

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1132 of 2019**

Arising Out of PS. Case No.-438 Year-2014 Thana- MAJHAULIA District- West Champaran

NEYAZ ANSARI Son of Laddan Ansari R/o Village- Baswaria, P.S.- Bettiah Town, present residing at Village- Semra Ghat, P.S.- Majhulia, District- West Champaran.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Md. Anjum Akhter, Adv

For the Respondent/s : Mr.Syed Ashfaque Ahmad, APP

**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT**

23-10-2019

Sole appellant, Neyaz Ansari being aggrieved by judgment of conviction dated 18.01.2018 and order of sentence dated 20.12.2018 passed by Presiding Officer, FTC-2nd, West Champaran at Bettiah in Sessions Trial No. 584/2016 whereby and whereunder, has been found guilty for an offence punishable under Section 306 IPC and sentenced to undergo RI for four years as well as to pay fine of Rs. 5000/- in default thereof, to undergo SI for three months additionally, challenged the same by way of preferring instant appeal.

2. Hasina Khatoon (PW 3) gave her Fardbeyan on 23.12.2014 at about 6:50 AM at her Village-Semra-Ghat before the concerned police official disclosing therein that *Nikah* of her daughter, Nusrat Jahan was performed approximately six years



ago with Neyaz Ansari son of Laddan Ansari of Village-Banswaria at present, Barwa, Semra-Ghat. After marriage, the couple enjoyed congenial atmosphere for some time but, in due course of time, Neyaz became addictive wine, whereupon, he used to give frequent assault whenever Nusrat Jahan protested. Further, also began to raise grievance by way of stating that at the time of marriage, nothing was given from her *Naihar* in lieu of dowry and so, instruct the mother to give cash and kind (she-buffalo) in lieu of dowry. On account of physical/mental torture having been exerted upon her, she also had gone to the place of her daughter and tried to give sermon to her son-in-law but, he did not pay heed to it. On the other hand, continued with his lesson. Lastly, in order to save herself, in the night of 22.12.2014, Nusrat and her daughter, Nazia came to the house of maternal grand-father of Neyaz lying at village-Semra-Ghat who happens to be her neighbour. At 10:00 PM, after hearing commotion, when she came out from her house, she had seen Neyaz as well as her daughter Nusrat. Her daughter, Nusrat was requesting her husband to go to house. She inquired from her daughter, whereupon, she disclosed that she is instructing him to go to house. At that very moment, Khush Mohammad, Ali Ahmad, Gul Mohammad, Kamrul Haque, Bismillah Khatoon,



Jamila Khatoon and Usha Ansari were present who have spoken to Neyaz that they have also their wife but, their wife did not follow them outside from their house. It is better to kill the lady. Even then, she anyhow managed to send her daughter to her house. Again, she heard uproar at about 11:00 PM in the night whereupon, she immediately, rushed to the house of Nusrat where she found her daughter, Nusrat in half burnt condition. She had seen Neyaz and Ali Ahmad untying the string. Khush Mohammad was digging and found them along with Gul Mohammad, Kamrul Haque and others in a way to bury. Seeing her, they all ran therefrom. So, she apprehended that on account of non fulfillment of demand of dowry, her daughter has been set ablazed.

3. After registration of Majhaulia PS Case No. 438/2014, investigation commenced and after concluding the same, charge-sheet has been submitted only against the appellant exonerating the others, facilitating the trial meeting with ultimate result, subject matter of instant appeal.

4. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. It has further been pleaded that the victim died of accidental fire which, she caught during



course of cooking. Furthermore, three DWs have been examined on that very score.

5. In order to substantiate its case, the prosecution has examined altogether nine PWs who are PW-1, Saheb Alam, PW-2, Shamshad Alam, PW-3, Hasina Khatoon, PW-4, Khairati Ansari, PW-5, Naziya Khatoon, PW-6, Naushad Alam, PW-7, Vinod Das, PW-8, Dr. Ashok Kumar Choudhary, and PW-9, Sabrul Nesha. Side by side, has also exhibited Ext-1, Inquest Report, Ext-2, Postmortem Report. Three DWs namely, DW-1, Md. Imteyaz, DW-2, Md. Nasim Akhtar and DW-3, Bholi Ansari have been examined. However, no documentary evidence has been adduced on behalf of defence.

6. Although, appellant was charged for an offence punishable under Section 304B of the IPC, 498A, 302 IPC but, during course of consideration of submission having at the end of rival party and, after going through the judgment impugned, more particularly, finding recorded by the learned lower court under para-16 and 17, it has been perceived that learned lower court had already made up its mind to convict the appellant under Section 306 of the IPC and, should be inflicted with lenient punishment otherwise, the learned lower court would have properly considered evidence, more particularly, whether



an offence under Section 302 IPC is made out or under Section 306 IPC. The finding of the learned lower court on the score of non presence of Section 304B of the IPC is found proper as based upon the materials available on the record.

7. So, a question has arisen whether there happens to be miscarriage of justice on account of appreciation of the materials in an inappropriate manner and, as an example, the relevant passage of the para-17 of the judgment is quoted below:-

“ Similarly, if the entire evidence is appreciated in the light of the evidence of the I.O. and doctor, I find that it is also a case which does not fall within four corners of the definition of causing murder. Hence, offence under Section 302 IPC has also not been proved against the accused.”

8. Therefore, apart from arguing the appeal on its merit, the learned counsel has also been requested to assist the court how to deal with the situation so prevailing on account of non application of judicial mind, and further, whether the approach of the lower court comes within ambit of miscarriage of justice, justifying *de novo* trial, or would justify setting aside the judgment impugned, be allowed by recording acquittal of the appellant on account of failure of justice, having at the end of lower court, for which appellant was not responsible.



9. Learned counsel for the appellant has submitted that the court has after proper application of the materials available on record concluded by way of negating presence of Section 302 IPC as well as 304B IPC as none of the ingredients attracting those sections found properly substantiated, and in likewise manner, should have also concluded even to the extent of Section 306 of the IPC as the prosecution failed to substantiate its case, whereupon, would have acquitted the appellant. It has also been submitted that there happens to be appreciation of the fact properly by the lower court while recording finding concerning Section 302 IPC nor under Section 304B IPC, save and except that the learned P.O. could not arrange the finding in chronological manner. From the judgment impugned, it is evident that irrespective of the fact that no case under Section 306 IPC is made out, the learned lower court convicted the appellant only because there happens to be death of deceased.

10. Further, elaborating the issue, it has been submitted that there happens to be initial prosecution version that in the house itself a grave was being dug and, there was preparation for burying the dead body. The persons so named having engaged therefor, have been exonerated which the



prosecution had accepted and so, the major portion of the allegation is found cindered, apart from the fact that the I.O. harpooned the prosecution version through objective finding relating to the P.O. Now, so far appellant is concerned, it is apparent that the version of the prosecution has got no truthfulness in the background of the fact that Appellant's Nani's house, as disclosed lie adjacent to the house of the informant and, from the evidence of the I.O., PW-7, it is evident that the same was not the actual P.O. rather P.O. was the house of the appellant, having at a distance and manner whereunder prosecution party shown their appearance is a circumstance, needs proper consideration, more particularly, in the background of the absence of an independent person to come forward to justify. Furthermore, the cause, demand of she-buffalo, having so alleged suffers from vagueness to such extent that it completely obviated 304B, and in likewise manner, has its impact relating to Section 306 IPC, more particularly, in the background of the fact that prosecution has kept silence over pointing out any activity at the end of appellant provoking the deceased to commit suicide. That means to say, the prosecution as well as the court below failed to identify the appellant to be abettor, hence no conviction would be for an offence punishable



under Section 306 IPC.

