

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1812 of 2018**

Arising Out of PS. Case No.-217 Year-2014 Thana- GARKHA District- Saran

CHANDAN KUMAR @ CHANDAN KUMAR SAH S/o Satrugan Sah, R/o
Vill.- Hakma, P.S.- Garkha, District- Saran.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Manoj Kumar, Adv.

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

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

Date : 06-11-2019

The judgment of conviction dated 13.4.2018 and order of sentence dated 16.4.2018 passed by the Addl. Sessions Judge VI, Saran at Chapra in S.Tr.No. 576/2015 arising out of Garkha P.S.Case No. 217/2014, whereby and whereunder the appellant Chandan Kumar has been found guilty for an offence punishable under section 304B I.P.C. and sentenced to undergo R.I. for ten years, is being challenged under the instant appeal.

Nand Kumar Sah (P.W.3) filed a complaint petition on 11.11.2014 against Chandan Kumar, Shatrughan Sah, Sanjay Sah, Reeta Devi, Anita Devi and the daughter of Shatrughan Sah (name not known), showing the date of occurrence as 25.9.2014 at about 2 A.M., disclosing the place of occurrence as house of the accused lying at village Hakma, P.S. Garkha, District Saran, having an allegation that his daughter Rimpa Devi (since deceased) was



married with Chandan Kumar on 18.5.2014. As demand of motorcycle having at the end of the accused persons was not fulfilled on account thereof, Rimpa Devi was subjected to physical torture and lastly, she was ousted from her Sasural, whereupon mother of Rimpa Devi, namely, Ramawati Devi had instituted a case on that very score against the accused persons which is pending before the S.D.J.M. In the aforesaid background, about 15 days ago a Panchayati was convened and as per resolution of Panchayati, Vidai of Rimpa Devi was affected. Then, it has been asserted that while Rimpa Devi was sleeping in her room at her Sasural on the alleged date and time of occurrence, all the accused persons after sprinkling inflammable substance over her body lit fire. Rimpa Devi got up, anyhow got fire extinguished with the help of her neighbours who arrived on her hue and cry and at whose instance the accused persons were forced to admit Rimpa Devi for treatment, although, till then she got severe burn injury. While Rimpa Devi was admitted at PMCH, her statement was recorded by Camp In-charge, PMCH on 1.10.2014 on a requisition of the doctor. During course of treatment Rimpa Devi died and on account thereof, his Fard Beyan was also recorded on 12.10.2014 in the Emergency Ward of PMCH. In spite of the relevant documents forwarded to the concerned police station, no case has



been registered in collusion with the accused persons, whereupon lastly the complaint petition is being filed.

Accordingly, the same was forwarded to the concerned police station for registration and investigation as per section 156(3) Cr.P.C., whereupon Garkha P.S. Case No. 217/2014 was instituted followed with an investigation as well as submission of charge sheet only against Reeta Devi, Shatrughan Sah and Chandan Kumar Sah keeping the investigation pending against Kajal Kumari, Sanjay Sah, Anita Devi, facilitating the trial, which concluded by way of recording acquittal against Shatrughan Sah as well as Reeta Devi while recording finding of guilt against the appellant Chandan Kumar Sah for an offence punishable under section 304B/34 I.P.C., whereupon sentenced to undergo R.I. for ten years, subject matter of the instant appeal.

Defence case as is evident from the mode of cross-examination as well as statement recorded under section 313 Cr.P.C. is that of complete denial of the occurrence. It has also been pleaded that the deceased died on account of burn injury which she sustained accidentally on account of falling of the lamp. However, nothing has been adduced in defence.

From the record it is evident that altogether 5 P.Ws. have been examined in order to substantiate its case at the end of the



prosecution, who are P.W.1 Chokhlal Ram @ Sukhlal Ram, P.W.2 Sheopujan Sah, P.W.3 Nand Kumar Sah, P.W.4 Raghunath Prasad and P.W.5 Dhananjay Kumar Singh. Side by side has also exhibited Ext. 1 series signature of the complainant (P.W.3) over the statement of Rimpa Devi as well as over the complaint petition, Ext.2 endorsement over the complaint petition, Ext.3 formal F.I.R., Ext.4 charge sheet and Ext.5 attested copy of the statement of Rimpa Devi. As stated above, nothing has been adduced on behalf of the defence.

