed to have been established on mere suspicion and surmises or inferences which are not supported by cogent evidence.

- 10. The ingredients of this offence are that there should be an agreement between the persons who are alleged to conspire and the said agreement should be for doing of an illegal act or for doing by illegal means an act which by itself may not be illegal. therefore the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. therefore the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. But if those circumstances are compatible also with the innocence of the accused persons then it can not be held that the prosecution has successfully established its case. Even if some acts are proved to have been committed it must be clear that they were so committed in pursuance of an agreement made between the accused who were parties to the alleged conspiracy. Inferences from such proved circumstances regarding the guilt may be drawn only when such circumstances are incapable of any other reasonable explanation. From the above discussion it can be seen that some of the circumstances relied upon by the*

prosecution are not established by cogent and reliable evidence. Even otherwise it can not be said that those circumstances are incapable of any other reasonable interpretation.

Reliance has also been placed on ***Mahesh Mahto V. State of Bihar, 1997 Cri. L.J. 4402***, wherein it has been observed that:

6. *Meera Devi (now dead) was the wife of Umesh Mahto (A-1) and Mahesh Mahto (A-2) is his younger brother. It is the prosecution case that A-1, A-2, and A-3 were demanding dowry and other articles from the brother of Meera Devi and for that reason they were harassing and assaulting her. To prove this story the prosecution relied upon the evidence of Ramdeo Prasad (P.W.7) who are brothers of Meera Devi. We have gone through their evidence and we find that there is a general allegation against three accused that they demanded a scooter and some other furniture articles. They further stated that only once the appellant made such demand. There is no evidence on the record to substantiate the prosecution case that the appellant was causing any harassment or assaulting Meera Devi. The Courts below have totally overlooked this fact and has erroneously held the appellant guilty for committing the murder of Meera Devi with the aid of Section 34 IPC. We are of the considered view that the prosecution has failed to prove beyond reasonable doubt the complicity of the appellant in committing the murder of Meera Devi.*
7. *What remains to be considered is as to whether conviction of the appellant under Section 201/34 IPC is sustainable? To prove this charge against the appellant the prosecution mainly relied upon the evidence of Chintaman Mahto (P.W.15). He is the resident of another village and has stated that he was posted as an operator in the Irrigation Department from 1982 to 1984 at Village Bhore Jairam. He was knowing A-1 as he used to go to his house very often. On 9.9.1984 during night when he had gone for answering the*

nature's call near the bound of the river Gandak he saw four persons carrying the dead body on the cot. It was a moonlit night and when he flashed his torch he identified the appellant and his brother Umesh Mahto (A-1), when he asked them whose dead body it was, they told him that it was of some woman and they proceeded towards the river Gandak. They then threw the dead body into the river. Admittedly the Investigating Officer has not recorded his statement under Section 161 Cr.P.C. and for that purpose the protest petition was filed by the informant against the Investigating agency. Several objections were raised to the credibility of the evidence of this witness but the courts below for the good reasons accepted the evidence of Chintaman Mahto (P.W.15) as trustworthy, We have gone through the judgments of the courts below as well as his evidence and we are satisfied that his evidence can be accepted as far as the incident of carrying the dead body towards the river Gandak and thereafter throwing the same into the river. The conviction of the appellant, therefore, under Section 201/34 IPC must be confirmed.

- 8 *Coming to the sentence awarded to the appellant for the offence punishable under Section 201/34 IPC it was urged on behalf of the appellant that at the time of incident he was 18 years old and was staying with his elder brother Umesh Mahto (A-1). The possibility that he having been pressed by his brother A-1 to carry the dead body of Meera Devi cannot be ruled out. He may not have been able to disobey his brother, younger in age as he was. After hearing learned counsel for the parties we are of the considered view that in the facts and circumstances of the case sentence of seven years awarded to the appellant was not justified. We, therefore, reduce the sentence of the appellant for an offence punishable under Section 201/34 IPC to the period already undergone.”*

and in *Rajendran and etc. Vs. State of Tamilnadu, 1997 Cri. L.J. 4344*, it has been observed that:

18. *Regarding the charge against both the accused under Section 201 of the Indian Penal Code, the counsel for the appellants would submit that according to the prosecution, both the accused committed the offence under Section 201 of the Indian Penal Code by dragging the dead body from Sanarpalayam village to Cheplanatham village, near graveyard, but the act of dragging the body for some distance and leaving the same in open field cannot be termed to be causing disappearance of the evidence. We find some force in this contention.*
20. *As rightly stated by the counsel, dragging the dead body from one place to another and putting the same in visible open ground would not in any way attract any ingredient incorporated in Section 201 of the Indian Penal Code. Therefore, we have no hesitation to hold that the prosecution has failed to prove the offence under Section 201 of the Indian Penal Code as against both the accused. In the result, both the appellants/accused are acquitted in respect of the charge under Section 201 of the Indian Penal Code."*

Ms. Narula has thus argued that there is no evidence to show that there was no meeting of minds of appellant/Manju and appellant/Manshi to kill the deceased by giving poisonous substance and prosecution has failed to prove beyond doubt that the appellant/Manju had a hand in the murder of deceased and at the most she is liable for offence punishable under Section 201 of Indian Penal Code.

Argument raised by by learned Counsel for the State

14. On the other hand, Mr. Sunil Sharma, learned counsel for the State opposed the appeals filed by the appellants and argued that it is a case of circumstantial evidence and the prosecution has been able to prove its case beyond reasonable doubt; that there is no reason to disbelieve the testimony of PW1 Kamrul as he is a reliable and trustworthy eye witness who saw the appellants dragging the body of the deceased towards the house of PW3 Rakesh Tyagi and the body was dumped in front of his house; that the two women were seen pulling the hands of the deceased and one Sardar Joginder Pal was seen pulling his legs; that PW1 Kamrul called the neighbour PW2 Harbans Lal @ Kale; that PW1 Kamrul and PW2 Harbans Lal chased the appellants in front of Pal Electrician in the gali and apprehended the appellant/Manshi; that appellant/Joginder Pal Bhatia and Appellant/Manju managed to flee from the spot; that PW1 Kamrul saw the deceased from whose mouth froth was coming out lying in front of the house of PW3 Rakesh Tyagi; that thereafter, PW1 Kamrul made a call to 100 number from his mobile phone and PCR reached at the spot and custody of appellant/Manshi was handed over to the police; that appellant/Manju was also arrested on the same day i.e. 07.12.2007; that during investigation, it was revealed that appellant/Manshi used to take goods on loan basis and was having illicit relations with appellant/Joginder Pal Bhatia and deceased; that appellant/Joginder Pal Bhatia was averse to the relation of appellant/Manshi with the deceased; that appellant/Joginder Pal Bhatia along with appellant/Manshi and

appellant/Manju with their common intention to kill deceased gave poisonous substance to the deceased in Tea; that appellant/Joginder Pal Bhatia was arrested on 14.04.2008 i.e 4 months and 7 days after the arrest of other appellants; that the driving licence, helmet and jacket of deceased were also recovered from the spot; that two ICICI Bank credit cards of deceased were also recovered from the house of appellant/Joginder Pal Bhatia; that PW2 Harbans Lal has corroborated the testimony of PW1 Kamrul that appellants were seen dragging the body of the deceased; that PW4 Deenu, brother of deceased, identified the dead body of the deceased.

15. In support of his submissions, learned counsel for the State has relied upon the case of ***Bhagat Ram vs. State of Punjab***(AIR 1954 SC 621) wherein it has been held as follows:

“where the case depends upon the conclusion drawn from circumstances, the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.”

16. Learned counsel for the State further relied on the case of **S. Chenga Reddy & Ors. Vs. State of A.P. (1996 (10) SCC 193)** wherein it has been observed as under:

“21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and as such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete

and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.’’

and in ***Trimukh Maroti Kirkan v. State of Maharashtra 2007 Cri L.J. 20***, the law is stated in the following terms:

*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 Prosecution 1944 AC 315* quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh : 2003CriLJ3892*). 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 traveling on a railway without ticket. The burden of proving that he had a ticket is on him.

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.”

also in ***State of Rajasthan vs Thakur Singh***, the Apex Court held:

15. We find that the High Court has not at all considered the provisions of Section 106 of the Evidence Act, 1872. This section provides, inter alia, that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him.

*16. Way back in **Shambhu Nath Mehra v. State of Ajmer : 1956 SCR 199** this 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. It was said:*

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.

