



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 25.10.2021

Delivered on : 17.11.2021

CORAM

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

AND

THE HONOURABLE MRS.JUSTICE S.ANANTHI

R.T. (MD) No.1 of 2021

and

CRL.A (MD)No.57 of 2021

R.T. (MD) No.1 of 2021:

State Rep. by
The Inspector of Police,
Chinnamanur Police Station,
Chinnamanur.

(Crime No.533 of 2015)

.. Complainant

-vs-

Suresh

.. Respondent

Referred Trial under Section 302 & 316 of IPC on the judgment of the learned Additional District and Sessions Judge, (Fast Track Court), Theni in S.C.No.81 of 2016 dated 14.12.2020.

For Complainant :: Mr.Hassan Mohammed Jinnah
State Public Prosecutor
Assisted by Mr.S.Ravi
Additional Public Prosecutor

For Respondent :: Mr.C.Muthusaravanan
for Mr.M.Jegadeesh Pandian

CRL.A (MD)No.57 of 2021:

Suresh .. Appellant/Sole Accused

-vs-

State Rep. by
The Inspector of Police,
Chinnamanur Police Station,
Theni District.

(Crime No.533 of 2015)

.. Respondent/Complainant

Criminal Appeals filed under Section 374 of the Code of Criminal Procedure against the judgment of the learned Additional District and Sessions Judge, (Fast Track Court), Theni in S.C.No.81 of 2016 dated 14.12.2020.



For Appellant :: Mr.C.Muthusaravanan
for Mr.M.Jegadeesh Pandian
For Respondent :: Mr.Hassan Mohammed Jinnah
State Public Prosecutor
Assisted by Mr.S.Ravi
Additional Public Prosecutor

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COMMON JUDGMENT

(Judgment of the Court was delivered by V.BHARATHIDASAN, J.)

The reference in R.T.(MD) No.1 of 2021, is made by the learned Additional District and Sessions Judge, (Fast Track Court), Theni, under Section 366 Cr.P.C., seeking confirmation of capital punishment imposed on the accused. CrI.A.(MD) No.57 of 2021, is filed by the accused challenging the conviction and sentence imposed on him and both the matters are heard together and disposed of with this common Judgment.

2. The appellant is the sole accused, in S.C.No.81 of 2016, on file of the learned Additional District and Sessions Judge, (Fast Track Court), Theni. He stood charged for the offences under Sections 302 and 316 I.P.C. The trial Court convicted the accused on both the charges and sentenced him to undergo death sentence and to pay a fine of Rs.1,000/-, for the offence under Section 302 I.P.C., and sentenced him to undergo ten years Rigorous Imprisonment and to pay a fine of Rs.10,000/-, in default to undergo two years Simple Imprisonment for the offence under Section 316 I.P.C. The trial Court made the reference to this court seeking confirmation of death sentence, and the appellant challenging the conviction and sentence, filed the appeal.

3.The case of the prosecution in brief is as follows:

The deceased in this case, Karpagavalli, is the wife of the accused. P.W.1 is the father of the deceased and P.W.11 is her mother. The accused and deceased were married five years prior to the occurrence, they were blessed with two children and at the time of occurrence, the deceased was six months pregnant. Suspecting the fidelity of the deceased, the accused harassed her. Earlier, a complaint has been filed by the wife alleging harassment before the Deputy Superintendent of Police, Bodinayakanur; the same was enquired and the police advised the accused and closed the complaint. On 21.07.2015, at about 3.30 p.m., there was a quarrel, in which, the accused attacked the deceased in the stomach and private part of the deceased, strangulated her with her Mangala Suthra thread and the deceased became unconscious. Then accused himself took her to the Chinnamanur Government Hospital and falsely informed the doctor that, she attempted to commit suicide by hanging. P.W.10, Doctor, on examination, found her unconscious,



found ligature mark measuring 3x2cm in the neck and the private part swollen with bleeding. After giving the first aid, P.W.10, referred her to Theni Government Medical College Hospital and issued Accident Register (Ex.P.6), where she was admitted and given treatment. On the next day, on 22.07.2015, at about 10.20 a.m., the deceased succumbed to the injuries, P.W.9, a doctor, working in the said hospital declared her death, sent death intimation (Ex.P5) to the respondent police and sent the body to mortuary for postmortem/autopsy. In the mean time, P.W.1, along with his relatives went to the hospital, suspecting foul play in the death of the deceased, went to the respondent police station and filed a complaint (Ex.P.1).

