

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 189 of 2020

Gobinda Bayen

Vs.

The State of West Bengal

For the Appellant : Mr. Kallol Mondal, Adv.
 Mr. Krishan Ray, Adv.
 Mr. Souvik Das, Adv.
 Mr. Anamitra Banerjee, Adv.
 Mr. Samsher Ansari, Adv.

For the State : Mr. Swapan Banerjee, Adv.
 Mr. Suman De, Adv.

Hearing Concluded on : January 10, 2023
 Judgement on : January 19, 2023

DEBANGSU BASAK, J.:-

1. Appellant assailed the judgement and order of conviction dated March 5, 2020 passed by the learned Additional District and Session Judge, 3rd Court, Tamluk in Sessions Trial No. 01 (04) 2018.

2. By the impugned judgement of conviction and the order of sentence dated March 5, 2020, the appellant was convicted under Section 302 of the Indian Penal Code, 1860 and was sentenced to suffer rigorous imprisonment for life

and to pay a fine of Rs. 20,000 and in default to suffer rigorous imprisonment for one year.

3. At the trial, the case of the prosecution was that, the appellant took the victim, who was his son from the house at about 5.30 A.M on December 20, 2017 and threw the victim into the water of the nearby canal thereby committing the murder of such victim.

4. In order to bring home such a charge, the prosecution examined 15 witnesses. The prosecution relied upon 11 documents which were marked as Exhibits 1 to 11. The statement of the appellant recorded under Section 161 of the Criminal Procedure Code was marked as Exhibit A series. Various Material Exhibits were tendered in evidence and marked as Material Exhibit I and II.

5. On conclusion of the evidence of the prosecution, the appellant was examined under Section 313 of the Criminal Procedure Code where he claimed to be innocent and falsely implicated. He declined to adduce any defence witness.

6. Learned advocate appearing for the appellant contended that, the prosecution did not produce any witness claiming to be an eye witness to the incident. He drew the attention of the Court to the evidence on Record. He

submitted that, there were embellishments and contradictions in the evidence led at the trial.

7. Learned advocate appearing for the appellant submitted that, the provisions of Section 106 of the Evidence Act were not attracted in the facts and circumstances of the present case since the ingredients necessary to attract the same were absent. In support of such contention, he relied upon **2021 Volume 10 Supreme Court Cases 725 (Nagendra Sah Vs. State of Bihar).**

8. Referring to the evidence which were produced at the trial, learned advocate appearing for the appellant submitted that, there was enmity between the family of the appellant and his brothers. The death of the victim could be a result of such enmity. The prosecution did not explore such possibility during the investigations.

9. Learned advocate appearing for the appellant drew the attention of the Court to the provisions of Section 162 (2) of the Criminal Procedure Code. He submitted that, in view of such provisions the statement of the appellant recorded under Section 161 of the Criminal Procedure Code which was subsequently marked as Exhibit A series at the trial could not be marked as an Exhibit. Such statements could not be

admitted into evidence. He drew the attention of the Court to the Section 25 of the Evidence Act in this regard.

10. In support of the contention that, statement of the appellant recorded under Section 161 of the Criminal Procedure code, could not be marked as an Exhibit by the Trial Judge, learned advocate appearing for the appellant relied upon ***All India Reporter 1941 Privy Council Page 16 (Maharaja Sris Chandra Nandy & Anr. Vs. Rakhalananda Thakur (Deceased) and Ors.), 1972 Volume 4 Supreme Court Cases 562 (Sait Tarajee Khimchand And Others Vs. Yelamarti Satyam alias Satteyya And Others), 1980 Volume 2 Supreme Court Cases 390 (Hazari Lal Vs. State (Delhi Administration)), 2004 SCC Online Cal 834 (Sudhir Bhuiya Vs. National Insurance Company Ltd. & Anr.), 2010 Volume 4 Supreme Court Cases 491 (Life Insurance Corporation of India And Another Vs. Ram Pal Singh Bisen), 2015 Volume 9 Supreme Court Cases 588 (V. K. Mishra And Another Vs. State of Uttarakhand And Another) and 2020 Volume 4 Supreme Court Cases 33 (Parvat Singh And Others Vs. State of Madhya Pradesh).***

11. In the facts and circumstances of the present case, learned advocate appearing for the appellant submitted that

the prosecution failed to establish the charges against the appellant beyond reasonable doubt. Consequently, the appellant should be acquitted.

