

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.258 OF 2014

Kedarnath s/o. Sambhaji Borgad
age 30 yrs, Occ. Agri,
R/o Nahad, Tq. Basmath,
District Hingoli.

..Appellant..
(orig. accused)

Versus

The State of Maharashtra,
Through Police Station Officer,
Hatta Police Station, Tq. Basmath,
District Hingoli.

..Respondent..

...

Mr. N S Ghanekar Advocate for the appellant.
Mr. M M Nerlikar, APP for the respondent State.

...

CORAM : V.K. JADHAV & S.G DIGE, JJ.

...

Reserved on : 05.07.2021
Pronounced on : 30.07.2021

...

JUDGMENT :- (Per V. K. Jadhav, J.)

1. This appeal is directed against the judgment and order of conviction passed by the Additional Sessions Judge, Basmath dated 11.4.2014 in Sessions Trial No.4 of 2013.

2. Brief facts of the prosecution case, are as follows :-

a] Deceased Alka was given in marriage to the appellant/accused Kedarnath and their marriage was

solemnized in the year 2005. After marriage, deceased Alka had started cohabiting with the appellant/accused and accused nos.2 to 4, who were then residing jointly at village Nahad. Out of the marital wedlock, deceased Alka gave birth to one son Shubham and daughter Vaishnavi. Accused no.2 Balaji is the elder brother of accused no.1. Accused nos.3 and 4 are the in-laws of deceased Alka. Accused nos.2 to 4 were acquitted.

b] As per the prosecution story, deceased Alka was treated well and maintained properly for a period of three years. Thereafter, she was subjected to ill-treatment under the pretext that she was not doing the work properly, and also on account of non-fulfillment of the demand of the cash amount for laying the pipeline. Deceased Alka was subjected to ill-treatment and she was also not provided food. Deceased Alka had disclosed the ill-treatment when she had been to her parent's house for festivals. Informant, PW-3 Baban Tompe and one Prakash went to the house of the accused for giving understanding to them. They have explained to the accused persons that, financial position

of the informant is not sound, and also explained to them that another daughter of the informant is still unmarried. It was informed to the accused persons that the amount will be paid after some time. They had requested the accused to maintain the deceased Alka properly. It is also the prosecution story that, in the month of September, 2012 PW-1 Atmaram Bhalerao (father of the deceased) brought deceased Alka at his house on account of "Dhonda" festival. Deceased Alka resided there for two days. At that time, deceased Alka had informed to the informant, mother and her sister that since the amount is not paid, accused are beating her and keeping her on starvation. She was also compelled to do the agricultural work. Accused nos.1, 3 and 4 had been to the parent's house of Alka in that Dhonde Festival, and informant PW-1 Atmaram had also honoured them by giving gifts. The informant again requested them to maintain Alka properly, and amount will be paid after cotton crop is harvested. The accused had assured that deceased Alka will be maintained properly, therefore, deceased Alka was sent with them at village Nahad.

c] The incident had taken place on 8.10.2012. On that day, one Namdev Hande of informant's village had received the information on phone, and accordingly, at about 07.30 p.m. said Namdev had informed PW-1 Atmaram that something was happened to the Alka. Thus, the informant, PW-2 Sulochana Bhalerao, his brother and other villagers went to village Nahad. They went to the residential house of the accused in the land. Nobody was present in the house. Dead body of Alka was lying in hut. They had noticed ligature marks around neck of the Alka, and there were signs of electric shocks around navel, on chest, lips and on private parts. PW-1 Atmaram Bhalerao thus went to Hatna Police station and lodged the FIR exhibit 24.

3. On the basis of the complaint lodged by PW-1 Atmaram, Crime no.105 of 2012 came to be registered with Hatta Police Station. Inquest panchnama was drawn on 9.10.2012 at about 2.00 am and dead body was sent for postmortem examination. Furthermore, Investigating Officer had also drawn panchnama of the scene of offence on 9.10.2012 at about 7 am to 8 am.

Accused nos.2 to 4 were arrested on 9.10.2012 and appellant/accused was arrested on 10.10.2012. Investigating officer has recorded the statements of the witnesses. He had also seized the articles and sent to C.A. for analysis. During the course of the investigation, at the instance of the appellant/accused, electric wire, simple wire were recovered. After completion of the investigation, the Investigating Officer has submitted charge-sheet against the accused.