11. In an alternative, it has also been submitted that the dead body was found in another house lying in the same village and so, there should have been positive evidence at the end of the prosecution regarding shifting of the deceased from the Nani's place to her own place whereupon prosecution case is lacking. The prosecution has no evidence on that very score and rightly been, because of the fact that deceased had not come to the place of Nani of the appellant. As is evident by them, the deceased had died during course of cooking as she caught hold of fire accidentally and on that very score, three DWs consistently deposed. So, in any view of the matter, the judgment of conviction and sentence could not survive.

12. Learned APP has fairly submitted that the learned lower court had not done proper exercise during course of scrutinizing the evidence save and except simply copying the same. Had there been proper mode of evaluation of the evidence, then in that circumstance, the result would have been different than the present one, because of the fact that from the evidence available on the record, the alternative offence is found duly substantiated and for that, the approach of the learned lower court happens to be averse to the judicial propriety. That



being so, it is a fit case whereunder after setting aside the judgment impugned, the matter be remitted back to the learned lower court to consider the material available on the record afresh, in accordance with law, after hearing both sides.

13. From the judgment impugned, it is evident that from paragraphs 5 to 15, the evidences of the witnesses have been copied and then at para-16 there happens to be rival submission and para-17 is the finding of the learned lower court. After going through para-17, it is evident that not even a word spoken by the witnesses have been discussed, appreciated, evaluated in order to trace out why Section 304B IPC is not made out and in likewise manner why Section 302 IPC is not made out and how Section 306 of the IPC is made out. Reason is the life and soul of the judgment and so, the finding should have well reasoned. Because of the fact that no reason has been assigned, therefore, the judgment is found deficient one on the score of non compliance of Sub-Section 1 of Section 354 of the CrPC.

14. In *State of Maharashtra vs. Salman Salim Khan and Ors* as reported in *2004 CrLJ 920*, it has been held as follows:-

“6. It is the case of the prosecution that on the night intervening the 27th and 28th



September, 2002, the respondent drove his car under the influence of alcohol, in a rash manner and caused the death of one person and caused grievous injuries to four others who happened to be sleeping on the footpath. A few days later the chargesheet filed as above, came to be modified based on the additional statement of the complainant, and instead of Section 304A IPC Section 304 Part II, IPC was substituted which is an offence exclusively triable by a Court of Sessions hence the learned Magistrate who took cognizance of the offence, committed the said case to the Court of Sessions for trial.”

15. The same view has also been reiterated in the case of *Prasad @ Hari Prasad Acharya v. State of Karnataka* as reported in *AIR 2009 SC 1911*.

16. PW-8 is the doctor. He had conducted postmortem over the dead body of the deceased and found the following ante-mortem injury:-

(i) Burn injury all over body except both leg lower part both sole.

(ii) sign of inflammation present in both leg. Body was looking blackish with sign of inflammation.

On dissection above mentioned ante mortem burn was confirmed. Some bleb with fluid present over affected area. Trachea congested. All abdominal viscera were found congested. Stomach empty. Heart-left full and right empty. All injuries were ante-mortem caused by fire. Cause of death- Shock due to burn wound. Rigor mortis present in both limbs.

17. During cross-examination, nothing substantial



has been elicited at the end of appellant, much less there happens to be an admission over cause of death. At the present moment, presence of carbon particles (soot) in the trachea though has got vital role in deciding whether deceased was alive during course of burning, whereupon both the parties lost their attention.

18. PW-7 is the I.O. He has stated that on 23.12.2014, he was posted at Majaulia PS as ASI. He was entrusted with the investigation of this case by the Officer In-charge. He had inspected the place of occurrence as pointed out by the informant which happens to be a thatched house situated at southern flank of village, Semra Ghat having northern front. The hut had two rooms. He had not found any incriminating object there. He shown boundary of the house North- Mango orchard of Munna Ansari, South-Part of the land of accused, East-House of Kamruddin and West-Land of Mansoor Ansari. Recorded statement of the witnesses. Prepared inquest report. Conducted raid, accused were found absconding, recorded statement of other witnesses, received supervision note, received postmortem report and then, after concluding investigation, submitted charge-sheet. During cross-examination, he has stated that during course of preparation of



inquest report, he had not seized the burnt string, chair nor he mentioned the same in the case diary. He had gone inside the house and, he had not found any sign of burn inside the house. He had not found ditch having been dug inside the house. At para-3, there happens to be contradiction relating to witness, Shamshad Alam. Para-4 and 5 are that of informant, Hasina Khatoon, Nazia Khatoon.

19. So, from the evidence of the doctor it has become abundantly clear that the deceased died of burn injury which has also not been controverted by the appellant who further tried to explain by way of proposing that it was an accidental fire which deceased caught during course of cooking but, from the evidence of the I.O., it is evident that he had not found any sign of burn at the place where inquest was prepared, that means to say, inside the house of the appellant. Furthermore, he had not found earthen stove nor firewood nay any other kind of stove. Furthermore, from cross-examination of the I.O., it is evident that he was not even suggested over presence of sign of flame, earthen stove, which he intentionally suppressed. That means to say, the objective finding having at the end of I.O. relating to P.O. goes out of controversy. It is needless to say, that appellant has not denied that the house from where the dead body was



recovered does not belong to him. It is not the case of the appellant that the dead body was forcibly or in deceitful manner thrust upon him rather tried to explain the death of the deceased by accidental burn while cooking by way of examining three DWs.

20. DW 1 has stated that Md. Neyaz happens to be his full brother. His wife was Nusrat Jahan who died four years ago on account of burn which she sustained during course of cooking. Children who were present there, raised alarm. Neyaz at that very time was in the village. He also came and then, they all extinguished the fire. Neyaz had love marriage and so, neither at the time of marriage nor subsequently thereof, there was demand of dowry nor, the victim was ever tortured on that very pretext. During cross-examination, he has stated that he reached at the house of his brother after hearing uproar. Naihar of the deceased lies at a distance of 10 Bigha. He has further stated that he happens to be Pairvikar of this case and then had denied the suggestion that in a way to shield his brother, he deposed falsely.

21. DW-2 has stated that on the alleged date and time of the occurrence at about 8.30 PM while he was coming from market, he saw the house of Neyaz on fire and the female folks



of the surroundings were raising hue and cry. They had gone there and extinguished the fire. Wife of Neyaz was cooking through leaves of sugarcane. At that very time, Neyaz was not present there. He came subsequently. During cross-examination, he had stated that when he reached at the P.O., he had seen the female folks including Hasina Khatoon (informant) raising hue and cry. Non was along with him. He remained for half an hour. Mukhia, Sheikh Mushtaque came subsequently.

22. DW-3 has stated that on the alleged date and time of occurrence while he was going towards his Khalihan at about 8:00-9:00 PM, he heard sound of uproar coming from house of Neyaz whereupon, he rushed and found the house under fire. Nasim, Imteyaz and others were engaged in extinguishing fire. At the time of cooking fire had spread over. Neyaz came subsequently. During cross-examination, he has stated that within two minutes, fire was extinguished. He has not sustained any kind of burn. Anybody's hand was burnt or not, he is unable to say. He happens to be maternal uncle of Neyaz.