4.P.W.17, the Sub-Inspector of Police, attached to respondent Police Station, on receipt of the complaint, registered a criminal case in Crime No.533 of 2015, under Section 174(3) Cr.P.C., sent the First Information Report (Ex.P.9) to the Revenue Divisional Officer, Uthamapalayam, and also sent copies to the higher officials.

5.P.W.18, Revenue Divisional Officer, Periyakulam, conducted inquest on the dead body and prepared inquest report (Ex.P.10), he was of the opinion that, the accused harassed the deceased and it is a suspicious death.

6.P.W.20, the Deputy Superintendent of Police, Bodi, on receipt of the First Information Report, commenced the investigation, visited the scene of occurrence, prepared Observation Mahazar (Ex.P.11) and Rough Sketch (Ex.P.12) and recorded the statement of witnesses. Based on the initial investigation and also the inquest report filed by P.W.18, he altered the F.I.R. for the offence under Section 302 I.P.C. and filed the alteration report (Ex.P.13).

7.In the meantime, P.W.15, Dr.K.Juliana Jeyanthi, Associate Professor, Department of Forensic Medicine, Government Theni Medical College, Theni, conducted postmortem autopsy on the dead body of the deceased and prepared postmortem report (Ex.P.7) and her final opinion (Ex.P.8). She was of the opinion that, the deceased would have died of cumulative effect of shock and hemorrhage due to injury No.6 and hypoxic encephalopathy due to ligature strangulation, 24 to 28 hours prior to autopsy.

8.P.W.20, Deputy Superintendent of Police, arrested the accused in the presence of witnesses and on such arrest, he voluntarily gave a confession admitting his guilt and based on the admissible portion of the confession, he recovered 7 grams of Mangala Soothra tied in a yellow thread, in a vacant place near his house, then, he forwarded the accused to the jurisdictional Magistrate for judicial remand. After recording the statements of other witnesses, including the doctor who conducted postmortem / autopsy and on completion of the investigation, he filed the final report against the accused for the



offences under Sections 302 and 316 I.P.C.

9.Considering the above materials, the trial Court framed charges for offences under Sections 302 and 316 I.P.C. and the accused denied the same as false. In order to prove its case, the prosecution examined as many as 20 witnesses, marked 13 documents and also produced 4 material objects.

10.Out of the said witnesses, P.W.1, is the father of the deceased. According to him, both the deceased and accused lived happily, and the accused informed him that the deceased has fallen down and sustained injuries, he immediately rushed to the hospital and found the deceased unconscious. On the next day, she died and he gave a complaint to the respondent police, however, he was treated as a hostile witness.

11.P.W.2, is the daughter of the deceased and accused. She was seven years old, and she was found incapable of giving evidence, her evidence was not recorded by the trial court. P.W.3, auto driver, took the deceased to hospital and he turned hostile. P.W.4, is the person running a shop near the accused's house, he has also turned hostile. P.W.5, neighbour of the deceased and a teacher. According to her, at about 6.00 p.m., after the occurrence, the neighbours brought the deceased and informed that they are taking her to the hospital. P.W.6, paternal uncle of the deceased, turned hostile. P.W.7, another paternal uncle of the deceased, who is a witness to the observation mahazar, was treated as a hostile witness.

12.P.W.8, Village Administrative Officer, is witness to the arrest of the accused, his confession (Ex.P.3) and recovery of M.O.1. P.W.9, Doctor, issued death intimation memo and sent the body for postmortem. P.W.10, Doctor, gave first aid to the deceased at Chinnamanur Government Hospital and issued Accident Register. According to her, the accused took the deceased to the hospital and told her that, she attempted to commit suicide, she found ligature marks around the neck and bleeding injury in the private part of the deceased.