4. The learned Additional Sessions Judge, Basmath has framed charge Exhibit-7 against the appellant/accused (original accused no.1) and against accused nos.2 to 4. Charge was read over and explained to the accused in vernacular, to which they pleaded not guilty and claimed to be tried. Prosecution has examined in all six witnesses to substantiate the charges levelled against them. After completion of the prosecution evidence, statement of the accused under section 313 of the Criminal Procedure Code were recorded. It is the defence of the accused that accused no.2 Balaji is permanently residing at the house of his

father-in-law at village Babhalgaon. Accused persons have residential house in village Nahad and also they have a residential house in the land. Accused nos.3 and 4 were residing in the village, and they were not residing at Akhada (residential house in the land). Only accused no.1 was residing in the land at Akhada with his wife deceased Alka. It is the defence of the appellant/accused - Kedarnath that at the time of the incident, none of the accused was present at Akhada and he also went to village Babhulgaon. He was not knowing anything about the incident. After he returned to his house from Babhulgaon, he saw dead body of Alka. Thus, he had informed about the same to the informant by phone. Defence has examined two witnesses.

5. By judgment and order dated 11.4.2014 the learned Additional Sessions Judge, Basmath in Sessions Trial No.4 of 2013 has convicted the appellant/accused Kedarnath for the offence punishable under section 498-A, 323, 302 of the Indian Penal Code and acquitted accused nos.2 to 4 from all the charges.

Operative part of the order passed by the Additional Sessions Judge, Basmath dated 11.4.2014 in S.T. No.4 of 2013 reads as under :-

- 1- Accused no.2 Balaji s/o Sambhaji Borgad, accused no.3 Sambhaji s/o Waman Borgad and accused no.4 Parwatibai w/o Sambhaji Borgad are hereby acquitted under section 235 (1) of Cr.P.C. of the offence punishable under section 323, 498-A and 302 r.w.34 of the Indian Penal Code.
- 2- Bail bonds of accused nos.2 to 4 shall stand cancelled.
- 3- Accused no.1 Kedarnath s/o Sambhaji Borgad is hereby convicted under section 235 (2) of Cr.P.C. for the offence punishable under section 498-A of IPC and sentenced to suffer R.I. for one year and fine of Rs.3,000/- (Rs. Three Thousand) I.d. to suffer R.I. for one month.
- 4- Accused no.1 Kedarnath s/o Sambhaji Borgad is also convicted for the offence punishable under section 323 of the Indian Penal Code and sentenced to suffer R.I. for six months and fine of Rs.1,000/- (Rs. one thousand) I.d. to suffer R.I. for one week.
- 5- Accused no.1 Kedarnath Sambhaji Borgad is also convicted for the offence punishable under section 302 of IPC and sentenced to suffer imprisonment for life and fine of Rs.10,000/- (Rs. Ten thousand) in default to suffer R.I. for two months.
- 6- In case of commutation of imprisonment for life, to any lessor punishment accused will be entitled for the set off under section 428 of Cr.P.C. for the period for which he is in jail in this crime.
- 7- Substantive sentences of imprisonment shall run concurrently.

8- Muddemal articles in this case are being worthless hence they be destroyed after the appeal period is over.

9- Accused nos.2 to 4 are in jail, hence they be released immediately, if their custody is not required in any other crime.

10-Copy of this judgment be given free of costs to accused no.1 forthwith.

6. Being aggrieved by the same, the appellant/accused Kedarnath has preferred this appeal.

7. Learned counsel for the appellant submits that homicidal death in this case is not disputed. Learned counsel submits that, so far as the ill-treatment allegedly extended to deceased Alka on account of the non-fulfillment of demand of cash amount for agricultural operations is concerned, there was no demand of a specific amount. There are general allegations about ill-treatment and no specific instances have been quoted.

8. Learned counsel submits that, the prosecution case entirely rests upon the circumstantial evidence, and there is no direct evidence in this case. Learned counsel submits that, even deceased Alka was not lastly

seen alive in the company of the accused. Even, there is no evidence indicating that the accused was present in the house prior to the incident or during the incident. Learned counsel submits that the appellant/accused was arrested on 10.10.2012 and on 13.10.2012 white colour cable and another black colour electric wire shown to have been seized at the instance of the appellant/accused. There is no explanation for such belated discovery. Moreover, panch witnesses are the highly interested witnesses. There was no sealing of the article wire at the time of drawing of the seizure panchnama. Learned counsel submits that, there is no evidence about presence of the accused in the house at Aakhada at the time of incident, and as such, the provisions of Section 106 of the Indian Evidence Act are not attracted. Learned counsel submits that, prosecution has failed to establish the motive on the part of the appellant/accused to commit the murder of wife deceased Alka. Further, on the same set of allegations about demand and ill-treatment being extended to the deceased Alka on account of the non-fulfillment of the said demand, Trial Court has acquitted