Learned counsel for the appellant while assailing the judgment impugned has submitted that there happens to be no legal evidence on the record in order to justify the finding recorded by the learned lower court, on account thereof, the judgment impugned is fit to set aside. In order to justify the same, it has been submitted that none is an eye witness to the occurrence. P.W.1, P.W.2 and P.W.3, have not supported the case of the prosecution and so, none of the ingredient of Section 304B I.P.C. is found duly substantiated.

Then it has been submitted that another theme with regard to occurrence in question, as is evident from the lower court record, is also not at all found properly placed in accordance with the Evidence Act, whereupon the finding so arrived at the end of



the learned lower court did not have legal sanctity. In order to buttress such plea, it has been submitted that all the original documents are missing. Photo copies are on record which could not have been accepted, admitted, exhibited as, did not justify status of secondary evidence. The doctor has not been examined and so, the postmortem report could not be looked into. So, in sum and substance, it happens to be a case of no evidence. Accordingly, the judgment impugned be set aside.

Learned Addl. P.P. repelled the argument having advanced by learned counsel for the appellant but has submitted that on the facts and circumstances of the case, as is evident, there happens to be slackness on the part of the learned lower court, on account thereof, original records could not be brought up on record irrespective of examination of P.W.5 who could have been directed before his examination to come alongwith the original record and in likewise manner, presence of the doctor would have been by way of adopting procedure so prescribed under law. In likewise manner, it has also been submitted that once dying declaration was there and the same has been admitted as Ext.5, relied upon by learned lower court then, in that circumstance, there should have been applicability of Section 319 Cr.P.C. in summoning of other co-accused against whom investigation has been kept pending and



further, there was no scope for other co-accused, namely, Shatrughan Sah and Reeta Devi to be acquitted, more particularly apart from having torturous activity so alleged at the end of the deceased against the accused persons, it has also been incorporated that as Chandan Kumar was not adamant to accept her as his wife, in the aforesaid background, on 25.9.2014 Chandan Kumar, Shatrughan Sah, Sanjay Sah, Reeta Devi, Anita Devi and her Nanad after sprinkling some substance, lit fire, whereupon she got up, anyhow extinguished fire, raised alarm, facilitating presence of so many persons whereupon the accused persons were forced to admit her at PMCH.

It has also been submitted at the end of the learned Addl. P.P. that had there been presence of the accused persons during course of treatment, their presence would have been over the Fard Beyan of deceased. Presence of Nand Kumar Sah (P.W.3) over the statement of the deceased is indicative of the fact that she was being cared at PMCH by him, that means to say by Naiharwala of deceased. The aforesaid statement happens to be attested copy as well as also got the seal of the police station alongwith the signature of the concerned official and in likewise is the status of other documents. In the aforesaid background, had there been minute observation of the evidence of investigation and proper



scrutiny of the circumstances irrespective of being the witnesses hostile the ultimate resultant would have been other than the present one. As, witness may lie not the circumstance.

It is manifest from the testimony of the material witnesses that irrespective of the fact that they were not at all eye witness to the occurrence but defence has suggested P.W.3 informant that on account of falling of lamp deceased had caught fire, whereupon she died during course of treatment but when the evidence of the I.O. (P.W.4) is being scrutinized more particularly with regard to objective finding relating to place of occurrence, it is evident that the story so propounded at the end of the appellant, became shaky as, the objective finding did not speak with regard to presence of bed over which the deceased was sleeping on the fateful day at the relevant time and in likewise manner, clothe if any. The I.O. had not found remnants of flame over the wall. The dying declaration did not divulge that the deceased was sleeping in a room while P.W.4 (I.O.) during course of inspection of the P.O. has located a room of the house.