13.P.W.11, mother of the deceased, spoke about the dispute between the accused and deceased, and they have given a complaint to the Deputy Superintendent of Police, to take action against the accused, after enquiry, the police advised the accused and sent the deceased with him. Thereafter, they were living together and on the date of occurrence, before 4.00 p.m., the accused informed her over phone that there was quarrel between accused and deceased and admitted the deceased in the hospital, they rushed to the hospital and found her unconcious.

14.P.W.12, cousin brother of the deceased and also related to the accused, and according to him, suspecting her fidelity, the



accused used to abuse her. P.W.13, sister of the deceased. She spoke about the earlier quarrel between the accused and deceased and the accused used to harass her suspecting that she had a illicit intimacy. P.W.14, witness to observation mahazar, turned hostile.

15.P.W.15, Doctor, conducted postmortem autopsy on the dead body of the deceased. She found multiple cigarette butt marks over the right breast and left side of lower chest and red colour contusion in the right forearm and dark coloured contusion over the right side of vulva with drain, also found two dark red colored ligature marks of sizes 14cmsx0.5cms and 14cmsx0.5cms, one below the other on the front of the neck. She also found red coloured contusions over the right and left side of the neck. Hair line fracture was seen over the left side of thyroid cartilage with surrounding bruise injuring the surrounding muscles, vessels and nerves and white coloured cigarette butt marks were seen over the right breast with surrounding bruised red coloured skin. According to her, it is a case of ligature strangulation and she was of the firm opinion that it is a case of homicidal strangulation.

16.P.W.16 is a police constable, identified the dead body for postmortem autopsy P.W.17, Sub-Inspector of Police, who registered the F.I.R. P.W.18, Revenue Divisional Officer, conducted inquest. P.W.19, relative of accused, turned hostile. P.W.20, Deputy Superintendent of Police, investigated the crime, examined the witnesses, recorded their statements, arrested the accused and recovered the material objects. After completion of investigation, filed the final report.

17.When the above incriminating materials were put to the accused under Section 313 Cr.P.C., the accused denied the same as false. However, the accused did not chose to examine any witness nor did he mark any document on his side.

18.Having considered all the above evidences, the trial Court found the accused/appellant guilty under the above said charges and accordingly sentenced him as detailed in the first paragraph of this judgment.

19.Mr.Hassan Mohammed Jinnah, learned State Public Prosecutor, appearing for the State, would submit that, the deceased is the wife of the accused and both of them were living together in the same house. The deceased is none other than his uncle's daughter. Even though P.W.1, father of the deceased, turned hostile, in his chief examination, he admitted the fact of filing the complaint (Ex.P.1). P.W.11, the mother of the deceased clearly spoke about the frequent quarrel between the accused and the deceased and the filing of a complaint before the Deputy Superintendent of Police, Bodi, and due to the harassment, earlier the deceased attempted to commit suicide twice. Apart from that, P.Ws.12 and 13, who are closely related to



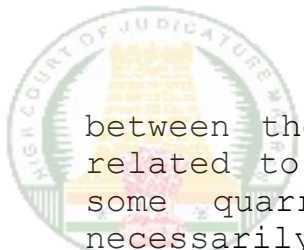
the accused, have stated that, suspecting fidelity, the accused used to harass the deceased. With those evidence, the prosecution has clearly proved the motive against the accused that, suspecting her fidelity, he harassed the deceased and ultimately caused her death.

20.Learned Public Prosecutor would further submit that, the medical evidence, namely, P.W.15, the Doctor, who conducted postmortem autopsy, clearly stated that it is a case of homicidal death due to strangulation. While answering to the court questions, the Doctor has firmly confirmed that it is a homicidal strangulation. That apart, cigarette butt burnt injuries were found all over the body, out of which, two injuries were inflicted just prior to the death. From the scientific evidence, the prosecution has established that it is a case of homicidal death and the prosecution has also established a prima facie case against the accused and the burden is on the accused to explain the cause of death, which within his special knowledge. However, the accused came up with a false explanation that it is a case of suicide by hanging. It is a additional circumstance, which strengthens the prosecution case and to completes the chain of circumstances. Considering those circumstances, the trial Court rightly convicted the accused.