23. When evidence of DWs have been gone through, it is evident that they have not succeeded to explain the death by burn, during course of cooking as DW-2 and DW-3 have stated that house was under fire, is completely controverted by the



DW-1 coupled with the objective finding of the I.O.. The I.O. was not even suggested that house was burnt, earthen stove was there, objective finding happens to be collusive one. These circumstances have to be seen with the evidence of the remaining PWs and the most important witness on this very score happens to be that of the daughter of the deceased as well as accused, who has been examined as PW-5, namely Nazia Khatoon, a minor girl. Before her examination, her mental IQ has properly been tested and then observing that she was fit to depose, allowed to depose. During her examination-in-chief, she has stated that her mother had gone to the place of maternal grand-mother to give meal. She had also accompanied her. While they were returning and during course thereof, reached near Darwaza of Noor Mohammad, they saw, Neyaz (her father), Gul Mohammad, Khush Mohammad, Kamrul Haque, Usha Ansari, Bismillah and Jamila, whereupon, her mother inquired from her Papa, 'what are you doing here?'. 'accompany them to the house'. Her father had disclosed that carry the child to the house. Bismillah and Jamila both escorted to her house. All of them came at her house and then, they dragged her mother towards the back of her house and then, they all throttled her till death. Thereafter, they lifted her mother and put her over



a chair, tied her down with the chair and then after sprinkling K.Oil, set her on fire. Gul Mohammad lit the fire. She began to cry. She tried to rush to the place of her maternal uncle but Jamila caught hold of her and gagged her mouth. All the accused were engaged differently during course thereof, Khush Mohammad began to dig the grave and rest of the accused were to put the dead body into the grave, anyhow, she got an opportunity, rushed to her Nani, shouting that 'her mother has been murdered.' whereupon, Nani, Mamu along with other villagers arrived, seeing whom, the accused persons ran away. Her mother was taken to the hospital by her Nani. After some time, the dead body of mother has been brought back. Police also came before whom, her Nani had given her Fardbeyan. The police had not recorded her statement. Then had disclosed that on account of non fulfillment of demand of dowry, she-buffalo, her mother has been killed. During cross-examination, she has stated that she is residing at the place of one Khurshid for the last three years. She has come from that place. In para-2, she has stated that her Nani has kept her at the place of Wakil Saheb. She has further stated that her Nani has brought to depose. In para-3, she has stated that she does not know the original place of residence of her father. Her father and uncle both reside here.



Then stated that the place is known as Bhusuk Tola. She used to visit place of her Nani. Then she denied the suggestion that there happens to be some sort of strained relationship in between her father and maternal uncle relating to Gharari land. Then has stated that her mother met with her father at the Darwaza of Gul Mohammad. At that very time, they both had not indulged in an altercation. Bismillah and Jamila after carrying them to the house, remained there. At the time when accused persons were taking away her mother to the back of her house, Bismillah and Jamila had also joined them. She had not raised alarm. They had committed murder of her mother by throttling. At that very time also, she could not raise alarm, as her mouth was gagged. She is unable to say how much time thereafter, they had kept her mother over chair. At the time when her mother was under flame, none of the villagers came. She is unable to say in which hospital they had gone but, Nani had taken away her mummy over tempo. She had also accompanied. When police came, she was present at her house. Police had recorded her statement. Then there happens to be contradiction. It is not a fact that during course of statement before the police, she had stated that her father attempted to extinguish the fire. Then she stated that she had stated before the police (whatever



been stated) during course of examination-in-chief. Then had stated that grave was dug behind the back of the house. Then has said that she is not remembering whether that grave was shown to the I.O. or not. Then, she denied the suggestion that her mother had caught fire during course of cooking and, she has deposed falsely.

24. PW 4 has simply stated that on hearing uproar, he rushed to the house of appellant where he found the wife of Neyaz dead on account of burn. Neyaz came subsequently. During cross-examination, he has stated that the marriage has been solemnized more than 9-10 years ago. It was love marriage. There was no demand of dowry.

25. PW-9 has simply stated that the occurrence is of about three years ago. At that very time, she was sleeping at her house. Then said that she did not know about the occurrence whereupon, she was declared hostile.

26. PW-1 is the brother of the deceased. He during his examination-in-chief has stated that Neyaz is his brother-in-law. Nusrat Jahan was his sister. Marriage was solemnized about six years ago from the date of occurrence. After marriage, his sister had gone to Sasural where Neyaz began to torture her in the background of non fulfillment of demand of dowry, i.e. one



she-buffalo. His sister used to inform. His mother had disclosed that at the present moment, she is unable to provide but in due course of time, might be given. On account of non fulfillment of demand, his sister was frequently subjected to torture and cruelty. On the alleged date of occurrence, maternal uncle of Neyaz, namely, Gul Mohammad along with Kamrul Haque, Ali Ahmad, Khush Mohammad, Usha Ansari and two ladies had assembled at the place of occurrence. Neyaz was also there. His Bhagini and sister, after preparing meal, had gone to the place of maternal grand-mother of Neyaz. During course of returning therefrom, his sister inquired from Neyaz, '*why is he loitering?, accompany them to the house.*' Whereupon, all of them said that how this lady dare to follow her husband. After hearing this, his brother-in-law began to quarrel with his sister. His house lies near about the road. After hearing uproar, they came from their house and got the matter pacified. His mother directed his sister to go to her house and then, they also returned back. All of them accompanied his sister. In the night at about 11:00-12:00, there was outcry that there happens to be fire in the house of Neyaz Ansari whereupon, they also rushed to the place where they had seen the dead body of his sister, Nusrat Jahan at the Darwaza. Save and except legs, whole body was burnt. There was wrapper



over her dead body. So many persons were there. Identified the accused. He has also stated that all the accused ran away seeing them. During cross-examination at para-6, he has stated that the accused (his brother-in-law) resides at his *Nanihal* and so, happens to be his neighbour. His mother is dead but father is alive. Accused has one more brother but both are separate. In para-11, he has stated that from the wedlock, his sister had begotten four children. The eldest one is aged about seven years. In para-14, he has stated that the spouses were carrying cordial relationship till birth of all the children. He is unable to disclose the exact date of demand of dowry. In para-16, he has stated that he had gone inside the house of his sister. She used to cook by firewood. In para-18, he has denied the suggestion that during course of cooking, his sister caught fire, as a result of which, she died. He denied the suggestion to the effect that accused is innocent. He has also denied the suggestion that there was no demand of dowry at the end of accused.

27. PW-2 is another brother of the deceased who during course of examination-in-chief has reiterated the version that since after marriage, which took place six years prior the occurrence, accused persons (named) began to demand dowry (she-buffalo) which, they failed to give on account of financial



crunch. He has further stated that they have seen the dead body of his sister. Her both hands were fixed like cross, whereupon, they inferred that her hands were tied by the string which might have burnt. Her hairs were also burnt. Tongue was protruded. Plastic chair got stuck to her body after having melted on account of burning. Excreta was there. There was *chhura* injury over her thigh. Her whole body was burnt and naked. After seeing the dead body, it was giving an impression that she had been murdered by way of burning. Identified the accused. During cross-examination at para-8, he has stated that the house of maternal grand-father of accused, Neyaz lies at a distance of 50 yards from his house. In para-11, he has stated that Neyaz used to reside at his Nani's place. His marriage was solemnized from the said place. In para-13, he has stated that house of non else is in the surrounding of house of Neyaz. In para-16, he denied the suggestion that Neyaz was married about 15 years ago and the age of the eldest daughter (Nazia) is nine years. Then in para-20, he has stated that his sister had not drawn up any kind of proceeding against anybody relating to demand of dowry. In para-21, he has stated that he had seen his sister going inside the house of Nani of Neyaz. She remained there for half an hour and then thereafter, she came out. At that very time,



Neyaz was sitting with Khush Mohammad and Gul Mohammad. At para 29, he has stated that during course of returning an altercation took place. In para-23, he has stated that after hearing uproar with regard to breaking of fire, he along with his brother and mother had gone to the house of Neyaz at about 11:00 PM. When they reached, at that very time, Neyaz was coming out from his house carrying the dead body of his sister. Grave was excavated behind the house. Seeing them, accused persons fled away after throwing the dead body. In para-25, he has stated that he had not gone inside the house. His sister was dead. She was naked. Police came. Grave was shown to the police. In para-28, 29 there happens to be contradiction. In para-30, he has stated that police had seen the chair. Then has denied the suggestion that during course of cooking, the victim sustained burn accidentally as a result of which, she died. Story of demand of dowry followed with murder of the deceased are false.