It has also been submitted that it is P.W.4 who has completely ruined the prosecution case as, during course of investigation he had not gone to Pirbahore P.S. for having the original document, statement of the concerned police official,



failed to make visit to PMCH in order to trace out the attending doctor in order to verify whether the deceased was in a fit mental condition, the attendanting nurses, any attempt having at the end of Pirbahore Police Station for getting dying declaration at the end of the Magistrate, collecting the bedhead ticket, showing treating doctor as a witness.

Furthermore, learned lower court also failed to consider that it is an admitted case of the appellant that the deceased sustained burn injury while she was staying at his place, there happens to be an averment in the complaint petition/ written report with regard to pendency of a case prior to the occurrence and so, it was incumbent upon them to explain how she sustained burn injury more particularly, in the background of Section 106 of the Evidence Act. The learned lower court, as is evident from the judgment impugned, irrespective of the fact that the charge has been framed under section 304B I.P.C. in an alternative under section 302 I.P.C. failed to scrutinize the evidence available on record, the circumstances visualizing from the scene. Had there been sincere, proper meticulous examination under the garb of Section 106 of the Evidence Act, then in that circumstance, the matter would have concluded differently than the present one and so, it is a fit case wherein the judgment impugned be set aside and



the matter be remitted back to the learned lower court to proceed afresh as there has been miscarriage of justice on account of indolence of the learned lower court.

P.W.1 has deposed that he knew Nand Kumar Sah, informant of this case, Rimpa Devi was daughter of Nand Kumar Sah but he is unable to say in which year she was married and with whom. Then, he said that Rimpa Devi is dead but he is unable to say when she died, how she died. Then, he said that his statement was not recorded by the police, whereupon he was declared hostile. At para-4 his attention has been drawn towards his previous statement and then suggestion was given to him that on account of collusiveness with the accused he has deposed falsely. During cross-examination, he has stated that the house of Nand Kumar Sah lies at a distance of 3 K,Ms. from his village.

P.W.2 is Sheopujan Sah, who has deposed that Rimpa Devi, deceased was his niece. She was married with Chandan Kumar Sah. After marriage she was residing at her Sasural. 2-3 years after the marriage she died. She died after setting ablaze herself. At that very time, she was at her Sasural. He identified Chandan Kumar, Shatrughan Sah and mother of Chandan Kumar. During cross-examination he has stated that he had gone to Sasural of Rimpa Devi. It is thatched house. During course of cooking she



caught fire, as a result of which, she got burnt. Then at para-4 he has stated that for the treatment of Rimpa Devi, her husband and other family members of Sasuralwala took her to PMCH and during course of treatment, she died. Her funeral was performed by her Sasuralwala wherein they have also participated.

P.W.3 is the informant Nand Kumar Sah, who has deposed that he is the informant. Rimpa Devi was his daughter. She was married with Chandan Kumar in the year 2014. After marriage, Rimpa Devi was living at her Sasural. Just five months after marriage, Rimpa Devi caught fire. Thereafter, he was informed. After getting information he rushed. At that very time, Rimpa Devi was at PMCH. She made statement during course of treatment in his presence but he is unable to say what statement she had given. Then has said that he had put his signature over the statement of Rimpa Devi which she had given at PMCH photo copy of that statement was placed before him carrying his signature which he admitted. Then has said that during course of treatment Rimpa Devi died. Police had prepared inquest report in carbon process whereupon he had put his signature. Identified the same. Police had recorded his Fard Beyan over which he had put his signature. Identified the same (photo copy). Then has stated that the police had not registered case on the statement of Rimpa



Devi as well as over his own statement on account thereof, he had filed a complaint petition before the C.J.M. Identified his signature. On the direction of the C.J.M., this case has been registered. Identified the accused. During cross-examination at para-8 he has stated that after getting information from the Sasural of his daughter, he had gone to Patna. When he reached at Patna, he had found his daughter unconscious and she died in same state of affair. In para-9 he has stated that he had found his daughter in congenial atmosphere at his Sasural. Whenever he visited sasural of her daughter, his daughter never complained against her husband, father-in-law, mother-in-law. He has also stated that the accused persons have not demanded dowry from him as well as from his daughter. He has also stated that the accused persons have not assaulted his daughter nor tortured any time. In para-12 he has stated that the blank paper is being called Fard Beyan. In the aforesaid background, he has stated that his signature was obtained on a blank paper. He has further stated that the statement of his daughter was not recorded in his presence. Darogaji took his signature on blank paper. What he had written down over the same, he is unable to say as the same was not read over to him. He is unable to disclose who had disclosed to him regarding statement of his daughter having been recorded. In para-13 he has stated that