21.Learned Public Prosecutor would further submit that at the time of death, the deceased was six months pregnant and by the cruel act of the accused both the deceased and the child in the womb died. That apart, postmortem report clearly shows that he has tortured the deceased by putting cigarette butts all over the body for a long period of time. Considering the gravity of the offence, the trial Court found it falls under the category of "rarest of rare case" and imposed death sentence and the sentence should be necessarily be confirmed.

22.Learned counsel for the appellant would submit that, the prosecution failed to prove the chain of circumstances, clearly pointing the guilt of the accused and the accused cannot be convicted merely relying upon the medical evidence, in the absence of any other corroborating circumstances. The trial Court failed to consider that it is only the accused, took the deceased to the hospital and he has also explained the cause of death, that she has attempted to commit suicide by locking the door from inside and after breaking the door open, he tried to save her, unfortunately, she had fallen down and sustained injuries, thereby the accused shifted the burden on him under Section 106 of the Evidence Act, 1872.

23.The learned counsel further submitted that almost all the witnesses, including the father of the deceased turned hostile. Even from the evidence of the mother, it could be seen that both the deceased and accused were living happily and there was no quarrel



between them. The other two witnesses P.Ws.12 and 13 are closely related to the deceased, their evidence only show that there were some quarrel between the husband and wife and it will not necessarily lead to the conclusion that the accused has committed the murder. The learned counsel further contended that even the medical evidence did not conclusively prove that it is a case of homicidal death. That apart, the Court has examined the medical witness, P.W.15, only on 01.12.2020, after questioning the accused i.e., on 05.10.2020, and those incriminating materials were not put to the accused under Section 313 Cr.P.C. seeking explanation. Hence, those materials cannot be put against the accused.

24. So far as the sentence is concerned, learned counsel would submit that it is not a case, falling under the 'rarest of rare cases' category, which warrants a death sentence. Admittedly, the petitioner is an young man, at the time of occurrence, he has no bad antecedents, he has a chance to reform and he cannot be considered as a menace to the society. Considering those mitigating circumstances, awarding of death sentence does not warrant in this case.

25. We have considered the rival submissions and the materials available on record carefully.

26. It is a case of circumstantial evidence. The deceased is the wife of the accused, and the accused is closely related to the deceased family. The marriage took place five years prior to the occurrence and out of the marriage they had two children. At the time of occurrence, the deceased was six months pregnant and she was only 19 years old. Most of the witnesses examined by the prosecution are closely related to the accused and deceased. Some of them turned hostile, except P.W.11, the mother of the deceased, P.Ws.12 and 13 cousins of the deceased.

27. P.W.1, father of the deceased turned hostile. However, in the chief examination, he has admitted filing of F.I.R. suspecting foul play in her death. P.W.11, mother of the deceased, spoke about the earlier quarrel between the accused and the deceased and the deceased's family gone to the extent of giving a police complaint. During enquiry, the police advised the accused and sent them back. It is also her evidence that already the deceased attempted to commit suicide twice. P.W.12, cousin brother of the deceased, spoke about the motive. According to him, the deceased had informed him that, the accused suspected her fidelity and used to abuse her. P.W.13, cousin sister of the deceased has clearly stated that the accused used to quarrel with the deceased and abused her suspecting that she is having illicit intimacy, both P.Ws.12, 13 are closely related to the accused also and there is no reason for them to make false allegation against him. From those witnesses of the prosecution have established that the accused used to quarrel with



the deceased suspecting her fidelity, which is the motive for the occurrence. This is the first circumstance against the accused.