28. PW-3 is the informant. During her examination-in-chief, she has reiterated her earlier version. She has further stated that when they reached at the house of Neyaz on hearing uproar, they had seen accused persons coming out from the house carrying the dead body of her daughter who, after seeing



them, ran away after throwing the dead body. Dead body of her daughter was naked. Her hands and legs were tied. There was string around her neck. Tongue was protruded. Her eyes and hairs were completely burnt. Excreta was also there. She has identified the accused. She has further stated that about six years ago from the date of occurrence, deceased was married to Neyaz. Identified the accused. During cross-examination at para-6, she has shown her ignorance with regard to institution of Majhauria PS Case No. 226/2013 against the accused. In para-8, she has disclosed that the house of Neyaz lies in Mohalla-Baswari while his Nanihal lies in her village. In para-9, she has stated that it was not a love marriage rather settled one. At the time of Nikah, Tajuddin was the Maulvi. In para-10, she has stated that Neyaz was residing at his Mamhar. His marriage was solemnized at the instance of his Nana, Nani and Mamu. Then at para-11, 12, there happens to be disclosure with regard to children having been begotten to her daughter. The eldest child was aged about 7 years and the youngest one was about a year at the time of occurrence. Then has denied the suggestion that the deceased was married about 15 years ago. In para-17, she has stated that Neyaz advanced the demand of a she-buffalo just one year after the marriage. Neither she nor her daughter



instituted any case against Neyaz on that very score. In para-18, she has stated that when there was uproar regarding breaking of fire in the house of Neyaz, at the very time, she was sitting at her Darwaza. Maternal grand-mother of Neyaz shouted. Rushed. She along with other co-villagers rushed to the house of Neyaz. When they arrived, till then, none others have come. When they arrived, they had seen the accused persons taking out the dead body of her daughter from the house and, just after seeing them they threw the dead body and ran away. At that very time, her daughter was naked. She was dead. She had not untied her hands, legs. She began to weep. She shouted. Police came and during course thereof, a large number of villagers also came. In the night, none had come even on her shout. In para-19, she has stated that house of Neyaz is a thatched house. In para-21, she has stated that she had not gone inside the house of Neyaz. Earthen stove lies in the court-yard. Police had come at about 5:00 AM. Police had not untied the string and in same condition, dead body was taken away. She had also accompanied. In para-22, she has stated that police had taken her statement in the village itself. Dead body was taken away for postmortem in same condition. When the dead body was handed over to her, string was not there. She is unable to say whether any document



was prepared by the police or not with regard to presence of string. In para-24, she has stated that the police had gone inside the house and seen the same. Then there happens to be contradiction over her further statement at para-25, 26, 27, 28. Then has denied the suggestion that at the time of cooking food, her daughter got burnt and died.

29. From the evidence as stated above, it is crystal clear that two kinds of evidence has been admitted at the end of prosecution. The first one, is that of PW-5, daughter, a minor, who claimed herself to be an eye witness and as per whose evidence, deceased was firstly throttled and then, put on fire after tying with a chair is not found duly supported by the medical evidence and further, the matter has not been duly explained at the end of both the parties. However, it is apparent that deceased died at her Sasural and on that very score, there happens to be no disputation much less after examination of DWs. Though the defence has tried to explain but, the same has to be perceived in the background of totality of the version in consonance with the obligation having over the appellant as required under the law.

30. The basic principle of criminal jurisprudence is based upon a proverb "*accused is innocent till he is found*



guilty” and that is based upon the principle of fundamental right so enshrined under Chapter III of the Constitution, more particularly, Article 21 of the Constitution of India takes care of whereunder it has been incorporated that the fundamental right of a citizen is subject to infringement only in accordance with law. And, the procedure has been prescribed for conduction of trial. In likewise manner, procedure has also been prescribed identifying the prosecution sharing the burden to prove its case beyond all reasonable doubt but, in certain circumstances, it happens to be mere a guess or expectation because of inability of the prosecution to support its case on account of its inability due to inaccessability on the other hand, being under exclusive knowledge of the accused as, the circumstances so suggests and, such circumstances, is found duly cared under Section 106 of the Evidence Act which speaks that a person who has got exclusive knowledge is bound to divulge the same.

31. In *Ranji Kumar Halder v. State of Sikkim* as reported in **2019(3) PLJR 358 (SC)**, it has been held as follows:

“13. Before we examine respective contentions of the learned Counsel for the parties, it would be appropriate to extract Section 106 of the Act, which reads as under:

“106. Burden of proving fact especially within knowledge. - When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.



14. The general Rule is that the burden of proof is on the prosecution. Section 106 of the Act was introduced not to relieve the prosecution of their duty but it is designed to meet the situation in which it would be impossible or difficult for the prosecution to establish facts which are especially within the knowledge of the Accused.

15. In *Shambu Nath Mehra v. State of Ajmer* : AIR 1956 SC 404, the Court held as under:

8. Section 106 is an exception to Section 101. Section 101 lays down the general Rule about the burden of proof.

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.”

Illustration (a) says--

“A desires a court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

9. This lays down the general Rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the Accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminent or exceptionally within his knowledge. If the Section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the Accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy



Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an Accused person to show that he did not commit the crime for which he is tried. These cases are *Attygalle v. Emperor* : AIR 1936 PC 169] and *Seneviratne v. R.* [(1936) 3 All ER 36, 49].

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11. We recognise that an illustration does not exhaust the full content of the Section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the Accused, the facts cannot be said to be "especially" within the knowledge of the Accused. This is a Section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the Accused could prove them, are all matters that must be taken into consideration. The Section cannot be used to undermine the well established Rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts.

16. In another judgment reported as *Trimukh Maroti Kirkan v. State of Maharashtra* : (2006) 10 SCC 681, the Court considered a situation wherein Accused is alleged to have committed the murder of his wife. The prosecution succeeded in leading evidence to show that shortly before the commission of the crime, they were seen together or the offence takes place in the dwelling house where the Appellant normally resided. The Court held as under:

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. In *Nika Ram v. State of H.P.* : (1972) 2 SCC 80: 1972 SCC (Cri.) 635: AIR 1972 SC 2077] it was observed that the fact that the Accused alone was with his wife in the house when she was murdered there with "khukhri" and the fact that the relations of the Accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In *Ganeshlal v. State of Maharashtra* : (1992) 3 SCC 106: 1993 SCC (Cri.) 435] the Appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the Appellant is under an obligation to give a plausible explanation for the cause of her death in his statement Under Section 313 Code of Criminal Procedure. The mere 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 is a prime Accused in the commission of murder of his wife. In *State of U.P. v. Dr. Ravindra Prakash Mittal* : (1992) 3 SCC 300: 1992 SCC (Cri.) 642: AIR 1992 SC 2045] the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that the wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife



by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the Accused and convicted him Under Section 302 Indian Penal Code. In State of T.N. v. Rajendran : (1999) 8 SCC 679: 2000 SCC (Cri.) 40] the wife was found dead in a hut which had caught fire. The evidence showed that the Accused and his wife were seen together in the hut at about 9.00 p.m. and the Accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the Accused (husband) who was the perpetrator of the crime.

