

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 484 of 2013**

- Harishankar Vishwakarma, S/o Toran Singh Vishwakarma, 23 years, R/o Nagar Palika Ward No.5, Bacheli, Post & P.S. Bacheli, Civil/Revenue District - Dantewada (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through – District Magistrate, Dantewada, Civil/Revenue District Dantewada (C.G.)

---- Respondent

For Appellant	:	Shri Akash Pandey, Advocate.
For Respondent/State	:	Ms. K. Tripti Rao, P.L.

**D.B. : Hon'ble Shri Justice Manindra Mohan Shrivastava &
Hon'ble Smt Justice Rajani Dubey**

Judgment On Board**08.10.2018****Per Manindra Mohan Shrivastava, J**

This appeal is directed against the impugned judgment of conviction and order of sentence dated 03.05.2013 passed by learned Session Judge, South Bastar Dantewada (C.G.), in S.T.No.312/2011 whereby and whereunder the appellant/accused has been held guilty of commission of offence under Section 302 IPC and sentenced to undergo rigorous life imprisonment along with fine of Rs.1,000/- and in default of payment of fine, additional R.I. for one month.

02. Prosecution story, as unfolded from the impugned judgment and

the record of the case, is that an FIR in Ex.P/4 was lodged in the police station by Nindar Singh (PW/7) on 04.08.2011 at 08.10 PM wherein, it was stated that informant's sister-in-law informed regarding missing of his brother (deceased). When the informant went around in the city he finally came to know that his brother Avtar Singh has been murdered by the appellant and his dead body is lying in the house of appellant Harishankar. The police then registered a morgue in Ex.P/5 and proceeded to the scene of occurrence. Inquest over the dead body was prepared vide Ex.P/3 in the presence of the witnesses. Dead body was sent for postmortem and Dr. (Smt.) Geeta Netam (PW/14) conducted postmortem and prepared a postmortem report in Ex.P/20 an opinion in regard to homicidal death on account of injuries was written. The police then held further investigation and it is said that the memorandum of the appellant was recorded wherein, the appellant stated having committed the murder and also hid the motorcycle of the deceased by the side of the road in bushes. Further it is said that a Sabbal (long iron rod with a sharp edge used for digging purpose) was also recovered on the disclosure statement of the appellant, from the back side of courtyard of the appellant's house. Upon conclusion of usual investigation, the police filed charge sheet before the concerned jurisdictional Magistrate, who in turn, committed the case for trial to the Sessions Court. On the basis of material contained in the charge sheet, learned trial Court framed charges against the appellant for commission of offence under Sections 302 and 201 IPC. Appellant abjured guilt and was, therefore, put to trial. In order to prove its case, the prosecution examined as many as 15 witnesses. The appellant

was also examined under Section 313 Cr.P.C. in respect of incriminating evidence and circumstances appearing against him in the evidence led by the prosecution. Appellant denied having committed the offence and stated that he has not committed the murder and he returned home from his work after arrival of his parents. He also denied other incriminating circumstance and has stated that the place of incident is outside of his house and that the spot map was prepared without any notice.

03. The learned trial Court, however, relying upon the evidence led by the prosecution particularly taking into consideration that the deceased had died homicidal death upon sustaining injuries, his dead body was found in the house of the appellant and his parents and that the motorcycle of the deceased as also the weapon alleged to be used in the commission of offence was recovered at the instance of the appellant and further that there was a motive held him guilty for commission of offence under Section 302 IPC and sentenced as described above.