28. The second strong circumstance is medical evidence. Immediately after the occurrence, the accused took the deceased to the Government Hospital, Chinnamanoor, where, the accused has informed the doctor that the deceased has attempted to commit suicide. The Doctor has found a ligature mark over the neck, that apart, the private part of the deceased was injured and bleeding and issued accident register (Ex.P.6), that, he found incomplete throttling and ligature mark over the anterior aspect of the neck and vulval edema and bleeding in private part. Then, he referred the deceased to the Theni Government Medical College Hospital, where, P.W.9 treated her. Subsequently, on 22.07.2015, at about 10.20 a.m., she succumbed to the injuries. P.W.15, conducted postmortem autopsy and found the following injuries:

"Appearance found at the postmortem: Moderately nourished body of a female aged about 19 years. Finger and toe nails were pale, Multiple healed scars of cigarette butt marks were seen over the left side of the abdomen and left side of the lower chest.

The following antemortem injuries were noted over the body:-

1. Red coloured contusion of size 8cmsx6cms seen over the inner aspect of the right forearm.

2. Dark coloured contusion of sizes 14cmsx6cms seen over the right side of vulva, with a drain.

On dissection: Dark red coloured haematoma of size 12cmsx8cms was seen.

3. Two dark red coloured ligature marks of sizes 14cmsx0.5cms and 14cmsx0.5cms were seen one below the other on the front of the neck.

4. Red coloured interrupted abrasion of size 5cmsx3cms was seen over the chin.

5. On bloodless dissection of the neck: Red coloured contusions of sizes 3cmsx3cms, and 4cmsx3cms were seen over the right and left side of the neck respectively.

Hair line fracture of size 4cmsx0.25cms was seen over the left side of thyroid cartilage with surrounding bruise injuring the surrounding muscles, vessels and nerves.

6. On dissection of abdomen:- Red coloured contusion of size 22cms x 18cms were seen over the entire lower abdominal wall. Red coloured contusion of size 8cmsx10cms was seen over the mesocolon. Red coloured contusion of size 18cmsx26cms was seen over the deeper plane of anterior abdominal wall.



Uterus - length 28cms, breath 24cms, multiple red coloured superficial ruptures were seen on all sides of the uterus. Uterus contained dead male foetus of length 28cms and 1000ml of red coloured blood with clots.

7.Two - white coloured cigarette butt marks of sizes 0.5cmsx0.3cms., 0.4cmsx0.2cms were seen over the right breast with surrounding bruised red coloured skin." (underline supplied)

From the postmortem report, it could be seen that there are multiple healed scars of cigarette butt and two - white coloured cigarette butt marks of sizes 0.5cmsx0.3cms., 0.4cmsx0.2cms seen over the right breast. The doctor was of the opinion that the cigarette butt marks would have been caused one or two days prior to the occurrence, which, clearly shows that the accused has tortured the deceased continuously and put the cigarette butt all over her body.

29.Nextly, from the postmortem report as well as the Accident Register, it is seen that, there is contusion in the private parts of the deceased, vulval edema and bleeding. In the abdomen, P.W.15, found red coloured contusion of size 22cms x 18cms over the entire lower abdominal wall, red coloured contusion of size 8cmsx10cms over the mesocolon and red coloured contusion of size 18cmsx26cms seen over the deeper plane of anterior abdominal wall. That apart, the uterus was ruptured with a length 28cms, breath 24cms and it contained dead male fetus of length 28cms and 1000ml of red coloured blood with clots, and it is clear that the fetus was dead due to the injuries in the uterus. The doctor was of the opinion, the death was due to the cumulative effect of shock and hemorrhage and hypoxia encephalopathy. She was also of the opinion that all those injuries would not likely to occur when the deceased fall down from hanging.

30.So far as the strangulation marks are concerned, the postmortem doctor, P.W.15, found two dark red coloured ligature marks of sizes 14cmsx0.5cms and 14cmsx0.5cms one below the other on the front of the neck. That apart, abrasion was also seen in the chin and contusion seen in the right forearm and hair line fracture was seen over the left side of thyroid cartilage. The postmortem doctor has been examined extensively and the Trial Court has also put questions to her under Section 165, Evidence Act, 1872. The doctor was of the firm opinion that, it is not a case of suicidal strangulation and it is a homicidal strangulation and also given strong reasons for her findings. Nothing was elicited in the cross-examination that it is a case of suicide by hanging. Considering those circumstances, we are of the considered view that the prosecution has clearly established that it is a case of homicidal death.