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18. Reliance was placed by this Court on **Ganeshlal v. State of Maharashtra** : (1992) 3 SCC 106 in which case the Appellant was prosecuted for the murder of his wife inside his house. Since the death had occurred in his custody, it was held that the Appellant was under an obligation to give an explanation for the cause of death in his statement Under Section 313 of the Code of Criminal Procedure. A denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the Appellant was a prime accused in the commission of murder of his wife.

19. Similarly, in **Dnyaneshwar v. State of Maharashtra** MANU/SC/7264/2007⁶: (2007) 10 SCC 445 this Court observed that since the deceased was murdered in her matrimonial home and the Appellant had not set up a case that the offence was committed by somebody else or that there was a possibility of an outsider committing the offence, it was for the husband

to explain the grounds for the unnatural death of his wife.

20. In Jagdish v. State of Madhya Pradesh : (2009) 9 SCC 495 this Court observed as follows:

It bears repetition that the Appellant and the deceased family members were the only occupants of the room and it was therefore incumbent on the Appellant to have tendered some explanation in order to avoid any suspicion as to his guilt.

21. More recently, in Gian Chand v. State of Haryana : (2013) 14 SCC 420 a large number of decisions of this Court were referred to and the interpretation given to Section 106 of the Evidence Act in Shambhu Nath Mehra was reiterated. One of the decisions cited in Gian Chand is that of State of West Bengal v. Mir Mohammad Omar : (2000) 8 SCC 382 which gives a rather telling example explaining the principle behind Section 106 of the Evidence Act in the following words:

During arguments we put a question to learned Senior Counsel for the Respondents based on a hypothetical illustration. If a boy is kidnapped from the lawful custody of his guardian in the sight of his people and the kidnappers disappeared with the prey, what would be the normal inference if the mangled dead body of the boy is recovered within a couple of hours from elsewhere. The query was made whether upon proof of the above facts an inference could be drawn that the kidnappers would have killed the boy. Learned Senior Counsel finally conceded that in such a case the inference is reasonably certain that the boy was killed by the kidnappers unless they explain otherwise.”

17. We have heard the learned counsel for the parties and considered their rival submissions and perused the impugned judgment as well as the material available on record. In order to deal with the contentions of both the parties, it would be appropriate to examine the testimonies of material witnesses, more particularly the testimonies of PW1 Kamrul, who saw the appellants dragging the body of the deceased on the day of the incident, PW3 Rakesh Tyagi in front of whose house the dead body of the deceased was dumped and PW5 Dinesh, brother of deceased, who identified the dead body of the deceased and articles of deceased.
18. PW1 Kamrul deposed that on 07.12.2007, after taking meal and watching TV, he went to sleep when he heard the noise of a latch and whispering of some persons coming from the adjoining house. Thereafter, he went outside and saw three persons dragging the body of deceased towards the house of PW5 Rakesh Tyagi. Two women were holding the hands of the dead body and one Sardar was holding his feet. He called his neighbour Harbans Lal in the Gali. On seeing them, all the three tried to flee away leaving behind the body. They chased them and were able to apprehend one of the ladies whose name was revealed as Manshi. He saw the froth coming out from the mouth of the body and found him dead and thereafter made a call to the police from his mobile phone. PCR came to the spot and appellant/Manshi was arrested. A black colour chappal of left foot was lying near the dead body. Police recorded the statement of the PW1 Kamrul and prepared a site plan at his instance. The police went

inside the house of the appellant/Joginder Pal Bhatia and seized a black colour chappal of the right foot. The chappal was kept in a piece of cloth and a pulanda was prepared which was sealed. The police also seized one half filled bottle of liquor (Addha), three strips of tablets, driving license of deceased, one steel glass with smell of alcohol, cooked vegetable with chapattis from the house of the appellant/Joginder Pal Bhatia. The relatives of the deceased came to the spot in the morning on 07.12.2007. A black colour motor cycle was recovered from B-Block, Uttam Nagar, Delhi.

