

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRA-D No. 72-DB of 2010 (O&M)

Reserved on : 15.2.2019

Date of decision : 26.2.2019

Balkar Singh Appellant

versus

State of Punjab ... Respondent

**Coram: Hon'ble Mr. Justice Rajiv Sharma
Hon'ble Mr. Justice Kuldip Singh**

Present Mr. Vinod Ghai, Senior Advocate with
Mr. S. S. Sandhu, Advocate, for the appellant.
Mr. S. P. S. Tinna, Additional Advocate General, Punjab.

Rajiv Sharma, J.

1. The present appeal is instituted against the judgment and order dated 1.12.2009, rendered by learned Sessions Judge, Gurdaspur, in Sessions Trial No. 27 of 2008, by the appellant, who was charged with and tried for the offence punishable under Section 302 IPC. He was convicted and sentenced under Section 302 IPC to undergo imprisonment for life and to pay a fine of ₹ 5,000/- and in default of payment of fine, to undergo further rigorous imprisonment for a period of six months.

2. The case of the prosecution in a nutshell is that PW1 Gian Singh had lodged the report to the effect that Jasbir Kaur was his youngest sister. She was married with Balkar Singh son of Surain Singh of village Jandrai Khalki. On 7.5.2008 at 9.00 P.M., Jasbir Kaur told PW Gian Singh

on telephone that accused Balkar Singh had given her severe beatings. She was proclaiming that he would kill her. PW Gian Singh could not visit his sister. On the next day i.e. 8.5.2008 at around 9.30 A.M., he accompanied by his brother Diwan Singh went to the matrimonial home of Jasbir Kaur. When they reached in the street outside the matrimonial home of Jasbir Kaur, they saw accused Balkar Singh coming out of the house carrying a scarf (*chunni*) in his hand. They tried to stop him to enquire about Jasbir Kaur. However, he did not respond and ran away along with scarf. When they entered the room, they found that Jasbir Kaur was lying dead on the floor of the room with injury on her neck. The matter was reported to the police, vide Ex.PA, on the basis of which FIR, Ex.PA/2, was lodged. The dead-body was sent for post-mortem examination. Investigation was carried out and challan was put up after completing all the codal formalities.

3. The prosecution examined a number of witnesses in support of the case. The statement of the accused was also recorded under Section 313 Cr.P.C. According to him, he had gone to Sri Hemkund Sahib along with other villagers including Massa Singh son of Mangal Singh and Bittu son of Bikar Singh few days prior to the occurrence. The deceased was baptized Sikh. She insisted to accompany him to Sri Hemkund Sahib but he (accused) did not agree because she was supposed to look after the children and old parents. He was convicted and sentenced, as noticed hereinabove. Hence, the present appeal.

4. Learned counsel appearing on behalf of the appellant vehemently argued that the prosecution has failed to prove its case. Learned counsel appearing for the State vehemently argued that the prosecution has

proved its case beyond reasonable doubt and supported the judgment and order of the learned trial Court below.

5. We have heard learned counsel for the parties and gone through the judgment and record very carefully.

6. PW1 Gian Singh testified that his sister Jasbir Kaur was married to accused Balkar Singh about 10 years prior to the occurrence. On 7.5.2008 at about 9.00 P.M., his neighbour Karam Chand received a call from Jasbir Kaur. He called him. He attended the call. Jasbir Kaur told him that the accused was beating her. He was threatening to kill her. She requested him to reach immediately. He told that he would come in the morning. On the next day at about 9.30 A.M., he and his brother Diwan Singh went to village Jandrai. When they reached near the house of the accused, he was seen rushing out of the house carrying a *chunni* in his hand. They tried to stop him but he did not stop. They went inside the room. They found that dead-body of Jasbir Kaur was lying on the cot. There was a ligature mark on her neck. They waited for the accused till 4.00 P.M. but he did not return.

7. PW4 Dr. Rajinder Parshad had conducted the post-mortem examination. His affidavit is, Ex.PD. Post mortem report is Ex.PE. He noticed the following injuries on the body of deceased Jasbir Kaur:-

“A ligature mark yellowish brown dry situated below the thyroid cartilage and is horizontal present in front of neck extending upto the sterno cleido mastoid muscle. Ligature marks was 1.75 cm wide abrasion and echymosis was present at the edges of ligature.”

As per opinion of the doctor, the cause of death was asphyxia due to

strangulation, which was sufficient to cause death in ordinary course of nature. The probable time elapsed between death and post-mortem was within 36 hours and the time elapsed between injury and death was immediate.

8. PW6 SI Ravinder Singh deposed that accused Balkar Singh made a disclosure statement that he had concealed one scarf (*chunni*) in the Gordrej almirah under the clothes. Disclosure statement is Ex.PH. As per his disclosure statement, Ex.PH, *chunni*, Ex.P1, was recovered.

9. PW7 SI Azad Davinder Singh deposed that on 8.5.2008, he visited the spot. Complainant Gian Singh made statement, Ex.PA, on which he made endorsement, on the basis of which FIR, Ex.PA/2, was lodged. He prepared inquest report. Dead-body was sent for post-mortem examination. The clothes of the deceased were sent to FSL, Chandigarh, for obtaining report. He denied the suggestion that children of deceased and Surain Singh had told him that deceased also insisted to accompany Balkar Singh to Hemkund Sahib and on his refusal, she committed suicide.

10. The post-mortem report is Ex.PE. The cause of death was asphyxia due to strangulation, which was sufficient to cause death in ordinary course of nature. The probable time between death and post-mortem was within 36 hours and between injury and death was immediate. A ligature mark yellowish brown dry was situated below the thyroid cartilage and was horizontally present in front of neck extending upto the sterno cleido mastoid muscle.

11. It has come in the statement of PW1 Gian Singh that his sister Jasbir Kaur was married to accused Balkar Singh about 10 years back to the

date of occurrence. He used to maltreat her. On 7.5.2008 at about 9.00 P.M., the deceased had called him to visit her. PW1 Gian Singh visited her matrimonial home on the next date in the morning along with his brother Diwan Singh. When they reached near the house of the accused, they saw accused rushing out of the house carrying with *chunni*. They tried to stop him. They went inside the room and noticed Jasbir Kaur lying dead on the cot. Police was informed. His statement, Ex.PA, was recorded.

12. Scarf (*chunni*), Ex.P1, was got recovered at the instance of accused Balkar Singh from the Gordrej almirah under the clothes.

13. The appellant has taken the plea of alibi but he has not proved the same. Plea of alibi is a double edged weapon. In his statement recorded under Section 313 Cr.P.C., he deposed that he had gone to Sri Hemkund Sahib along with other co-villagers, namely, Massa Singh and Bittu, but he has not examined Massa Singh and Bittu. The dead-body was found in the house of the appellant. It was for him to explain under Section 106 of the Indian Evidence Act how his wife died in his house.

14. In order to prove plea of alibi, their Lordships of Hon'ble the Supreme Court in *Binay Kumar Singh vs State of Bihar* (1997) 1 SCC 283, have held that once the prosecution succeeds in discharging the burden, it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. Their Lordships have held as under :-

“22. We must bear in mind that an alibi is not an exception (special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are

inconsistent with the fact in issue are relevant. Illustration (a) given under the provision is worth reproducing in this context:

"The question is whether A committed a crime at Calcutta on a certain date; the fact that on that date, A was at Lahore is relevant."

23. The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down

that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. This Court has observed so on earlier occasions (vide *Dudh Nath Pandey v. State of U.P.* 5; *State of Maharashtra v. Narsingrao Gangaram Pimple*.”

15. Their Lordships of Hon'ble the Supreme Court in *Trimukh Maroti Kirkan vs State of Maharashtra* 2006 (10) SCC 681 observed that in view of Section 106 of the Evidence Act, the law does not enjoin a duty on the prosecution to lead evidence as to how the crime was committed. Their Lordships held as under:-

“12. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecution* 1944 AC 315 quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh* (2003) 11 SCC 271). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving

that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him."

Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

13. A somewhat similar question was examined by this Court in connection with Section 167 and 178-A of the Sea Customs Act in *Collector of Customs, Madras & Ors. v. D. Bhoormull* (1974) 2 SCC 544, and it will be apt to reproduce paras 30 to 32 of the reports which are as under :

30. It cannot be disputed that in proceedings for imposing penalties under Clause (8) of Section 167 to which Section 178-A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the

onus cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it - "all exactness is a fake". El Dorado of absolute proof being unattainable, the law, accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case.

31. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered - to use the words of Lord Mansfield in *Blatch v. Archer* (1774) 1 Cowp. 63 at p.65 "according to the proof which it was in the power of one side to prove, and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

32. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in

the special or peculiar knowledge of the person concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. As pointed out by Best in 'Law of Evidence', (12th Edn. Article 320, page 291), the "presumption of innocence is, no doubt, *presumptio juris*; but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property", though the latter is only a presumption of fact. Thus the burden on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden, to discharge which, very slight evidence may suffice."

(Emphasis supplied)

The aforesaid principle has been approved and followed in *Balram Prasad Agrawal v. State of Bihar*, (1997) 9 SCC 338 where a married woman had committed suicide on account of ill- treatment meted out to her by her husband and in-laws on account of demand of dowry and being issueless.

14. The question of burden of proof where some facts are within the personal knowledge of the accused was

examined in *State of West Bengal v. Mir Mohammad Omar* (2000) 8 SCC 382. In this case the assailants forcibly dragged the deceased Mahesh from the house where he was taking shelter on account of the fear of the accused and took him away at about 2.30 in the night. Next day in the morning his mangled body was found lying in the hospital. The trial Court convicted the accused under Section 364 read with Section 34 IPC and sentenced them to 10 years RI. The accused preferred an appeal against their conviction before the High Court and the State also filed an appeal challenging the acquittal of the accused for murder charge. The accused had not given any explanation as to what happened to Mahesh after he was abducted by them. The learned Sessions Judge after referring to the law on circumstantial evidence had observed that there was a missing link in the chain of evidence after the deceased was last seen together with the accused persons and the discovery of the dead body in the hospital and had concluded that the prosecution had failed to establish the charge of murder against the accused persons beyond any reasonable doubt. This Court took note of the provisions of Section 106 of the Evidence Act and laid down the following principle in paras 31 to 34 of the reports :

"31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the court what else happened to Mahesh at least until he was in their custody."

Applying the aforesaid principle, this Court while

maintaining the conviction under Section 364 read with Section 34 IPC reversed the order of acquittal under Section 302 read with Section 34 IPC and convicted the accused under the said provision and sentenced them to imprisonment for life.

15. In *Ram Gulam Chaudhary & Ors. v. State of Bihar* (2001) 8 SCC 311, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for the absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they have murdered the boy. It was further observed that 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 accused by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference.”

16. In the present case, the body was found inside the house of the accused. Accused Balkar Singh was seen rushing out of the house carrying a *chunni* in his hand. There was a ligature mark on the neck of the deceased. The accused failed to give any plausible explanation for the cause of death of his wife. The appellant has not lodged any complaint regarding the murder of his wife. Thus, the prosecution has proved the case against the appellant beyond reasonable doubt.

17. Accordingly, the appeal is dismissed upholding the well reasoned judgment recorded by the learned trial Court. Sentence of appellant Balkar Singh was suspended vide order dated 5.2.2018. The order of his suspension of sentence is revoked. He is ordered to surrender before the trial Court to undergo his remaining sentence awarded to him by the trial Court vide judgment and order dated 1.12.2009.

(Rajiv Sharma)
Judge

26.2.2019
vs

(Kuldip Singh)
Judge

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No