accused nos.2 to 4. Learned counsel submits that Section 106 of the Indian Evidence Act does not relieve the prosecution to prove its case beyond reasonable doubt. Only when the prosecution case has been proved, the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same subject to certain statutory exceptions. Learned counsel submits that, it is for the prosecution to prove involvement of the accused beyond reasonable doubt before taking recourse to Section 106 of the Indian Evidence Act. Learned counsel submits that, even if prosecution case is accepted as it is, at the most, strong suspicion is created against the appellant/accused suggesting his involvement in the crime. The said suspicion, however, strong it may be, cannot take the form of legal proof. Learned counsel submits that, prosecution has failed to bring home the guilt of the appellant/accused and as such he is entitled for the benefit of doubt.

9. Learned counsel for the appellant/accused, in order to substantiate his contentions, placed reliance on the following judgments :-

1. Sohel Mehaboob Shaikh Vs. State of Maharashtra in Criminal Appeal no.1080 of 2007 decided on 17.4.2009.
2. Shambhu Nath Mehra Vs. State of Ajmer in criminal no.65 of 1954 decided on 12.3.1956.
3. Mulak Raj Vs. State of Haryana in criminal no.5 of 1982 decided on 19.1.1996.
4. Mr. Ulhas Sudam Gorhe Vs. The State of Maharashtra in criminal appeal no.512 of 2017 with criminal application no.881 of 2018 decided on 12.10.2018.
5. P.Mani Vs. State of Tamilnadu in criminal appeal no.1081 of 2005 decided on 24.2.2006.
6. Sharad Kondiba Walke Vs. State of Maharashtra in criminal appeal no.414 of 2007 decided on 5.1.2010.
7. Vandana wd/o Yogesh Mankar Vs. The State of Maharashtra in criminal appeal no.508 of 2012 decided on 5.2.2015.
8. Gangadhar Krishna Pukale Vs. State of Maharashtra reported in [2015] 4 BomCR (Cri) 691.
9. Khomu Kasar Bahadur Raul Vs. State (through PI Panji Police Station, Panji, Goa) reported in [2018] 1 Mh.L.J. (cri) 121.

10. Learned APP for the respondent-State submits that, though, prosecution case rests upon the circumstantial evidence, however, the evidence is consistent about the demand, ill-treatment being

extended to the deceased on account of the non-fulfillment of the demand and homicidal death of the deceased in the house situated in the land where she was residing with the appellant/accused. There were ligature marks around the neck and burn injuries on various parts of the body. PW-5 Dr. Harish Darade has recorded in the postmortem report Exhibit-33 that there were superficial to deep burn marks on lower lip and right angle of mandible and left clavicle region, on right thigh and below right chest exactly below 12th rib of deceased Alka. PW-5 Dr. Harish Darade has mentioned in Column no.17 of the postmortem notes Exhibit-33 that there was mark on the neck of substance like a dense wire around the neck. All the injuries were ante-mortem in nature. In his opinion, the cause of death is "Asphyxia due to Strangulation". PW-5 Dr. Harish Darade was shown muddemal articles i.e. electric wires. According to him, ligature marks on the person of deceased Alka are possible by muddemal article no.4. So far as muddemal article no.5 is concerned, he opined that injury marks i.e. burns which were on the dead body of deceased Alka are possible by this electric cable

wire, if electric shock was given to deceased Alka. Learned A.P.P. submits that, the prosecution has proved recovery of wire Article-4 and recovery of black colour electric wire Article-5 at the instance of the accused.

11. Learned APP submits that it was a custodial death. The appellant/accused/husband had committed crime in complete secrecy inside the house. Thus, the nature and amount of evidence required to establish the charge cannot be of same degree as required in other cases of circumstantial evidence. Admittedly, deceased Alka and the appellant/accused were residing in the house situated in the agricultural land known as Akhada. There is a evidence about the ill-treatment being extended to deceased Alka on account of non-fulfillment of certain demands. She was not provided food. The appellant/accused has not given any explanation as to how deceased Alka had ligature marks around neck and burn injuries on the body.

12. In view of Section 106 of the Indian Evidence Act, corresponding burden is on the appellant/accused to give cogent explanation as to how the homicidal death of

deceased Alka occurred in the house. On the other hand, the appellant/accused had taken a defence of alibi, which he could not establish. Furthermore, post incident conduct of the appellant/accused is also suspicious. Appellant/accused neither informed the incident to anyone including the parents of the deceased, and he remained absconding for two days after the incident. Learned APP submits that, the prosecution has proved the case beyond reasonable doubt against the appellant/accused. There is no substance in this appeal. Appeal is liable to be dismissed.