04. Learned counsel for the appellant argued that the prosecution has failed to prove its case beyond reasonable doubt that it was the appellant who had committed murder of Avtar Singh. He would argue that the prosecution evidence itself renders highly doubtful, the time of lodging FIR (Ex.P/4). The FIR informant Nindar Singh (PW/7) has admitted that he had lodged report in the police station in the morning of 05.08.2011, whereas the time recorded in the FIR is 8.10 PM. It is next contended that even according to the prosecution, the house where dead body was found it was not the appellant alone who was

residing but his parents also and they have been examined as prosecution witnesses PW/3 and PW/4 and they have stated that the appellant left the house in the morning before they left the house and returned after their return in the evening. The next submission of learned counsel for the appellant is that the evidence of last seen though improvement, does not involve the appellant but the name of appellant's father has been mentioned. Further submission is that the evidence of motive is a complete improvement from the diary statement and it has been stated for the first time in the Court, therefore, not reliable. The next submission is that even according to the independent prosecution witnesses PW/11 and PW/13 of seizure, the recovery panchanama of motorcycle was made in the police station, and in-fact, all the documents of seizure etc. were prepared only in the police station. Therefore, it does not constitute any incriminating circumstantial evidence. Even the identity of the vehicle that it belongs to the deceased has not been proved by the prosecution by leading any evidence whatsoever. Lastly, it has been submitted that recovery of *Sabbal* from an open place is not an incriminating circumstance in the absence of there being any serological report from the FSL that it was stained with the blood of the deceased. In any case, it is submitted, even according to the prosecution, the appellant was not only the person residing in the house, recovery of the *Sabbal* would not provide any link to connect it with the appellant. In support of his submission learned counsel for the appellant has placed reliance upon the decision of the Apex Court in the matters of **Varun Chaudhary V.**

State of Rajasthan¹, Mustkeem @ Sirajudeen V. State of Rajasthan², Joydeb Patra & Ors. V. State of West Bengal³, S.K. Yusuf V. State of West Bengal⁴ and decision of this Court in the matter of **Dameshwar Ram V. State of Chhattisgarh⁵**.

05. On the other hand, learned counsel for the State argued that once the homicidal death of the deceased is proved and that his dead body was found inside the house which was shared by the appellant, connected with the motive for commission of offence. In absence of any explanation offered by the appellant in his statement recorded under Section 313 of Cr.P.C. as how the deceased sustained injuries and died homicidal death in his house, provides a complete chain of circumstantial evidence and a close live link to bring home the guilt of the appellant.

06. We have heard the rival submissions made by learned counsel for the parties and perused the records of the Court below.

07. The prosecution story as reflected from the FIR (Ex.P/4) is that Avtar Singh was murdered by the appellant on account of dispute relating to transaction of money. So, according to the FIR (Ex.P/4), the motive for murder was dispute on account of money transaction.

08. The FIR (Ex.P/4) is said to have been recorded by Nindar Singh (PW/7), brother of the deceased, who has deposed that he received an information from his sister-in-law Fulmati (PW/6) at about 11.00 AM that his brother has not come back, followed by another call at 4.00 PM

1 (2011) 12 SCC 545

2 (2011) 11 SCC 724

3 2013 CRI.L.J. 2729

4 (2011) 11 SCC 754

5 ILR 2017 CG 1369

that his brother has not returned till that time. This witness then states that thereafter he tried to trace his brother but his mobile was reported to be switched off. He then went around in the colony and then came to know that Harishankar, son of Kunti (PW/4), assaulted and murdered his brother Avtar Singh, thereafter, he informed his sister-in-law and then report was lodged in the police station. He then states that on the next day he went to the house of Kunti (PW/4), saw the dead body of his brother and reported the matter. In para 10, he admits that he had informed regarding the murder of his brother to his sister-in-law Fulmati (PW/6) and also to the members of family but then he states that in the night of incident he neither went to police station nor lodged any report but then maintains that he gave report in the police station next morning. He emphatically states that at 8.10 in the night of the previous date he did not lodge any report.

The FIR, however, records the time as 8.10 PM on 04.08.2011. According to the FIR informant's evidence, he lodged report next morning and not in the night. According to him, he even did not go to the police station.

09. A.K. Joshi (PW/12) - Investigating Officer, has stated in his evidence that he recorded FIR (Ex.P/4) in the night as disclosed by FIR informant Nindar Singh (PW/7). Therefore, the very lodging of FIR and its timing is rendered highly doubtful. It has to be noted that this witness has stated that despite information his sister-in-law namely Fulmati (PW/6) neither went to see the dead body nor went to police station, which appears to be highly surprising and creates suspicion on the prosecution story right from its inception.

