

21.12.2022
S/L. 5
Court No.12
Suvayan

CRA 492 of 2006
With
IA No: CRAN 2 of 2009 (Old No. CRAN 1953 of 2009)

In the matter of: **Sisir Bagdi @ Shanti Kr. Bagdi**

....Appellant.

Mr. Mukteswar Maity

...for the appellant.

Mr. Madhusudan Sur

Mr. Manoranjan Mahata

...for the State.

1. The report submitted by Monoranjan Mahata, learned Counsel for the State be taken on record.
2. Heard learned Counsel for both the parties.
3. This appeal arises out of the judgment and order of sentence passed in Sessions Trial No. 3 (December) 2005 arising out of Sessions Case No. 198 of 2005 passed by learned Additional Sessions Judge, Fast Track 1st Court, Suri, Birbhum convicting the appellant under Section 302 IPC and sentencing him to suffer imprisonment for life.
4. P.W. 2 is stated to be the informant and P.W. 1 is the scribe of the FIR. The appellant was living with his wife in the same house where his brother and his brother's wife (P.W. 2) were also living. In the morning of 23.06.2005, the deceased was found to be dead in her room and a gamcha was there around her neck. The dead body was first brought to the Varandah and thereafter it was brought to the courtyard of the house. It is further alleged that when the villagers gathered, they inquired about the death of the deceased and manhandled the appellant.

On receipt of the FIR the case was lodged and investigations was taken up by P.W. 11. In course of investigation witnesses were examined, inquest over the dead body was held, dead body was challaned for postmortem and incriminating articles were seized. On completion of investigation charge-sheet under Section 302 IPC was filed against the appellant.

5. Prosecution has examined 11 witnesses to prove the charge, out of whom P.W.s 2, 9 and 11 are relevant for the purpose of this appeal. P.W. 2 is the wife of the brother of the appellant, P.W. 9 is the Medical Officer who conducted the postmortem and P.W. 11 is the I.O.

Defence plea is one of denial and false implicating. But no witness has been examined by the defence.

6. Learned Trial Court believing the evidence of P.W.s 2 and 9 has returned the finding of guilt against the appellant especially for non-explanation by the appellant regarding the cause of death of the deceased in view of Section 106 of the Evidence Act.
7. As stated earlier P.W. 2 is the wife of brother of the appellant. She has testified in her examination-in-chief that after coming from the field she noticed the door of her elder brother-in-law (appellant) to be closed. She called and thereafter her elder brother-in-law came out from the room. She has further testified that it seemed to her that something happened. The deceased died by "fash". It is further testified by her that she was nervous and called the villagers who gathered there. A complaint was lodged to the police and she put her L.T.I. on the complaint. She has specifically testified that she cannot

say about the reason of the death of the deceased. In her cross-examination she has testified that deceased was suffering from mental agony and disturbance for her not having any child. Further she is denied to have stated anything to the police regarding the death of the deceased in her cross-examination. From the tenor of cross-examination of the witness (P.W.2) on recall, we find that though there is nothing to show in the evidence that P.W. 2 was declared hostile yet she has been cross-examined by the prosecution on recall. Evidence of P.W. 9, the medical officer specifically shows that the death of the deceased was by strangulation and it is homicidal in nature. In view of the evidence of P.W. 2 and the specific evidence of P.W. 9 regarding the homicidal death of the deceased, learned Trial Court has relied on Section 106 of Evidence Act to shift the onus to the appellant to explain his conduct.

8. Hon'ble Supreme Court in the case of ***Nagendra Sah vs. State of Bihar (2021) 10 SCC 725*** in paragraph 18 to 21 has ruled regarding applicability of Section 106 of the Evidence Act and has held thus:

“18. Now we come to the argument of the prosecution based on Section 106 of the Evidence Act. Section 106 reads thus:-

“106. Burden of providing fact especially within knowledge. – When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

- a) When a person does an act with some*

intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

- b) *A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him”*

19. Under Section 101 of the Evidence Act, whoever desires any Court to give a judgment as to a liability dependent on the existence of facts, he must prove that those facts exist. Therefore, the burden is always on the prosecution to bring home the guilt of the accused beyond a reasonable doubt. Thus, Section 106 constitutes an exception to Section 101. On the issue of applicability of Section 106 of the Evidence Act, there is a classic decision of this Court in the case of **Shambu Nath Mehra v. The State of Ajmer (1956) SCR 199** which has stood the test of time. The relevant part of the said decision reads thus:-

“Section 106 is an exception to Section 101. Section 101 lays down the general rule about the burden of proof. “Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist”.

Illustration (a) says-

“A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime”.

This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not

*intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word “especially” stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are **Attygally v. Emperor** and **Seneviratne v. R.***

Illustration (b) to section 106 has obvious reference to a very special type of case, namely to offences under Sections 112 and 113 of the Indian Railways Act for travelling or attempting to travel without a pass or ticket or with an insufficient pass, etc. Now if a passenger is seen in a railway carriage, or at the ticket barrier, and is unable to produce a ticket or explain his presence, it would obviously be impossible in most cases for the railway to prove, or even with due diligence to find out, where he came from and where he is

going and whether or not he purchased a ticket. On the other hand, it would be comparatively simple for the passenger either to produce his pass or ticket or, in the case of loss or of some other valid explanation, to set it out; and so far as proof is concerned, it would be easier for him to prove the substance of his explanation than for the State to establish its falsity.

We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be “especially” within the knowledge of the accused. This is a section which must be considered in a common sense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law, that, save in a very exceptional class of case, the burden is on the prosecution and never shifts.”

9. From the aforesaid decision, it is clear as to when non-explanation of the appellant regarding his conduct resumes relevance.
10. When the evidence of the witnesses in the present case is re-appreciated in the light of the aforesaid judgment, it is found

that the deceased had died a homicidal death. Evidence of P.W. 2 makes it clear that in the house not only the deceased and her husband but P.W. 2 and her husband were also residing in separate room. If her evidence is taken into consideration, it would be clear that not only the appellant but other persons in the house had also opportunity to play foul so far as the murder of the deceased is concerned. Furthermore, from the evidence of P.W. 2 alone which is shaky in nature, it cannot be held that it is the appellant alone who could have committed the crime. The onus under Section 106 of the Evidence Act would have been shifted to the appellant to explain his conduct if the prosecution would have proved the case against the accused beyond reasonable doubt. Here the evidence of P.W. 2 being shaky, on the basis of evidence of medical officer P.W. 9 alone it cannot be held that the appellant is the only person who can be held guilty.

11. In view of our discussion (Supra) the appeal succeeds. The impugned judgment and order of sentence dated 29.06.2005 passed in Sessions Trial No. 3 (December) 2005 arising out of Sessions Case No. 198 of 2005 passed by learned Additional Sessions Judge, Fast Track 1st Court, Suri, Birbhum is set aside.
11. The appeal being **CRA 492 of 2006** along with interim application being **CRAN 2 of 2009 (old No. CRAN 1593 of 2009)** are, accordingly, disposed of. The appellant be set at liberty forthwith, if his detention is not required in any other case.

12. LCR along with a copy of this judgment be sent down forthwith to the concerned trial Court for due compliance.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)