13. Learned APP, in order to substantiate his contentions, placed reliance on following judgments :-

1. Trimukh Maroti Kirkan Vs. State of Maharashtra reported in 2007 Cri.L.J. 20.
2. State of Rajasthan Vs. Thakur Singh in criminal appeal no.357 of 2005 decided on 30.6.2014.
3. Kalu Alias Laxminarayan Vs. State of Madhya Pradesh in criminal appeal no.1677 of 2010 dated 7.11.2019.
4. Jayantilal Verma Vs. State of M.P. (now Chattisgarh) in criminal appeal no.590 of 2015 dated 19.11.2020.

14. We have carefully considered the submissions advanced by the learned counsel for the appellant-accused and the learned APP for the respondent State. With their able assistance, we have perused the grounds taken in the appeal, annexures thereto, the record and proceeding and the case laws cited by the respective parties.

15. The prosecution has examined PW-5 Dr. Harish Manikrao Darade to prove the homicidal death of deceased Alka. We have carefully gone through the evidence of PW-5 Dr. Harish Darade and also the postmortem report exhibit-33. PW-5 Dr. Harish has found superficial to deep burn marks on i] lower lip, ii] right angle of mandible, iii] left clavicle region, iv] on the right thigh and v] below right chest exactly below 12th rib. PW-5 Dr. Harish Darade has noted marks around the neck of a substance like a dense wire, on left side of neck that mark was vanishing near trapeziums and on right side obliquely going behind mastoid bone (strangulation mark). PW-5 Dr. Harish Darade has opined that all the injuries were ante mortem in nature.

He has also noticed congestion in larynx and trachea with small blood spots. In his opinion, the cause of death is "Asphyxia due to ligature strangulation." PW-5 Dr. Harish Darade has explained that because of the strangulation by wire, in ordinary course of nature the death of Alkabai may occur. He was shown the muddemal articles. In his opinion, ligature marks on the person of the deceased are possible by muddemal article no.4, burn injuries were possible by black electric cable wire muddemal article no.5. Inquest panchnama exhibit-17 is also admitted by the defence. In the inquest panchnama exhibit-17, ligature marks around the neck are mentioned and also black marks on various parts of the body. It is also not disputed that the dead body of Alka was lying in the hut in the land of the accused. Prosecution has proved homicidal death of the deceased Alka beyond doubt. The defence has also not disputed the same.

16. The prosecution case entirely rests upon the circumstantial evidence and there is no direct evidence in this case. It is a settled proposition of law that, in a

case of circumstantial evidence, the circumstances must be consistent with the sole hypothesis of the guilt of the accused. The circumstances so proved must be of conclusive in nature, having a definite tendency of implicating the accused. There should be a complete chain of circumstantial evidence to exclude every hypothesis of the innocence and unerringly point out the guilt of the accused.

17. In the instant case, the prosecution has examined the parents of the deceased PW-1 Atmaram Panditrao Bhalerao, PW-2 Sulochana Atmaram Bhalerao. Prosecution has also examined PW-3 Baban Dattarao Tompe, who is from the brotherhood of PW-1 Atmaram. It is their consistent evidence that deceased Alka was given in marriage to the appellant/accused no.1 Kedarnath in the year 2005 and, she was treated well for three to four years or till the birth of son Shubham and daughter Vaishnavi. Thereafter, deceased Alka was subjected to ill-treatment mainly on the count of the non-fulfillment of the demand. There was a demand of an amount for laying down the pipeline in the

agricultural land. Though, no specific amount was demanded, however, deceased Alka was subjected to ill-treatment such as beating, not providing the food etc. Deceased Alka used to disclose the same to her parents either on phone or at the time of her visit to her parent's house. Consequently, PW-1 Atmaram the father of deceased Alka alongwith Prakash Ikkar and PW-3 Baban Tompe had been to the house of the accused for giving understanding to them. PW-1 Atmaram has given understanding to the accused that his financial position is not sound and further assured to pay the amount after taking crop of the cotton. There is a consistent evidence of these three prosecution witnesses that, in the Marathi month Dhonda, accused persons were invited by PW-1 Atmaram at his house. PW-1 Atmaram has honoured them by giving clothes etc., and further assured them that the amount will be given after some time. Even at that time also, deceased Alka told her parents about continuous ill-treatment being extended to her. She had told the parents that, she was subjected to beating and she was kept without food. PW-1 Atmaram had assured the accused persons about

the fulfillment of their demand after performance of marriage of his another daughter and on his assurance the accused persons took deceased Alka with them. At that time, they had also assured PW-1 Atmaram that deceased Alka will be maintained properly.

