

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 579 of 2011**

- Pancham Dhobi, aged about 45 years, S/o Halaknava, R/o Sonbarasa, P.S. Podi, District Korla (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through : P.S. Manendragarh, District Korla (C.G.)

---- Respondent**And****CRA No.642 of 2011**

- Smt. Tarabai, wife of Pancham Dhobi, aged about 40 years, R/o village Sonbarsa, P.S. Pondi, District Korla (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through : P.S. Manendragarh, District Korla (C.G.)

---- Respondent

For Appellants	:	Shri Anil Gulati and Shri Ashok Kumar Shukla, Advocates
For Respondent/State	:	Shri Vaibhav Goverdhan, Panel Lawyer

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Arvind Singh Chandel.

Judgment on Board**By Pritinker Diwaker, J****09/11/2017**

As these two appeals arise out of common judgment of conviction and order of sentence dated 24.06.2011 passed by 2nd Additional Sessions Judge, Manendragarh, District Korla, in Sessions Trial No. 113/2010 convicting the accused/appellants under Section 302/34 of IPC and sentencing them to undergo imprisonment for

life and to pay fine of Rs.1000/- each, in default of payment of fine amount to further undergo R.I. for three months, they are being disposed by this common judgment.

2. In the present case name of the deceased is Naresh Kumar, 8 years old, 5th son of accused/appellant Pancham in Cr.A.No.579/2011 (hereinafter referred to as A-1) from his first wife Lalti Bai. Accused/appellant Tara Bai in Cr.A.No.642/2011 (hereinafter referred to as A-2) is second wife of A-1.

3. As per the prosecution case, A-1 and his first wife Lalti Bai had six issues. A-1 had also performed second marriage with A-2. A-1, his first wife Lalti Bai and A-2 were living in a same house where A-1 used to sleep with A-2 in a separate room. On 23.07.2010, appellants (A-1 and A-2) slept together along with the deceased after bolting the door from inside. Next morning when A-1, A-2 and deceased did not wake up, Lalti Bai (PW/1), first wife of A-1, knocked the door and then it was A-2 who informed her that A-1 is not allowing her to open the door. Immediately thereafter, Lalti (PW/1) raised her cries and hearing the same neighbours came there and when the door was not opened despite all the efforts, Brijesh Kumar (PW/2) and Premnath (PW/3) climbed up the roof, removed tiles, gained entry inside the room and saw A-1 from the top holding bloodstained axe and the dead body was lying on the floor. After some time, A-2 opened the door and Lalti (PW/1) saw A-1 standing there holding bloodstained axe in his hand and thereafter she became unconscious. On 24.07.2010 at 8.55 am, dehati merg (Ex.P/1) was lodged at the instance of Lalti Bai (PW/1) followed by dehati nalisi (Ex.P/2) and merg intimation (Ex.P/14). On the basis of merg (Ex.P/14), FIR (Ex.P/15) was registered against A-1 under Section 302 IPC. On the same day, inquest on the body

of deceased was conducted vide Ex.P/5-A and body was sent for postmortem examination to Community Health Center, Manendragarh where Dr. (Smt.) Soubhagya Singh (PW/13) conducted postmortem on the body of deceased and gave her report Ex.P/17-A noticing following injuries:-

- (i) Large reddish incised cut through wound over left side of neck at id portion horizontally situated in the size of 2 x 2 x 5 cm. All blood vessels and bone cut at wound. Reddish clotted blood seen over wounds.
- (ii) Large reddish incised wound with clotted blood over right upper part of chest, extending from axilla to supra-sternal notch in the size of 7.5 x 2 x 1.5 inch x depth.

The Autopsy Surgeon opined that the cause of death of deceased was hemorrhagic shock due to large extensive wounds and death was homicidal in nature.

04. Clothes of A-1 were seized vide property seizure memo (Ex.P/9) whereas gamcha of A-2 was seized vide Ex.P/10. This apart, at the instance of A-1, one axe was seized from the spot vide Ex.P/8 and likewise, bloodstained soil and plain soil was also seized from the spot, however, there is no FSL and serological report on record to confirm presence of blood and its origin. After filing of charge sheet, the trial Court framed the charge against the accused/appellants u/s 302/34 of IPC. In addition to this, charge under Section 506 Part-II of IPC was also framed against A-1.

05. In order to prove the complicity of the accused/appellants in the crime in question, the prosecution has examined 13 witnesses. Statements of the accused under Section 313 Cr.P.C. was also

recorded in which they denied their guilt and pleaded innocence and false implication in the case.

06. After hearing the parties the Court below has convicted and sentenced the accused/appellants as mentioned above in paragraph No.1 of this judgment. Hence, this appeal

07. Counsel for the accused/appellants submits:

(i) That there is no eye-witness account to the incident and the appellants have been convicted solely on the basis of circumstantial evidence but the nature of circumstantial evidence is so weak which can be made basis for their conviction.

