

IN THE HIGH COURT OF ORISSA AT CUTTACK.

CRIMINAL APPEAL No.187 of 2021

In the matter of an application under Section 374(2) of the Code of Criminal Procedure.

- 1. Satya Prakash Dixit, aged about 35 years,
S/o. Sri Ganesh Chandra Dixit**
- 2. Ganesh Chandra Dixit, aged about 62 years,
S/o. Late Mukunda Madhab Dixit,
Both are of village-Mahuldiha, Ward No.2,
P.S.-Rairangpur Town, Dist-Bayurbhanj Appellants**

-Versus-

State of Orissa

.....

Respondent

For Appellants : Mr. B.N. Mohapatra, Advocate

For Respondent : Mr. Sk. Zafrulla,
Additional Standing Counsel

CORAM :

HONOURABLE MR. JUSTICE C.R. DASH

HONOURABLE MR. JUSTICE M.S. SAHOO

JUDGMENT

Date of Hearing: 29.03.2022

Date of Judgment: 27.04.2022

C.R. Dash, J.

In S.T. Case No.19 of 2017, learned Additional Sessions

Judge, Rairangpur in the district of Mayurbhanj found the present

Appellants Satya Prakash Dixit and Ganesh Chandra Dixit guilty of offence under Sections 302/34 of I.P.C. He sentenced both the aforesaid convicts to suffer R.I. for life and to pay a fine of Rs.20,000/- (Rupees twenty thousand) each in default, to suffer further R.I. for six months each.

Appellant No.1-Satya Prakash Dixit is the son of Appellant No.2-Ganesh Chandra Dixit.

2. Prosecution case, stated succinctly runs as follows:

Sarat Chandra Padhi (P.W.12), who is the father of the deceased lodged the F.I.R. alleging that his daughter was done to death by Appellant No.1 and her parents in the night of 24.08.2016 (Janmastami Day). Marriage between deceased Rupali and Appellant No.1-Satya Prakash Dixit was solemnized as per their caste custom, rites and tradition. After marriage, for one year Rupali led a happy conjugal life in her matrimonial house. Thereafter, members of the family of her in-laws started tormenting her mentally. Even the parents-in-law of deceased Rupali asked her and her husband to live in separate mess. In the meantime, Satya Prakash Dixit-Appellant No.1 fathered a son. Obviously, the family expenditure increased and Appellant No.1-Satya Prakash Dixit could not give much money to his parents for their

expenditure. The parents-in-law of the deceased for such a situation blamed her. On 21.08.2016, deceased Rupali and her husband Satya Prakash Dixit visited the house of the informant where Rupali told her father that, her father-in-law and mother-in-law are planning to separate her and her husband from their house and on the same day Satya Prakash Dixit husband of the Rupali told the informant that, they will drive Rupali out, if she does not bring extra dowry. Even he threatened to murder Rupali, if Rs.5,00,000/- (Rupees five lakhs) do not reach their house before Janmastami. On 24.08.2016 (Janmastami Day), at about 1.30 A.M. night the informant received information from one Rajanikanta Padhi that Rupali has committed suicide in her in-laws house. The informant along with his family members rushed to the house of the Appellants and saw the dead body of Rupali lying on the floor of her room and there was a saree knotted around her neck. It is alleged that owing to demand of dowry, the Appellants and Rupali's mother-in-law have killed the deceased and they have tried to show case it as a case of suicide.

On the basis of F.I.R. lodged by the informant (P.W.12) IIC, Rairangpur P.S. (P.W.13) registered case under Section 498-A/304-B/302/201/34 IPC read with Section 4 of the D.P. Act against the accused persons.

On completion of investigation, charge sheet was filed against the present Appellants. Keeping the investigation open as mother-in-law of the deceased had not yet been apprehended.

Learned Trial Court on the basis of materials available on record framed charge against the accused persons sent for trial under Sections 498-A/304-B/302/201/34 IPC and Section 4 of the D.P. Act.

3. Prosecution has examined 13 witnesses to prove the charge. P.W.12 is the informant, who happens to be the father of the deceased. P.W.11 is the mother of the deceased. P.W.10 is the younger sister of the informant and happens to be the aunt of the deceased. P.W.1 is the scribe of the F.I.R. and informant P.W.12 happens to be his maternal uncle. P.W.2 is an independent witness and a co-villager of the Appellants. P.W.3 is a witness like P.W.2. P.W.4 is the brother of P.W.1. P.W.5 is the friend of P.W.4. P.Ws.5, 6, 8 and 9 are witnesses to seizure out of whom, P.Ws.5 and 6 are also witnesses to confessional statement of Appellant No.1-Satya Prakash Dixit before the police recorded under Section 27 of the Evidence Act and recovery of a bamboo stick at his instance. Similarly, P.Ws.10 and 12 are witnesses to inquest over the dead body of the deceased. P.W.7 is the Medical Officer, who conducted post-mortem over the dead body of the deceased. P.W.13 is the Investigating Officer.

