

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 11 of 2015**

1. Sakru Kashyap S/o Lakhmu Ram Kashyap, aged 58 year, R/o Mundapar, Bade Marenga, Thana Parpa, Civil and Revenue District Bastar (C.G.)
2. Jayati Bai W/o Sakru Ram Kashyap, aged about 56 years, R/o Mundapar, Bade Marenga, Thana Parpa, Civil and Revenue District Bastar (C.G.)

---- Appellants**Versus**

- The State of Chhattisgarh Through : Police Station Frajerpur, District Bastar (C.G.)

---- Respondent

For Appellants.	:	Shri Punit Ruparel, Advocate.
For Respondent.	:	Shri Rahul Tamaskar, P.L.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Gautam Chourdiya

Judgment On Board**By Pritinker Diwaker, J****01/08/2018**

This appeal arises out of the judgment of conviction and order of sentence dated 29.11.2014 passed by III Additional Sessions Judge, Bastar at Jagdalpur, in S.T. No.85/2014 convicting accused/appellant No.1-Sakru under Sections 302 and 201/34 IPC & sentencing him to undergo imprisonment for life with fine of Rs.200/-, and R.I. for three years with fine of Rs.200/- and accused/appellant No.2-Jayati Bai under Section 201/34 IPC & sentencing her to undergo R.I. for three years with fine of Rs.200/- plus default stipulation.

02. In the present case name of the deceased is Narsu Kashyap, grandson of the accused/appellants, aged just 15 year. It is said that on the date of incident, son and daughter-in-law of the accused/appellants i.e. mother and father of the deceased, have gone to other village to attend some function. While leaving the house they left the deceased in the custody of the accused/appellants. When the deceased was sleeping near pooja room, accused/appellant No.1- Sakru woke him up, asked him to take the cattle for grazing, however, the deceased refused the same saying that the accused/appellant No.1 plays witchcraft and the villager pass adverse comments which were not liked by him (deceased). Accused/appellant No.1 got annoyed with the reply of the deceased and strangulated him. After ensuring the death of the deceased and to give it colour of suicide, the accused/appellant No.1 tied his private part by the electric wire and hanged the body of deceased in pooja room by rope and gamcha with the help of accused/appellant No.2. After committing murder of the deceased, the accused/appellant No.1 along with Dharmu Mourya (PW/2) had gone to village Dongariguda where his son Chaitu (PW/10) had gone and there he informed Chaitu (PW/10) that deceased Narsu is missing. In reply, it was told by Chaitu (PW/10) to his father accused/appellant No.1 that he had left the deceased in his custody. Further case of the prosecution is that the accused/appellant No.1 and Chaitu (PW/10) returned to their village and then in the pooja room

the body of deceased was found hanging. After the death of the deceased, merg intimation (Ex.P/15) was recorded on 09.07.2014 at 8.45 AM at the instance of accused/appellant No.1. While lodging the merg intimation, it has been stated by accused/appellant No.1 that the deceased went missing, he was searched in the nearby village and while searching his body was found in the hanging condition in the house. Based on merg inquiry, FIR (Ex.P/19) was lodged on 14.07.2014 under Section 302 IPC against unknown person. On 09.07.2014, inquest on the body of deceased was conducted vide Ex.P/11 and dead body was sent for postmortem examination to Community Health Center, Tokapal, where Dr. Dhiraj Sahani (PW/8) conducted postmortem on the body of deceased and gave his report (Ex.P/17) noticing following injuries/symptoms:-

- (i) Eyes were covered with white vest.
- (ii) Maroon gamcha with single nod was tied around neck.
- (iii) White plastic rope with running noose tied around neck.
- (iv) Ligature mark was present around neck above thyroid cartilage below sub-mandibular bone and directed upward at antero lateral side (left) of chin.
- (v) Green-yellow electric wire was tied around abdomen at level of umbilical which was continued tied around penis shaft with one end of electric wire.
- (vi) Semen was present on undergarment and

urinated smell was coming from it.

The autopsy surgeon opined the cause of death of deceased to be asphyxia due to strangulation and death was homicidal in nature.

03. Memorandum of the accused/appellant No.1 was also recorded on 15.07.2014 vide Ex.P/1 but no seizure was effected on the basis of his memorandum. However, the gamcha, which was used for tying the body of deceased, was identified by Chaitu (PW/10) to be that of the accused/appellant No.1. After filing of the charge sheet, the trial Court has framed the charge under Sections 302 and 201/34 IPC against accused/appellant No.1-Sakru, whereas accused/appellant No.2-Jayati Bai has been charged with the offence under Section 201/34 IPC.

04. So as to hold the accused/appellants guilty, the prosecution examined as many as 11 witnesses. Statements of the accused/appellants were also recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication.

05. The trial Court after hearing counsel for the respective parties and considering the material available on record has convicted and sentenced the accused/appellants as mentioned in para-1 of this judgment. Hence, this appeal.

06. Learned counsel for the appellants submits as under :

- (i) That there is no eye-witness account to the incident and the accused/appellants have been convicted solely on the basis of weak type of circumstantial evidence
- (ii) That all the important witnesses have not supported the prosecution case and turned hostile.
- (iii) That conduct of the accused/appellant No.1 appears to be natural as when the deceased went missing, he was extensively searched by him, even he had gone to nearby village and during search, the body of deceased was found in hanging condition.
- (iv) That there is a shop near the house of the accused/appellants and number of persons were sitting there and, thus, the possibility of some third person committing the murder of the deceased cannot be ruled out.
- (v) That a very improbable story has been put forth by the prosecution where it is alleged that the accused/appellants have killed their own grandson.
- (vi) That at-least there is no evidence against accused/appellant No.2 - Jayati to bring home her guilt within the definition of Section 201 IPC.

07. On the other hand, supporting the impugned judgment it has been argued by learned counsel for the State as under:-

- (i) That the body of the deceased was found inside the house in pooja room and admittedly at the relevant time the accused/appellants were the only inmates in the house. While leaving the village, Chaitu (PW/10), son of the

accused/appellants, had left his son Narsu (deceased) with the appellants and it is, thus, established that the deceased was in the house along with the accused/appellants.

(i) That there is no evidence on record that the pooja room had several doors to gain entry and that nobody could have entered the said room.

(ii) That the accused/appellants have failed to offer any explanation as to how the deceased died homicidal death. In absence of any probable acceptable explanation under Section 313 Cr.P.C., there is no doubt that it is the accused/appellants who have committed the crime in question.

(iii) That, the conduct of accused/appellant No.1 is very unnatural where instead of searching in his own house, he had gone to other village and inquired about the deceased from his son Chaitu (PW/10).

(vi) That PW/10 identified the cloth found on the body of deceased as gamcha of accused/appellant No.1.

(vi) That while lodging the merg intimation, a false information has been given by accused/appellant No.1 and this is an additional link to the chain of circumstantial evidence.

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

09. Daya Ram (PW/1) and Dharmu Mourya (PW/2), witnesses to memorandum (Ex.P/1) & spot map inspection memo (Ex.P/2), have turned hostile. Bhanesh Shrivastava (PW/3) is the Patwari who prepared spot map vide Ex.P/6. Dhanno Bai (PW/4), mother

of the deceased and daughter-in-law of the accused/appellants, turned hostile. She has stated that accused/appellant No.1- Sakru had come to village Dongariguda to her parents' house and inquired about her son. Samlu (PW/5) - village Kotwar, has stated that on the date of incident the accused/appellant No.1 informed him that his grandson has committed suicide and then the incident was informed to other villagers. He has further stated that accused/appellant No.1 and other villagers had seen the body of the deceased in hanging condition and when inquired from him whether the deceased has been hanged after killing, the accused/appellant No.1 informed him that the deceased himself has committed suicide. Sukhchand (PW/6) and Domanlal Sen (PW/9) - Head Constable and Constable, assisted in the investigation respectively. Harish Pandey (PW/7) turned hostile. Dr. Dhiraj Sahani (PW/8) performed postmortem examination on the body of deceased and gave his report (Ex.P/17) opining the cause of death to be asphyxia due to strangulation. Chaitu (PW/10) is father of the deceased and son of accused/appellants. He has stated that on the date of incident, he had gone to village Dongariguda to attend some function and at about 9.00 PM accused/appellant No.1 came there and inquired about the deceased. He states that he and his father accused/appellant No.1 returned to Bademarega from Dongariguda, searched the deceased in nearby places and at about 10.00 PM the deceased was found in hanging condition in his house in pooja room. He has further stated that there was

nothing on the floor where the deceased was hanging and his foot was two and half feet above the floor. This witness has admitted his signature on Ex.P/4 i.e identification of gamcha but has denied the fact that he identified the same. K.N. Tiwari (PW/11) - Investigating officer, has duly supported the prosecution case.

10. Close scrutiny of the evidence makes it clear that on 08.07.2014 Chaitu (PW/10) along with his second wife had gone to his second wife's house situated at village Dongariguda to attend some function leaving the deceased in the custody of the accused persons. On the same day, at 9.00 PM the accused/appellant No.1 came to village Dongariguda in search of the deceased and inquired about him from Dharmu Mourya (PW/2), who shown ignorance. Thereafter, they made search of the deceased and ultimately in the night his body was found hanging with a rope on the rafter of the house of accused/appellants. The evidence, thus, clearly establishes the fact that the accused/appellants were there inside the house and that the deceased was with them in the house. Further, at the time of lodging merged intimation, accused/appellant No.1 informed that after working in the field, the deceased returned to house for lunch and thereafter he did not go anywhere and ultimately his body was found hanging in pooja room of the accused/appellants. Conduct of the accused/appellant No.1 also creates suspicion as it was well within his knowledge that the deceased was inside the house

and just to give a different colour to the incident he, instead of searching the deceased in the house, had gone to other village. The position in which the body of deceased was found hanging suggests that he did not commit suicide but was murdered by strangulation and thereafter was hanged. Noteworthy to mention that the foot of the deceased was just two and half feet above the floor and no article was found on the spot like stool etc, by which the deceased can get up to the roof of ceiling and hang himself. All these clearly establishes the fact that he was hanged after killing.

That apart, according to postmortem report (Ex.P/17), maroon gamcha and white plastic rope with running noose were tied around the neck, ligature mark was on thyroid cartilage below sub-mandibular bone, green yellow electric wire was tied around abdomen at level of umbilical which was continuously tied around penis shaft with one end of electric wire and the autopsy surgeon opined the cause of death of deceased to be asphyxia due to strangulation and death was homicidal in nature. Thus, admittedly the deceased was left by PW/04 and PW/10 in the custody of the accused persons and ultimately he was found hanging inside the house and according to autopsy surgeon his death was homicidal in nature. In these circumstances, in view of the provision of Section 106 of the Evidence Act, it was incumbent upon the accused persons to explain as to how the deceased died a homicidal death. However, instead of offering such explanation they ventured to

give false information and thus failed to discharge the burden under Section 106 of the Evidence Act.

11. Thus from the material collected by the prosecution it is proved that the death of the deceased was homicidal in nature and the dead body was recovered from the house of accused/appellants. The house of the accused/appellants was in their occupation, no probable acceptable explanation has been offered by them in his 313 Cr.P.C. statement as to how the deceased died and his body was found inside his house.

12. 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.”

13. 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.”

14. Thus, in view of the aforesaid factual and legal position and taking into consideration the entire evidence on record, in particular the conduct of accused/appellant No.1-Sakru and his statement recorded under Section 313 of Cr.P.C., this Court is of the considered opinion that the prosecution has collected sufficient evidence to hold the accused/appellant No.1 guilty for committing the murder of his grandson, causing disappearance of evidence of offence and that way the Court below has been justified to arrive at a conclusion slapping conviction on the accused/appellant No.1 under Sections 302 and 201 IPC.

15. So far as conviction of accused/appellant No.2- Jayati Bai under Section 201/34 is concerned, except memorandum of the accused/appellant No.1, there is absolutely no clinching and credible evidence showing her involvement in the commission of offence. Thus, the accused/appellant No.2 is liable to be acquitted of the charge levelled against her by extending her benefit of doubt.

16. In the result, the appeal is partly allowed. Conviction of the accused/appellant No.1 under Sections 302 and 201 IPC is maintained. Being already inside, no order in respect of arrest etc. of the accused/appellant No.1 is necessary. Accused/appellant No.2 is acquitted of the charge under Section 201/34 IPC by extending her benefit of doubt. The accused/appellant No.2 is on bail. Her bail bonds stand discharged.

Sd/-

(Pritinker Diwaker)
JUDGE

Sd/-

(Gautam Chourdiya)
JUDGE