

NAFR**HIGH COURT OF CHHATTISGARH, BILASPUR****CRA No. 39 of 2012**

- Bhikhari Dhiwar, S/o Gajaru Dhiwar, aged about 30 years, R/o village Tulsi, Ward No.11, Police Station Newra, District Raipur (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through : Station House Officer, Police Station - Newra, District Raipur (C.G.)

---- Respondent

For Appellant. : Shri Anil Gulati, Advocate.
For Respondent/State: Shri Adil Minhaj, P.L.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Smt Justice Vimla Singh Kapoor

Judgment On Board**By Pritinker Diwaker, J****20/08/2018**

This appeal arises out of the judgment of conviction and order of sentence dated 29.10.2011 passed by the Additional Sessions Judge, Bhatapara, District Raipur, in S.T. No.01/2011 convicting the accused/appellant under Section 302 IPC & sentencing him to undergo imprisonment for life with fine of Rs.100/-, plus default stipulation.

02. As per the prosecution case, the accused/appellant used to suspect fidelity of his wife Kumari Bai and was suspecting of having illicit relation with his neighbour Rajulal Verma (PW/8). The accused/appellant also showed his grievance before his brother-in-law Shyamlal (PW/2), who made efforts to pacify the dispute. It is said that in the night intervening 14-15/11/2010, the accused/appellant and deceased along with their children slept in the house of Shyamlal (PW/2) and their in the night he committed murder of the deceased by causing several axe injuries on her neck. After committing murder of the deceased, accused/appellant straight away went to police station and lodged FIR (Ex.P/23) on 15.11.2010 at 12.40 in the mid night. Based on his report, offence under Section 302 IPC was registered against him. Accused/appellant was immediately brought to the place of occurrence by the police where inquest (Ex.P/3) was conducted. On the same night, merg intimation (Ex.P/24) was also recorded at the instance of the accused/appellant. Body of the deceased was sent for postmortem examination to Community Health Center, Tilda which was conducted by R.S. Painkra (PW/18) who gave his report (Ex.P/16) noticing following injuries:-

- (i) Incised wound in the size of 5.0 x 3.0 x 1.5 cm on upper neck from left to mid line to right side of neck.
- (ii) Incised wound in the size of 9.0 x 4.0 x 2.5 cm on mid line to right side of neck and just

below the injury No.1.

- (iii) Incised wound in the size of 5.0 x 4.0 x 3.0 cm on mid line to right side of neck, just below the above mentioned 2nd injury.
- (iv) All the injuries were caused by hard and sharp object and antemortem in nature.
- (v) Hyoid bone was fractured at multiple places and dislocated.

The Autopsy Surgeon opined the cause of death of deceased to be syncope due to excessive hemorrhage and death was homicidal in nature.

03. Memorandum of the accused/appellant was recorded on 15.11.2010 vide Ex.P/6, based on which axe vide Ex.P/7 and clothes vide Ex.P/9 were seized. However, there is no FSL report on record to confirm presence of blood thereon. After investigation, charge sheet was filed against the accused/appellant under Section 302 IPC & accordingly charge was framed against him by the trial Court.

04. So as to hold the accused/appellant guilty, the prosecution examined as many as 19 witnesses. Statement of the accused/appellant was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him 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/appellant as mentioned in para-1 of this judgment. Hence, this appeal.

06. Learned counsel for the appellant submits as under :

- (i) That there is no eye-witness account to the incident and the conviction of the accused/appellant is based on circumstantial evidence but none of the circumstances from which the inference of guilt of appellant can be drawn has been proved beyond reasonable doubt and therefore there can be no inference that it was the appellant who committed the murder.
- (ii) That the FIR lodged by the accused/appellant cannot be used against him.
- (iii) Even if the entire prosecution case is taken as it is, the accused/appellant is liable to be conviction under Section 304 Part-I IPC as it appears that out of anger he has committed murder of the deceased.

07. On the other hand, supporting the impugned judgment it has been argued by learned counsel for the State that conviction of the accused/appellant is strictly in accordance with law and there is no infirmity in the same. He further argued that the accused/appellant made extra-judicial confession before Meena (PW/1) and the said witness has duly supported the prosecution case. It has been also argued that both the accused/appellant and the deceased had slept on a same cot where the body of deceased was found in a pool of

blood and being an inmate he was under obligation to offer plausible and probable explanation but, except saying that he has been falsely implicated in the crime in question, no such explanation has been offered by him in his statement recorded under Section 313 Cr.P.C., which itself makes it clear that it is he who committed murder of his wife.

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

09. Meena (PW/1), sister of the deceased and wife of Shyamlal (PW/2), has stated that on the date of incident the deceased, accused/appellant and their children had slept in her house and in the night the accused/appellant committed murder of his wife. She has further stated that when she woke up in the night and inquired from the accused/appellant, he confessed that he has killed his wife by axe. In cross-examination, her statement remained intact and nothing could be elicited by the defence to discredit her testimony.

10. Shyamlal (PW/2), brother-in-law of the accused/appellant, has stated that on the fateful night the appellant and deceased slept in his house along with their children and in the night body of deceased was noticed. This witness has been declared hostile.