12. Learned advocate appearing for the State submitted that the prosecution was able to establish the charge beyond reasonable doubt. The victim was only 45 days when he died. He referred to the Post Mortem Report and submitted that, the death of the victim was due to effects of drowning ante mortem in nature. He referred to the Inquest Report and submitted that, the dead body of the victim was seen lying on the lap of the appellant on the slab of the canal.

13. Referring to the enmity between the appellant and his family members learned advocate appearing for the State submitted that, the same was not established at the trial. No documentary evidence was led with regard thereto. The sister-in-law of the appellant, against whose family, the allegation of enmity was made, was declared hostile by the prosecution.

14. Learned advocate appearing for the State submitted that, the victim was sleeping with the appellant immediately prior to the incident. They were in the same room. They went to sleep in the same room on December 19, 2017. The victim was found dead on December 20, 2017 in the early hours of

the morning. The appellant as the father of the victim did not report the victim as a missing child to any person. The brother of the victim, PW 4, confirmed the presence of the appellant in the room on the date of the incident. The appellant did not go to the spot of recovery, alone. Therefore, the death of the victim was within the special knowledge of the appellant. The appellant failed to explain how the victim went missing from the room and his dead body was recovered from the canal.

15. In such circumstances, he submitted that, the guilt of the appellant was established. The learned Trial Judge correctly convicted the appellant and imposed the sentence of life imprisonment.

16. The mother of the victim lodged a written complaint dated December 21, 2017 with the police. Such written complaint was treated as First Information Report by the police. The police conducted the investigation and submitted a charge sheet. The Trial Court framed charge under Section 302 on April 25, 2018 against the appellant. At the trial, 15 prosecution witnesses were examined.

17. The mother of the victim deposed as PW 1. The mother of the victim stated that, she was illiterate, although she can sign. She was married with the appellant according to the

Hindu Marriage Act. She was the second wife of the appellant. She stated that, there were two sons with the elder one being aged about 12 years and the other being the victim who died at the age of 45 days.

18. With regard to the incident, she stated that, at 5 A.M, the victim was lying with her. Her elder son was lying with the appellant on the floor of the room. The appellant went to the bath room and after 5 to 7 minutes she also went to the bathroom leaving the youngest son on the bed. After coming from the bathroom she saw her husband was wearing dress in another room. After she entered the room where her sons were sleeping, she did not find the victim. She started crying and searching. The elder son woke up hearing the noise. Many people gathered hearing her noise. She was informed by the public that a baby was found in the water of the canal which was 15 minutes away from her house. She rushed to the spot and saw the public pulling out the victim from canal. Seeing the victim she became senseless. After regaining her senses she came back to the house with the help of the public.

19. A number of questions were put to by the Court to her. In answer to such queries of the Court, PW 1 stated that, she was staying in her father's house when she came to depose at

the trial. She was feeling uneasy in staying at her father's house. She was near about begging. She would be happy if the appellant, her husband was released and she was dependent upon her husband. She stated that there was no allegation against the appellant from her. She stated that she could never complain against her husband. She also claimed that her husband could not do any offence like the one he was accused of. She felt sorrow for the death of her son, she wanted to know the truth about who killed her son and how he was killed.

20. PW 1 introduced the claim of enmity between her family and the family of the cousin brother of the appellant. She claimed that her cousin brother-in-law family became jealous when she and the appellant constructed a house on the land. She claimed that there was a Civil Case filed by the cousin brother-in-law against them.

21. PW 1 was declared hostile and cross-examined by the prosecution. In such cross-examination by the prosecution, she denied telling the police about an abortion she underwent or the demand of the appellant of Rs. 50,000 for looking after the victim. She denied telling the police that the appellant suspected her when she became pregnant for the second time.

She denied telling the police that on the date of the incident, she woke up at 5 A.M hearing the cry of the victim and saw the appellant to be going out with the victim. She rushed behind the appellant when the appellant told her to stay. She denied telling the police that she failed to run and keep up with the appellant and that the appellant went away. She denied telling the police that she saw her husband returning from the garden behind the house without the baby. She denied telling the police that she asked her husband about the baby when her husband stated that he did not know.

22. The learned Trial Judge recorded in the deposition that, PW 1 started weeping on the dock during the time of cross-examination by the prosecution after PW 1 was declared as hostile. She identified the appellant in Court.