18. It is the prosecution story that 8 to 10 days thereafter i.e. on 8.10.2012 PW-1 Atmaram had received a phone call at about 07.30 p.m. from one Namdev Hande of their village. Said Namdev informed to PW-1 Atmaram that something was happened to his daughter. Thus, PW-1 Atmaram Bhalerao alongwith his family members went to village Nahad by jeep. He directly went to the residential house in the land. On reaching there, PW-1 Atmaram and others noticed that nobody was present in the house and dead body of Alka was lying in the hut. They have noticed ligature marks around neck of Alka and also electric shocks around nevel, lips, chest and private part. They have seen it in electric light. PW-1 Atmaram has thereafter lodged the complaint exhibit-24 in the concerned police station.

19. We find the evidence of PW-1 to PW-3 on the point of non-fulfillment of the demand and ill-treatment being extended to the deceased Alka at her matrimonial home reliable, trustworthy and consistent. Deceased Alka was not only subjected to beating by the appellant/accused, but she was also subjected to starvation. Deceased Alka had disclosed the same to her parents on phone, so also on her visits to her parent's house. Even, soon before the death i.e. 8 to 10 days prior to the incident, deceased Alka had narrated the ill-treatment being extended to her continuously by the appellant/accused on account of non-fulfillment of the demand. We are not inclined to draw inference that no amount was specified and as such the allegations about the demand are false. Prosecution evidence is consistent on the point that there was a demand for laying down the pipe line in the agricultural land. There cannot be any fix amount for laying down the pipeline and the same depends upon the expenses incurred for laying the pipe line. In view of the same, if no amount is specified the same is not an aspect to negate the evidence of the prosecution about the demand.

20. The appellant/accused Kedarnath and deceased Alka were alone residing in the house situated at Akhada. The appellant/accused Kedarnath had given his statement in writing while explaining the incriminating circumstances put to him under section 313 of the Criminal Procedure Code. The appellant/accused Kedarnath has specifically stated in the said statement that, he was residing with his wife deceased Alka from last three years in the house situated at three kilometers away from the village at Akhada and his parents were living in the house situated in the village. Even, accused nos.2 to 4 (parents of appellant/accused and his brother) have examined the defence witnesses DW-1 and DW-2 to substantiate their defence that they were residing in the house situated in the village and the appellant/accused was residing alongwith the deceased Alka in the house situated in the land. It is not disputed that, when the agricultural land is away from the village, usually the agriculturists construct the house in the land which is commonly known and called as "Aakhada". In this case the agricultural land of the appellant/accused was

three kilometers away from the village. Prosecution has proved the circumstance that deceased Alka and appellant were residing in the house situated in the land at Aakhada. It has also come in the prosecution evidence that, the residential houses of the others in the respective agricultural lands are situated at a distance from each other. It is for the reason that, the residential houses are constructed in the agricultural land to cultivate the land conveniently, and as such, residential houses in the land are not situated adjacent to each other. This is important for the reason that, dead body of deceased Alka was found in the room of the house situated in the agricultural land. If the homicidal death of deceased Alka occurred at a place inside privacy of the house, possibly no one had an opportunity to witness it. It will be extremely difficult for the prosecution to lead the evidence to establish the guilt of the accused, if the strict principle of circumstantial evidence are insisted upon by the Courts.

21. Deceased Alka and appellant/accused were only residing in the house at Akhada. Deceased Alka met

with the homicidal death in the said house at Akhada. It was a brutal murder. There was a mark around neck of a substance like a dense wire. Those were on the left side neck vanishing near trapeziums and right side obliquely going behind mastoid bone. In addition to this, there were superficial to deep burns marks on lower lip, right angle of mandible and left clavicle region, on right thigh and below right chest exactly below 12th rib. All the injuries were ante mortem in nature. The cause of death was "Asphyxia due to ligature strangulation".