19. PW4 Deenu deposed that in the evening of 06.12.2007, at the time of lighting of 'Jot', he made a telephone call to his brother Prahlad @ Bholu to find out when he would return but his brother informed him that he was held up and he should do the 'Pooja'. PW4 further deposed that his brother did not return till next day and he was informed by the police that his brother had been murdered. PW4 identified the dead body of the deceased as of his brother Prahlad @ Bholu at Deen Dayal Upadhyaya Hospital.
20. It has also been testified by PW5 Dinesh that the appellant/Manshi used to take goods from the deceased on loan basis as she had some business terms. PW5 Dinesh categorically stated that :

"On 06.12.2007, I was doing work on the said godown with the labour. At about 2:00 p.m., accused Manshi came at our godown and talked with my brother Bholu in the office while I was doing the work with labour outside. After talking with Bholu, accused Manshi came out of the office with my brother and started going somewhere. On being asked, my brother told me

that Manshi was taking him to some place for getting the money of the goods. Accused Manshi and Bholu went on motorcycle No. DL-8S-AK- 2236 make Pulsar.”

21. Testimony of PW5 Dinesh clearly establishes the fact that the appellant/Manshi was seen in the company of deceased on the day of the incident. It has been held by the Hon’ble Supreme Court in the case of ***Bodhraj v. State of Jammu & Kashmir, (2002) 8 SCC 45***, that:

31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased, A-1 and A-2 were seen together by witnesses i.e. PWs 14, 15 and 18; in addition to the evidence of PWs 1 and 2.

Similarly in the case of ***State of U.P. v. Satish, (2005) 3 SCC 114***, the Apex Court observed that:

“22. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of

other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs 3 and 5, in addition to the evidence of PW 2.”

22. Relying upon the above cited judgments and the last seen theory having been established there being positive evidence that the deceased and appellant/Manshi were together, the testimony of PW1 Kamrul who gave a graphic narration of the entire incident rules out that he was a planted witness. Perusal of the testimonies of PW1 Kamrul and PW5 Dinesh cast no doubt that the evidence as against the appellants and their testimonies are fully reliable and trustworthy. PW1 Kamrul has categorically deposed that he used to do embroidery work at his house and it is very much possible that he happened to see the appellant when appellant/Joginder Pal Bhatia was dragging the body of the deceased along with appellant/Manshi and appellant/Manju, particularly since it was a night at around 1:30 a.m. when there would have been a pin drop silence and it is pretty natural that in night the voice of adjacent house can be heard in the silence of midnight and on hearing such noise of dragging, he went upstairs and saw entire incident from the roof of his own house and came downstairs and called other neighbours too.
23. The contention of learned counsel for the appellants that PW1 Kamrul is a planted witness, having a weak eye sight and also he is having

some property dispute with the appellant/Joginder Pal Bhatia, therefore we cannot rely upon his testimony, does not hold ground as the witness has stood the test of lengthy cross examination and core of his testimony could not be shaken in the cross-examination. Moreover, the evidence of this witness also stands substantially supported by his statement recorded under Section 161 of Code of Criminal Procedure which lends assurance to his testimony. Moreover, on his alerting other neighbors the appellants were chased and appellant/Manshi was caught during the chase. Therefore, the evidence of the witness inspires confidence and there is absolutely no reason to disbelieve his version. His testimony is fully supported by the medical evidence and the recovery of articles seized from the house of the appellant/Joginder Pal Bhatia. His testimony corroborates with the testimony of PW2 Harbans Lal and PW3 Rakesh Tyagi on the material particulars, which proves that PW1 Kamrul spoke the truth. More so, the presence of PW1 Kamrul at the spot of crime has also been proved by PW2 Harbans Lal and PW3 Rakesh Tyagi.

24. Another submission made by the learned counsel for the appellants was that the evidence of PW2 Harbans Lal and PW3 Rakesh Tyagi is hearsay and their testimonies are not reliable and trustworthy, also does not hold ground as PW1 Kamrul testified that he saw the appellants dragging the body of the deceased and he called other neighbours including PW2 Harbans Lal and both of them chased the appellants and appellant/Manshi was arrested on the spot whereas

others fled away. Thus, we are in alignment with the view taken by the learned Trial Court that this contradiction regarding the dragging and seeing of such incident by PW2 Harbans Lal is corroborated with the evidence of other witnesses and circumstances of the case.