he had not got ascribed the facts of the case which has been filed at Chapra Court. People from his Samdi's village have brought him and they coerced to file a case as, after filing of this case his son-in-law as well as Samdhi will be implicated. They got the paper typed and then procured his signature. They have not taken him to the court of CJM. In para-14 he has stated that due to falling of the lamp in the night his daughter caught fire as a result of which, she burnt. In para-15 he has stated that Shatrughan Sah, Reeta Devi and Chandan Kumar have not killed his daughter. In para-16 he has stated that Rimpa Devi has not been murdered rather on account of accidental fire she died. He has further stated that she remained unconscious till her death and never gave any statement.

P.W.4 is the I.O., who has deposed that on 26.11.2014 he was O/C of Garkha P.S. As directed by the court he had registered Garkha P.S. Case No. 217/2014 on a copy of the complaint and exhibited the relevant endorsement having thereupon, a formal F.I.R. Then thereafter he took up investigation. He reached at the place of occurrence at 10.30 A.M. which happens to be the house of the deceased Rimpa Devi wife of Chandan Sah lying at village Hakma. It is pucca building having Western front. The darwaja is adjacent thereto having Southern side. He had found all the articles kept in proper manner. He had not found any sign of set on fire.



Then disclosed the boundary of the P.O. North house of Kailashpati Goswami, South Umesh Sah, East Yogendra Sah and West Road. He recorded statement of the witnesses on 27.11.2014. He recorded further statement of the informant and then, thereafter, recorded statement of other witnesses. They all have supported the case of the prosecution. The accused was apprehended on 31.1.2015. He received supervision note on 5.3.2015. He sent Chaukidar Devendra Manjhi to Pirbahore P.S. to bring statement of Rimpa Devi on 13.3.2015 but he had not brought statement of Rimpa Devi and instead thereof, brought Fard Beyan of her father Nand Kumar Sah which has been incorporated in the case diary. He had also received postmortem report which he incorporated in the case diary. Later on, he procured certified copy of statement of Rimpa Devi from Pirbahore P.S. which has also been incorporated in the case diary. Arrested two more accused Shatrughan Sah as well as Reeta Devi. Then, in pursuance of the order of S.D.P.O. he submitted charge sheet against the aforesaid three accused persons showing the allegation untrue against Kajal Kumari, Sanjay Sah, Anita Devi. He also exhibited the same. During cross-examination at para-8 he has stated that during course of inspection of the P.O., he had not found any sign of flame over the building having been the share of



Rimpa Devi. In para-9 he has stated that he received attested copy of the statement of Rimpa Devi. It was prepared in carbon process. Statement of Rimpa Devi was not recorded in her presence. At para-10 he has stated that he had not recorded statement of those police official who had recorded statement of Rimpa Devi. There was sincere effort to trace out the original statement but could not succeed. In para-11 he has stated that he had not recorded statement of other Patidars, who were residing in the same building. Then at para-12 denied the suggestion that he had not investigated the case in right manner.

P.W.5 has deposed that he had recorded statement of Rimpa Devi, wife of Chandan Kumar of village Hakama, P.S. Garkha, District Chapra who was admitted in Emergency Ward of PMCH, Room No. 303 (Burn Ward) on 1.10.2014. At that very time, she was conscious. At para-2 he has further stated that Rimpa Devi had stated that for procurement of motorcycle her husband and other Sasuralwala always tortured her and on account of non-fulfilment of the same once she was ousted from her Sasural, whereupon she came to her Maikhe. Then thereafter her Maikewala took her to Sasural where Panchayati was convened and in presence of Panches, her husband disclosed that he does not like her so, she returned back to her Maikhe. Thereafter Chandan Kumar