17. In another Judgment reported as Nika Ram v. State of Himachal Pradesh : (1972) 2 SCC 80, it was held that the absence of any cogent explanation by the Accused would indicate that the Accused is responsible for commission of the crime. The Court held as under:

“16. It is in the evidence of Girju PW that only the Accused and Churi deceased resided in the house of the Accused. To similar effect are the statements of Mani Ram (PW 8), who is the uncle of the Accused, and Bhagat Ram school teacher (PW 16). According to Bhagat Ram, he saw the Accused and the deceased together at their house on the day of occurrence. Mani Ram (PW 8) saw the Accused at his house at 3 p.m., while Poshu Ram (PW 7) saw the Accused and the deceased at their house on the evening of the day of occurrence. The Accused also does not deny that he was with the deceased at his house on the day of occurrence. The house of the Accused, according to plan PM, consists of one residential room, one other small room and a verandah. The correctness of that plan is proved by A.R. Verma overseer (PW 5). The fact that the



Accused alone was with Churi deceased in the house when she was murdered there with the khokhri and the fact that the relations of the Accused with the deceased, as would be shown hereafter, were strained would, in the absence of any cogent explanation by him, point to his guilt.

18. In *State of Rajasthan v. Thakur Singh* : (2014) 12 SCC 211, this Court reiterated the principle that burden of proving guilt of the Accused is on the prosecution but there may be certain facts pertaining to a crime that can be known only to the Accused. The Court held as under:

“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.

19. In *Dnyaneshwar v. State of Maharashtra* : (2007) 10 SCC 445, this Court held as under:

“10. It has not been disputed before us that the deceased was murdered in her matrimonial home. It is not the case of the Appellant that the offence was committed by somebody else. It is also not his case that there was a possibility of an outsider to commit the said offence. One of the circumstances which is relevant is that when the couple was last seen in a premises to which an outsider may not have any access, it is for the husband to explain the ground for unnatural death of his wife. In *Raj Kumar Prasad Tamarkar v. State of Bihar* : (2007) 10 SCC 433: (2007) 3 SCC (Cri.) 716: (2007) 1 Scale 19] this Court held: (SCC p. 440, paras 22-23)

22. The conspectus of the events which had been noticed by the learned Sessions Judge as also by the High Court categorically goes to show that at the time when the occurrence took



place, the deceased and the Respondent only were in the bedroom and the terrace connecting the same. There was no other person. The cause of death of the deceased Usha Devi i.e. by a gunshot injury is not disputed. The fact that the terrace and the bedroom are adjoining each other is not in dispute.

23. The autopsy report shows that 'a blackening and charring' existed so far as Injury (i) is concerned. The blackening and charring keeping in view the nature of the firearm, which is said to have been used clearly go to show that a shot was fired from a short distance. Blackening or charring is possible when a shot is fired from a distance of about 2 feet to 3 feet. It, therefore cannot be a case where the death might have been caused by somebody by firing a shot at the deceased from a distance of more than 6 feet. The place of injury is also important. The lacerated wound was found over glabella (middle of forehead). It goes a long way to show that the same must have been done by a person who wanted to kill the deceased from a short distance. There was, thus, a remote possibility of causation of such type of injury by any other person, who was not on the terrace. Once the prosecution has been able to show that at the relevant time, the room and terrace were in exclusive occupation of the couple, the burden of proof lay upon the Respondent to show under what circumstances death was caused to his wife. The onus was on him. He failed to discharge the same.

20. In Ram Gulab Chaudhary and Ors. v. State of Bihar : (2001) 8 SCC 311, this Court held as under:

“24. Even otherwise, in our view, this is a case where Section 106 of the Evidence Act would apply. Krishnanand Chaudhary was brutally assaulted and then a chhura-blow was given on the chest. Thus chhura-blow was given after Bijoy Chaudhary had said "he is still alive and should be killed". The Appellants then carried away the body. What happened thereafter to Krishnanand Chaudhary is especially within



the knowledge of the Appellants. The Appellants have given no explanation as to what they did after they took away the body. Krishnanand Chaudhary has not been since seen alive. In the absence of an explanation, and considering the fact that the Appellants were suspecting the boy to have kidnapped and killed the child of the family of the Appellants, it was for the Appellants to have explained what they did with him after they took him away. When the abductors withheld that information from the court, there is every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be 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 like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The Appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference. We, therefore, see no substance in this submission of Mr. Mishra.

32. In *Nika Ram v. State of Himachal Pradesh* as reported in *AIR 1972 SC 2077*, it has been held:-

“16. It is in the evidence of Girju PW that only the accused and Churi deceased resided in the house of the accused. To similar effect are the statements of Mani Ram (PW 8), "who is the uncle of the accused, and Bhagat Ram school teacher (PW 16). According to Bhagat Ram, he saw the accused and the deceased together at their house on the day of occurrence. Mani Ram (PW 8) saw the accused at his house at 3 p.m., while Poshu Ram, (PW 7) saw the accused and the deceased at their house on the evening of the day of occurrence . The accused also does not deny that he was with the deceased at his house



on the day of occurrence. The house of the accused, according to plan PM, consists of one residential room one other small room and a varandah. The correctness of that plan is proved by A. R. Verma overseer (PW 5). The fact that the accused alone was with Churi deceased in the house when she was murdered there with the Khokhri and the fact that the relations of the accused with the deceased, as would be shown hereafter, were strained would, in the absence of any cogent explanation by him, point to his guilt.

33. In *Ganeshlal v. State of Maharashtra* as reported in *(1992) 3 SCC 106*, it has been held as :-

“11. From this evidence it is clear that the accused appellant and his family members were present in the house at the time when the deceased was bring due to fire lit after pouring kerosene on her and they made no attempt to save her. The contention that the Doctor had stated that the death was instantaneous and nothing was left for the appellant and the other family members to save her, is unacceptable. The normal ordinary human conduct would be that when one of their inmates, namely Kanchana was in flames, they would have made every endeavour to save her life, if it were a case of suicide, and call the people to come to their rescue to save her life or at least would have sought first aid from PW-6, who is next door neighbour, to save the life of the deceased. No such attempt was made nor even attempted. On the other hand the appellant's earliest attempt was to misguide that Kanchana died due to short circuit. This attempt was burned fathom deep from the evidence of PW.10, Elect. Engr. Then they set up the plea of suicide. We have Ex. 73, the first information report, immediately lodged by A-6 with the police. We need not go into the question as to what extent the admission by a co-accused would be used against the appellant.