23. The Court put further questions to PW 1. In reply to such queries, PW 1 stated that, she did not know that one required to obtain a death certificate when a person dies. She did not inform the police when the victim was missing. Her husband, the appellant herein also did not inform the police regarding the missing baby. She and her husband did not file any First Information Report against any person when they

saw the dead body of the victim. They did not obtain the death certificate of the victim.

24. The maternal grandfather of the victim deposed as PW 2. He stated that he was present when the appellant was showing the police reconstruction of the offence in front of the camera. He claimed that there was enmity between the appellant and his relatives regarding land.

25. The Court put various questions to PW 2. In reply to such queries, PW 2 stated that, he received news of the incident from a neighbour at about 8 A.M. He enquired about the baby and was told that the baby was found dead. He went to the house of PW 1 and in the evening after sometime, police took him to the police station and asked him whether they will take the dead body of the victim. He refused to do that. He did not see PW 1 and the appellant. Police returned him with their vehicle near his daughter's house. On the next day, his daughter came to his house with her elder son crying. He did not meet the appellant after the incident. He came to know from his daughter that the police arrested the appellant. He did not do anything for the appellant. He did not meet the appellant after that.

26. In cross-examination PW 2 stated that, he and his wife came to the police station. His wife also signed the papers. His daughter arranged the Sradh ceremony of the victim on the fourth day after his death.

27. The maternal grandmother of the victim deposed as PW 3. She stated that, the in-laws of the mother of the victim were living separately. The appellant was previously married and that there was one son who was about 12 years old of the first wedlock. The first wife of the appellant died. Thereafter, the second marriage of the appellant was arranged. Her daughter, the wife of the appellant was dependent upon the appellant. She identified the appellant in court. She identified her signature in the seizure list. She stated that, the place where the body of the victim was found was at five minutes walking distance from the house of her daughter. The body of the victim was found near about 10 AM in the morning. She stated that, the police took away her daughter and the appellant. Police asked them to take the body of the victim. However, they did not take the body of the victim. She was declared hostile by the prosecution. On cross examination by the prosecution, she denied the suggestion that she told the police that on December 24, 2017, at noon, the police took the

appellant to his house where the appellant showed how the appellant took away the baby on December 20, 2017 and threw the baby in the canal. She denied the suggestion that she was deposing falsely to save the appellant as he was her son-in-law. In cross-examination by the defence, she stated that, she did not know anything about the contents of the paper which she signed.

28. The first son of the appellant deposed as PW 4. He was about 12 years old when he deposed. The learned trial judge initially examined him and found that PW 4 was of sufficient maturity to give rational answers and therefore, held that, he could be examined. In examination in chief, he stated that the incident took place at dawn. After dinner he went to sleep. He and the appellant were sleeping on the floor while his mother, PW 1 and his youngest brother, the victim, on the cot, at the same room. The appellant used to sell juice of sugarcane. The appellant used to go for his job at dawn. When he woke up, he saw the appellant and PW 1 were crying and his brother dead. He did not know how his brother died. He could not identify the garments of the appellant. After the garments were shown to him, he stated that, they were not of the appellant. In reply to a question put by the court, he stated that, he did not know

what happened with the dead body of his brother after police took the body on that date. Cross-examination on behalf of the defence was declined.

29. The sister-in-law of PW 1 deposed as PW 5. She stated that, the family of the appellant consisted of the appellant, PW 1, and three sons. The youngest of the three sons died. On the fateful day, she was sleeping in her house. She heard a hue and cry at dawn. She came out of the house and saw the parents to be crying. Her parents told her that the youngest son of the appellant and PW 1 was dead and that his body was found in the canal. Police came afterwards and took away the appellant, PW 1 and her. They also took the dead body of the victim. Police left her afterwards. Police did not interrogate her. She identified the appellant in court. She was declared hostile by the prosecution. On cross examination by the prosecution, she stated that she met the police on December 21, 2017. She denied making any statement to the police on December 20, 2017. She denied that, PW 1 did not tell her that the appellant took away the baby and went away from the house. She also denied that, PW 1 told her that, PW 1 rushed against the appellant and tried to catch him. PW 1 failed to catch the appellant and returned home and informed the

second son and her regarding such fact. She denied telling the police that appellant took the baby and threw away the baby in the canal to kill him. She denied the suggestion that she was deposing falsely on the request of the appellant in order to protect him. In cross-examination, she stated that, appellant used to love the victim. She did not see any dispute regarding the victim between appellant and PW 1.