11. Shanti (PW/3) is mother of the appellant. Though this witness turned hostile but she has categorically stated that on the fateful night it is the appellant and the deceased who slept in a same room.

12. Malti (PW/4), niece of the appellant, has also stated that the accused/appellant and deceased along with their children slept in a room. She has further stated that at about 11.30 PM when she woke up, her mother told that her uncle (appellant) has killed the deceased.

13. Rajesh (PW/5), neighbour of Shyamlal (PW/2), has stated that on the fateful night at about 11.30, upon hearing the cries of Meena Bai (PW/01), he woke up and saw the accused/appellant fleeing from the spot. He has further state that the PW/1 was screaming that the accused/appellant has killed his wife.

14. Neeraj (PW/6), son of the accused/appellant, has stated that the accused/appellant and deceased had slept in a separate room and in the night when he woke up, he saw the accused/appellant opening the door carrying axe in his hand.

15. Kushal (PW/7), son of the accused/appellant, turned hostile. Rajulal Verma (PW/8) has been declared hostile.

16. Dinu Sharma (PW/9) is the witness to inquest (Ex.P/3), spot map (Ex.P/5), memorandum of the accused/appellant (Ex.P/6) and seizure (Ex.P/7). Though this witness turned hostile but has admitted his signature on the documents.

17. Devsant (PW/10), nephew of the accused/appellant, has stated that on the fateful night when he woke up at 11.30 PM after hearing the cries of his mother PW/1, her mother was screaming that the accused/appellant fled away from the spot after killing his wife.

18. Ramesh Kumar (PW/11), witness to inquest (Ex.P/3), has turned hostile. Kejudas (PW/12), village Kotwar, witness to seizure (Ex.P/10), has turned hostile. Manoj (PW/13) is the formal witness. Rajulal Verma (PW/14), witness to memorandum of the accused/appellant (Ex.P/6), seizure (Ex.P/7, P/8 and P/9), though turned hostile but has admitted his signature therein.

19. Shankar Lal Verma (PW/15) is the Patwari who prepared spot map vide Ex.P/13.

20. J.P.N. Singh (PW/16) - Investigating Officer, has duly supported the prosecution case.

21. Harish Setpal (PW/17) is the photographer who took photographs of the spot where the body of deceased was lying.

22. Dr. R.S. Painkra (PW/18) conducted postmortem examination on the body of deceased and gave his report (Ex.P/16) opining the cause of death to be syncope due to excessive hemorrhage.

23. Shrawan Kumar Mishra (PW/19) - Assistant Sub Inspector, assisted in the investigation.

24. Close scrutiny of the evidence makes it clear that relations between the accused/appellant and the deceased were strained and the accused/appellant used to suspect fidelity of the deceased. On the fateful night, accused/appellant and the deceased along with their children slept in the house of PW/2 in a separate room where he committed murder of the deceased by causing several axe injuries and the body of deceased was

found in pool of blood. According to postmortem report (Ex.P/16), three incised wounds were noticed on the neck of the deceased and cause of death of deceased was opined to be syncope due to excessive hemorrhage. As per inquest made under Ex.P/3, dead body was found inside the room on a cot where undisputedly the accused/appellant was also sleeping and this fact has duly been proved by Meena (PW/1) before whom the accused/appellant made extra-judicial confession. Though, PW/1 turned hostile but she has supported the prosecution case to the extent that the accused/appellant and the deceased had slept in his house and he made extra-judicial confession before her. The version of PW/1 is well corroborated by Rajesh (PW/5) who has stated that the body of deceased was found in the house of PW/1, noticed cut injuries on her neck, saw the accused/appellant fleeing from the spot and the axe was lying in the courtyard. 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 found inside the room where he was sleeping with the deceased but still no reasonably convincing explanation has been offered by him in his 313 Cr.P.C. statement as to how the deceased died. All that apart, there is absolutely no substantive piece of evidence on record to suggest that any third person entered their room and caused injuries to the deceased.

25. 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.”

26. 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.”

27. 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.”

28. Another aspect of the case which needs to be discussed is that immediately after the incident, the accused/appellant went

to police station and lodged report (Ex.P/23). True it is that the FIR recorded on the basis of statement of the appellant itself cannot be made basis for his conviction unless being corroborated by the substantive piece of evidence. The accused/appellant made extra-judicial confession before PW/1. It is further settled position of law that the evidence of extra-judicial confession is weak type of evidence and the same also cannot be made basis for conviction unless being proved to be made voluntarily. Present is a case where other circumstances speaks against the act of the accused/appellant. The accused/appellant, after commission of offence, made extra-judicial confession before PW/1, who has categorically stated that on being asked, the accused/appellant confessed his guilty that he has killed the deceased by axe. At the time of making extra-judicial confession, except PW/1 no one was present there and it appears that he made the extra-judicial confession voluntarily and without any pressure. The aforesaid circumstance only indicates the involvement of the accused/appellant in commission of offence.

29. 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.

30. 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/-

(Vimla Singh Kapoor)
JUDGE