10 Fulmati Baghel (PW/6), wife of the deceased, has stated in para 9 of her cross-examination that she neither went to police station nor even went to see the dead body though she admits that her residence from police station is hardly 200-250 away meters from her house. She then states that her brother-in-law Nindar Singh (PW/7) did not give any information regarding murder of her husband in the night but it was informed to her on the next morning. This witness emphatically states of her own that had she been informed in the night, she would have definitely gone to see the dead body of her husband and also to the police station. Thus, with regard to information given to wife of the deceased Fulmati (PW/6) by brother of the deceased Nindar Singh (PW/7), there is serious contradiction as to when she was informed.

11. The motive for alleged commission of offence as disclosed in the FIR is that there was a dispute between the appellant and the deceased in connection with some money transaction. However, for the first time in the Court, Fulmati (PW/6) has come out with the story that her husband had illicit relation with Kunti (PW/4), mother of the appellant, and she (PW/6) caught her husband red handed on many occasions. She has deposed that this illicit relation was going on for the last three years and she had many a time advised Kunti (PW/4) to deter from such illicit relations upon which she was threatened. She has also narrated a specific incident of her husband having been found with Kunti (PW/4) at about 12 in the night in her own house which led to a dispute and attempt was made by her husband to assault her. It has also been stated that Kunti (PW/4) time and again used to invite her husband over telephone and her husband had also stated that

Kunti has taken Rs. 70,000/- from her husband and is further demanding Rs.35,000/- and threatened to kill him.

In her cross-examination, however, she admits this entire story of there being illicit relation between her husband and Kunti (PW/4), they being caught together in the night, dispute, threat and demand of money were not stated by her in her police statement Ex.D/1 nor it has been explained. Thus, this entire story of illicit relation is an improvement.

12. Nindar Singh (PW/7) states that his sister-in-law had informed him regarding illicit relation of his brother with Kunti (PW/4) and admits that he had talked to his brother. But then if this fact was known to him, and a motive, this witness has failed to explain why this fact was not stated by him in his FIR (Ex.P/4). According to him, the only motive was a dispute relating to money transaction and nothing more. Therefore, this shaky contradictory evidence of the prosecution with regard to motive renders the prosecution case highly doubtful.

13. It has also come in the evidence of Fulmati (PW/6), wife of the deceased that she was informed by her husband that Toran (PW/3) (father of the appellant) is coming to call him and then her husband went along with Toran (PW/3). This also has proved to be a complete improvement upon her diary statement. In any case, the prosecution evidence of last seen is only with the Toran (PW/3) and not with the present appellant.

14. The prosecution has sought to prove a link and an incriminating circumstantial evidence of recovery of motorcycle of the deceased and

the Sabbal (long iron rod) alleged to be used in commission of offence. In this regard, the prosecution has examined two memorandum and seizure witnesses namely Sukhvinder Singh (PW/11) and Baldev Singh (PW/13). Sukhvinder Singh (PW/11) though states that a memorandum of the appellant was recorded in his presence in which the appellant stated that sabbal, golden ring, purse, ATM card, PAN card and shoes were kept in a polythene and thrown in a red nala. Even according to the prosecution witnesses, recovery of aforesaid articles is not proved to have been made from the place alleged by the prosecution. Though the witnesses have stated that in the memorandum statement the appellant disclosed having hid the motorcycle on Bahinar Road in Jungle and keys thrown in jungle, and that the motorcycle was seized in his presence, in his cross-examination, this witness admits that the motorcycle was seized in the police station and discovery statement Ex.P/7 and memorandum (Ex.P/8) were as also other memorandums were prepared only in the police station.

The other witness of memorandum and seizure Baldev Singh (PW/13) has also given similar statement regarding disclosure statement made by the appellant and he also admits that the motorcycle was seized in the police station and all the documents of discovery statement (Ex.P/7, P/8, P/9, P/10 and P/11) were prepared only in the police station.