30. A neighbour deposed as PW 6. He did not add any value to the case of either the prosecution or the defence.

31. A police personnel who went to collect the viscera and the post-mortem blood of the victim deposed as PW 7. He stated that, he collected such articles and gave it to the sub-inspector of police. He identified his signature on the seizure list dated January 13, 2018. In cross-examination, he stated that, when he saw the dead body of the victim, there was blood on his mouth.

32. The doctor who conducted the post-mortem on the victim deposed as PW 8. He described the distinctive features that he found on the dead body. He stated that, in his opinion the death was due to the effects of drowning. He tendered the post-mortem report which was marked as exhibit 4. In answer to questions put by the court, he stated that, the victim died

due to drowning. Before drowning he was alive. In cross-examination, he stated that he could not tell whether the family members of the victim were present at the time of post-mortem or not.

33. The scribe of the written complaint, deposed as PW 9. He stated that, he wrote the complaint according to the dictation and instruction of PW 2. He read over and explained the contents of the written complaint to PW 2. PW 2 signed the written complaint in his presence. He also signed the written complaint as the scribe. He identified his signature. He stated that he did not make any personal interference while writing the written complaint. In reply to the queries of the court, he stated that, PW 2 and his wife and son came to the court premises and told him to write the written complaint as his daughter was under the custody of the police and that she would be released after filing the written complaint. He told the fact of the written complaint without any influence on his own. In cross-examination, he stated that, the appellant was the son-in-law of PW 2.

34. A neighbour of the appellant deposed as PW 10. He stated that, the canal was about 200 hands away from the residence of the appellant. He saw the appellant with the dead

body of the victim on his lap by the side of the canal. Cross-examination by the defence was declined.

35. Another neighbour of the appellant deposed as PW 11. He identified the appellant in court. He stated that, there were 2 wives of the appellant. The first wife of the appellant was dead. There was one son out of the first marriage. There were 2 sons out of the second marriage. The appellant used to sell sugarcane juice. He deposed as to the incident on the basis of hearsay. Cross-examination was declined.

36. Another neighbour of the appellant deposed as PW 12. He identified the appellant in court. Again, his deposition was based on hearsay.

37. The police personnel who took the photographs deposed as PW 13. He stated that, on December 24, 2017, he was posted at the photography cell in the office of the Superintendent of Police, Purba Mednipur. He stated that, he took the video photography of the reconstruction of the crime and prepared a DVD and handed over the same on January 29, 2018 to the investigating officer. He identified his signature on the seizure list dated January 29, 2018. The DVD prepared by him was tendered in evidence and marked as Material Exhibit I. In reply to a query of the court, he stated

that, the appellant put a doll on the bed and took the doll and went through the road and threw the doll into the canal and went away. In cross-examination, he stated that, when he went to take the video photography PW 1 was at home and was crying.

38. The police personnel who signed the seizure list on January 29, 2018 deposed as PW 14. He identified his signature on the seizure list.

39. The investigating officer deposed as PW 15. He narrated about the course of investigation. He spoke about the written complaint which was treated as a formal First Information Report. The formal First Information Report was tendered in evidence and marked as Exhibit 6. He prepared the rough sketch map with index. The rough sketch map and index were tendered in evidence and marked as Exhibit 7. The photograph of the baby was marked as Exhibit 8. He collected the garments of the appellant and prepared a seizure list dated December 24, 2017 which was marked as Exhibit 2. He spoke about going to the second place of occurrence and preparing the sketch map and index which was tendered in evidence and marked as Exhibit 9. He spoke about collection of the post-mortem report and the post-mortem blood. He held

the inquest of the victim on December 20, 2017. The inquest report was tendered in evidence and marked as Exhibit 11. He stated that, PW 1 told him that, when PW 1 became pregnant for the second time, the appellant told her to abort the baby and claimed Rs. 50,000 to maintain the baby. She told him that, the appellant suspected that her 2nd pregnancy was due to some other person. PW 1 told him that on that date at about 5 AM, hearing the cry of her younger son, she woke up and saw that her husband was going out of the room with the baby. She rushed behind him and told him to stop. After some time, she failed to follow him. She told him that, she saw the appellant returning from the garden behind their house. After much searching, she saw the dead body of the victim to be floating in the canal.