31. Admittedly, both the accused and the deceased were living together in the same house, except them, there is no other person available. The occurrence took place inside the house, at that time the accused was also present in the house, he alone took the deceased to the hospital. As already held, the prosecution has prima facie established it is a homicidal death. In these circumstances, the burden is on the accused under Section 106 of the Evidence Act, to explain as to how the occurrence has taken place, as the fact is within his exclusive knowledge, especially the deceased sustained serious internal injuries in the abdomen, mesocolon and uterus was also ruptured, consequently six month old fetus dead. That apart, it is the firm medical opinion that these injuries would not have occurred while falling down. But the deceased came up with an explanation that the deceased attempted to commit suicide. The explanation offered by the accused is only a false explanation, it is strong circumstance against the accused, it is an additional link to the chain of circumstances to complete the chain, and we can reasonably infer that, the accused is responsible for the commission of the crime.

32. At this stage, it is useful to refer the judgment of the Hon'ble Supreme Court reported in **(2018) 13 SCC 655 [State of J & K v. Vijay Kumar]**:

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

33. In **Kalu v. State of M.P. reported in (2019) 10 SCC 211**, the Hon'ble Supreme Court held as follows:

"13. In the circumstances, the onus clearly shifted on the appellant to explain the circumstances and the manner in which the deceased met a homicidal death in the matrimonial home as it was a fact specifically and exclusive to his knowledge. It is not the case of the appellant that there had been an intruder in the house at night. In **Hanumant v. State of Madhya Pradesh, AIR 1952 SC 343**, it was observed: (AIR pp. 345-46, para 10)

"10.It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should



be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

14. In **Tulshiram Sahadu Suryawanshi v. State of Maharashtra, (2012) 10 SCC 373**, Court observed: (SCC pp.381-82, para 23)

"23. It is settled law that 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 position is strengthened in view of Section 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilised. We make it clear that this section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. It is useful to quote the following observation in **State of W.B. v. Mir Mohammad Omar, (2000) 8 SCC 382**, (SCC p.393, para 38)

"38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In **Shambhu Nath Mehra v. State of Ajmer, AIR 1956 SC 404**, the learned Judge has stated the legal principle thus: (AIR p.406, para 11):

"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."

15. In **Trimukh Maroti Kirkan v. State of Maharashtra, 2006 (10) SCC 681**, this Court was considering a similar case of homicidal death in the confines of the house. The following observations are considered relevant in the facts of the present case: (SCC pp. 690-91 & 694, paras 14-15 & 22)

"14. 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 Prosecutions, 1944 AC 315 (HL)** - 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 travelling on a railway without ticket. The burden of proving that he had a ticket is on him."

15. 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



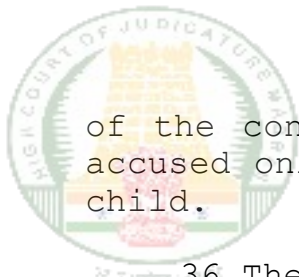
establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation 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.

* * *

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."

34. Learned counsel appearing for the appellant strongly relied on the judgment of the Hon'ble Supreme Court reported in **2021 SCC Online SC 717 [Nagendra Sah v. State of Bihar]** and a Division Bench of this Court in **Sakunthala v. The State [2021-2-L.W. (CrI) 356]**, to which one of us (Justice V.BHARATHIDASAN) is a party, and would submit that unless the prosecution successfully establish the fact and the chain of circumstances unerringly pointing the guilt of the accused, the burden will not shift on the accused under Section 106 of the Evidence Act. But in the instant case, as stated earlier, the prosecution has prima facie established the guilt of the accused and the burden is on the appellant/accused to explain the special circumstances in which his wife was killed. Hence, the judgment relied on by the appellant is not applicable to the facts of the instant case.