22. The appellant/accused came to be arrested on 10.10.2012 though other accused persons on 9.10.2012. On 13.10.2012 at the instance of the appellant/accused beneath heap of fodder at a distance of 100 feet from the Akhada, the appellant/accused took out two wires and those were seized under the Memorandum of panchnama exhibit-27 and recovery panchnama exhibit-28. One nylon plastic wire and one black colour electric cable wire came to be seized at the instance of the appellant/accused. So far as nylon plastic wire is concerned, the same is marked as article no.4 and black

colour electric cable wire is marked as article no.5. We find no substance in the submissions made on behalf of the appellant/accused that panch witnesses on the memorandum panchnama exhibit-27 and recovery panchnama exhibit-28 are the highly interested witnesses, and, therefore, the recovery of the said wires at the instance of the appellant/accused is doubtful. PW-6 API Ashok Yayatirao Ghorbande has also deposed about the memorandum panchnama exhibit-27 and recovery of the two wires at the instance of the appellant/accused as per the recovery panchnama exhibit-28. Furthermore, PW-5 Dr. Harish Darade has also accepted the possibility that ligatures marks around the neck strangulation are possible by wire article no.4 and burns if the electric shocks are given by using black wire article no.5.

23. On receiving the information, PW-1 Atmaram alongwith other family members and villagers rushed to the house of the appellant/accused at Akhada. On reaching there, it was noticed by PW-1 Atmaram alongwith his wife PW-2 Sulochana and other family

members that dead body of Alka was lying alone in the house at Akhada. The appellant/accused was not present there. Mr. Ghanekar, the learned counsel appearing for the appellant/accused has vehemently submitted that, there was no evidence indicating that the appellant/accused was present in the house prior to the incident or during the incident. There is no evidence to indicate that deceased Alka was lastly seen alive in the company of the accused. Learned counsel submits that, the appellant/accused has given explanation that he was not present in the house. Learned counsel has vehemently submitted that section 106 of the Evidence Act does not relieve the prosecution initial burden to prove it's case beyond reasonable doubt. Only when the prosecution case has been proved, the burden in regard to such facts which were within the special knowledge of the accused may be shifted on the accused for explaining the same. It is thus for the prosecution to prove the involvement of the accused beyond doubt before taking recourse to Section 106 of Indian Evidence Act.

Per contra, the learned APP Mr. Nerlikar submits that, it was a custodial death. The appellant/accused has committed the crime in complete secrecy inside the house. Thus, the nature and evidence required to establish the charge cannot be of the same degree as required in other cases of circumstantial evidence. In view of the provisions of section 106 of the Indian Evidence Act, corresponding burden is on the appellant/accused to give cogent explanation as to how homicidal death of deceased Alka occurred in the house where they were only residing. On the other hand, the appellant/accused has taken a defence of alibi, which he could not establish.

24. In a case of **Trimukh Maroti Kirkan vs. State of Maharashtra** reported in **2007 Cri.L.J. 20** relied upon by the learned APP, the Supreme Court in paragraph no.12 of the judgment has made following observations :-

“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 vs. 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 : 2003 AIR SCW 4065

(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."

25. In a case of **State of West Bengal Vs. Mir Mohammad Omar and Ors.** reported in (2000) 8 SCC 382 the Supreme Court has dealt with the provisions of Section 106 of the Evidence Act and laid down the following principles in paragraph nos.31 to 34 of the reports : 2000 AIR SCW 3230.

"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 recognized 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."

26. In a case of **State of Rajasthan Vs. Thakur Singh** reported in **2014 AIR (SCW) 4479**, relied upon by the learned APP, in paragraph nos.22 and 26, the Supreme Court has made the following observations :-

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.

26. In our opinion, the High Court has very cursorily dealt with the evidence on record and has upset a finding of guilt by the Trial Court in a situation where Thakur Singh failed to give any explanation whatsoever for the death of his wife by asphyxia in his room. Moreover, the very fact that all the relatives of Thakur Singh turned hostile clearly gives room for suspicion and an impression that there is much more to the case than meets the eye. Even the complainant, Himmat Singh who squarely blamed Thakur Singh (in the FIR) for the murder of his wife, turned hostile to the extent of denying his relationship with Thakur Singh.

27. In a case of **Kalu @ Laxminarayan Vs. State of Madhya Pradesh** reported in **2019 (4) J.K.J. 578**, relied upon by the learned APP, by referring the observations made in a case of Trimukh Maroti Kirkan's case (supra), in paragraph no.15, the Supreme Court has made following observations :-

15. In view of our conclusion that the prosecution has clearly established a prima facie case, the precedents cited on behalf of the appellant are not considered relevant in the facts of the present case. Once the prosecution established a prima facie case, the appellant was obliged to furnish some explanation under Section 313, Cr.P.C. with regard to the circumstances under which the deceased met an unnatural death inside the house. His failure to offer any explanation whatsoever therefore leaves no doubt for the conclusion of his being the assailant of the deceased.