Suffice it to state that in his examination under Section 313 Cr. PC. , the appellant admitted that A-6 went to the police station and gave FIR Ex-73, to the Head Constable, PW-11 and that A-6 stated that the deceased caught fire while she was handling the wet clothes for drying, due to short circuit. In Ex-73, it was also stated that this information was conveyed by the appellant himself. This admission is not only a relevant fact under Section 8 of Evidence Act as res gestae but a most important circumstance against the appellant. The indifferent and hard hearted conduct are also important circumstances. It was also admitted that the walls in the room became blackish due to smoke. It is settled law that the conduct of an accused in an offence previous and subsequent to the crime are relevant facts. Absence of any attempt to save the life of the deceased Kanchana while she was burning and was charred to death, their conduct in not attempting to give any medical aid, the conduct of the appellant immediately after the deceased was soaked with kerosene and letting fire after closing the door A.6 obviously opened it after ensuring that she had died, the appellant's coming down and standing at the grill gate on ground floor; the appellant shouted that uncle A.6 should close down falsely proclaimed that there was short circuit; implying to scare away the people from attempting to save Kanchana. These are most telling and relevant crucial facts apart from repulsive inhuman conduct. The false plea of suicide is yet another relevant fact. When the death had occurred in their custody the appellant is under an obligation in Section 313 Cr. PC. statement at least to give a plausible explanation for the cause of her death. No such attempt was even made excepting denying the prosecution case. These facts completely are inconsistent with the innocence, but consistent with the hypothesis that the appellant is a prime accused in the commission of gruesome murder of his wife. The circumstantial evidence thus discussed is complete and consistent with the



only conclusion that the inmates alone committed the crime and the appellant was one among them.

34. In *State of U.P. v. Dr. Ravindra Prakash Mittal*

as reported in *AIR 1992 SC 2045*, It has been held:-

“ 20. As pointed out supra, there is no direct evidence to connect the respondent with this offence of murder and the prosecution entirely rests its case only on circumstantial evidence. There is a series of decisions of this Court so eloquently and ardently propounding the cardinal principle to be followed in cases in which the evidence is purely of circumstantial nature. We think, it is not necessary to recapitulate all those decisions except stating that the essential ingredients to prove guilt of an accused person by circumstantial evidence are:

(1) The circumstances from which the conclusion is drawn should be fully proved;

(2) the circumstances should be conclusive in nature.

(3) all the facts so established should be consistent only with the hypothesis of guilt and inconsistent with innocence;

(4) the circumstances should, to a moral certainty, exclude the possibility of guilt of any person other than the accused.

21. Vide *Rama Nand v. State of Himachal Pradesh* : 1981CriLJ298 ; *Gambir v. State of Maharashtra* : 1982CriLJ1243 ; *Earabhadrapa v. State of Karnataka* : 1983CriLJ846 and *Ram Avtar v. State of Delhi Administration* : 1985CriLJ1865 .

22. Now let us formulate the impelling circumstances attending the case and examine whether the cumulative effect of those circumstances negatives the innocence of the respondent and serves as a definite pointer towards his guilt and unerringly leads to the conclusion that within all human probability the



offence was committed by the respondent alone and none else.

23. The circumstances which are established as having closely linked up with one another are as follows:

(1) The motive for the occurrence.

(2) The room in which this tragic and pathetic incident took place was in the exclusive possession and occupation of the respondent and the deceased.

(3) The occurrence had happened in the wee hours of 12th October 1971 when no body would have got an ingress into the room wherein the husband and wife admittedly slept.

(4) The evidence of PW-2, swearing that the respondent was found in the scene house at 7.15 a.m.

(5) The presence of the respondent inside the room wearing nightgown when PW-4 went to the scene room.

(6) The position of the dead body lying on the ground within a cot frame with extensive burns except on the back and lumbar regions.

(7) The presence of the traditional external visible features of strangulation as well as the internal injuries establish the use of violence.

(8) The positive opinion of PW-1 who conducted the autopsy on the dead body of the deceased, stating that the death was due to strangulation and the burns were post-mortem.

(9) False plea of alibi and the conduct of the respondent feigning innocence.

(10) The intrinsic value of the inviolable and impregnable evidence let in by the prosecution completely and conclusively establishing the links of the entire chain of circumstances as a whole and not in fragments proving the guilt of the respondent/accused.”

35. In *State of Tamil Nadu v. Rajendran* as reported in (1999) 8 SCC 679, it has been held

“6. Coming now to the second question, the



law is fairly well settled that in a case of circumstantial evidence, the cumulative effect of all the circumstances proved, must be such as to negative the innocence of the accused and to bring home the charge beyond reasonable doubt. It has been held by a series of decisions of this Court that the circumstances proved must lead to no other inference except that of guilt of accused. (See Ram Avtar v. State (Delhi Administration) : 1985CriLJ1865 and Prem Thakur v. State of Punjab : 1983CriLJ155 . The law relating to circumstantial evidence no longer remains res integra and we do not think it necessary to multiply authorities on this point. The circumstances which can be said to have been established by unimpeachable evidence are that the husband and wife namely the accused and the deceased were frequently quarreling and even on the date of incident they quarreled with each other from 7 P.M. to 9 P.M., as has been deposed to by PWs 1, 3 and 4. The incident namely the death of the deceased and her two children occurred inside the house of the accused and accused had been seen inside the house at 9 P.M. On the date of incident, which has been established through the evidence of PWs 1, 3 and 4 and PW 1 happens to be a neighbour. In course of incident, the accused himself was seen coming out of the house through the roof as deposed to by PWs 1 and 3 and the accused has also admitted in his statement under Section 313 of the CrPC. The very conduct of the accused in not raising any alarm even on seeing the fire, knowing fully well that his wife and two daughters are inside the house and no attempt had been made by the accused to save anyone of the deceased persons. On the other hand the prosecution evidence indicates that after coming out the accused was standing as a silent spectator. The opinion of the doctor indicating that the wife of the accused died of asphyxia due to strangulation and not on account of burn injuries and several findings indicated in the post-mortem report undoubtedly supports the



conclusion about the death on account of asphyxia. If the accused and his wife were seen together in the house at 9 P.M. and accused came out in the morning through the roof, leaving the wife and two children and the death of the wife was found to be not on account of burn injuries but on account of strangulation and on being asked, the accused offers and explanation about the accidental fire which is found to be untrue, then in such a case, there cannot be any hesitation to come to the conclusion that it is the accused who is the perpetrator of the crime. In a case of circumstantial evidence when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This proposition fully applies to the circumstances of the present case. On the circumstances enumerated above which have been established by the prosecution, we have no hesitation to come to the conclusion that the charge of murder has been proved beyond reasonable doubt as against the accused respondent and the High Court erroneously acquitted him of the said charge. We, therefore, set aside the impugned order of acquittal and convict the respondent Rajendran of the offence under Section 302 I.P.C. So far as the sentence is concerned, we are not in a position to hold that the case represents one of the rarest of the rare cases, justifying a penalty of death. We, therefore, sentence respondent Rajendran to the imprisonment for life. Coming to the charge under Section 436 IPC, the aforesaid circumstances together with the evidence of PW 5 to whom the accused is said to have stated about his setting fire to the house, fully establishes the said charge. The High Court in our opinion was in error in interfering with the conviction and sentence passed by the learned Sessions Judge under Section 436 IPC. We, accordingly, set aside the order of acquittal of the



High Court, so far as this charge is concerned and confirm the conviction and sentence recorded by the learned Sessions Judge. Needless to mention, sentences would run concurrently.”

36. In *Trimukh Maroti Kirkan v. State of Maharashtra* as reported in (2006) 10 SCC 681, It has been held as:-

“12. In the case in hand there is no eye-witness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence.

13. The demand for dowry or money from the parents of the bride has shown a phenomenal increase in last few years. Cases are frequently coming before the Courts, where the husband or in-laws have gone to the extent of killing the bride if the demand is not met. These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. No member of the family, even if he is a witness of the crime, would come forward to depose against another family member. The neighbours, whose evidence may be of some assistance, are generally reluctant to depose in Court as they want to keep aloof and do not want to antagonize a



neighbourhood family. The parents or other family members of the bride being away from the scene of commission of crime are not in a position to give direct evidence which may inculcate the real accused except regarding the demand of money or dowry and harassment caused to the bride. But, it does not mean that a crime committed in secrecy or inside the house should go unpunished.

