

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 208 of 2005

- Dameshwar Ram, S/o Rijhram, age 30 years, Occupation - Agriculture, R/o Village Tamasingha, PS Kansabel, District Jashpur (CG) ----- **Appellant**

Versus

- The State of Chhattisgarh, through PS Kansabel, District Jashpur (CG) ----- **Respondent**

For Appellant : Shri AK Prasad, Advocate
For Respondent/State : Smt Smita Ghai, Panel Lawyer.

**Hon'ble Shri Justice Prashant Kumar Mishra &
Hon'ble Shri Justice Anil Kumar Shukla**

Judgment on Board by Prashant Kumar Mishra, J.

07.03.2017

- 1) Appellant stands convicted for committing murder of his wife Saraswati Bai at about 5 pm on 05.06.2004 and has been sentenced to undergo life imprisonment.
- 2) The prosecution case, lying in narrow compass, is that on the date of incident, the appellant had gone to another village and came back to his own village in the evening and committed murder of his wife by causing fatal injuries by means of an axe. After committing murder, the appellant absconded on a bicycle. Little later, his mother PW-2 Manmati entered the room where the appellant and the deceased resided and found that the deceased is lying on the floor having injuries over her neck and face.
- 3) One Karmuram informed the village Kotwar, PW-1 Bharatram who resides in a nearby village. The Kotwar came to the place of occurrence where he was informed about the incident by the

appellant's mother. He lodged the morgue intimation at 9.15 hours on 06.06.2004 and thereafter lodged the FIR (Ex.P/1) at 9.20 hours on the same day. In course of investigation, the Investigating Officer recorded appellant's memorandum statement vide Ex.P/5 and recovered the Axe, full pant, broken bangles, plain and blood stained soil vide Ex.P/4. Since the appellant and the deceased alone were residing in the house and just before the incident he was available in the house and his mother had informed PW-1 Bharatram, the informant, that the appellant had committed murder, he was charge-sheeted and was sent for trial for committing the offence punishable under Section 302 IPC and at the end of trial he has been convicted for this offence.

- 4) Learned counsel for the appellant would submit that the judgment of conviction and sentence is based on conjectures and surmises. There is absolutely no evidence to implicate the appellant, therefore, the judgment deserves to be set aside.
- 5) Per contra learned State counsel would submit that there is evidence to the effect that the appellant was available in the house at the time of incident. Therefore, it was for him to explain the death of his wife when the dead body is found in his house. The appellant having failed to submit any proper explanation about the presence of dead body in his house, he has rightly been convicted.
- 6) There being no ocular evidence to the offence, the prosecution is relying on circumstantial evidence. However, it is a case where there is no evidence in the nature of extra judicial confession or

dying declaration or recovery of bloodstained weapon of offence. Moreover, all the important witnesses, including the informant and the appellant's mother PW-2 Manmati have turned hostile. Informant- Bharatram derived information about the offence from PW-2 Manmati. However, both of them having turned hostile, there is no evidence in form of oral statement about the presence of the appellant in his house at the time of incident. On the contrary both the witnesses have said that at the time of incident the appellant had gone to a different village.

- 7) The principle under Section 106 of the Evidence Act is pressed into service more often when murder of a family member occurs and one of the family member who resides in the same house is accused of committing the offence. In such cases, the burden lies heavily on the accused to explain the circumstance of presence of dead body in the house when he or she alone was present in the house and no one else had access to the place of incident. However, once there is evidence either in form of statement under Section 313 Cr.P.C or in form of oral evidence of witnesses that the accused was not present in the house at the time of incident, the burden shifts on the prosecution to prove from other evidence that it was the accused who committed the offence. The principle under Section 106 of the Evidence Act that the fact, which is within the exclusive knowledge of any person, has to be explained by the person concerned may not apply where the prosecution has failed to provide sufficient factual foundation to require the accused to explain that special fact within his knowledge.

- 8) In a recent judgment of this Court in Criminal Appeal No. 587 of 2004 decided on 25.10.2016, in para-21 it is held that :

"Strong reliance has been placed by the State counsel upon the decision rendered by the Supreme Court in **State of Rajasthan Vs Thakur Singh**¹. In the said case, the accused had committed murder of his wife by locking his wife and daughter inside the room and bolting it from inside. All three remained in the room throughout the day and the accused did not yield to the persuasion of the relatives to open the door. Later in the evening the relatives removed the roof tiles (kelu) from above the house and discovered that the accused had killed his wife. The door of the house was broken open and the accused was caught and tied by his brothers and relatives. Although the Supreme Court referred to its earlier decisions in the matters of **Shambhu Nath Mehra Vs The State of Ajmer**², **Trimukh Maroti Kirkan Vs State of Maharashtra**³, **Ganeshlal Vs State of Maharashtra**⁴, **State of WB Mir Mohammad Omar and others**⁵ and **Gian Chand and others Vs State of Haryana**⁶ to hold that the facts relating to the cause of death of the accused's wife being known only to the accused yet he chose not to disclose them or to explain them, the principles laid down in Section 106 is clearly applicable, therefore, a very strong presumption arises that the accused had killed his wife, however, in the case at hand, the basic case of the prosecution is not that the appellant alone had killed

¹ (2014) 12 SCC 211

² AIR 1956 SC 404

³ (2006) 10 SCC 681

⁴ (1992) 3 SCC 681

⁵ (2000) 8 SCC 382

⁶ (2013) 14 SCC 420

the deceased and both were together in the room throughout the night. Instead, the allegation is that the appellant and the acquitted co-accused Santosh has illicit relation and they together killed the deceased, however, one of the accused having been acquitted, it did not remain the case of the prosecution that since the appellant alone was in the house, it is for her to explain the special fact within her knowledge about the death of the deceased."

- 9) In an extremely recent case in the matter of **Jose Alias Pappachan Vs Sub-Inspector of Police, Koyilandy and another**⁷, at para- 52, the Supreme Court has held that :

"In the 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 him as contemplated under Section 106 of the Evidence Act. The consistent testimony of the appellant and his son to the effect that after alighting from the bus on their return from Potta, the deceased was made to accompany DW 1 back home while the appellant did go in search of labourers for works in his compound on the next day and that thereafter till the time DW 1 had departed for his ancestral house, the appellant did not return home, consolidates the defence plea of innocence of the appellant."

⁷ (2016) 10 SCC 519

- 10) In the same judgment, at para- 56, the Supreme Court has reiterated the 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. Such a doubt essentially has to be reasonable and not imaginary, fanciful, intangible or non-existent but as entertainable by an impartial, prudent and analytical mind, judged on the touch stone of reason and common sense. It is also a primary postulation in criminal jurisprudence that if two views are possible on the evidence available, one pointing to the guilt of the accused and the other to his innocence, the one favourable to the accused ought to be adopted.
- 11) In **Sujit Biswas Vs State of Assam** (2013) 12 SCC 406, the Supreme Court, in the contextual facts constituting circumstantial evidence ruled that in judging the culpability of an accused, the circumstances adduced when collectively considered must lead to the only irresistible conclusion that the accused alone is the perpetrator of a crime in question and the circumstances established must be of a conclusive nature consistent only with the hypothesis of the guilt of the accused.

- 12) In **Dhan Raj Vs State of Haryana** (2014) 6 SCC 745, the Supreme Court while dwelling on the imperatives of circumstantial evidence ruled that the same has to be of highest order to satisfy the test of proof in a criminal prosecution. It was underlined that such circumstantial evidence should establish a complete unbroken chain of events so that only one inference of guilt of the accused would ensue by excluding all possible hypothesis of his innocence. It was held further that in case of circumstantial evidence, each circumstance must be proved beyond reasonable doubt by independent evidence excluding any chance of surmise or conjecture.
- 13) In **Jose** (supra), the Supreme Court observed that the inalienable interface of presumption of innocence and the burden of proof in a criminal case on the prosecution has been succinctly expounded in the following passage from the treatise “The Law of Evidence” fifth edition by Ian Dennis at page 445: “The presumption of innocence states that a person is presumed to be innocent until proven guilty. In one sense this simply restates in different language the rule that the burden of proof in a criminal case is on the prosecution to prove the defendant's guilt. As explained above, the burden of proof rule has a number of functions, one of which is to provide a rule of decision for the factfinder in a situation of uncertainty. Another function is to allocate the risk of mis-decision in criminal trials. Because the outcome of wrongful conviction is regarded as a significantly worse harm than wrongful acquittal the rule is constructed so as to minimise the risk of the

former. The burden of overcoming a presumption that the defendant is innocent therefore requires the state to prove the defendant's guilt."

- 14) The Supreme Court further observed, quoting **Ian Dennis** (supra) that "Where the case against the accused depends wholly or partly on inferences from circumstantial evidence, fact-finders cannot logically convict unless they are sure that inferences of guilt are the only ones that can reasonably be drawn. If they think that there are possible innocent explanations for circumstantial evidence that are not "merely fanciful", it must follow that there is a reasonable doubt about guilt. There is no rule, however, that judges must direct juries in terms not to convict unless they are sure that the evidence bears no other explanation than guilt. It is sufficient to direct simply that the burden on the prosecution is to satisfy the jury beyond reasonable doubt, or so that they are sure. The very high standard of proof required in criminal cases minimises the risk of a wrongful conviction. It means that someone whom, on the evidence, the fact-finder believes is "probably" guilty, or "likely" to be guilty will be acquitted, since these judgements of probability necessarily admit that the fact-finder is not "sure". It is generally accepted that some at least of these acquittals will be of persons who are in fact guilty of the offences charged, and who would be convicted if the standard of proof were the lower civil standard of the balance of probabilities. Such acquittals are the price paid for the safeguard provided by

the “beyond reasonable doubt” standard against wrongful conviction.”

- 15) Having marshalled the evidence put forth by the prosecution against the present appellant, it falls the way short of a robust foundation even to call the accused to submit explanation of a fact within his exclusive knowledge as required under Section 106 of the Evidence Act. Had it been a case where clinching evidence or any evidence in the nature of the appellant having been seen in the house at the time of incident is produced by the prosecution, there would have been an occasion to warrant the appellant to explain the fact of murder and presence of dead body in his own house. However, there being no such evidence on record, the prosecution has failed to prove its case beyond all reasonable doubt.
- 16) Resultantly, the appeal succeeds. We are of the considered opinion that the appellant's conviction is not based on correct marshalling of evidence.
- 17) In the result, the appeal is allowed. Conviction and sentence of the appellant under Section 302 of the IPC is hereby set aside. He is acquitted of the charges framed against him.
- 18) It is stated that the appellant is on bail, his bail bond shall continue for a further period of 6 months in view of Section 437A of the Code.

Sd/-
Judge
Prashant Kumar Mishra

Sd/-
Judge
Anil Kumar Shukla