28. In a case of **Jayantilal Verma Vs. State of M.P (Now Chattisgarh)** reported in **2020 (13) Scale 143** relied upon by the learned APP for the State, while referring the observations made in the case of Trimukh

Maroti Kirkan (supra), the Supreme Court has observed that when the incident had taken place inside, the onus is on the person residing in the house to give such explanation. In such a situation, it is difficult for the prosecution to lead any direct evidence to establish the guilt of the accused.

29. In a case of **Shambhu Nath Mehra Vs. State of Ajmer** reported in **AIR (SC) 1956 0 404**, relied upon by the learned counsel for the appellant, in paragraph no.11, the Supreme Court has made following observations :-

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 preeminently 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. The King*, 1936 AIR PC 169 and *Seneviratne v. r.* 1936-3 ER 36."

30. In a case of **Ulhas Sudam Gorhe Vs. The State of Maharashtra in Criminal appeal No.512 of 2017**, the

Division Bench of this Court while referring the observations made in Shambhu Nath Mehra's case (supra) in paragraph no.9 of the judgment has made following observations :-

9. The Supreme Court in the case of Shambhu Nath Mehra v. State of Ajmer, reported in AIR 1956 SC 404, has held that Section 106 of the Indian Evidence Act is not a substitute for the burden of proof which rests on the prosecution. As noted earlier, in the present case, there is no evidence on record even to remotely suggest that the Appellant was in fact last seen in the company of the deceased Kavita either, at the time of noticing the dead body or prior thereto or he was seen in the vicinity of the scene of offence within the proximity of the relevant time. In the absence of such evidence, the failure of the Appellant to offer any explanation under Section 106 of the Indian Evidence Act cannot be used and termed as a circumstance against the Appellant nor can a presumption of guilt can be drawn on the failure of the Appellant. As noted earlier, there is no other material except mentioned above, available on record to connect the Appellant with the present crime. In other words, the prosecution has failed to lead any cogent and succinct evidence to base conviction of the Appellant. It appears to us that, the case of the prosecution is based on the presumption of accused was being in the said room without there being any evidence in that behalf and therefore, the only conclusion which we can draw is that the Appellant is entitled for a clean acquittal."

However, in this criminal appeal, the case of Trimukh Maroti Kirkan (supra) is not referred and discussed.

31. In a case of **P. Mani Vs. State of Tamil Nadu in Criminal appeal no.1081 of 2005** relied upon by the learned counsel for the appellant, in paragraph nos.9 and 10 of the judgment, the Supreme Court has made following observations :-

- "9. The High Court, however, did not pay much credence to the said statements of the Investigating Officer and other witnesses inter alia on the ground that the burden of proof thereof lies upon the Appellant in terms of Section 106 of the Evidence Act as also, in view of the fact that the Appellant did not suffer any burn injury.
10. We do not agree with the High Court. In a criminal case, it was for the prosecution to prove the involvement of an accused beyond all reasonable doubt. It was not a case where both, husband and wife, were last seen together inside a room. The incident might have taken place in a room but the prosecution itself has brought out evidences to the effect that the children who had been witnessing television were asked to go out by the deceased and then she bolted the room from inside. As they saw smoke coming out from the room, they rushed towards the same and broke open the door. Section 106 of the Evidence Act, to which reference was made by the High Court in the aforementioned situation, cannot be said to have any application whatsoever."

However, the facts of case cited above are totally different. The Supreme Court has thus made observations that Section 106 of the Indian Evidence Act cannot be said to have application.

32. In a case of **Sharad Kondiba Walke Vs. State of Maharashtra in criminal appeal No.414 of 2007** relied upon by the learned counsel for the appellant, in paragraph no.26, this court has made following observations :-

- "26. Considering the rival submissions, at the out set the prosecution has failed to establish the very presence of the appellant in the house during the intervening night between 30th and 31st January, 2007 by any cogent evidence and it was a duty of the prosecution to establish primarily the nexus between the appellant and the alleged crime, and it was the primary duty of the prosecution to prove and establish the facts that the death of deceased Chhaya was within the special knowledge of the appellant herein, then only

provisions of Section 106 of the Evidence Act could have been invoked, but the prosecution has failed in that exercise, and therefore, Section 106 of the Evidence Act cannot be invoked in the present case and liability of death of deceased Chhaya cannot be fastened upon the appellant herein relying upon the observations made in the above referred case (supra)."

33. In criminal appeal no.508 of 2012 **Vandana wd/o Yogesh Mankar Vs. The State of Maharashtra** the Division Bench of this court at Nagpur in paragraph no.17 has made following observations, however, in this criminal appeal the view expressed by the Supreme Court in Trimukh Kirkan's case (supra) are not referred and discussed.

