

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 16-08-2017

Judgment delivered on 19-09-2017

Criminal Appeal No. 750 of 2005

Smt. Madhu Devi Mishra, aged about 48 years, S/o. Ramashraya Mishra, R/o. Village Sukulpara Kharoud, P.S. Shivrinarayan, District Janjgir Champa, Chhattisgarh

---- Appellant

Versus

State of Chhattisgarh, Through Police Station – Shivrinarayan, District Janjgir Champa, Chhattisgarh

---- Respondent

For Appellant	:	Mr. Afroj Khan, Advocate.
For Respondent/State	:	Mr. Vivek Sharma, Govt Advocate

**Coram: Hon'ble Shri Justice Pritinker Diwaker
 Hon'ble Shri Justice Ram Prasanna Sharma**

CAV JUDGMENT

Per Ram Prasanna Sharma, J.

- 1) This appeal is directed against the judgement of conviction and order of sentence dated 28.07.2005 passed by the Third Additional Sessions Judge (FTC) Janjgir, Session Division, Janjgir (C.G.), in Sessions Trial No. 132 of 2005, convicting the accused/appellant under Sections 302 and 201 of the IPC and sentencing him to undergo imprisonment for life and to pay fine of Rs. 500/-; rigorous

imprisonment for three years and to pay fine of Rs. 500/- with default stipulation.

- 2) Name of the deceased is Nirmala Devi. The deceased was married to one Raghuraj of village Shivrinarayn. After the death of Raghuraj, the deceased was living with the accused/appellant in her house at Sukulpara, Kharoud.
- 3) As per the prosecution case, It is alleged that after the death of her husband the deceased left her parental house with some ornaments and cash of Rs. 50,000/- and she was living with her son in the house of the accused/appellant. The appellant always locked the deceased in the house and she was not permitted to go anywhere. The appellant was torturing the deceased and tried to get money which was in the possession of the deceased. Son of the deceased left the house of the appellant and started living with his grandmother. The deceased was found dead in the house of the accused/appellant. It is alleged that the appellant went to her relative's house at village Bhainsmudi and returned on 09.12.2004. As per prosecution, the appellant committed murder of the deceased thereafter she left for village Bhainsmudi. The door of the house was opened by villagers Radhabai and Sangita where they found that the deceased was dead. Thereafter, one Chamelibai lodged the First Information Report (Ex.P-21) at Police Station Shivrinarayan and Panchanama (Ex.P-14) was prepared and postmortem was conducted. At the time of investigation certain documents and ornaments were seized from the house of the appellant; statements of the witnesses were recorded under Section 161 of the Cr.P.C.

- 4) After completion of the investigation, charge sheet was filed against the accused/ appellant in the Court of Judicial Magistrate First Class, Janjgir, who, in turn, committed the case to the Court of Sessions Judge, Janjgir. The appellant was charge sheeted under Section 302 and 201 of the IPC to which she did not plead guilty, therefore, trial was conducted. After completion of evidence of the prosecution side, statement of the appellant under Section 313 of the Cr.P.C. was recorded and after completion of trial, the trial Court considering the material available on record by the impugned judgement convicted and sentenced the accused/appellant as mentioned above.
- 5) Learned counsel appearing for the accused/appellant submits as under:
- (i) That from the evidence of the prosecution it is established that the appellant was in village Bhainsmudi between 03.12.2004 to 09.12.2004 and she was not in the house where the dead body of the deceased was found.
 - (ii) That all the witnesses have deposed that there is good relation between the appellant and the deceased and there is no motive for commission of murder by the appellant.
 - (iii) That as per the post-mortem report, the deceased died since 96 to 120 hours from the period of post-mortem i.e. from 11.12.2004 it means that she died either on 07.12.2004 or 08.12.2004 and in that period the appellant was not present in the house where the incident occurred therefore, liability cannot be fastened on her.

- (iv) That the documents and ornaments seized from the house of the appellant is not incriminating circumstances against her as the deceased was living in the same house and had kept her documents and ornaments there.
- 6) *Per contra*, learned State counsel supporting the impugned judgement has submitted that the judgement of the trial Court is strictly in accordance with the law and well founded and there is no illegality or infirmity in it warranting any interference by this Court.
- 7) We have heard counsel for the parties and perused the material on record.
- 8) Dr N. Prasad (PW-9) had conducted the postmortem of deceased Nirmala Devi on 11.12.2004. He found the following injuries and facts after autopsy;-
 - (I) Decomposition started in the body and maggots were found in the same rigor mortis is absent.
 - (ii) Carno of the hyoid bone was separated.
 - (iii) Cause of death is asphyxia due to massive pressure upon chest and throat, the same is homicidal in nature and duration of death is 96 to 120 hours from the period of autopsy. From the opinion of the expert it is clear that the deceased died either on 07.12.2004 or 08.12.2004.
- 9) There is no eye witness account to the incident, the case of the prosecution is based on circumstantial evidence and as per the law laid down by Supreme Court in the case of **Jaharlal Das vs State**

of Orissa, (1991) 3 SCC 27; circumstantial evidence in order to sustain the conviction must satisfy three conditions;

((i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accuse;

(iii) 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, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.

In case depending largely upon circumstantial evidence there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. When the main link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubts. It is at this juncture the Court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes unconsciously it may happen to be a short step between moral certainty and legal proof. At times it can be a case of 'may be true'. But there is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions.