15. As far as seizure of Sabbal, alleged to be used in commission of offence is concerned, the same is said to have been recovered from an open space in the courtyard behind the house of the appellant. There

is no evidence led by the prosecution in the form of serologist report received from FSL proved that the said sabbal was stained with the blood of the deceased.

16. Furthermore, there is absolutely no evidence oral or documentary led by the prosecution to prove that the motorcycle No.CG18-E-5172 (Hero Honda Passion Pro) belongs to the deceased. Neither the registration documents have been produced nor even PW/6 and PW/7, wife and brother of the deceased respectively, have stated that the motorcycle belongs to the deceased. This fact has also been admitted by the Investigating Officer (PW/12) in his cross-examination.

17. We thus find as far as recovery part is concerned, it hardly constitutes an incriminating circumstantial evidence to implead the appellant in the alleged commission of offence. The motorcycle is said to have been seized in the police station, the sabbal is said to have been found in an open space and not proved to contain the blood of the deceased and all other items like golden ring, purse, ATM card, PAN card and shoes not recovered from the place allegedly disclosed in the memorandum statement (Ex.P/7) of the appellant. In fact, according to this memorandum statement, even Sabbal was thrown in a red nala, whereas the recovery of the same has been made from the courtyard.

18. Recovery of an article or weapon alleged to be used in commission of offence, said to be recovered on the disclosure made in the memorandum statement of the accused, would not constitute an

incriminating evidence unless there is live link between such recovery and commission of offence. As has been discussed herein above, the prosecution has failed to establish recovery of motorcycle constitute an incriminating evidence. Mere seizure of motorcycle is not enough unless it is found to have a link, as in the given case, that it belongs to the deceased and further that it was recovered from a place which can be said to be an exclusive possession of the appellant or so hidden that the appellant alone who disclosed its location viz buried under the ground, hidden under the bushes, room or any other enclosure, under water in any specific location and the like.

19. Similarly, recovery to *sabhal*, allegedly used as a weapon, has not been found containing human blood much less blood group and origin of that of the deceased.

20. In the case of **Mustkeem alias Sirajuddin V. State of Rajasthan**⁶, the aspect of circumstantial evidence relating to recovery of weapon or any other article on the disclosure statement of the accused was considered as below:-

“19. The AB blood group which was found on the clothes of the deceased does not by itself establish the guilt of the appellant unless the same was connected with the murder of the deceased by the appellants. None of the witnesses examined by the prosecution could establish that fact. The blood found on the sword recovered at the instance of Mustkeem was not sufficient for test as the same had already disintegrated. At any rate, due to the reasons

6 (2011) 11 SCC 724

elaborated in the following paragraphs, the fact that the traces of blood found on the deceased matched those found on the recovered weapons cannot ipso facto enable us to arrive at the conclusion that the latter were used for the murder”.

*“27. The scope of ambit of Section 27 were also illuminatingly stated in **Pulukuri Kotayya v. King Emperor (1946-47) 74 IA 65 : AIR 1947 PC 67** reproduced hereinbelow : (IA p.77)*

“... it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the

informant.”

The same were thereafter restated in another judgment of this Court in **Anter Singh v. State of Rajasthan** reported in **(2004) 10 SCC 657 : 2005 SCC (Cri) 597.**

21. It is not a case of the prosecution that the place where from the dead body of deceased was recovered, was in exclusive use and residence of the appellant. It is interesting to note that the prosecution has examined Toran (PW/3) and Kunti (PW/4), father and mother of the appellant respectively, as a prosecution witnesses. It is not a case where the prosecution has come out with the allegation that the appellant and his parents PW/3 and PW/4 all were involved in the alleged commission of offence of murdering Avtar Singh. The evidence of PW/3 and PW/4 does not support the case of the prosecution. PW/3 has stated that the dead body of Avtar Singh was found on the door and she does not know how he died. He has been declared hostile. In cross-examination, he admits that he had borrowed money from Avtar Singh (deceased). He denied that any dispute had arisen with regard to money transaction. In cross-examination, he states that he, his son and wife all work at different place and in usual course he first leaves the house, thereafter, his son and then his wife proceed to their respective work places and on the date of incident, his wife left the house at last and on the date of incident she came first followed by him and then his son.