(ii) In respect of A-2, it has been argued that even if the entire prosecution case is taken as it is, it appears that she was inside the room where murder has taken place, however, no overt-act has been assigned to this accused. Learned counsel further argued that Lalti (PW/1) has not stated anything against A-2 and according to her, relations between her and A-2 were cordial.

(iii) That certain seizures have been effected allegedly at the instance of appellants, but in absence of FSL and Serological report, it loses its significance.

08. On the other hand, supporting the impugned judgment it has been argued by the State counsel that the conviction of the accused/appellants is strictly in accordance with law and there is no infirmity in the same. It has been further argued that A-1 was seen holding bloodstained axe immediately after the incident and this apart, A-1 has also made extra-judicial confession before PW/1. He also argued that none of the accused has offered any probable explanation in their statements recorded under Section 313 of Cr.P.C. as to how the deceased died homicidal death and in view of

Section 106 of the Evidence Act, burden lies on them and, therefore, they have rightly been convicted in the commission of crime.

09. We have heard learned counsel for the parties and perused the material available on record.

10. Smt. Lalti (PW/1), informant and first wife of A-1, has stated that she has six issues from A-1. Her son deceased Naresh was very affectionate to his father A-1 and on the date of incident he slept with him and his step mother Tara Bai (A-2). In the morning when she woke up, she noticed that her son deceased, who normally used to wake up before her, did not wake up and, thereafter, she knocked the door where he was sleeping. In reply, she heard the voice of A-1 that “मर्डर हो गया है” and she when she raised her cries, Ajay, Premnath and her son Brijesh reached there. They too also knocked the door but it was simply replied by A-1 that murder has taken place. Thereafter, Premnath and Ajay climbed up on the roof and when they removed the roof's tile, they saw A-1 standing there holding bloodstained axe in his hand and then the door was opened by A-2. She has further stated that when she saw A-1 holding bloodstained axe in his hand, she became unconscious. This witness has also stated that as she was weeping, she could not ask any question to A-2. She has also stated that her relation with A-2 was cordial though she was second wife of her husband (A-1). This witness also went on to state that A-1 used to fondle deceased. In para 16, this witness states that accused persons and the deceased had slept together in a room, however, she could not say as to who killed him but she saw A-1 holding axe in his hand and then he (A-1) made extra-judicial confession before her that he had killed the deceased.

11. Brijesh Kumar (PW/2) is son of PW/1 & A-1 and brother of the deceased. He has stated that prior to 2-3 months of the incident, as he was beaten by his father A-1, he started living with his aunt. On the date of incident at about 7.00 am, her mother came to his aunt's house and informed that accused persons are not opening the door. Thereafter, he rushed to place of occurrence along with Ajay and Premnath and then both of them climbed up on the roof and after removing roof's tile they saw A-1 standing there holding bloodstained axe in his hand. After some time, A-2 opened the door and then he also saw A-1 standing there holding axe in his hand. He has further stated that A-1 was asking him to come inside and threatened that he has already killed one and would kill him also. This witness, in para 5, has stated that he inquired from A-2 as to what had happened inside the room then she informed him that after tying her hands and leg, it is A-1 who killed the deceased. This witness has also admitted the fact that relation between A-1 and the deceased were cordial.

12. Premnath (PW/3) is neighbour of the appellants who after receiving the information from PW/1 had gone to her house and when the door was not opened, he climbed up on the roof, removed tile and saw A-1 holding bloodstained axe in his hand. He is also witness to inquest (Ex.P/5-A), seizure (Ex.P/3, P/7, P/8, P/9, P/10 and P/11)

13. Lakhan (PW/4) is also neighbour of the appellants and deceased. This witness has also seen A-1 holding bloodstained axe in his hand. He is also a witness to inquest (Ex.P/5-A) and seizure (Ex.P/11).

14. Smt. Indra Kumar (PW/5) is hearsay witness. Sahadev Prasad

(PW/6) is witness to inquest (Ex.P/5-A). Ajay (PW/7), brother of the deceased, turned hostile. Veer Sai (PW/8) is Patwari who prepared spot map vide Ex.P/4. M.R. Kashyap (PW/9) – Police Inspector did part of investigation. Ramesh Kumar (PW/10) -Head Constable and Sanjay Bhagat (PW/11), Constable, assisted in the investigation. S.K. Ghari (PW/12) is Investigating Officer who has duly supported the prosecution case. Dr. (Smt.) Soubhagya Singh (PW/13) conducted postmortem examination on the body of deceased and gave her report (Ex.P/17-A) opining the case of death to be hemorrhage due to large extensive wounds and death was homicidal in nature.

