

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 262 of 2013**

- Mohan Kashyap S/o Urdoram Kashyap, aged about 38 years, R/o village Baniyagaon, Police Station Bhanpuri, District - Bastar (C.G.)

---- Appellant**Versus**

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

---- Respondent

For Appellant	:	Shri Anil Gulati, Advocate.
For Respondent/State	:	Shri Anil Pillai, Dy. A.G. and Smt. Madhunisha Singh, Panel Lawyer

Hon'ble Shri Justice Pritinker Diwaker**Hon'ble Shri Justice Arvind Singh Chandel****Judgment on Board by Pritinker Diwaker, J****27/01/2018**

This appeal has been filed against the judgment of conviction and order of sentence dated 22.01.2013 passed by the Sessions Judge, Bastar at Jagdalpur, in Sessions Trial No. 45/2012 convicting the accused/appellant under Section 302 IPC and sentencing him to undergo imprisonment for life with fine of Rs. 2000/-.

2. In the present case name of the deceased is Khuji Bai @ Khunji Bai, wife of the appellant.

03. It is alleged that on 14.12.2011 deceased was found dead in her house where couple was residing alone. Accused/appellant disclosed to villagers that the deceased died after sustaining injury by fall. At the instance of Heera Lal (PW/6), merger intimation (Ex.P/7) was recorded. On 15.12.2011, inquest on the body of the deceased

was conducted vide Ex. P/2 and the dead-body was sent for postmortem examination to Civil Hospital, Bhanpuri which was conducted by Dr. Ravindra Kumar Netam (PW/7) vide report Ex. P-9 noticing following injuries:-

- (i) Multiple abrasions present on both side of face and shoulder.
- (ii) There was swelling in blackish colour over right forehead which was stained with dust.
- (iii) Blood clot was present over neck and upper part of jaw.
- (iv) Upper part of trachea in neck was pressed and blood clot was present.
- (v) Upper thyroid cartilage was broken and blood clot was present.

Autopsy Surgeon opined the cause of death of deceased to be asphyxia due to strangulation and death was homicidal in nature.

04. After merg inquiry, FIR (Ex.P/10) was registered on 17.12.2011 against the accused/appellant under Section 302 of IPC. After filing of charge sheet, the trial Court framed the charge against the accused/appellant u/s 302 IPC.

05. In order to prove complicity of the accused/appellant in the crime in question, the prosecution has examined 08 witnesses. Statement of the accused/appellant under Section 313 Cr.P.C. was also recorded in which he denied his guilt and pleaded innocence and false implication in the case.

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

07. Counsel for the accused/appellant submits :

(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 the accused/appellant is alleged to have made extra-judicial confession before panchayat but from the evidence of the witnesses it is apparent that at the time of making extra-judicial confession police was present there.

(ii) That even if the entire prosecution case is take as it is, at best the accused/appellant can be convicted under Section 304 Part-I or Part-II of IPC as it appears that after consuming liquor, it is the deceased who first assaulted the accused/appellant and if in defence, some injuries have been caused by the accused/appellant, his case would fall under Exception 2 or 4 to Section 300 of IPC.

08. 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.

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

10. Maansai (PW/1), Jogeshwar (PW/2), Rama Ram (PW/3), Nirdhat (PW/5) and Heera Lal (PW/6) are the witnesses to extra-judicial confession, however, they admit that at the time of making extra-judicial confession by the appellant, the police was present there.

11. Antu (PW/4) has turned hostile. Dr. Ravindra Kumar Netam (PW/7) conducted postmortem examination on the body of deceased and gave his report Ex.P/9 opining the cause of death to be asphyxia due to strangulation and death was homicidal in nature. S.N. Shukla (PW/8) is the Investigating Officer who has duly supported the prosecution case.

12. Admittedly, there is no eyewitness account in the present case and the entire case is based on the circumstantial evidence and alleged extra-judicial confession of the accused/appellant.

13. Though, as per the witnesses i.e. PW/1, PW/2, PW/3, PW/5 and PW/6, the accused/appellant has made extra-judicial confession before Panchayat that it is he who killed the deceased but simultaneously these witnesses have also admitted the fact that at the time of making such extra-judicial confession, the police was also present there. It is settled position of law that in case the prosecution relies on extra-judicial confession, the Court has to examine the same with a greater degree of care and caution. It is further settled legal position that extra-judicial confession is a weak type of evidence and if the entire case of the prosecution hinges upon it, a greater degree of care and caution is required to be taken by the Court while appreciating the evidence. PW/1, PW/2, PW/3, PW/5 and PW/6 in their evidence have categorically stated that the accused/appellant made extra-judicial confession before the panchayat in presence of police. Extra-judicial confession made by the accused/appellant appears to be involuntary and he might have said the same on account of pressure of the police. Considering this aspect of the case, merely on the basis of extra-judicial confession, the accused/appellant cannot be convicted.

14. Another strongest circumstance 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. Even as per the evidence of PW/5, after the death of the deceased, the accused/appellant had not permitted anyone to enter the house and no satisfactory explanation has come from the accused as to how the deceased died when there was no other person except the two.

15. 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 Autopsy Surgeon (PW/7), the cause of death of deceased was asphyxia due to strangulation and death was homicidal in nature. 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.”

16. 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.”

17. 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.

18. 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.

19. 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/-
(Arvind Singh Chandel)
Judge