His wife Kunti (PW/4), against whom serious allegations have been levelled by Fulmati (PW/6), wife of the deceased, has also been

declared hostile, and according to her, on the date of incident, first her husband left for work then her son Harishankar went and, thereafter, she went to the work place in the last and, in para 11, she states that on the date of incident after the work she first came back, thereafter, her husband and then her son came to the house. She further states that when she reached her house, she found the dead body of Avtar Singh lying there near the door and the moment she opened the door, the dead body fell down.

22. Thus, from the prosecution evidence itself, the house where the dead body was found, was inhabited not only by the appellant but also by his parents Toran (PW/3) and Kunti (PW/4). It, therefore, cannot be said that the appellant was the exclusive resident of the house where the dead body was found. Moreover, we find that the prosecution witnesses PW/6 and PW/7 have come out with the story that there was an illicit relation between the deceased and Kunti (PW/4) and at times Fulmati (PW/6) caught the deceased and Kunti (PW/4) red handed where-after the quarrel had taken place and threat was administered. Moreover, according to this witness, the deceased had gone along with Toran (PW/3) on the date of incident suggesting thereby that the deceased was last seen along with Toran (PW/3).

23. If that be the situation, in our considered opinion, there was no burden cast on the appellant to explain how deceased Avtar Singh sustained injury and died in his house. This is so because, even according to prosecution, the residence was shared by Toran (PW/3) and Kunti (PW/4). According to PW/6 there was illicit relation between the deceased and PW/4 and the deceased was last seen together with

Toran (PW/3). They are not accused in the present case. They have been cited as prosecution witnesses and have stated that the appellant left the house first and reached after the arrival of Toran (PW/3) and Kunti (PW/4). The failure on the part of the appellant, therefore, to explain as to how Avtar Singh sustained fatal injury and died in his house would not by itself incriminate to point on him alone and annuls that in all probability the appellant must have murdered the deceased. According to Nindar Singh (PW/7), as cited in his FIR, the motive was dispute relating to money transaction, whereas other kind of evidence has been brought on record to the fact that there was illicit relation between Kunti (PW/4) and the deceased. In this regard, we wish to refer following decisions of the Supreme Court in the matter of discharging burden of the accused on the principles embodied in Section 106 of the Evidence Act.

24. In the case of **Joydeb Patra & Ors. V. State of West Bengal** reported in **2013 CRI.L.J. 2729**, the Supreme Court explained the principle regarding burden of proof as embodied in Section 106 of the Evidence Act.

*“ 8. We are afraid, we cannot accept this submission of Mr. Ghosh. This Court has repeatedly held that the burden to prove the guilt of the accused beyond reasonable doubt is on the prosecution and it is only when this burden is discharged that the accused could prove any fact within his special knowledge under Section 106 of the Indian Evidence Act to establish that he was not guilty. In **Sucha Singh v. State of Punjab, (2001) 4 SCC 375 : (AIR 2001 SC 1436 : 2001 AIR***

SCW 1292), this Court held:

“We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference.”

Similarly, in **Vikramjit Singh v. State of Punjab, (2006) 12 SCC 306 : (2006 AIR SCW 6197)**, this Court reiterated:

“Section 106 of the Indian Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule, e.g., where burden of proof may be imposed upon the accused by reason of a statute.”