37. In *Ravindra Laxmaiah v. State of Andhra Pradesh* as reported in *2013 CrLJ 3147*, it has been held as follows:-

“15. It is a settled legal proposition that in a case based on circumstantial evidence, where no eye-witness's account is available, the principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation for the same, or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. (Vide: *State of U.P. v. Dr. Ravindra Prakash Mittal* : AIR 1992 SC 2045; *Gulab Chand v. State of M.P.* : AIR 1995 SC 1598; *State of Tamil Nadu v. Rajendran* : AIR 1999 SC 3535; *State of Maharashtra v. Suresh* : (2000) 1 SCC 471; and *Ganesh Lal v. State of Rajasthan* : (2002) 1 SCC 731).”

38. In *Neel Kumar v. State of Haryana* as reported in *(2012) 5 SCC 766*, it has been held:-

“30. It is the duty of the accused to explain the incriminating circumstance proved against him while making a statement under Section 313 Code of Criminal Procedure. Keeping silent and not furnishing any explanation for such



circumstance is an additional link in the chain of circumstances to sustain the charges against him. Recovery of incriminating material at his disclosure statement duly proved is a very positive circumstance against him. (See also: Aftab Ahmad Anasari v. State of Uttaranchal : AIR 2010 SC 773).”

39. In *Sunil Mahadeo Jadhav v. State of Maharashtra* as reported in (2013) 15 SCC 177, It has been held:-

“36. Section 106 of the Indian Evidence Act states that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Since it was accused No. 1 who had arrested the deceased at 00.45 a.m. on 17.12.1985 and kept the deceased in police lock up after his arrest was complete, it was for the accused No. 1 to explain the injuries on the body of the deceased other than those which were noticed in Ex. 76. Accused No. 1 has not stated anything in this regard in his statement under Section 313 of the Code of Criminal Procedure, 1973 (for short 'Code of Criminal Procedure') nor adduced any evidence in defence to explain these injuries. In the absence of any explanation by accused No. 1 or any evidence adduced on behalf of accused No. 1 to explain on these injuries on the body of the deceased, there can be no escape from the conclusion that these injuries have been caused on the body of the deceased by accused No. 1 and no one else.

40. In *Anjanappa vs. State of Karnataka* as reported in (2014) 2 SCC 776, it has been held:-

“30. Besides, the conduct of the Appellant speaks volumes. He was absconding and could



be arrested only on 19/02/1992. Moreover, in his statement recorded under Section 313 of the Code he has not explained how the deceased received burn injuries. He did not set up the defence of alibi. It was obligatory on him to explain how the deceased received burn injuries in his house. His silence on this aspect gives rise to an adverse inference against him. It forms a link in the chain of circumstances which point to his guilt.

41. In State of *Jammu and Kashmir v. Vijay Kumar*

as reported in **(2018) 13 SCC 655**, it has been held

“13. It is obvious from the medical evidence that the death was homicidal and the body was thrown in the Nallah after killing. The body had torture marks including the burn marks. This is further established on record that immediately before the death, the deceased was living with her husband. In the light of evidence on record, it could be held that the burden would be on the husband Under Section 106 of the Evidence Act to explain the circumstances in which the deceased living with him was killed and her body was thrown in the Nallah”.

42. In *Surdu v. State of Chhattisgarh* reported in

(2019) 8 SCC 333, it has been held as follows:-

7. From the evidence of PW 1 Janki Bai it would reveal, that insofar as that part of the evidence wherein, she has stated that there was a quarrel between her husband and her, she left the room with the other two children and the deceased and the appellant were alone in the room and that when she reached the house in the morning, she saw her son Ajit covered with the blanket and after opening the said blanket seeing Ajit to be dead is concerned, the same has remain



unshattered. It could thus be seen that, from the evidence of PW 1 Janki Bai, it can be safely held that there was a quarrel between PW 1 Janki Bai and appellant and after the quarrel, she went to the house of her brother-in-law with two younger children and that the deceased was left alone in the company of appellant and on the next day morning the deceased was found to be dead.

8. In this view of the matter, after the prosecution has established the aforesaid fact, the burden would shift upon the appellant under Section 106 of the Evidence Act. Once the prosecution proves, that it is the deceased and the appellant, who were alone in that room and on the next day morning the dead body of the deceased was found, the onus shifts on the appellant to explain, as to what has happened in that night and as to how the death of the deceased has occurred.

9. In this respect reference can be made to the following observation of this Court in *Trimukh Maroti Kirkan v. State of Maharashtra* [*Trimukh Maroti Kirkan v. State of Maharashtra*, (2006) 10 SCC 681 : (2007) 1 SCC (Cri) 80] : (SCC p. 694, para 21)

“21. In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete.”

10. The appellant has utterly failed to discharge such burden. The appellant has taken defence in his statement under Section 313 CrPC, that the deceased has died due to an ailment. However, this is falsified by the medical evidence of PW 2 Dr B.K. Tirki. In his evidence he has stated that, there was a fracture on the head of the deceased and the death of the deceased might have occurred due to



strangulation. There were marks of fingers on the neck of the deceased. No doubt, that non-explanation or false explanation by appellant cannot be taken as a circumstance to complete the chain of circumstances to establish the guilt of the appellant. However, the false explanation can always be taken into consideration to fortify the finding of guilt already recorded on the basis of other circumstances.

11. In this respect apart from referring to the observations of this Court in *Trimukh Maroti Kirkan* [*Trimukh Maroti Kirkan v. State of Maharashtra*, (2006) 10 SCC 681 : (2007) 1 SCC (Cri) 80] , it will be apposite to refer to the following observation of this Court in *Sharad Birdhichand Sarda v. State of Maharashtra* [*Sharad Birdhichand Sarda v. State of Maharashtra*, (1984) 4 SCC 116 : 1984 SCC (Cri) 487] , which reads thus: (*Sharad Birdhichand Sarda case* [*Sharad Birdhichand Sarda v. State of Maharashtra*, (1984) 4 SCC 116 : 1984 SCC (Cri) 487] , SCC p. 184, para 151).

“151. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court.”

43. In *Mahesh Kumar vs. State of Haryana* as reported in (2019)8 SCC 128, it has been held:-

9. The first and foremost question that arises in this case, and in respect of the necessary ingredients of Section 304-B Indian Penal Code, is whether there is a proximate nexus between the death of the deceased with the cruelty or harassment inflicted upon her in respect of the demand of dowry. Section 304-B reads as under:

“304-B. Dowry death.--(1) Where the death of a woman is caused by any burns or



bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called 'dowry death', and such husband or relative shall be deemed to have caused her death.

Explanation.--For the purpose of this Sub-section, 'dowry' shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

10. This Court in *Satvir Singh and Ors. v. State of Punjab and Anr.* : (2001) 8 SCC 633 examining the significance and implication of the use of the words 'soon before her death' in Section 304-B, has held as under:

20. Prosecution, in a case of offence Under Section 304-B Indian Penal Code cannot escape from the burden of proof that the harassment or cruelty was related to the demand for dowry and also that such cruelty or harassment was caused "soon before her death". The word "dowry" in Section 304-B has to be understood as it is defined in Section 2 of the Dowry Prohibition Act, 1961. That definition reads thus:

2. Definition of "dowry".--In this Act, 'dowry' means any property or valuable security given or agreed to be given either directly or indirectly--

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person;

at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of



persons to whom the Muslim personal law (Shariat) applies.