40. PW 15 stated that, PW 2 filed the written complaint. PW 2 told him that, appellant used to torture PW 1 and told PW 2 to give the appellant money. He also said that, appellant did not want the baby and claimed Rs. 50,000 from PW 2 to rear the baby. PW 2 told him that, on December 20, 2017, appellant strangled the baby and threw the baby in the canal at about 5:30 AM when PW 1 was sleeping.

41. PW 15 stated that, PW 3 told him that on December 24, 2017 at noon, the police took the appellant to his house and the appellant showed how the appellant took away the baby on December 20, 2017 and threw away the baby in the canal. At that time, the appellant was wearing a pink coloured strip shirt and brown coloured full pant and blue muffler. He gave that to the police and police seized that. PW 3 signed such seizure list.

42. PW 15 stated that, PW 5 told him that on December 20, 2017 at the morning, she heard the shouting of PW 1 and woke up. PW 1 told PW 5 that the appellant took away the baby and went away from the house. PW 5 told him that, appellant strangulated the baby and threw him in the canal for killing him.

43. Questions were put by the court to PW 15 in 2 tranches. In the 1st tranche, in reply to the queries of the court, PW 15 stated that, no family member of the baby came to collect the body of the baby so he returned the baby to the hospital for proper disposal according to rule. He tendered the letter with regard to the disposal of the dead body of the victim which was marked as Exhibit 10. In reply to the 2nd tranche of queries of the court, PW 15 stated that, at the 2nd place of

occurrence by the side of the canal, he saw the bush of “chor Kanta”. PW 15 did not seize the death certificate of the victim. He did not seize the death certificate from any of the relatives of the victim. The relatives of the victim did not give him the death certificate of the victim. He stated that he knew that the dead body of the victim was not taken away from the morgue by his family members. Appellant and PW 1 did not file any First Information Report regarding the death of the victim. At the time of the inquest, he saw blood and abrasion on 2 sides of the lip of the victim. He saw bloodstain on the left-hand of the shirt of the appellant which he seized. He did not receive the forensic science laboratory report. The post-mortem blood and the garments were sent to the forensic science laboratory.

44. In cross-examination, PW 15 stated that, appellant claimed that he kept his garments at his house. The appellant did not utter that his garments were at his house and that he can show the garments to PW 15. He stated that, he did not take the signature of the appellant in the statements. However, the statements of the accused were marked as Exhibit ‘A’ series during the cross-examination of PW 15. The cross-examination of PW 15 was deferred and resumed on the

next date. PW 15 denied the suggestions put to him in cross-examination.

45. The appellant was examined under Section 313 of the Criminal Procedure Code where he denied any involvement, claimed to be innocent and falsely implicated.

46. The victim was found dead on December 20, 2017. The time of the discovery of the dead body of the victim vacillates between 8 AM as stated by PW 2 being the time when he was told by his neighbour as to the incident and 10 AM as claimed by PW 3. The post-mortem report of the victim being exhibit 4 and the testimony of the post-mortem doctor being PW 8 established that, the death of the victim was due to the effects of drowning, ante-mortem in nature. The victim died due to drowning. Before drowning he was alive. The victim was aged 45 days. The victim went to sleep with his parents on December 19, 2017. PW 1 was the mother of the victim. The appellant was the father of the victim. PW 1 and the appellant were poor. PW 1 was dependent upon the appellant for her survival. PW 1 was residing with the parents subsequent to the arrest of the appellant. These facts were proved at the trial.

47. The prosecution did not produce any eyewitnesses at the trial. The prosecution relied upon circumstantial evidence and the failure of the appellant to discharge his onus under Section 106 of the Evidence Act to bring home the guilt of the appellant.

48. It is trite law that, the circumstances from which the conclusion of guilt was to be drawn should be fully established. The facts established at the trial should be consistent only with the hypothesis of the guilt of the accused and none else. The circumstances should exclude every possible hypothesis except the one to be proved and there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the acts were done by the accused.

49. In the facts and circumstances of the present case, it was established beyond reasonable doubt that, the victim went to sleep with PW 1 and the appellant in the same room on December 19, 2017. The victim was found dead on December 19, 2017 from a canal. The cause of death was established to be drowning.