25. Similarly, it is in the evidence of PW2 Harbans Lal, resident of the same locality who also lives near the house of the appellant, therefore he happened to see the dragging of the body by three people including his neighbour (appellant/Joginder Pal Bhatia @ Sardar) along with two ladies. PW1 Kamrul and PW2 Harbans Lal chased them and got to know the name of one lady as Manshi who was arrested on the spot. PW2 Harbans Lal also knew PW1 Kamrul and stated that he was the neighbour of one of the appellant/Joginder Pal Bhatia @ Sardar and he had been called by PW1 Kamrul on the day of incident. Though PW2 Harbans Lal was a chance witness but he had a plausible explanation of his seeing the incident in question. His version of seeing the appellants holding and dragging the body of the deceased was also corroborated by PW1 Kamrul.
26. The contention of the learned counsel for the appellant/Manju that she was not responsible for causing the death of the deceased as she had no knowledge that a poisonous substance had been administered to the deceased does not hold any ground. Appellant/Manju failed to give a plausible explanation about her presence in the midnight at 1:30 a.m. at the residence of the appellant/Joginder Pal Bhatia. She had no reason to be there at odd hours. It is not denied that she knew the

deceased and that she pulled the dead body of the deceased from the house of appellant/Joginder Pal Bhatia. It leaves no room for doubt that appellants had connived to do away with the deceased and while they were trying to dispose of the dead body of the deceased, to their bad luck, they were seen by PW1 Kamrul, who raised the alarm.

Motive

27. Learned counsel for the State argued that the motive of the murder was that appellant/Manshi was having illicit relations with deceased and appellant/Joginder Pal Bhatia did not like her affiliation with the deceased. Since, appellant/Joginder Pal disliked this relation and wanted to get rid of the deceased, he along with other appellants gave some poisonous substance to the deceased which resulted in his death. The prosecution failed to lead any evidence to this effect that appellant/Joginder Pal Bhatia had illicit relations with appellant/Manshi.

At the same time, it is not necessary for the prosecution to prove the motive which is only one of the circumstances to be kept in mind while appreciating the evidence adduced by the prosecution. If the evidence of the witnesses appears to be truthful and convincing, failure to prove the motive is not fatal to the case of the prosecution. Our view is fortified by the law laid down by the Apex Court in ***State of U.P. v. Hari Prasad (1974) 3 SCC 673***, wherein the Apex Court dealt with the aspect of motive and has stated that:

“This is not to say that even if the witnesses are truthful, the prosecution must fail for the reason that the motive of the crime is difficult to find. For the matter of fact, it is never incumbent on the prosecution to prove the motive for the crime. And often times, a motive is indicated to heighten the probability that the offence was committed by the person who was impelled by that motive. But, if the crime is alleged to have been committed for a particular motive, it is relevant to inquire whether the pattern of the crime fits in with the alleged motive.”

Similarly, in ***Mani Kumar Thapa v. State of Sikkim, (2002) 7 SCC***, wherein the Apex Court has observed that:

“In this case court has stated that the PW1, wife of the deceased, has spoken about some enmity between A-1 and the deceased. Assuming that this evidence is insufficient to establish the motive for murder even then if the prosecution is able to establish beyond all reasonable doubt from other circumstantial evidence that it is the accused (including the appellant) alone who could have committed the murder, the absence of the motive will not hamper a safe conviction”.

In ***Nathuni Yadav v. State of Bihar, (1998) 9 SCC 238***, Hon’ble Supreme has observed that:

“16. xxxxxxxxx Learned Sessions Judge treated it as a very weak motive for this gory murder. Learned counsel for the appellant rightly contended that by murdering Sona Devi the appellants could not succeed in securing the property which was gifted away by Bhagelu Singh. Does it mean that the appellants would have had no motive at all for gunning down Bhagelu Singh Yadav and his wife? The mere fact that motive alleged by the prosecution is not strong enough for others to develop such a degree of grudge would not mean that the assailants had no serious reasons to do this.”

Medical Evidence:

28. As per the post mortem report Ex.PW7/A prepared by PW7 Dr. Komal Singh, H.O.D., Forensic Medicine, the following external injuries were found on the body of the deceased :

a) Abrasions over the left knee joint 2 x 2 cms and on the left nostril of 1.3 cm x 5 mm ; grave abrasion over the back 7 to 8 in number vertically placed line on the mid lateral side of the back.

