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HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 855 of 2011**

- Gajendra Kosariya, S/o Raja Ram Kosariya, aged about 28 years, R/o Kukari Talab Par, Gudiyari, P.S. Gudiyari, District Raipur (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through : Police Station Gudiyari, District Raipur (CG)

---- Respondent

For Appellant	:	Shri Amiyakant Tiwari, Advocate
For Respondent/State	:	Smt. Madhunisha Singh, Panel Lawyer

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Ram Prasanna Sharma
Judgment on Board by Pritinker Diwaker, J

27/06/2017

This appeal has been filed against the judgment of conviction and order of sentence dated 30.09.2011 passed by the Sessions Judge, Raipur, in Sessions Trial No. 40/2011 convicting the accused/appellant under Section 302 IPC and sentencing him to undergo imprisonment for life with fine of Rs. 1000/-, plus default stipulation.

2. In the present case name of the deceased is Saraswati Bai, wife of the appellant. As per the prosecution case, quite often there used to be quarrel between the accused/appellant and his wife and few months prior to the incident, deceased had left the house of the accused/appellant and was residing in her parent's house. It is said that the accused/appellant had gone to the house of his in-laws, brought his wife assuring that he would not ill treat

her and keep properly. On 15.12.2010 at night a quarrel took place between the accused/appellant and the deceased. On second day i.e. 16.12.2010 at about 4-5.00 am he was abusing his wife but neighbours did not pay any heed to it considering it to be their routine exercise. On that day at about 7.00 am when the accused/appellant did not open the door, neighbours assembled there and asked him to open the door and they found the body of deceased in mutilated condition. At the instance of Aatmaram Banjare (PW/1) dehati nalisi Ex.P/1 and dehati merg Ex.P/2 was recorded on 16.12.2010. Inquest on the body of the deceased was conducted on that very day vide Ex. P/4 and the dead-body was sent for postmortem examination to Dr. B.R. Ambedkar Memorial Hospital, Raipur which was conducted by Dr. Shivnarayan Manzi (PW-9) vide report Ex. P-11 opining the cause of death to be shock and hemorrhage as a result of multiple injuries to the body. On 16.12.2010 memorandum of the accused Ex. P-12 was recorded based on which recovery of grinding stone vide Ex.P/13, roller vide Ex.P/14, cushion, bed-sheet, handkerchief, 7 green colour bangles, bloodstained soil and plain soil vide Ex.P/15, sickle vide Ex.P/16, black colour full pant and one purple colour sando vest were made, and as per FSL report Ex.P/27 blood has been found on all the seized articles. After filing of charge sheet, the trial Court framed the charge against the accused/appellant u/s 302 IPC.

3. In order to prove the complicity of the accused/appellant in the crime in question, the prosecution has examined 12 witnesses. Statement of the accused under Section 313 Cr.P.C. was also recorded in which he denied his guilt and pleaded innocence and false implication in the case. One defence witness Santram (DW/1) has also been examined by the defence in support of its case.

4. After hearing the parties the Court below has convicted and sentenced the accused/appellant as mentioned above in paragraph No.1 of this judgment.

5. Counsel for the accused/appellant submits as under:

(i) That there is no eyewitness account in this case and the accused/appellant has been convicted solely on the basis of circumstantial evidence but the circumstances on which the prosecution has relied upon are not as such to connect the accused/appellant with the crime in question.

(ii) That possibility of some third person entering the house and committing the offence cannot be ruled out.

(iii) That the trial Court has completely ignored the evidence of Santram (DW/1) who has categorically stated that on the early morning of 16.12.2010 the accused/appellant left his house along with him for selling kerosene oil and that the deceased was alive.