4. The defence plea is one of complete denial and suicidal death of the deceased during their absence in their house.

Defence has examined two witnesses. D.W.1 Ganesh Chandra Dixit, Appellant No.2 himself and D.W.2 is a co-villager of the Appellants.

5. During trial P.Ws.1, 2, 3, 4, 5, 10, 11 and 12 did not support the prosecution case and each of them were cross-examined by the Additional Public Prosecutor under Section 154 of the Evidence Act. In view of such development during trial, learned Additional Sessions Judge held that the principal prosecution witnesses having not supported the prosecution case, the entire case rests squarely on circumstantial evidence. Having held thus, he discussed in great detail, the different circumstances that inculcate the Appellants.

6. From the reading of the impugned judgment it is found that, learned Trial Court has relied on the following circumstances:

(i) Homicidal death of the deceased within the privacy of her matrimonial home.

(ii) Discovery of a bamboo stick at the instance of Appellant No.1-Satya Prakash Dixit on the basis of his

statement before the police recorded under Section 27 of the Evidence Act.

(iii) Photographs taken (not exhibited) by the D.F.S.L. Authority at the time of their crime scene visit and their report (not exhibited) about the existence of furniture in the spot room during their visit discredited the defence plea that there was one stool in the room and another stool Appellant No.1-Satya Prakash Dixit had used to bring the dead body of the deceased hanging from the ceiling fan down.

(iv) Silence of the Appellants regarding cause of the alleged suicide or alleged death of the deceased when there was no marital discord and she (deceased) was to take care of a 3 years old son.

(v) Falsity of the defence plea of alibi.

7. Mr. B.N. Mohapatra, learned counsel for the Appellants at the outset impugned the Trial Court judgment on the ground that, the finding of the learned Trial Court regarding the fact that death of the deceased was a homicidal death is wrong and misconceived. He submits that from the post-mortem report and the surrounding circumstances it is clearly proved that the death of the deceased was a suicidal death. He

relies on different passages of the medical jurisprudence by Modi and an unreported decision of Hon'ble Bombay High Court in Criminal Appeal No.152 of 2015 (*Subhash @ Suraj Ramnaresh Bind vs. State of Maharashtra*) decided on 10.01.2017.

Mr. Zafrulla, learned Additional Standing Counsel, on the other hand, supports the impugned judgment so far as the aforesaid finding is concerned and submits that the opinion of the Medical Officer cannot be lightly brushed aside.

8. We shall prefer to discuss the law on the point. In the Case of *Mafabhai N. Raval v. State of Gujarat, AIR 1992 SC 2186* Hon'ble the Supreme Court has held that, in respect of nature of injuries and causes of death, most competent witness is the doctor examining the deceased and conducting post-mortem. Unless there is something inherently defective, the Court cannot substitute its opinion in place of the doctor.

In the case of *Mohd. Zahid vs. State of Tamil Nadu AIR 1999 SC 2416: (1999) 6 SCC 120* It has been held that, sufficient weightage should be given to the evidence of the doctor who has conducted the post-mortem, as compared to the statements found in the textbooks, but giving weightage does not ipso facto mean that each and

every statement made by a medical witness should be accepted on its face value even when it is self-contradictory.

In the case of *State of Madhya Pradesh vs. Sanjaya Rai* **AIR 2004 SC 2174** Hon'ble the Supreme Court held that, though opinions expressed in textbooks by specialist authors may be of considerable assistance and importance for the court in arriving at the truth, cannot always be treated or viewed to be either conclusive or final as to what such author says to deprive even a court of law to come to an appropriate conclusion of its own on the peculiar facts proved in a given case. Such opinions cannot be elevated to or placed on a higher pedestal than the opinion of an expert examined in court and the weight ordinarily to which it may be entitled to or deserves to be given.

9. From the evidence of the Medical Officer (P.W.7) it is found that, on the date of examination in chief defence declined to cross-examine him which shows that the opinion expressed by him was acceptable to the defence. However, P.W.7 was further cross-examined on recall.

A thorough perusal of the evidence of the Medical Officer (P.W.7) in his examination in chief and in his cross-examination shows that, there exists no contradictory statement in his evidence and he has

stood by his conclusion that, the cause of death of the deceased was owing to asphyxia as a result of ligature strangulation. We therefore, hesitate to take an opinion otherwise and reach a different conclusion on the basis of submission advanced by learned counsel for the Appellants. We are constrained to hold that, death of the deceased was a homicidal death.

