

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 222 of 2016

- Mithlesh Mahto, S/o Fulena Mahto, Aged About 22 Years, R/o East Hadsar, P.S. Drounda, Distt. Sivan, Bihar, At Present Sahdeopali, Near Santoshi Mandir, P.S. City Kotwali, Raigarh, District Raigarh, Chhattisgarh

---- Appellant

Versus

- State Of Chhattisgarh, Through District Magistrate, District Raigarh, Chhattisgarh

---- Respondent

For Appellant

Shri Krishna Tandon, Advocate and
Shri Amit Sharma, Advocate

For Respondent

Shri Chitendra Singh, PL

Hon'ble Justice Shri Prashant Kumar Mishra

Hon'ble Justice Shri Gautam Chourdiya

Order On Board by Prashant Kumar Mishra J.

23/09/2019

1. With the consent of learned counsel for the parties, the appeal is heard finally.
2. Appellant would challenge his conviction and sentence of life imprisonment under Section 302 of IPC for committing murder of his wife Gudiya on 23.09.2013.
3. The merg intimation (Ex-P-11) was lodged by Fulena Prasad (PW-1), father of the appellant, at about 9:25 am on 24.09.2013 informing the Police that he reached his house at about 11 pm after completing his duties in a hotel. At that time, his wife informed that

the appellant and the deceased were quarreling in their room and have slept after bolting the door from inside. When his wife went to see the room on the next morning, the appellant went out and moved to the road, but the deceased Gudiya was lying dead on the floor. In the postmortem report (Ex-P-5), it was found that the deceased has died homicidal death on account of throttling. The postmortem has been proved by PW-5 Dr. S. Lakra.

4. The appellant was arrested, however, his memorandum statement has not been recorded. No seizure of any weapon or other article has been made from the appellant.
5. In the absence of any ocular version of the incident, the prosecution relied on circumstantial evidence to bring home the charges and the Trial Court has convicted the appellant on the ground that the appellant was last seen in the company of his wife, therefore, he is guilty of committing murder.
6. We have heard learned counsel for the parties at length and perused the record.
7. Admittedly, there is no eye witness to the crime. PW-1 Fulena Mahto, father of the appellant, has stated that the appellant is engaged in the work of applying the lubricant (grease) to the vehicles and had gone to attend his work 3-4 days prior to the date of incident. Thus, he would not support his own version informed to the Police in the mere intimation. This witness has been declared hostile. Similarly, PW-2 Lalmati, mother of the deceased, would also state that the appellant was not available in the house at the time the deceased died in their house. No other witness would depose

against the appellant to bring home the evidence of either last seen together or extra judicial confession. There is total lack of evidence in respect of motive to commit the crime.

8. On the contrary, PW-7 Subhash Mahto, elder brother of the deceased, would state that he had spoken to the deceased 6 days prior to the incident, but the deceased had not informed him about any dispute between her and the appellant. Similarly, PW-8 Manju Devi, mother of the deceased, has also stated that she had spoken to the deceased about 3-4 days prior to the incident and the deceased had informed her that she is well.
9. There is no other evidence incriminating or connecting the appellant in commission of crime. Therefore, the Trial Court's finding that the appellant has committed murder of the deceased is wholly perverse. Merely because of the fact that the appellant happens to be the husband of the deceased, he cannot be presumed to have committed murder of his wife when there is evidence on record suggesting that he was not available in the house at the time of incident.
10. In an extremely recent judgment, the Supreme Court in the matter of **Smt. Gargi vs State of Haryana, CRA No.1046/2010**, decided on **19.09.2019**, has held that companionship of the deceased husband and wife under the same roof would not mean that a presumption of guilt of the appellant is to be drawn. The Supreme Court has held thus in paragraph 28.1:-

“28.1. Insofar as the 'last seen theory' is concerned, there is no doubt that the appellant being none other than the wife of the deceased and staying under the same roof, was the last person the deceased was seen with.

However, such companionship of the deceased and the appellant, by itself, does not mean that a presumption of guilt of the appellant is to be drawn. The Trial Court and the High Court have proceeded on the assumption that Section 106 of the Indian Evidence Act directly operates against the appellant. In our view, such an approach has also not been free from error where it was omitted to be considered that Section 106 of the Indian Evidence Act does not absolve the prosecution of its primary burden. This Court has explained the principle in **Sawal Das vs State of Bihar**¹ in the following:-

"10. Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused....."

11. Drawing support from the judgment rendered by the Supreme Court in the matter of **Smt. Gargi** (supra), we are of the considered view that the appeal deserves to be and is hereby allowed. The impugned judgment of conviction and sentence is set aside. The appellant is acquitted of the charges. He is directed to be released forthwith, if he is not required for any other offence, on his furnishing a personal bond for a sum of Rs.25,000/- with one surety in the like sum to the satisfaction of the Trial Court. The bail bond shall remain in operation for a period of 6 months in view of the provisions of Section 437-A of the Cr.P.C. The appellant shall appear before the Higher Court as and when required.

Sd/-
Prashant Kumar Mishra
Judge

Sd/-
Gautam Chourdiya
Judge

Nirala

¹ (1974) 4 SCC 193