* * *

22. It is not enough that harassment or cruelty was caused to the woman with a demand for dowry at some time, if Section 304-B is to be invoked. But it should have happened "soon before her death". The said phrase, no doubt, is an elastic expression and can refer to a period either immediately before her death or within a few days or even a few weeks before it. But the proximity to her death is the pivot indicated by that expression. The legislative object in providing such a radius of time by employing the words "soon before her death" is to emphasise the idea that her death should, in all probabilities, have been the aftermath of such cruelty or harassment. In other words, there should be a perceptible nexus between her death and the dowry-related harassment or cruelty inflicted on her. If the interval elapsed between the infliction of such harassment or cruelty and her death is wide the court would be in a position to gauge that in all probabilities the harassment or cruelty would not have been the immediate cause of her death. It is hence for the court to decide, on the facts and circumstances of each case, whether the said interval in that particular case was sufficient to snuff its cord from the concept "soon before her death".

11. In *Hira Lal and Ors. v. State (Govt. of NCT), Delhi* : (2003) 8 SCC 80, this Court held that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. The prosecution has to Rule out the possibility of a natural or accidental death so as to bring it within the purview of death occurring otherwise than in normal circumstances. It was held as under:

9. A conjoint reading of Section 113-B of the Evidence Act and Section 304-B Indian Penal Code shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. The



prosecution has to Rule out the possibility of a natural or accidental death so as to bring it within the purview of "death occurring otherwise than in normal circumstances". The expression "soon before" is very relevant where Section 113-B of the Evidence Act and Section 304-B Indian Penal Code are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by the prosecution. "Soon before" is a relative term and it would depend upon the circumstances of each case and no straitjacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption Under Section 113-B of the Evidence Act. The expression "soon before her death" used in the substantive Section 304-B Indian Penal Code and Section 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression "soon before" is not defined. A reference to the expression "soon before" used in Section 114 Illustration (a) of the Evidence Act is relevant. It lays down that a court may presume that a man who is in the possession of goods "soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for their possession". The determination of the period which can come within the term "soon before" is left to be determined by the courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the



alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence.

44. In *Rajesh v. State of Haryana* as reported in *2019 CrLJ 2432*, it has been held

7. It is necessary to refer to Section 306 Indian Penal Code and Section 107 Indian Penal Code which reads as under:

306. Abetment of suicide.--If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

107. Abetment of a thing.--A person abets the doing of a thing, who--

First.--Instigates any person to do that thing; or

Secondly.--Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.--Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.--A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

8. Conviction Under Section 306 Indian Penal Code is not sustainable on the allegation of harassment without there being any positive action proximate to the time of occurrence on the part of the Accused, which led or compelled the person to commit suicide. In order to bring a case within the purview of Section 306 Indian Penal Code, there must be a case of suicide and in the



commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted Under Section 306 Indian Penal Code. (See Amalendu Pal alias Jhantu v. State of West Bengal : (2010) 1 SCC 707).

9. The term instigation Under Section 107 Indian Penal Code has been explained in Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi : (2009) 16 SCC 605: (2010) 3 SCC (Cri.) 367) as follows:

16. Speaking for the three-Judge Bench in Ramesh Kumar case [: (2001) 9 SCC 618: 2002 SCC (Cri.) 1088], R.C. Lahoti, J. (as His Lordship then was) said that instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of "instigation", though it is not necessary that actual words must be used to that effect or what constitutes "instigation" must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. Where the Accused had, by his acts or omission or by a continued course of conduct, created such circumstances that the deceased was left with no other option except to commit suicide, in which case, an "instigation" may have to be inferred. A word uttered in a fit of anger or emotion without intending the consequences to actually follow, cannot be said to be instigation.

17. Thus, to constitute "instigation", a person who instigates another has to provoke, incite, urge or encourage the doing of an act by the other by "goad" or "urging forward". The dictionary meaning of the word "goad" is "a thing that stimulates someone into action; provoke to action or reaction" (see Concise Oxford English Dictionary); "to keep irritating or



annoying somebody until he reacts" (see Oxford Advanced Learner's Dictionary, 7th Edn.).

10. Words uttered in a fit of anger or omission without any intention cannot be termed as instigation.

(See Praveen Pradhan v. State of Uttaranchal : (2012) 9 SCC 734).

45. The term miscarriage of justice refers to a legal act or verdict that is clearly mistaken, unfair or improper. A miscarriage of justice is declared only when the court after examination of entire cause including the evidence is of the opinion that is reasonably probable, that a result more favourable to the appealing party would have been reached in the absence of error.

46. A court will set aside a judgment or grant a new trial, any cause on the ground of misdirection or the court, or of the improper admission or rejection of the evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, only if the court is of the opinion that the error complained of or of has resulted in a miscarriage of justice. However, the court will examine the entire cause including the evidence, before setting aside the judgment and granting a new trial.

47. In *Ukha Kolhe v. State of Maharashtra* as reported in (1964) 1 SCR 926, it has been held:-



“15. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons.

Harries, C.J., in *Ramanlal Rathi v. The State* : AIR1951Cal305 , observed :

"If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the Court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case."

48. Aforesaid view has been founded in *Atma Ram*

v. State of Rajasthan as reported in *AIR 2019 SC 1961*.



49. In *P. Ramesh vs. State* as reported in *AIR 2019*

SC 3559, it has been held:-

“17. We are mindful of the fact that the decision of the High Court was in an appeal preferred by the Accused. In such a situation it is necessary to discuss the scope of the High Court's powers in an appeal filed against conviction. Section 374 of the Code of Criminal Procedure provides for appeals against convictions and allows any person convicted by a Sessions Judge or an Additional Sessions Judge to appeal before the High Court. Section 386 of the Code of Criminal Procedure¹⁰ defines the powers of the Appellate Court while disposing of an appeal against an order of conviction or acquittal. The power under this Section is not unlimited. The provision is to be taken as giving the power to do only that which the lower court could and should have done in a criminal case.

18. A three judge Bench decision of this Court in *Mohd. Hussain v. State (Govt. of NCT of Delhi)* : (2012) 9 SCC 408 while dealing with the powers of the Appellate Court to order a retrial Under Section 386(b) of the Code of Criminal Procedure, held thus:

41. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the Accused Under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A de novo trial or retrial of the Accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the



exercise of power of retrial Under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an Accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.

A similar position was adopted by this Court in *Ajay Kumar Ghoshal v. State of Bihar* : (2017) 12 SCC 699, where it was held thus:

11. Though the word "retrial" is used Under Section 386(b)(i) Code of Criminal Procedure, the powers conferred by this Clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings. An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the court refused to hear certain witnesses who were supposed to be heard."

50. Thus, after analyzing the facts and circumstances of the case as well as in the background of the principle laid down by the Apex Court as referred hereinabove, it is crystal clear that the finding so recorded by the learned lower court and its prevalence is non sustainable in the eye of law, whereupon, the same is set aside. The appeal is allowed. The matter is



remitted back to the learned lower court to proceed afresh at the stage of hearing of argument and will decide the appeal in accordance with law.

51. The appellant is under custody, is directed to be produced before the learned lower court. Considering the fact that the appellant is under custody, hence, the learned lower court will decide the appeal within three months after receipt of the lower court record. Office to transmit the lower court record at once.

(Aditya Kumar Trivedi, J)

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