6. On the other hand, State counsel while supporting the judgment impugned has submitted that the findings recorded by the Court below convicting the accused/appellant under Section 302 are strictly in accordance with law and there is no infirmity in the same. He submits that at the time of incident except the appellant and the deceased no other person was there in the house and therefore it can safely be inferred that it is the accused/appellant alone who committed the murder of the deceased. She further submits that the accused/appellant has failed to give any probable explanation as to under what circumstances his wife has been killed and therefore also the presumption goes against him. State counsel submits that after committing the murder of the deceased, the accused/appellant has

taken false defence that at the time of incident he was not there in the house. State counsel also submits that on the memorandum (Ex.P/12) of the accused/appellant recovery of grinding stone vide Ex.P/13, roller vide Ex.P/14, cushion, bed-sheet, handkerchief, 7 green colour bangles, bloodstained soil and plain soil vide Ex.P/15, sickle vide Ex.P/16, black colour full pant and one purple colour sando vest were made, and the FSL report Ex.P/27 is positive in this respect. State counsel also submits that though there is no serological report but considering other evidence, seizure of certain articles, the FSL report can be taken as additional evidence against the accused/appellant.

7. Heard the counsel for the parties and perused the material available on record.

8. Aatmaram Banjare (PW/1) is lodger of dehati nalisi Ex.P/1 and dehati merg Ex.P/2. He is also witness to inquest made under Ex.P/4. Smt Sonarin Bai (PW/2) is mother of the deceased. She is also a witness to inquest made under Ex.P/4. She has stated that the accused/appellant was suspecting fidelity of the deceased and used to commit maarpeet with her. She has further stated that before the incident her daughter left the company of accused/appellant and stayed in her (this witness) house for 2-3 months due to his rude behaviour. Thereafter, accused/appellant took the deceased to his house assuring that he would not ill treat and keep her (deceased) properly. This witness has also stated that the accused/appellant kept her daughter properly for about 2 months, thereafter, her son Lala @ Kanhaiya received information that the accused/appellant has killed her daughter. In para 4, this witness has stated that on the previous night of incident, the deceased had made a phone call but at that time she did not make

any complaint. Lala @ Kanhaiya (PW/3) is brother of the deceased. He is also a witness to inquest made under Ex.P/4. Almost similar statement has been made by this witness as that of PW/2. Smt. Jamuna Bai (PW/4), Ashok Kumar Chaturvedi (PW/5), Smt. Tarabai Berwant (PW/7) and Satyanarayan Berwant (PW/8), neighbours of the accused/appellant and deceased, have turned hostile. Nagendra Kumar Singh (PW/6) is the Patwari who prepared spot map Ex.P/6. Dr. Shivnarayan Manzi (PW/9) is the witness who conducted postmortem examination on the body of the deceased vide Ex.P/11 and noticed following injuries:-

- i. Stab injury present on right thigh on medial aspect upper 1/3 part in the size of 2 x 1 cm x 9 cm transversely oblique, one end sharp cut and another end sharp contusion. After cutting skin, soft tissues and muscle then cut femoral artery and femoral vein through bone deep. Red colour ecchymosis all around the injury.
- ii. Multiple impacted abrasion present on left waist dorsal in the size of 3 x 1 cm transversely.
- iii. Four incised wounds present on right side of neck in the size of 0.5 cm gapping to each other 5 x 1 cm long x .5 deep transversely.
- iv. Stab injury in the size of 1.5 x .5 x 4 cm present on left thigh just below sternal fold.
- v. Contused lacerated wound present on head in the size of 4 x 1.5 cm.
- vi. Contused lacerated wound present on left parietal eminence in the size of 5 x 2 cm x bone deep.
- vii. Contused lacerated wound in the size of 3 x 2 cm x bone deep just below injury No.6.
- viii. Impacted abrasion just below mastoid left side in the size of 5 x 4 cm transversely, skull shows left surface.
- ix. Contused lacerated wound in the size of 3 x 1 cm x .5 vertically on left index finger.
- x. Contusion in the size of 5 x 1 cm on right side of palm.
- xi. Contused lacerated wound in the size of 2 x 1 cm transversely on chin.

According to this witness, all the injuries having red colour ecchymosis and antemortem in nature, stab and incised wounds caused by hard and sharp object, injuries were sufficient to cause

death in ordinary course of nature. Cause of death has been opined to be shock and hemorrhage due to multiple injuries on the body and death was homicidal in nature.

9. Pradeep Kurre (PW/10) and Premchand Sonwani (PW/11) are the witnesses to memorandum Ex.P/12 and seizure thereof made under Ex.P/13, P/14, P/15, P/16 and P/17. They have also duly supported the prosecution case. R.S. Singh (PW/12) is the Investigating Officer who has duly supported the prosecution case. Santram (DW/1) has stated that he is the neighbour of the accused/appellant. He and the accused/appellant used to sell kerosene oil and for this they used to leave around 6.30 daily in the morning. On the date of incident, he and the accused/appellant left the village for selling kerosene oil and at that time the deceased was alive. He has also stated that the accused/appellant had gone toward Pandari Talab, whereas he had gone toward Katora Talab. This witness has further stated that at about 8.30 am he received the call from one Dau Patel that the deceased has been killed and immediately thereafter he had gone to Pandari to inform the appellant about the incident. Both he and the accused/appellant went back to appellant's house and found the dead body of the deceased. In 313 Cr.P.C. statement, the accused/appellant has nowhere stated that at the time of incident he had gone along with Santram (DW/1) to sell kerosene oil rather he has stated that on the date of incident he left the house at 6.30 am to work as labour and there he came to know from one Derha that his wife has been murdered, thereafter, he came back to his house where he saw the dead body of the deceased. It is, thus, apparent that the defence taken by the accused/appellant in his 313 Cr.P.C. statement is contrary to that of Santram (DW/1).

10. Admittedly, 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 forth by the prosecution, in this case is that the accused along with deceased was residing in the house in question and no third person was present in the house at the relevant time. No satisfactory explanation has come from the accused as to how the deceased died when there was no other person except the two. Though Santram (DW/1) has stated that at the time of incident he and the accused/appellant left the village for selling kerosene oil and at that time the deceased was alive. He has also stated that the accused/appellant had gone towards Pandari Talab, whereas he had gone towards Katora Talab and that he received the call from one Dau Patel at about 8.30 am that the deceased has been killed and immediately thereafter he had gone to Pandari to inform the appellant about the incident, but the statement of the accused/appellant recorded under Section 313 Cr.P.C. is contrary to what has been stated by the DW/1. As per the defence witness, it is he who informed the accused/appellant about the murder of the deceased, whereas as per 313 Cr.P.C. statement of the accused/appellant, he came to know about the incident through one Derha. It appears that the accused/appellant has offered false explanation in his 313 Cr.P.C. statement and the statement of DW/1 is of no help to him.

11. 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. Here in this case the dead body was found in the house of the accused and as per the evidence of the witnesses, there used to be quarrel between the accused/appellant and the deceased, and accused/appellant used

to ill treat her. 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.”

12. 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 Senior 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.”

13. 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 the privacy of a house where apart from the accused, deceased was also residing and 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 plausible explanation has come forth from the accused/appellant in his statement recorded under Section 313 of the Code of Criminal Procedure as to how the death of his wife occurred though being the sole adult inmate of the house in question it was his bounden duty to explain the things by leading cogent and pin-pointed evidence in his defence. Apart from that on the memorandum (Ex.P/12) of the accused/appellant, recovery of grinding stone vide Ex.P/13, roller vide Ex.P/14, cushion, bed-sheet, handkerchief, 7 green colour bangles, bloodstained soil and plain soil vide Ex.P/15, sickle vide Ex.P/16, black colour full pant and one purple colour sando vest were made, and the FSL report Ex.P/27 is positive in this respect.

14. Thus in view of the aforesaid factual and legal position this

Court is of the considered opinion that the prosecution has collected sufficient evidence to hold the accused/appellant guilty for committing the murder of his wife and that way the Court below has also been justified to arrive at a conclusion slapping conviction on the accused under Section 302 IPC. Accordingly, the judgment impugned calls for no interference in this appeal.

15. Appeal thus being devoid of any substance is liable to be dismissed and it is hereby dismissed. Judgment impugned is affirmed. Being already inside, no order in respect of arrest etc. of the accused is necessary.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(Ram Prasanna Sharma)
Judge