25. Then the Division Bench of this Court in case of **Dameshwar Ram v. State of Chhattisgarh** reported in **ILR 2017 Chhattisgarh 1369**, explained the postulate of law under Section 106 of the Evidence Act, as under:-

“7. The principle under Section 106 of the Evidence Act

is pressed into service more often when murder of a family member occurs and one of the family member who resides in the same house is accused of committing the offence. In such cases, the burden lies heavily on the accused to explain the circumstance of presence of dead body in the house when he or she alone was present in the house and no one else had access to the place of incident. However, once there is evidence either in form of statement under Section 313, Cr.P.C. or in form of oral evidence of witnesses that the accused was not present in the house at the time of incident, the burden shifts on the prosecution to prove from other evidence that it was the accused who committed the offence. The principle under Section 106 of the Evidence Act that the fact, which is within the exclusive knowledge of any person, has to be explained by the person concerned may not apply where the prosecution has failed to provide sufficient factual foundation to require the accused to explain that special fact within his knowledge.

26. In another decision of Division Bench of this Court in **Criminal Appeal No.587 of 2004** reported in **ILR 2017 CG 539**, in para 21 it is held that:

“Strong reliance has been placed by the State counsel upon the decision rendered by the Supreme Court in State of Rajasthan v. Thakur Singh (2014) 12 SCC 211 : (2014 AIR SCW 4479). In the said case, the accused had committed murder of his wife by locking his wife and daughter inside the

room and bolting it from inside. All three remained in the room throughout the day and the accused did not yield to the persuasion of the relatives to open the door. Later in the evening the relatives removed the roof tiles (kelu) from above the house and discovered that the accused had killed his wife. The door of the house was broken open and the accused was caught and tied by his brothers and relatives. Although the Supreme Court referred to its earlier decisions in the matters of *Shambhu Nath Mehra v. The State of Ajmer* (AIR 1956 SC 404), *Trimukh Maroti Kirkan v. State of Maharashtra* (2006 10 SCC 681 : 2006 AIR SCW 5300), *Ganeshlal v. State of Maharashtra* (1992 3 SCC 681), *State of W.B. Mir Mohammad Omar and others* (2000 8 SCC 382 : AIR 2000 SC 2988) and *Gian Chand and others v. State of Haryana* (2013 14 SCC 420 : AIR 2013 SC 3395) to hold that the facts relating to the cause of death of the accused's wife being known only to the accused yet he choose not to disclose them or to explain them, the principles laid down in Section 106 is clearly applicable, therefore, a very strong presumption arises that the accused had killed his wife, however, in the case at hand, the basic case of the prosecution is not that the appellant alone had killed the deceased and both were together in the room throughout the night. Instead, the allegation is that the appellant and the acquitted co-accused Santosh has illicit relation and they together killed the deceased, however, one of the accused

having been acquitted, it did not remain the case of the prosecution that since the appellant alone was in the house, it is for her to explain the special fact within her knowledge about the death of the deceased.”

27. In yet another decision in the matter of **Jose alias Pappachan v. Sub-Inspector of Police, Koyilandy and another** reported in **(2016) 10 SCC 519 : (AIR 2016 SC 4581)**, it was propounded, in para 52, as below:-

“In the absence of any persuasive evidence to hold that at the relevant time the appellant was present in the house, it would also be impermissible to cast any burden on him as contemplated under Section 106 of the Evidence Act. The consistent testimony of the appellant and his son to the effect that after alighting from the bus on their return from Potta, the deceased was made to accompany DW 1 back home while the appellant did go in search of labourers for works in his compound on the next day and that thereafter till the time DW 1 had departed for his ancestral house, the appellant did not return home, consolidates the defence plea of innocence of the appellant.”

28. In the light of aforesaid settled principle of law, the non explanation on the part of the appellant is not a incriminating circumstantial evidence compatible with the hypothesis of guilt of the appellant. The entire case of the prosecution, thus, becomes highly doubtful in the case as to whether it was the appellant and the

appellant alone, who in all probability, murdered the deceased in his own house and not other resident of the house. Being so, the benefit of doubt must be credited to the appellant and he deserves to be acquitted of the charge leveled against them.

29. In the result, the appeal succeeds and is, accordingly, allowed. The impugned judgment is hereby set aside and the appellant is acquitted of the charge under Section 302 IPC by extending him benefit of doubt. The appellant is reported to be in jail. He be set at liberty forthwith, if not required in any other case.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge