

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 769 of 2012

1. Smt. Kesar Bai Shende W/o Madhukar Shende Aged About 45 Years, Occupation- Housewife.
2. Madhukar Shende D/o Late Narayan Shende Aged About 49 Years, Occupation-Service.
3. Yavraj @ Mukesh Shende S/o Madhukar Shende Aged About 24 Years, Occupation – Business

Accused No. 1 to 3 all are R/o Bada Ashok Nagar Gudiyari, P.S. Gudiyari, Raipur C.G.

4. Yograj Brahmanekar S/o Khem Raj Aged About 33 Years, Occupation-Labour, R/o Vikas Nagar Gudiyari, P.S. Gudiyari Raipur C.G.

---- Appellants

Versus

- State Of Chhattisgarh Through - P.S. Gudiyari, Distt. Raipur C.G.

---- Respondent

CRA No. 770 of 2012

- Rakesh Shende S/o Madhukar Shende Aged About 28 Years, Occupation-Driver, R/o Bada Ashok Nagar Gudiyari, P.S. Gudiyari, Raipur C.G.

---- Appellant

Versus

- State Of Chhattisgarh Through - P.S. Gudiyari, Distt. Raipur C.G.

---- Respondent

For Appellants	:	Shri Sunil Pillai, Advocate.
For Respondent/State	:	Shri Ravindra Agrawal, G.A.
For Objector (PW-1)	:	Shri R.K. Pali, Advocate.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Sanjay Agrawal

Judgment on Board by Pritinker Diwaker, J

13/03/2018:

As both these appeals arise out of a common judgment of conviction and order of sentence dated 29.8.2012 passed by the First Additional Sessions Judge, Raipur in Sessions Trial No. 233/2010, they are being disposed of by this common judgment. By the said judgment, appellants in Cr.A.No.769/12 have been convicted under Section 498A of IPC and sentenced to undergo RI for two years and fine of Rs.1000/- with default stipulation, and appellant in Cr.A.No.770/12 has been convicted under Sections 302 & 498A of IPC and sentenced to life imprisonment, fine of Rs 1000/- and RI for two years and fine of Rs.1000/- with default stipulations respectively.

2. In the present case, name of the deceased is Sarita Shende, wife of accused No.1 Rakesh Shende. Their marriage was solemnized on 24.5.2010 and she suffered homicidal death on 5.9.2010 in her matrimonial house. Accused No.2 Kesharbai is mother-in-law, accused No.3 Madhukar Shende is father-in-law, accused No.4 Yuvraj @ Mukesh Shende is brother-in-law (*Devar*) of the deceased whereas accused No.5 Yograj is maternal uncle of accused No.1. There was one juvenile accused also namely Rajesh who is said to have been acquitted of the charges vide judgment dated 21.8.2017 passed by the Juvenile Justice Board, Raipur.

3. Brief facts of the case are that on 5.9.2010 in between 5-5.30 pm deceased Sarita died in her matrimonial house. Juvenile accused Rajesh gave information about illness of the deceased to PW-4 Madhukar, neighbour of the accused persons, both of them

immediately took the deceased to hospital where she was declared dead. At the instance of PW-4 mereg intimation Ex.P/6 was recorded on 5.9.2010 itself. Inquest was conducted on the body of the deceased on 6.9.2010 vide Ex.P/2 and thereafter, the dead body was sent for postmortem which was conducted on the same day by PW-15 Dr. Shivnarayan Manjhi vide Ex.P/24. The autopsy surgeon noticed presence of ligature mark on mid part of neck, thyroid cartilage was fractured, there were contusions on neck and right wrist. In his opinion, the cause of death was asphyxia as a result of strangulation by ligature and the death was homicidal in nature. After mereg inquiry, FIR (Ex.P/34) was registered against the accused persons on 6.9.2010 under Sections 302, 304B, 34 & 201 of IPC. Accused No.1 Rakesh was medically examined vide Ex.P/22 by PW-12 Dr. Raziya Khan who noticed two abrasions on his right arm, which were caused by hard and blunt object. On the memorandum of accused No.1 Rakesh (Ex.P/16), one sari allegedly used for strangulating the deceased was seized vide Ex.P/17. While framing charge, the trial Court framed charges under Sections 498A, 302 & 201 of IPC against accused No.1 Rakesh Shende whereas the other accused/appellants were charged under Sections 498A & 201 of IPC.

4. In order to prove the complicity of the accused/appellants in the crime in question, the prosecution has examined 17 witnesses. Statements of the accused under Section 313 Cr.P.C. were also recorded in which they denied their guilt and pleaded innocence and false implication in the case. In their defence, they examined one Bhuvan Tawade as DW-1.

5. After hearing counsel for the parties and considering the material on record, the Court below has convicted and sentenced the accused/appellants as mentioned above. Hence these appeals.

6. It has been informed by learned counsel for the appellants and not dispute by learned counsel for the State and the Objector that accused No.3 Madhukar Shende has expired in the year 2013. Therefore, the appeal (CrA No.769/2012) stands abated in respect of this appellant.

7. Counsel for the accused/appellants submits as under:

(i) that there is no eyewitness account in this case and the accused/appellants have 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/appellants with the crime in question.

(ii) that at the time of incident, except juvenile accused, no other accused persons was there at home. Accused No.1 had gone to drive his auto-rickshaw whereas other accused had gone to Durg to attend pooja ceremony in the house of DW-1.

(iii) though the deceased had a homicidal death but there is no evidence as to who killed her.

(iv) as per autopsy surgeon the deceased died after strangulation by a rope and not by sari allegedly seized from the possession of accused No.1.

(v) that no cell phone of the deceased has been seized and most importantly, call details have not been proved as per Section 65B of the

Evidence Act.

(vi) so far as injuries sustained by accused No.1 are concerned, the same was because of beating given to him by the police and this has been stated by him in his statement under Section 313 of CrPC.

(vii) that there is material discrepancy in the weight of the allegedly pledged gold ornaments and likewise, the list of gold ornaments pledged with Gold Smith (PW-7) is different from the alleged list of dowry.

(viii) lastly it has been submitted that if this Court comes to the conclusion that conviction of accused No. 2, 4 & 5 is required to be maintained, then considering their detention period they may be sentenced to the period already undergone by them by enhancing the fine amount. He submits that accused No.2 has remained in jail for one month and twelve days; accused No.4 has remained inside for one month and six days and accused No.5 has remained in jail for one month and eight days.

8. On the other hand, State counsel supporting the judgment impugned has submitted as under:

(i) that the findings recorded by the Court below convicting the accused/appellants are strictly in accordance with law and there is no infirmity in the same.

(ii) that within four months of marriage the deceased died unnatural death in her matrimonial house and as per autopsy surgeon, it was homicidal in nature.

(iii) that even injuries have been found on the person of the

deceased, which shows that she was beaten before her murder by accused No.1.

(iv) that accused No.1 also sustained two abrasions on his right arm, which shows that while he was strangulating the deceased, there was struggle between them and as a result thereof, he suffered those abrasions.

(v) that the explanation offered by accused No.1 that he was beaten by the police is not tenable because had it been so, the accused or his counsel would have definitely informed the Magistrate about the same. Even otherwise, the nature of injury sustained by accused No.1 is not as such which could occur on account of beating by the police.

(vi) though call details have not been proved by the prosecution as per requirement of law, but from the link connected by the prosecution regarding call made by the deceased to her mother immediately prior to the incident has duly been proved. Further, oral testimony of PW-1 Kanhaiyalal, PW-3 Smt. Tarabai & PW-9 Pradeep Kumar clearly spell out a case against the appellants and point out towards their guilt.

(vii) that all the ornaments given by parents of the deceased were pledged by accused No.1 to fulfill his lust and this has also been proved by goldsmith PW-7 Yuvraj Jadha.

(viii) that the plea of alibi taken by the accused persons is nothing but an afterthought and this has not been proved by them by leading cogent and convincing evidence. If the plea of alibi is accepted that accused No. 1 to 5 were not present in the house in question, then there is no evidence on record to show as to who killed the deceased. It is accused No.1 who killed the deceased and rest of the accused

persons have rightly been convicted by the trial Court for harassing the deceased in connection with demand of dowry.

9. Learned counsel appearing for the objector submits that conviction of the appellants is based on proper appreciation of the evidence on record and for this purpose, he adopts the arguments advanced by the State counsel.

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

11. PW-1 Kanhaiyalal, father of the deceased has stated that marriage of the deceased was solemnized with accused No.1 Rakesh Shende on 24.5.2010. After 5-6 days of marriage, his wife had gone to the house of the accused persons to hand over them the dowry articles and after seeing those articles, the accused persons were not happy and started quarreling with her saying that number of articles have not been given to them. He states that immediately from the house of the accused persons his wife called him on cell phone and informed about the demand being raised by the accused persons and then he (this witness) called accused No.3 Madhukar and informed him that he would fulfill their demands gradually and requested them not to harass the deceased. He further states that the deceased stayed with him for about 8-10 days and thereafter she was taken back by the accused persons to her matrimonial house. However, after eight days the deceased called him again and requested for giving the remaining dowry articles and expressed the apprehension of being killed by the accused persons in case dowry articles are not given to them. However, he made the deceased understand. On 5.9.2010 i.e. the date

of incident his daughter again called him on his cell phone, which was received by his wife, and the deceased informed that she is being beaten by accused No.1 and then she requested to come immediately and take her back otherwise she would be killed. This fact was later informed to him by his wife PW-3 Tarabai. When the maternal uncle of the deceased was contacted on phone he informed him that the deceased has expired. Immediately thereafter he and his relatives rushed to Raipur and came to know that dead body of the deceased has been kept in mortuary in the hospital. He is also a witness to inquest Ex.P/2 and dead body supurdnama Ex.P/4. In his lengthy cross-examined, he remained firm and reiterated as to the manner in which the deceased was being subjected to cruelty by the accused persons for dowry.

12. PW-2 Sheetlabai @ Pinky, neighbour of the deceased, has stated that when the deceased came to her parents' house she informed her that she is being subjected to cruelty by the accused persons for dowry. PW-3 Smt. Tarabai, mother of the deceased, has made almost similar statement as has been made by PW-1. She has also leveled allegations of cruelty against the appellants for dowry. PW-4 Madhukar, neighbour of the accused persons, is the lodger of merg intimation. PW-5 Sangeeta, sister of the deceased, has also made allegations against the accused persons regarding demand of dowry and subjecting the deceased to cruelty in connection therewith. PW-6 Smt. Nisha Sahu, cousin of the deceased, has also stated that the deceased was being harassed by the accused persons for dowry. PW-7 Yuvraj, goldsmith, has stated that on 30.08.2010 accused No.1 Rakesh Shende had pledged ear tops with him and thereafter on

3.9.2010 he also pledged gold nose pin with him saying that these gold ornaments are of his wife/deceased, and took money in lieu thereof. He has duly proved the receipt of these gold ornaments. PW-8 Smt. Poonam Soni conducted inquest on the body of the deceased. PW-9 Pradeep Kumar, brother of the deceased, has also made allegations of demand of dowry against the accused persons and stated that his sister/deceased was being subjected to cruelty by the accused persons due to non-fulfilment of their dowry demand.

13. PW-10 Karan Pradhan has been declared hostile. PW-11 Sanad Kumar is a witness to memorandum of accused No.1 (Ex.P/16) and seizure Ex.P/17. PW-12 Dr. Rajiya Khan medically examined accused No.1 Rakesh Shende and noticed two abrasions on his right arm, which were caused by hard and blunt object and were simple in nature vide Ex.P/22. PW-13 Ramakant Singh, Police Constable, assisted in the investigation. PW-14 Narendra Pandey, Patwari, prepared the spot map Ex.P/8. PW-15 Dr. Shivnarayan Manjhi conducted postmortem on the body of the deceased on 6.9.2010 vide Ex.P/24 and noticed presence of ligature mark on mid part of neck, thyroid cartilage was fractured, there were contusions on neck and right wrist. In his opinion, the cause of death was asphyxia as a result of strangulation by ligature and the death was homicidal in nature. PW-16 Jaiprakash Dubey, investigating officer, has duly supported the prosecution case. PW-17 Brajesh Kumar Tiwari, did initial part of investigation and has supported the prosecution case.

14. DW-1 Bhuvan Tawde has stated that on the date of incident i.e. 5.9.2010 there was religious function in his house at Durg which was

attended by accused No. 2 to 5 who had come from Raipur. He states that in the evening these accused persons left Durg for Raipur.

15. In his statement under Section 313 of CrPC accused No.1 Rakesh Shende has stated that he was not at home on the date of incident and had gone to drive his auto-rickshaw and that the injuries found on his person was due to beating by the police. The other accused persons have also taken plea of alibi in their defence statements.

16. Close scrutiny of the evidence makes it clear that marriage of the deceased with accused No.1 Rakesh was solemnized on 24.5.2010 and just within four months thereafter she had homicidal death on 5.9.2010 in her matrimonial house. As regards the plea of alibi, it is considered as the weakest type of plea and therefore the same is required to be proved through exhaustive, cogent & reliable evidence. Accused No.1 Rakesh has stated that on the date of incident he was not at home and had gone to drive his auto-rickshaw. However, mere saying of the accused that at the relevant time he was not present at the scene of occurrence is not sufficient to substantiate this plea. He ought to have adduced some cogent and convincing evidence in this regard but no such evidence is there on record. So far as other accused persons' plea of alibi is concerned, DW-1 Bhuvan has stated that on the date of incident accused No. 2 to 5 had come to his house at Durg to attend some pooja function and left for Raipur in the evening at about 5 pm only. Even if their plea of alibi is accepted, it makes no difference because their conviction is under Section 498A of IPC. As regards accused No.1, he has failed to substantiate the defence of alibi

as required under the law. Rather the evidence on record shows that it is he who killed the deceased by strangulation because as per postmortem report of the deceased, there was ligature mark on mid part of neck, thyroid cartilage was fractured, there were contusions on neck and right wrist and that the cause of death was asphyxia as a result of strangulation by ligature and the death was homicidal in nature. Further, medical report Ex.P/22 of the accused No.1 Rakesh shows that he also suffered two abrasions on his right arm. Though he has tried to explain those injuries by saying that it was due to beating by the police. However, this explanation is not acceptable to us because had it been so, the accused or his defence counsel would have informed the Magistrate about the same. Further, considering the nature of injuries suffered by this accused, it cannot be said that such injuries could have been the result of beating by the police. Rather it appears to have been caused during the course of struggle between the deceased and accused No.1 while he was snatching away her gold ornaments or was strangulating her. PW-7 Yuvraj has categorically stated that on 30.8.2010 and thereafter on 3.9.2010 accused No.1 Rakesh had come to his jewellery shop to pledge golden ears tops and nose pin with him and obtained money in lieu thereof.

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.”

11. Further in the matter of **State of Rajasthan v. Thakur 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.”

18. Here in this case, undisputedly the deceased died in her matrimonial house where she was living with the accused persons. As discussed above, on the date of incident, accused No. 2 to 5 were not at home and had gone to attend some pooja function in the house of DW-1 at Durg whereas the plea of alibi taken by accused No.1 stands falsified in view of the overall evidence on record including medical evidence and conduct of this accused. Thus, it becomes clear that death of the deceased in this case took place inside the privacy of a house where apart from accused No.1 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/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 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, and rather he has taken a false plea of alibi. It is not the case of the defence that any third person entered their house and killed the deceased.

19. Though call details have not been proved by the prosecution as per requirement of law. But from the unrebutted oral evidence of PW-1,

PW-2, PW-3, PW-5 and PW-9 it is clear that the deceased used to have talk with them over phone and inform them about the cruelty being meted out to her by the accused persons in connection with demand of dowry. As such, non-proving of call details is of no help to the accused persons when the witnesses have consistently stated in the Court about the act of the accused persons.

20. On the basis of aforesaid discussions, we are of the opinion that the trial Court was fully justified in holding accused No.1 Rakesh Shende guilty under Sections 302 & 498A of IPC. Accordingly, the appeal preferred by him i.e. CrA No.770/2012 being without any substance is liable to be dismissed.

21. As regards conviction of accused Nos.2, 4 & 5 under Section 498A of IPC, the same is also based on proper appreciation of the evidence on record and therefore, is hereby maintained. However, in the facts and circumstances of the case, in particular the fact that the incident took place more than seven years ago, considering the age of the accused persons and that they are on bail since 2012, the maximum sentence awarded to them is two years and that they have remained in jail for about one month and ten days, we are of the opinion that no useful purpose would be served in sending them back to jail at this stage and ends of justice would be served if they are sentenced to the period already undergone and are directed to pay a sum of Rs.10,000/- each to be paid as compensation under Section 357 of CrPC to parents of the deceased (PW-1 Kanhaiyalal and PW-3 Smt. Tarabai).

22. In the result:

- Cr.A.No.770/2012 preferred by accused/appellant Rakesh Shende is dismissed. He is reported to be in jail, therefore, no further order regarding his arrest/surrender etc. is required to be passed.
- Cr.A.No.769/12 preferred by accused/appellants Smt. Kesar Bai Shende, Yuvraj @ Mukesh Shende and Yograj Brahmarkar is allowed in part. While maintaining their conviction under Section 498A of IPC, they are sentenced to the period already undergone by them. However, each of them are to deposit a sum of Rs.10,000/- with the concerned trial Court within a period of four months from today or else they shall have to suffer additional imprisonment for two months. The amount so deposited by these appellants, shall be given as compensation under Section 357 of CrPC to parents of the deceased i.e. PW-1 Kanhaiyalal and PW-3 Smt. Tarabai by the trial Court after due verification. These appellants are reported to be on bail, therefore, their bail bonds stand discharged.

Sd/

(Pritinker Diwaker)
Judge

Sd/

(Sanjay Agrawal)
Judge