15. Close scrutiny of the evidence makes it clear that on 23.07.2010, accused persons and the deceased slept together in one room and the said room was bolted from inside. On the next morning, when the door of room was not opened, door was knocked by PW/1, mother of deceased, and in reply it was told by A-1 that murder has taken place. Immediately thereafter PW/1 rushed to her son Brijesh (PW/2) and neighbours (PW/3 and PW/4), who reached the place of occurrence, climbed up on the roof, removed tile and saw A-1 holding bloodstained axe in his hand. After the door was being opened by A-2, PW/1 also saw A-1 holding bloodstained axe in his hand.

16. Obviously there is no eyewitness account in the present case and the entire case is based on the circumstantial evidence. One of the strongest circumstances put down by the prosecution, in this case is that apart from the accused and the deceased, no third person was present in the room where incident took place. No satisfactory explanation has come from the accused as to how the deceased died when there was no other person except the two.

Evidence of prosecution witnesses is not fragile in nature and indicates that it is A-1 who was holding bloodstained axe in his and said that murder has taken place.

17. In case where house murder is the issue, heavy burden is on the shoulders of the accused to explain as to under what circumstances the deceased died. While dealing with the matter involving the murder committed inside the house it has been held by the Apex Court in the matter of **Trimukh Maroti Kirkan v. State of Maharashtra** reported in **(2006) 10 SCC 681** as under:

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

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

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

18. Further in the matter of **State of Rajasthan v. Thkur Singh** reported in **(2014) 12 SCC 211** it has been held by the Apex Court as under:

“17. In a specific instance in Trimukh Maroti Kirkan v. State of Maharashtra (2006) 10 SCC 681) this Court held that when the wife is injured in the dwelling home where the husband ordinarily resides, and the husband offers no explanation for the injuries to his wife, then the circumstances would indicate that the husband is responsible for the injuries. It was said: (SCC p. 694, para 22)

“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.”

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* {(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 MP* {(2009) 9 SCC 495} this Court observed as follows: (SCC 503, para 22)

“22... 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 WB v. Mir Mohammad Omar* which gives a rather telling example explaining the principle behind Section 106 of the Evidence Act in the following words: (*Mir Mohammad Omar case* (2000) 8 SCC p 393 para 35)

“35. During arguments we put a question to the learned Sernioir Counsel for the respondents based on 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 a 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. The 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.”

22. The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts.”

19. Now if the facts of the present case are seen in the light of the afore-quoted judicial pronouncements, picture which emerges is almost identical. The death of the deceased in this case undisputedly took place inside a room where apart from the accused and deceased, no other person was present at the relevant time. In the cases like the present one, the assailant has all the opportunity to plan and commit the crime at the time and in the circumstances of his choice and it is extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence is insisted upon. Furthermore, no explanation has come forth from the accused/appellants in their statements recorded under Section 313 of the Code of Criminal Procedure as to how the death of deceased occurred though being the adult inmates of the room in question it was their bounden duty to explain the things by leading cogent and pin-pointed evidence in their defence.

20. So far as conviction of A-2 is concerned, there is no legally admissible evidence showing her involvement in commission of

offence though she was also present inside the room. From the evidence of prosecution witnesses, it appears that as she was threatened by A-1, she kept quiet and as per A-2, her hands were tied by A-1. Neither prosecution witnesses have stated anything specific against A-2 nor any incriminating material has been adduced by the prosecution to bring home her guilt. That apart, it is A-1 who has made extra-judicial confession before PW/1, PW/2 and PW/3 who saw him holding bloodstained axe in his hand. The postmortem report also supports the prosecution case wherein two incised wound over neck and chest were found and according to Autopsy Surgeon, the injuries sustained by the deceased could have been caused by axe and the cause of death was hemorrhagic shock due to large extensive wound and death was homicidal in nature.

21. Thus in view of the aforesaid factual and legal position this Court is of the considered opinion that the prosecution has adduced sufficient evidence to hold the A-1 guilty for committing the murder of his son and that way the Court below has also been justified to arrive at a conclusion slapping conviction on the A-1 under Section 302/34 of IPC.

22. Consequently, Cr.A.No.579/2011 being devoid of any substance is liable to be dismissed and it is hereby dismissed. Appellant Pancham Dhobi (A-1) in Cr.A.No.579/2011 is in jail and no further order regarding his arrest etc is needed.

23. Considering the quality of evidence collected by the prosecution, this Court is of the opinion that conviction of A-2 under Section 302/34 IPC is not based on due appreciation of the evidence available on record and that being so she is entitled for benefit of

doubt.

24. Consequently, Cr.A.No.642/2011 is allowed. The judgment impugned convicting Appellant Tara Bai (A-2) under Section 302/34 of IPC is set aside and she is acquitted of the charge levelled against her. A-2 is reported to be on bail, her bail bonds stand discharged.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(Arvind Singh Chandel)
Judge

Vijay