10. Coming to the second circumstance it is submitted by Mr. B.N. Mohapatra, learned counsel for the Appellants that, the seizure of the bamboo stick at the instance of the Appellant No.1 cannot be believed in as much as the bamboo stick has not been used for the fatal assault and it was found in the kitchen of the house, which was accessible to all. Mr. Zafrulla, learned Additional Standing Counsel, however, supports the reasoning of learned Trial Court.

11. It is not denied that, when the statement was made Appellant No.1-Satya Prakash Dixit was in the custody of the police and according to the I.O., he made the statement in presence of the witnesses and on the basis of such confessional statement, the bamboo stick (M.O.1) was seized. P.Ws.5 and 6, who are the witnesses to confessional statement of the Appellant No.1-Satya Prakash Dixit and consequent discovery of M.O.1 have not supported the prosecution case.

P.W.13, the Investigating Officer in Paragarph-3 of his examination in chief has testified thus:

“On 27.08.2016 I apprehended accused Satya Prakash Dixit and Ganesh Dixit. During interrogation accused Satya Prakash Dixit confessed his guilt. I recorded his confessional statement under Section 27 of Evidence Act. This is the confessional statement marked as Ext.3/2and the accused lead us to his house for recovery of weapon of offence i.e. one bamboo stick. The bamboo stick was recovered from the house of the accused on his production. I seized the same and prepared the seizure list”.

12. We have seen in numerous cases that Section 27 of the Evidence Act has frequently been misused by the police and Court should be vigilant about the circumvention of its provision. In the present case, admittedly, the bamboo stick is not the weapon to cause the fatal assault. The fatal assault is strangulation by a saree. We fail to understand why a bamboo stick was used to assault first and then the deceased was strangled to death. Obviously any form of attack by a blunt object shall cause the deceased to raise alarm thereby surfacing the hidden design of the assailants and no assailants in ordinary course of events shall follow such a course. We are conscious that, learned Trial Court has relied on some decisions to the effect that, even on the basis of

evidence of the I.O., disclosure statement and consequent seizure can be held to be proved provided it inspires confidence of the Court.

From the sequence of events, the nature of death of the deceased and non-support of independent witnesses to the factum of confessional statement and consequent seizure compel us to disbelieve the evidence of the I.O. (P.W.13) in its entirety so far as this circumstance is concerned.

13. So far as Circumstance No.(iii) supra is concerned, the photographs taken by the D.S.F.L. Authority and the crime scene report prepared by the D.S.F.L. Authority being not matters of record and observation of learned Trial Court during trial only, we decline to comment upon the same and the said circumstance is held to be disproved.

14. Before Circumstance No.(iv), we shall prefer to take Circumstance No.(v) first “the falsity of defence plea of alibi”. In this regard, Paragraphs-158 to 160 of the decision of Hon’ble the Supreme Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116*** lessen our burden to discuss the circumstance at length. Paragraph-158 to 160 of the aforesaid decision reads thus:

“158. It may be necessary here to notice a very forceful argument submitted by the Additional

*Solicitor-General relying on a decision of this Court in **Deonandan Mishra v. State of Bihar**, to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor-General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:*

But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, . . . such absence of explanation or false explanation would itself be an additional link which completes the chain."

159. *It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied :*

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,

(2) the said circumstance points to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

160. *If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in **Shankarlal** case where this Court observed thus:*

Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused.”

From the aforesaid decision, it is clear that, falsity of defence plea can be taken into consideration, if other circumstances proved in the case point unfailingly to the guilt of the accused. Such a view, however, cannot be taken in the present case so far as the guilt of the Appellants is concerned, as found from our discussion supra.

15. Circumstance No. (iv) is silence of the Appellants regarding cause of death (homicidal or suicidal) of the deceased when there was no

marital discord and she should have lived to take care of a three years old son.

Mr. B.N. Mohapatra, learned counsel for the Appellants submits that, the Trial Court has shifted the burden to the Appellant so far as the present circumstance is concerned under Section 106 of the Evidence Act misconceivedly and on the basis of the confessional statement of Appellant No.1 before the police, he has held all the accused persons guilty.

Mr. Zafrulla, learned Additional Standing Counsel, on the other hand, submits that when the death has been caused in the privacy of the matrimonial house and no material is coming out from the Appellants as to how and under what circumstance death of the deceased was caused burden obviously shifts to the inmates of the house to explain the cause of death (suicidal or homicidal) of the deceased.