came at her Maiké and after persuasion took her to his place where she was severely tortured and in continuation thereof, while she was sleeping at night, her Sasuralwala sprinkled some inflammable substance and then lit fire. She woke up and with great effort succeeded in extinguishing fire. Till then, she severely burnt. She wanted to escape from there but seeing delicate situation her Sasuralwala caught hold her and then took her to PMCH where she was admitted. She has disclosed the names of the culprit. He has further stated that the statement of Rimpa Devi was recorded in presence of one Nand Kumar Sah who was relative of the victim. After recording her statement, he read over the same to her, whereupon she put her RTI. Nand Kumar Sah also put his signature and exhibited the same. During cross-examination at para-4 he has stated that he used to take statement of 7-8 persons in a day. He is not remembering how many persons statement were recorded on 1.10.2014. In para-5 he has stated that he was not knowing Rimpa Devi since before. Rimpa Devi was introduced by Nurses whose name he is not remembering. He had gone there on an information given by the doctor. Information was by way of requisition. In para-6 he has stated that he is not remembering whether I.O. had recorded his statement or not. In para-7 he has stated that the original statement of Rimpa Devi is



not before him rather it happens to be photo copy duly attested by Pirbahore P.S. He has not photo copied the same nor it was done in his presence. Then at para-8 he has said that he has made statement before the court on the basis of case diary. In para-9 he has further said that niether doctor nor Nurse has put signature over the statement of Rimpa Devi. He had not signed below the statement as page was over and so on the back portion of that page, he had put his signature, as well as also made endorsement. Then he denied the suggestion that neither Rimpa Devi had made statement before him nor he had recorded the same and so, the original is not available. The aforesaid statement happens to be creation of forged and fabricated document.

From the materials as discussed hereinabove, it is evident that two kinds of materials are available on record. The first happens to be oral evidence given by the material witnesses, that means to say, P.W.1, P.W.2 and P.W.3 and other part happens to be that of the police officials, P.W. 4 and P.W.5. Furthermore, documentary evidence have also been adduced. From the oral evidence it is evident that all the material witnesses including the informant, P.W.3 inclined towards the accused and that being so, P.W.3 has gone to such extent that he has disowned to have his presence before the C.J.M. where complaint was filed which was



not prepared at his instance rather at the instance of co-villager of the accused persons. He has also stated that when he reached at the PMCH, Rimpa Devi, his daughter, was unconscious and remained unconscious till her death though, during examination-in-chief he has deposed on that very score, that meant to say, the victim being alive had made statement in his presence over which the victim put her RTI and he had also put his signature. It is further evident that neither the learned lower court had tried to bring on record the original dying declaration nor the inquest report, the bedhead ticket, the attending doctor, the doctor who conducted postmoretem apart from the fact that the prosecution also failed on that very score. It is further evident that after examination of P.W.3 statement of the accused was recorded on 16.11.2016 and then thereafter petition was filed on behalf of the prosecution for procurement of the original statement of Rimpa Devi, Nand Kumar Sah and in likewise manner, presence of the witnesses including the doctor, who conducted postmortem and the same was allowed vide order dated 24.1.2017. Subsequently thereof, as is evident P.W.4 has been examined on 26.4.2017 and P.W.5 on 3.11.2017. The most surprising feature is that when attested photo copy of the statement of Nand Kumar Sah and Rimpa Devi has been brought up on record, even then the learned lower court had



not insisted upon to have original as, without original it could not have much less attested. In likewise manner, appearance of the doctor would have also insisted upon including the attending doctor in order to certify with regard to mental condition of the deceased.

In spite of the fact that there happens to be no denial at the end of the appellant/ accused that the deceased Rimpa Devi did not sustain burn injury at his place. There happens to be no denial with regard to commission of occurrence few months after the marriage. It is further evident that though there happens to be specific disclosure in the complaint petition/ written report with regard to institution of a case prior to the occurrence and pendency of the same before the SDJM but during course of evidence, the aforesaid part has not been deposed nor brought up on record that means to say, from the record it is manifest that the learned P.O. silently allowed the proceeding to sail. That means to say, the learned P.O. commanded the trial in mechanical manner. That means to say, learned P.O. had not acted in judicious manner in order to search out the truth as, the trial happens to be a process inquest of truth. Times without number it has been held by the Apex Court that the learned P.O. while conducting the trial should not sit as an idol rather he has to take sincere legal judicious



approach in order to search out the truth. Punishing an innocent is illegal, contrary to spirit of law but in likewise manner, acquittal of guilty is a devastating event and for that purpose trial is being conducted in order to properly identify.