35. The next submission of the learned counsel for the appellant is with regard to non-compliance of Section 313 Cr.P.C. From the perusal of records it could be seen that the trial Court has examined the postmortem doctor only to clarify certain doubts regarding the injuries sustained by the deceased, as to whether it is a homicidal strangulation or suicidal strangulation. It is only in the nature of clarification and nothing incriminating against the accused was elicited. That apart, unless the accused show that by non-compliance of the provision of Section 313 Cr.P.C., material prejudice is caused to him, it cannot be held that the trial is vitiated on that score. Considering all those circumstances, we are



of the considered view that it is only a homicidal death and this accused only caused the death of the deceased and the 9 week unborn child.

36. The next question arises for consideration is whether the Trial Court is justified in imposing death sentence on the appellant/accused. The law is well settled that, life imprisonment is the rule to which the death penalty is the exception. The death sentence could be imposed only when the life imprisonment appears to be altogether inappropriate punishment, having regard to the relevant facts and circumstances of the case. While imposing the Death Sentence, the Court should consider the aggravating and mitigating circumstances, and after giving full weightage to the mitigating circumstances, the Court should strike a balance between the aggravating and mitigating circumstance before imposing the capital punishment.

37. A Constitution Bench of the Hon'ble Supreme Court in **Bachan Singh Vs. State of Punjab**, reported in (1980) 2 SCC 684, indicated the guidelines for imposing death sentence and evaluated the principle of 'rarest of rare cases', for imposing death sentence.

38. Following the same in **Machhi Singh Vs. State of Punjab** reported in (1983) 3 SCC 470, the Hon'ble Supreme Court explained the circumstances for awarding death sentence, which reads as follows:

"38. In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentences arises. The following propositions emerge from Bachan Singh's case:

(i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously



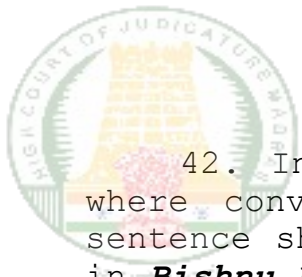
exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

39. According to **Bachan Singh case** (cited supra) the three major mitigating circumstances are (i) age of the accused; (ii) the probability that the accused would not commit any criminal act which constitute a continuing threat to society; and (iii) the probability that the accused can be reformed and rehabilitated. The guiding principles laid down in **Bachan Singh case** (cited supra) as well as **Machhi Singh case** (cited supra) have been consistently followed till date by the Hon'ble Supreme Court as well as the High Courts.

40. It is also equally settled that the question of awarding sentence should not be determined with reference to the volume and the character of the evidence adduced or nature of proof. While imposing punishment, the Court should consider the circumstance of the case with particular reference to any extenuating circumstances, which can be said to mitigate the enormity of the crime.

41. That apart, there is another issue that whether the accused could be awarded with death penalty in cases where evidence is based on circumstances. There are two sets of thoughts on that. In the first line, the Hon'ble Supreme Court has held that death sentence can be imposed in cases of circumstantial evidence. In **Amrutlal Someshwar Joshi Vs. State of Maharashtra** reported in (1994) 6 SCC 186, the Hon'ble Supreme Court has held that, if there is clinching and reliable circumstantial evidence, then that would be the best evidence to be safely relied upon. In **Shivaji Vs. State of Maharashtra** reported in (2008) 15 SCC 269, it has been held that if circumstantial evidence found to be credible, cogent and trustworthy for the purpose of awarding conviction and that evidence cannot be treated as mitigating circumstance. It has also been held that the incriminating circumstances has to be clearly established and the chain of circumstances should be conclusive in nature to exclude any kind of hypothesis, that the one proposed to be proved, and leads to a definite conclusion that the crime was committed by the accused, then it is sufficient to sentence him to death penalty. In **Manoharan Vs. State** reported in (2019) 7 SCC 716, the Hon'ble Supreme Court has held that in a case of circumstantial evidence, if the prosecution has clearly proved its case beyond reasonable doubt, the death sentence can be imposed.