- 10) Smt. Radha Mishra (PW-2) deposed that the deceased was residing with the appellant in her house at Sukulpara, Kharoud. As per her statement when the appellant returned from village Bhainsmudi, she was called by the appellant and when she reached the house of the appellant found that the deceased was lying on the cot and she was dead. In her cross-examination she deposed that at the time of death of deceased appellant had gone to village Bhainsmudi and she also had gone to village Bhainsmudi.

- 11) Naresh Kumar Mishra (PW-5) deposed in para-2, that the appellant had gone to village Bhainsmudi for some social work and at that time the deceased was alone in the house. He further deposed that when the appellant returned from village Bhainsmudi, he was called by the appellant and when he reached the house of the appellant, he found that Nirmala was dead. Triveni Devi Choubey (PW-7) deposed that the appellant had gone to village Bhainsmudi as her relative Pudukbai expired and the appellant stayed there up to *terahvi* of her relative. Rajkumar Choubey (PW-8) deposed in similar fashion. Chameli Bai (PW-1) deposed that the deceased left the house of her husband after his death and she was having some ornaments, documents of bank and post office and cash of Rs. 50,000 to 60,000/-. Goutam Tiwari (PW-3) is the son of the deceased and he deposed that he stayed with his mother for some time in the house of the appellant thereafter two persons of village Kharoud took him to village Shivrinarayan. Rajendra Kumar Yadav (PW-6) is the person who received the information about the death of Nirmala thereafter he reached the house of the appellant where there was mob and the appellant was abusing some police personnels. Puranlal Sidar (PW-19) deposed that some documents and ornaments were seized from the house of the appellant relating to fixed deposit of the deceased and other deposits. Chandrabhan Sidar (PW-20) deposed the same and the same was corroborated by the evidence of K.S. Rathiya (PW-21) who is Police Officer/ Investigating Officer and as per evidence of Chameli Bai (PW-1), K.S.Painkra (PW-10) Nayab Tahsildar, Yogendra Kumar Soni (PW-

- 13), Poosram Shrivasa (PW-16) identification of ornaments was done in their presence.
- 12) The appellant stated in her statement recorded under Section 313 of the CrPC, that the mother-in-law and brother-in-law of the deceased had quarrel on many occasions in her house with the deceased and they threatened her to kill and they used to visit their house even in her absence and she had gone to village Bhainsmudi and on 09.12.2004 when she returned from village Bhainsmudi she found Nirmala dead.
- 13) Only circumstance which is established by the prosecution that the deceased was residing in the house of the appellant but from the evidence it is established that the appellant had gone to village Bhainsmudi and when she returned from the village Bhainsmudi she called the witnesses and when they reached the house of the appellant they found that Nirmala dead. In this context we may profitably utilize the legal principle embodied in Section 106 of the Evidence Act which reads as follows: "When any fact is especially within the knowledge of any person, burden of proving that fact is upon him.
- 14) The section 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 the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to

meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he/she could prove without difficulty or inconvenience. The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge."

- 15) In the present case as per post-mortem report the deceased died either on 07.12.2004 or 08.12.2004 and from the statement of prosecution witness it is established that the appellant had gone to village Bhainsmudi and returned on 09.12.2004, so it can not be said that the circumstances was within the knowledge of the appellant.
- 16) It is not a case where the prosecution has succeeded in proving that on the date of incident the appellant was in the house with the deceased. Documents regarding fixed deposit and the ornaments seized from the house of the appellant is not incriminating circumstances because admittedly case of the prosecution is that the deceased was living in the same house with the documents and ornaments, so the same is not connecting piece of evidence with the crime in question. On the contrary, it establishes innocence of the appellant as the articles of the deceased were found in the

same house where she was living and no one had removed those articles.

- 17) In the matter of **Jose Alias Pappachan v. Sub-Inspector of Police, Koyilandy and Another**, reported in **2016 (10) Supreme Court Cases 519**, it is held by Hon'ble Apex Court that in absence of any persuasive evidence to hold that at the relevant time the appellant was present in the house, it would also be impermissible to cast any burden on her as contemplated under Section 106 of the Evidence Act. It would be, in our view, wholly unsafe to hold the appellant guilty of the charge of murder. It is a trite proposition of law, that suspicion however grave, it cannot take the place of proof and that the prosecution in order to succeed on a criminal charge cannot afford to lodge its case in the realm of "may be true" but has to essentially elevate it to the grade of "must be true". In a criminal prosecution, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof and in a situation where a reasonable doubt is entertained in the backdrop of the evidence available, to prevent miscarriage of justice, benefit of doubt is to be extended to the accused.
- 18) The circumstances brought forth by the prosecution do not rule out in absolute terms the hypothesis of the innocence of the appellant. We thus consider it to be wholly unsafe to maintain her conviction as recorded by the courts below. We are therefore inclined to extend benefit of doubt to her. The conclusions drawn by the courts below are not tenable on the basis of the evidence available.

- 19) Accordingly, the appeal is allowed and the conviction and sentence recorded by the courts below is hereby set aside. The appellant is reported to be on bail. Her bail bonds stand discharged.

Sd/-
(Pritinker Diwaker)
JUDGE

Sd/-
(Ram Prasanna Sharma)
JUDGE

Santosh