It is also evident from the judgment impugned that though the appellant has been found guilty for an offence punishable under section 304B I.P.C., but there happens to be no reference with regard to Section 302 IPC though co-accused have been acquitted under both counts.

In **Sachin Kumar Singhraha v. State of MP**, reported in (2019)8 SCC 371, it has been held:

“17. At this juncture, we would like to recall that it is well settled that criminal justice should not become a casualty because of the minor mistakes committed by the investigating officer. We may hasten to add here itself that if the investigation officer suppresses the real incident by creating certain records to make a new case altogether, the Court would definitely strongly come against such action of the investigation officer. There cannot be any dispute that the benefit of doubt arising out of major flaws in the investigation would create suspicion in the mind of the Court and consequently such inefficient investigation would accrue to the benefit of the accused.

18. As observed by this Court in *State of H.P. v. Lekh Raj* [*State of H.P. v. Lekh Raj*, (2000) 1 SCC 247 :



2000 SCC (Cri) 147], a criminal trial cannot be equated with a mock scene from a stunt film. Such trial is conducted to ascertain the guilt or innocence of the accused arraigned and in arriving at a conclusion about the truth, the courts are required to adopt a rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses. The courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional dogmatic hypertechnical approach has to be replaced by a rational, realistic and genuine approach for administering justice in a criminal trial. In this view of the matter, we find no error in the reliance placed by the courts upon the circumstance of the recoveries effected at the instance of the appellant-accused.

In **Dayal Singh vs. State of Uttaranchal**, reported in (2012) 8 SCC 263, it has been observed:

“22. Even the present case is a glaring example of irresponsible investigation. It, in fact, smacks of intentional mischief to misdirect the investigation as well as to withhold material evidence from the court. It cannot be considered a case of bona fide or unintentional omission or commission. It is not a case of faulty investigation simpliciter but is an investigation coloured with motivation or an attempt to ensure that the suspect can go scot-free. This can safely be gathered from the following:



22.1. The entire investigation, including the statement of the investigating officer, does not show as to what happened to the viscera which was, as per the statement of PW 3, handed over to the constable PW 7, who, in turn, stated that the viscera had been deposited in the police station malkhana. In the entire statement of the investigating officer, there is no reference to viscera, its collection from the hospital, its deposit in the malkhana and whether it was sent to the FSL at all or not. If sent, what was the result and, if not, why?

22.2. Conduct of the investigating officer is more than doubtful in the present case. In his statement, he had stated that he noticed three injuries on the body of the deceased. He also admitted that in the post-mortem report, no internal or external injuries were shown on the body of the deceased. According to him, he had asked PW 3 in that regard but the reply of the doctor was received late and the explanation rendered was satisfactory. Firstly, this reply or explanation does not find place on record. There is no document to that effect and secondly, even in his oral evidence, he does not say as to what the explanation was.

22.3. In his statement, PW 3 Dr C.N. Tewari, stated that he did not find any external or internal injuries even after performing the post-mortem on the body of the deceased. This remark on the post-mortem report apparently is falsified both by the eyewitnesses as well as the investigating officer. It will be beyond apprehension as to how a healthy person could die, if there were no injuries on his body and when,



admittedly, it was not a case of cardiac arrest or death by poison, etc., more so, when he was alleged to have been assaulted with dandas (lathis) by four persons simultaneously. In any case, the doctor gave no cause for death of the deceased and prepared a post-mortem report which ex facie was incorrect and tantamounts to abrogation of duty. The trial court while giving the judgment of conviction, noticed that medico-legal post-mortem examination is a very important part of the prosecution evidence and, therefore, it is necessary that it be conducted by a doctor fully competent and experienced.

22.4. The court also commented adversely upon the professional capabilities and/or misconduct of Dr C.N. Tewari, as follows:

“Whatever may have been the reasons but it is quite evident that Dr C.N. Tewari failed in his professional duty and he did not perform the post-mortem examination properly after considering the inquest report and the police papers sent to him. If his finding deferred from the finding of the panchas he should have informed his superior officers in that regard so that another opinion could have been obtained before the disposal of the dead body. The evidence leaves no room for doubt that Shri Pyara Singh was attacked with lathis as alleged by the prosecution and he received three injuries already referred to above which were mentioned in the inquest report (Ext. Ka-6)....

The case of the prosecution cannot be thrown on account of the gross negligence and apathy of the



Medical Officer Dr C.N. Tewari who had performed autopsy on the dead body of Shri Pyara Singh. Since the Medical Officer Dr C.N. Tewari had conducted in a manner not befitting the medical profession and prepared the post-mortem report against facts for reasons best known to him and was negligent in his duty in ascertaining the injuries on the body of the deceased, hence it is just and proper that the Director General, Medical Health U.P. be informed in this regard for taking necessary action and for eradicating such practices in future.”

(emphasis supplied)

In **Ranjit Kumar Haldhar vs. State of Sikkim**, reported in (2019)7 SCC 684, it has been held:

“12. 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.”

13. 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.



14. In Shambu Nath Mehra v. State of Ajmer [Shambu Nath Mehra v. State of Ajmer, AIR 1956 SC 404 : 1956 Cri LJ 794] , the Court held as under: (AIR p. 406, paras 10-11 & 13)

“10. Section 106 is an exception to Section 101. Section 101 lays down the general rule about the burden of proof.

‘101. 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.’

11. 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-eminently 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. R.* [*Attygalle v. R.*, 1936 SCC OnLine PC 20 : AIR 1936 PC 169] and *Stephen Seneviratne v. R.* [*Stephen Seneviratne v. R.*, 1936 SCC OnLine PC 57 : (1936) 3 All ER 36, 49]

13. 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.”

(emphasis supplied)

15. In another judgment Trimukh Maroti Kirkan v. State of Maharashtra [Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681 : (2007) 1 SCC (Cri) 80] , the Court considered a situation wherein the 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: (SCC pp. 694-95, para 22)

“22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In Nika Ram v. State of H.P. [Nika Ram v. State of H.P., (1972) 2 SCC 80 : 1972 SCC (Cri) 635] 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* [*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 CrPC. 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. Ravindra Prakash Mittal* [*State of U.P. v. Ravindra Prakash Mittal*, (1992) 3 SCC 300 : 1992 SCC (Cri) 642] 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 IPC. In State of T.N. v. Rajendran [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.”

16. In another judgment Nika Ram v. State of H.P. [Nika Ram v. State of H.P., (1972) 2 SCC 80 : 1972 SCC (Cri) 635] , 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: (SCC p. 87, para 16)

“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.”

17. In State of Rajasthan v. Thakur Singh [State of Rajasthan v. Thakur Singh, (2014) 12 SCC 211 : (2014) 6 SCC (Cri) 666] , 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: (SCC p. 218, para 22)

“22. The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts.”



18. In *Dnyaneshwar v. State of Maharashtra* [*Dnyaneshwar v. State of Maharashtra*, (2007) 10 SCC 445 : (2007) 3 SCC (Cri) 728] , this Court held as under: (SCC p. 447, para 10)

“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* [*Raj Kumar Prasad Tamarkar v. State of Bihar*, (2007) 10 SCC 433 : (2007) 3 SCC (Cri) 716] 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.’ ”

19. In Ram Gulam Chaudhary v. State of Bihar [Ram Gulam Chaudhary v. State of Bihar, (2001) 8 SCC 311 : 2001 SCC (Cri) 1546] , this Court held as under: (SCC pp. 319-20, para 24)

“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.”

In **P. Ramesh vs. State Rep. By Inspector of Police**, reported in 2019 SCC Online SC 927, wherein the recent decision of the Apex Court in **Atma Ram vs. State of Rajasthan**, reported in 2019(3) BLJ 326 (SC) has been discussed, in which the



miscarriage of justice has been considered though, the facts of the case is quite different i.e. with regard to non-permission of two minor witnesses to depose, it has been held:

“19. 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 Cr.P.C. provides for appeal 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 CrPC 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.

20. A three judge Bench decision of this Court in Mohd Hussain v. State (Govt of NCT of Delhi) while dealing with the powers of the Appellate Court to order a retrial under Section 386(b) of the CrPC, 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.”

21. A similar position was adopted by this Court in *Ajay Kumar Ghoshal v. State of Bihar*, where it was held thus:

“11. Though the word “retrial” is used under Section 386(b)(i) CrPC, 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.”**

(emphasis supplied)

22. The power of an Appellate Court to order a retrial on the limited point of re-recording statements of witnesses was recently discussed in *Atma Ram v. State of Rajasthan*, where the Trial Court had convicted the accused persons of offences under Sections 302, 307, 452, 447, 323, 147, 148 and 149 IPC and sentenced them to death. During the trial, the court had recorded the evidence of twelve witnesses in absence of the accused persons. In an appeal against conviction preferred by the accused persons, the High Court exercised its powers under Section 386(b) of CrPC to quash and set aside the judgment of the Trial Court and remanded the matter back to Trial Court to the extent of recording statements of the twelve witnesses afresh after securing presence of the accused in the court. The High Court held in the following terms:

“In view of the discussion made hereinabove and looking to the glaring facts of the case at hand, we feel that in order to do complete justice to the accused as well as to the victims, the entire case



cannot be thrown out by holding the proceedings to be vitiated on account of the mistakes committed by the trial Judge or the prison authorities concerned. A fresh trial/ de- novo has to be ordered by directing the trial court to lawfully re-record statements of the witnesses indicated above whose evidence was recorded in the first round without ensuring presence of the accused in the court.”

23. The accused persons preferred a Special Leave Petition before this Court, challenging the High Court’s order of a de-novo trial for re-recording of statements of witnesses. Affirming the view taken by the High Court, this Court held thus:

“22. ... Section 386 then enumerates powers of the Appellate Court which inter alia includes the power to “reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial:. The powers of Appellate Court are equally wide. The High Court in the present case was exercising powers both under Chapters XXVIII and XXIX of the Code. **If the power can go to the extent of ordering a complete re-trial, the exercise of power to a lesser extent namely ordering de novo examination of twelve witnesses with further directions as the High Court has imposed in the present matter, was certainly within the powers of the High Court.**



There is, thus, no infraction or jurisdictional error on the part of the High Court.”

“25. If there was an infraction, which otherwise does not vitiate the trial by itself, the attempt must be to remedy the situation to the extent possible, so that the interests of the accused as well as societal interest are adequately safeguarded. **The very same witnesses were directed to be de novo examined which would ensure that the interest of the prosecution is subserved and at the same time the accused will have every right and opportunity to watch the witnesses deposing against them, watch their demeanor and instruct their counsel properly so that said witnesses can be effectively cross-examined. In the process, the interest of the accused would also stand protected.** On the other hand, if we were to accept the submission that the proceedings stood vitiated and, therefore, the High Court was powerless to order de novo examination of the concerned witnesses, it would result in great miscarriage of justice. The persons who are accused of committing four murders would not effectively be tried. The evidence against them would not be read for a technical infraction resulting in great miscarriage. Viewed thus, the order and directions passed by the High Court completely ensure that a fair procedure is adopted and the depositions of the witnesses, after due distillation from their cross-examination can be read in evidence.”



(emphasis supplied)

Consequent thereupon, the judgment impugned is set aside. The appeal is allowed. Matter is remitted back to the learned lower court to proceed afresh by way of collecting relevant documents, witnesses and will give an opportunity to defence and then after hearing both the parties, will pass judgment in accordance with law.

(Aditya Kumar Trivedi, J)

Surendra/-

AFR/NAFR	NAFR
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