42. In another line, the Hon'ble Supreme Court has held that where conviction is based on circumstantial evidence, the death sentence should not be normally imposed. The Hon'ble Supreme Court in **Bishnu Prasad Sinha Vs. State of Assam** reported in (2007) 11 SCC 467, has held that in cases of circumstantial evidence, ordinarily, death penalty cannot be awarded. In **Swamy Sharaddananda (2) Vs. State of Karnataka** reported in (2008) 13 SCC 767, it has been held that in cases where the sole basis for conviction is circumstantial evidence, there is far greater chance for wrongful conviction. In **Kalu Khan Vs. State of Rajasthan**, reported in (2015) 16 SCC 492, the Hon'ble Supreme Court has held that the conviction based on "seemingly conclusive circumstantial evidence" should not be presumed as foolproof incidences and the circumstantial evidence must be a definite factor at the stage of sentencing.

43. Recently, in **Shatrughna Baban Meshram vs. State of Maharashtra**, reported in (2021) 1 SCC 596 in paragraphs 50 and 51, the Hon'ble Supreme Court, after considering both the views, ultimately held as follows:

"50. It can therefore be summed up :-

50.1. It is not as if imposition of death penalty is impermissible to be awarded in circumstantial evidence cases.

50.2. If the circumstantial evidence is of an unimpeachable character in establishing the guilt of the accused and leads to an exceptional case or the evidence sufficiently convinces the judicial mind that the option of a sentence lesser than death penalty is foreclosed, the death penalty can be imposed.

51. It must therefore be held that merely because the instant case is based on circumstantial evidence there is no reason to commute the death sentence. However, the matter must be considered in the light of the aforestated principles and see whether the circumstantial evidence is of unimpeachable character and the option of a lesser sentence is foreclosed."

44. Keeping the above principles in mind, now let us consider the aggravating and mitigating circumstances in the instant case. The accused was aged about 31 years at the time of the occurrence and he had no bad antecedents. The accused has a chance to reform and rehabilitated, and the instant case falls short of 'rarest of rare cases' category and we are of the considered view that the



mitigating circumstances outfaced the aggravating circumstances.

45. Considering those circumstances, we are of the view that imposing death sentence does not warrant in the case, on the other hand imposing life imprisonment will meet the ends of justice.

46. In the result,

(a) The conviction of the appellant/accused under Sections 302 and 316 IPC is confirmed.

(b) The death sentence imposed for the offence under Section 302 IPC is commuted and the appellant/accused is sentenced to undergo Life Imprisonment, and to pay a fine of Rs.1,000/- and in default to undergo 6 months Simple Imprisonment.

(c) The sentence imposed for the offence under Section 316 IPC is confirmed.

(d) The sentences imposed for the offences under Sections 302 and 316 IPC shall run concurrently. The sentence already undergone shall be given set off under Section 428 Cr.P.C.

(e) As ordered by the trial Court, after the expiry of appeal time or appeal M.Os.2 to 4 are ordered to be destroyed and the interim custody of M.O.1 with P.W.1 is made absolute.

47. With the above modification, CrI.A.(MD) No.57 of 2021 is partly allowed and the reference in R.T.(MD) No.1 of 2021 is answered accordingly.

Sd/-

Assistant Registrar(CS-III)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

sj

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1. The Additional District and Sessions Judge,
(Fast Track Court), Theni.



2. The Judicial Magistrate, Theni,
3. The Chief Judicial Magistrate, Theni.
4. The Inspector of Police,
Chinnamanur Police Station, Chinnamanur.
5. The Superintendent, Central Prison, Madurai.
6. The District Collector, Madurai.
7. The Director General of Police, Mylapore, Chennai.
8. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

Copy to

1. The Registrar (Judicial),
Madurai Bench of Madras High Court, Madurai.
2. The Section Officer,
Criminal Records,
Madurai Bench of Madras High Court,
Madurai (2 copies)

Judgment in
R.T.(MD) No.1 of 2021 and
Criminal Appeal No.(MD) No.57 of 2021
Delivered on 17.11.2021

NA (CO)
TR/SKN(24.11.2021) 18P 12C