"17. Learned Additional Public Prosecutor Shri Thakre during the course of argument has also contended that since incident took place in the house occupied by the appellant and deceased, burden lies upon the appellant to explain as to the cause of death of deceased in view of Section 106 of the Indian Evidence Act, 1872. However, we are not inclined to accept said submission having considering the fact that the burden of proving the fact especially within the knowledge can be shifted upon the appellant only upon prosecution establishing its case against the appellant beyond reasonable doubt. Section 106 of the Indian Evidence Act does not relieve the prosecution to prove its case beyond reasonable doubt. Only when the prosecution case has been proved, the burden in regard to such fact which was within the special knowledge of the accused may be shifted to the accused for explaining the same subject to certain statutory exceptions. In that view of the matter, we reiterate that in criminal cases it is for the prosecution to prove the involvement of the accused beyond reasonable doubt before taking recourse to Section 106 of the Indian Evidence Act."

34. We have already discussed in the foregoing paragraphs that the prosecution evidence is consistent about the ill-treatment being extended to deceased Alka

on account of non-fulfillment of the demand for laying down the pipe line. She was subjected to beating and starvation. Even, prior to 8 to 10 days, when she had been to her parents house in the month of Dhonda, deceased Alka had disclosed to her parents about continuous ill-treatment, beating and starvation on account of non- fulfillment of said demand. It is an admitted fact that deceased Alka and appellant/accused -Kedarnath were residing alone in the house situated in the agricultural land at Akhada. Deceased Alka met with the homicidal death in the said house. It was a brutal murder. She died due to "Asphyxia due to ligature strangulation". In addition to this, there were superficial to deep burns marks on various parts of the body such as lower lip, right angle of mandible, left clavicle region, on right thigh and below right chest exactly below 12th rib. PW-5 Dr. Harish found frothy fluid was oozing through nostrils and pressure on chest. It is thus clear that deceased Alka was tortured and brutally murdered by constricting her neck with the substance like wire. Prosecution has also proved recovery of the white wire which was used for

constricting the neck and black wire for the purpose of giving shocks, at the instance of the appellant/accused. The appellant/accused has tendered his explanation by submitting the written statement in his examination under section 313 of the Criminal Procedure Code. According to the appellant/accused he had been to village Babhulgaon and, after returning from Babhulgaon, he had seen dead body of his wife. It is not clear from his statement as to when the accused had gone to village Babhulgaon, however, it has made clear in the statement itself that, the appellant/accused and deceased Alka were only residing in the house situated at Akhada. It was for the appellant/accused to explain that what led him to leave the house, particularly, on the date of the incident. So far as the defence witnesses examined by the defence are concerned, those are mainly on the point that co-accused, who came to be acquitted by the Sessions Court, were not residing with the appellant/accused in the house situated at Akhada, and they were residing in the house situated in the village. The appellant/accused has not examined himself on oath. Further, post-incident conduct of the

appellant/accused is also doubtful. The appellant/accused has neither informed to the parents of deceased Alka nor anyone in the village about the said death. After returning from village Babhulgaon, if he had seen the dead body of his wife lying in the house in Akhada, in normal circumstances, the appellant/accused would have called the agriculturists residing in their respective agricultural lands in Akhada. On the other hand, the appellant/accused remained absconding.

35. In our considered opinion, the ratio laid down by the Supreme Court in Trimukh Maroti Kirkan's case (supra) squarely applies to the facts and circumstances of the present case. In the facts of the present case, it is extremely difficult for the prosecution case to lead the evidence to establish the guilt of the accused, if the strict principle of circumstantial evidence is insisted upon. In the facts of the present case, initial burden to establish the case has been discharged by the prosecution. Said initial burden is comparatively lighter in character in terms of the observations made by the

Supreme Court in Trimukh Kirkan's case. In view of the provisions of section 106 of the Indian Evidence Act, there is a corresponding burden on the appellant/accused to give cogent explanation.

36. In the instant case, the accused has failed to discharge the burden by giving a cogent explanation. It is a strong circumstance pointing to his guilt. We are of the opinion that the approach of the Trial Court is the correct approach. We upheld the conviction and sentence passed by the Trial Court. Hence, we proceed to pass the following order.

ORDER

- i. Criminal Appeal is hereby dismissed.
- ii. Criminal appeal is accordingly disposed off.

(S. G. DIGE, J.)

(V.K. JADHAV, J.)

...

aaa/-