No blood present at the margins, postmortem Injuries.

b) On internal examination it was found that the Brain and lungs were congested and odematous. Intracerebral hemorrhage present. Mucoio secretion present in the lumen of trachea. Stomach contains 20 ml of fluid. All other body organs were congested.

A bare reading of the postmortem report Ex.PW7/A clearly suggest that the cause of death was due to respiratory failure subsequent to the poisoning and as per FSL report No. 2007/C-4637 dated 30-06-2008 Mark X, 'Lorazepam' was found in the blood and urine samples of the deceased, which clearly establishes that the death of deceased was occurred due to poisonous substance.

Defective Investigation:

29. It has been pointed by the learned counsel for the appellants that there are major defects in the investigation as no finger prints were found on the glasses, helmet, jacket, vegetables, chappals etc. though all these articles were lifted and seized from the spot by the investigating team but no attempt was made to take the finger prints of the

appellants and sent the same for comparison, the benefit of which must go to the appellants.

30. In our opinion, despite the lapses pointed out in the investigation conducted, there is enough material available on record to prove that the appellants have committed the murder of the deceased. It is well settled by a catena of judgments that the defects in the investigation cannot in itself be a ground for acquittal. Reliance can be placed in the case of ***Rotash Vs. State of Rajasthan, 2007(1) ACR 129 (SC)***, wherein the Hon'ble Apex Court has held thus:

“The investigation was not full proof but then defective investigation would not lead to total rejection of the prosecution case.

In Visveswaran v. State Rep. by S.D.M. 2003 Cri L J 2548, this Court held:

“Before we notice the circumstances proving the case against the appellant and establishing his identity beyond reasonable doubt, it has to be borne in mind that the approach required to be adopted by courts in such cases has to be different. The cases are required to be dealt with utmost sensitivity, courts have to show greater responsibility when trying an accused on charge of rape. In such cases, the broader probabilities are required to be examined and the courts are not to get swayed by minor contradictions or insignificant discrepancies which are not of substantial character. The evidence is required to be appreciated having regard to the background of the entire case and not in isolation. The ground realities are to be kept in view. It is also required to be kept in view that every defective investigation need not necessarily result in the acquittal. In defective investigation, the only requirement is of extra caution by courts while evaluating evidence. It

would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved.”

In State of M.P. Vs. Man Singh and Ors., (2003) 10 SCC 414, this Court held:

“Even if it is accepted that there was deficiencies in investigation as pointed out by the High Court, that cannot be a ground to discard the prosecution version which is authentic, credible and cogent. Non-examination of Hira Lal is also not a factor to cast doubt on the prosecution version. He was not an eyewitness, and according to the version of PW8 he arrived after PW8. When PW8 has been examined, the non-examination of Hira Lal is of no consequence.”

It therefore falls that merely if there are deficiencies in the investigation, it would not lead to the rejection of the case of the prosecution when it is otherwise proved.

30. Finally, the prosecution has been able to prove that the deceased accompanied appellant/Manshi on the evening of 06.12.2007 and brother of the deceased is a witness to the last seen. The prosecution has conclusively proved through the testimony of PW1 Kamrul, who saw all the appellants dragging the dead body of the deceased. The prosecution through medical evidence has proved that the deceased was given a poisonous substance which resulted in his death. The prosecution has been able to prove all other circumstances which unerringly point towards the guilt of the appellants and the chain of circumstantial evidence is complete and leaves no ground towards the innocence of the appellants. In all probability, the appellants entered

into a criminal conspiracy to do away with the deceased and therefore are guilty of the offences under Section 302 of Indian Penal Code read with Section 120-B of Indian Penal Code.

31. Thus, having considered all the incumbent factors, we do not find any infirmity in the impugned judgment dated 30.10.2013 and order on sentence dated 07.03.2014 passed by the learned Additional Session Judge. Accordingly, the judgment against the appellants is upheld. Both the appeals are dismissed.
32. Appellants are reported to be in custody. They shall serve the remaining period of sentence.
33. Copy of the order be sent to the Superintendent Jail as well as to the Trial Court for compliance.
34. Trial court record be sent back.

SANGITA DHINGRA SEHGAL, J.

G. S. SISTANI, J.

April 15, 2015
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