16. In Paragraph-23 of the judgment, learned Trial Court has held thus:

“ 23. Section 34 I.P.C. is attached, in a case for which it is difficult to distinguish between the acts of individual members of a party who act in furtherance of common intention of all or to prove exactly what part was taken by each of them. Section 34 of I.P.C. lays down the principle of constructive liability which means the meeting

of the mind before the act expecting a particular result. To prove the liability U/S 34 of I.P.C., prosecution has to prove that:

- (a) one criminal act is done by several persons,*
- (b) such act is done in furtherance of common intention of all, and lastly*
- (c) each of such persons is liable for that act in the same manner as if it were done by him along.*

*In the present case the accused persons in furtherance of common intention committed the crime. Without participation of either of them the offence could not be completed. **During commission of the crime one of the accused was holding the legs of accused, one holding the hands and another strangulate the victim.** So as per the provision of law, the accused persons are coming under the ambit of constructive liability and all of them are equally liable.”*

Emphasis added

From the aforesaid finding, we are constrained to hold that without evidence on record, learned Trial Court has based the conviction of three persons on the basis of confessional statement of Appellant No.1-Satya Prakash Dixit.

17. So far as application of Section 106 of the Evidence Act is concerned, Hon’ble the Supreme Court in a recent decision in the case of

Nagendra Sah vs. State of Bihar (2021) 10 SCC 725 from Paragraphs-18 to 21 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 proving 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 **Attygalle 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 commonsense 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.”

20. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the Court can always draw an appropriate inference.

21. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden Under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused.”

18. Further going through the judgment of Hon'ble the Supreme Court in the case of **Nagendra Sah** (supra), we found in that case that the Appellant had committed the offence of uxoricide. She died of alleged burn injuries. Medical Officer on autopsy found that cause of death was "asphyxia due to pressure around neck by hand and blunt substance". The defence plea in the case was one of accidental death of the deceased. In course of scrutiny of evidence Hon'ble the Supreme Court came to finding that there is nothing on record to show that relationship was strained between the Appellant and his wife and some more persons including the parents of the Appellant were staying in the spot house beside the Appellant. With the aforesaid facts in the background and on discussion of the law as settled in the case of **Sharad** (supra) Hon'ble the Supreme Court in Paragraph-17 of the judgment held thus:

"17. In this case, as mentioned above, neither the prosecution witnesses have deposed to that effect nor any other material has been placed on record to show that the relationship between the appellant and the deceased was strained in any manner. Moreover, the appellant was not the only person residing in the house where the incident took place and it is brought on record that the parents of the appellant were also present on the date of the incident in the house. The fact that other members of the family of the appellant were present shows that there could be another

hypothesis which cannot be altogether excluded. Therefore, it can be said that the facts established do not rule out the existence of any other hypothesis. The facts established cannot be said to be consistent only with one hypothesis of the guilt of the appellant.”

19. We have already held and concluded in this case that, the circumstances established by the prosecution has not been proved except the fact that the deceased died a homicidal death in the privacy of her matrimonial home. The death might have been caused conjointly by the Appellants and mother-in-law of the deceased or alone by any one of them. If the death would have been caused conjointly as held by the trial Court on the basis of confessional statement of Appellant No.1 recorded under Section 27 of the Evidence Act, there would have been marks of ecchymosis or bruises on both the hands and legs of the deceased as the assailants would have applied sufficient force and pressure to pin the deceased down to the ground. There is however no such evidence by the Doctor (P.W.7). It is therefore doubtful whether the death of the deceased was caused by one person or more than one person. There is scope for alternative hypothesis in this case also which points towards the innocence of the Appellants.

20. Therefore, the question that survives for consideration is whether only on the basis of opinion of the Medical Officer (P.W.7),

who conducted the autopsy over the dead body of the deceased regarding the cause of death, can be held to be sufficient to hold the Appellants guilty. We are of the merited view that, only on the basis of post-mortem report and the opinion of the doctor when other circumstances are held to be disproved the Appellants cannot be convicted for the offence punishable under Sections 302/34 IPC (*See Balaji Gunthu Dhule vs. State of Maharashtra (2012) 11 SCC 685 and AIR (2013) SC 264*).

21. In the result, the conviction of the Appellants under Section 302/34 IPC by the learned Additional Sessions Judge, Rairangpur in S.T. No.19 of 2017 and consequent sentence recorded thereunder are set aside. The appeal is allowed. Each of the Appellants be released forthwith, if their detention is not required in any other case.

.....
(C.R. Dash, J.)

M.S. Sahoo, J. I agree.

.....
(M.S. Sahoo, J.)

Orissa High Court, Cuttack.
The 27th day of April, 2022.
L. Murmu, Senior Stenographer