50. According to the prosecution, the victim was last seen together with the appellant on the night of December 19, 2017 and on the morning of December 20, 2017 before the victim being found dead. Therefore, according to the prosecution, the burden of proof was on the appellant to explain the death of the victim in view of the provisions of Section 106 of the Evidence Act.

51. Both PW 1 who was the mother of the victim and the appellant who was the father of the victim acknowledged at the trial that, the victim went to sleep with them on December 19, 2017. The victim was with them on the morning of December 20, 2017. PW 1 and the appellant claimed at the trial that, the appellant went to the bathroom first and thereafter PW 1 went to the bathroom. According to PW 1, the appellant returned from the bathroom and went to the other room to change his dress. When PW 1 returned from the bathroom to the room where the victim was sleeping, she did not find the victim when she raised a hue and cry. Therefore, in the morning of December 20, 2017, till such time, the appellant left for the bathroom, he was with the victim. Even going by the statement of PW 1, the appellant returned to the

other room prior in point of time than PW 1. Both the rooms were adjacent to each other.

52. PW 1 did not specify the time she spent at the bathroom. She did not say about the time gap between the time she saw her husband to come out of the bathroom and the time when she saw her husband in the next room.

53. In his examination under Section 313 of the Criminal Procedure Code, the appellant stated that, he went to the bathroom outside the house. After him, PW 1 went to the bathroom. He stood in front of the bathroom and after that, he came to the house. He was wearing his garments for going to his business when PW 1 entered the other room and on seeing the baby not to be there started crying.

54. The canal from where the dead body of the victim was recovered was at a distance of 15 minutes' walk from the bedroom of the victim according to PW 1 and 5 minutes walking distance according to PW 2 and 3. PW 10 described the canal to be 200 hands away from the residence of the appellant. Therefore, the time spent by PW 1 in the bathroom was crucial to evaluate the defence of alibi set up by the appellant. Essentially, the appellant was banking upon the testimony of PW 1 to buttress his defence of alibi. According to

the appellant, he was not at the place of occurrence at the relevant point of time. He was with the victim when he left for the bathroom. Since the appellant after his visit to the bathroom went into the other room, he was not aware that the victim was missing. It was only on PW 1 raising a hue and cry that he became aware of the victim being missing.

55. The testimony of PW 1 with regard to the conduct of the appellant in the morning is unreliable. There was time gap between the time when she went to the bathroom and the return of the appellant from the bathroom which remained unexplained. It was admitted by her that she was dependent upon the appellant for her livelihood. She stated in evidence that, she would not say anything as against the appellant. She would not make any allegation against the appellant. This stand of hers does not inspire confidence when she described the conduct of the appellant in the morning of May 20, 2017. She claimed that the appellant could not commit the offence that he was charged with. She stated that, she felt sorrow for the death of the victim and that she wanted to know the truth about the death of the victim.

56. Significantly, neither PW 1 nor the appellant lodged any complaint with the police regarding the death of the

victim. The appellant in his cross-examination under Section 313 of the Criminal Procedure Code stated that, he did not file any complaint against any person. He was arrested and so he did not take the body of the victim after the post mortem.

57. It was contended on behalf of the appellant that, Section 106 of the Evidence Act was not attracted in the facts and circumstances of the present case. In **Nagendra Sah (supra)**, the Supreme Court held as follows :-

“20. 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.”

21. 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 *Shambu Nath Mehra v. State of Ajmer* [*Shambu Nath Mehra v. State of Ajmer*, 1956 SCR 199 : AIR 1956 SC 404 : 1956 Cri LJ 794] which has stood the test of time. The relevant part of the said decision reads thus : (AIR p. 406, paras 10-13)

“10. Section 106 is an exception to Section 101. Section 101 lays down the general rule about the burden of proof.

‘101. 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) to Section 106 of the Evidence Act says—

‘(a) 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’.

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 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. R.* [*Attygalle v. R.*, 1936 SCC OnLine PC 20] and *Seneviratne v. R.* [*Seneviratne v. R.*, 1936 SCC OnLine PC 57 : (1936) 3 All ER 36, 49]

12. 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.

13. 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.”

(emphasis supplied)

22. 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.

23. 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.”

58. In the facts and circumstance of the present case, the appellant and the victim were last seen together. With the prosecution establishing that the appellant was last seen together with the victim, a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the appellant. It was for the appellant as the father of the victim to explain the death of the victim by drowning and the recovery of the dead body of the victim from a canal which was about 5 minutes’ walking distance from the room where the victim was sleeping. The victim was 45 days age. It was inconceivable that the victim moved himself from his bed to the canal and accidentally drowned himself, given his age. As a parent of the victim, more so, when the appellant was last seen together with the victim, the provisions of Section 106 of the Evidence Act squarely stood attracted and the appellant was required to explain the death of the victim.

59. In the facts and circumstances of the present case, the appellant failed to discharge the burden of proof in establishing his non-involvement in the death of the victim. As noted in ***Nagendra Sah (supra)***, the failure of the appellant

in discharging the burden placed on him by virtue of Section 106 of the Evidence Act, provided an additional link to the chain of circumstances.

60. Learned Trial Judge relied upon Exhibit 'A' series as one of the grounds to hold the appellant guilty. Exhibit 'A' series were the statements of the appellant recorded under Section 161 of the Criminal Procedure Code.

61. In ***Maharaja Sris Chandra Nandy & Anr. (supra)***, the Privy Council held as follows :-

“Once a statute is passed which purports to contain the whole law, it is imperative. It is not open to any Judge to exercise a dispensing power, and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue. The rules of evidence, whether contained in a statute or not, are the result of long experience choosing no doubt to confine evidence to particular forms, and therefore, eliminating others which it is conceivable might assist in arriving at truth. But that which has been eliminated has been considered to be of such doubtful value as on the whole to be more likely to disguise truth than discover it. It is therefore discarded for all purposes and in all circumstances. To allow a Judge to introduce it at his own discretion would be to destroy the whole object of the general rule.”

62. In ***Sait Tarajee Khimchand And Others (supra)***, the Supreme Court dealt with a Civil Suit for recovery of money on

the basis of a mortgage bond. In the facts of that case, the plaintiffs sought to rely upon the day book and the ledger which were marked as Exhibits at the trial. The Supreme Court held that, mere marking of an Exhibit does not dispense with the proof of the document. In the facts and circumstances of that case, it was found that, the contents of such exhibits were not proved.

63. Hazari Lal (*supra*) dealt with Section 161 and 162 of the Criminal Procedure Code and Section 145 of the Evidence Act. It held as follows :-

“8. The learned counsel was right in his submission about the free use made by the courts below of statements of witnesses recorded during the course of investigation. Section 162 of the Code of Criminal Procedure imposes a bar on the use of any statement made by any person to a Police Officer in the course of investigation at any enquiry or trial in respect of any offence under investigation at the time when such statement was made, except for the purpose of contradicting the witness in the manner provided by Section 145 of the Indian Evidence Act. Where any part of such statement is so used, any part thereof may also be used in the re-examination of the witness for the limited purpose of explaining any matter referred to in his cross-examination. The only other exception to this embargo on the use of statements made in the course of an investigation relates to the statements falling within the provisions of Section 32(1) of the Indian Evidence Act or

permitted to be proved under Section 27 of the Indian Evidence Act. Section 145 of the Evidence Act provides that a witness may be cross-examined as to previous statements made by him in writing and reduced into writing and relevant to matters in question, without such writing being shown to him or being proved but, that if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.....”

64. In ***Sudhir Bhuiya (supra)***, the Court dealt with proceedings under the Motor Vehicles Act, 1988. It held that, although the technicalities of the Evidence Act would not stand in the way of a tribunal in giving appropriate relief to the litigant but, the tribunal should be guided by the basic principles of natural justice. The principle of exclusion of hearsay evidence as provided in the Evidence Act, was however not a technical rule but based on the principle that the evidence must be direct and that the person whose version would form part of the evidence was cross-examined by the party against whom such evidence would be used.

65. In ***Life Insurance Corporation of India and Another (supra)*** certain documents were marked as Exhibits. In the facts of that case, it was found that, the records did not reveal that any notice of admission of the case or notice to admit the

documents was served upon the opposite party. Moreover, it was held that, mere filing or exhibiting a document in the Court did not amount to proof of its contents. Admission of a document in Court may amount to admission of its contents but not their truth. In any event, the documents which were not produced and marked as required under Evidence Act, cannot be relied upon by a Court.

66. Dealing with the statements recorded under Section 161 of the Criminal Procedure Code, the Supreme Court in **V.K. Mishra and Another (supra)** held as follows :-

“17. The court cannot suo motu make use of statements to police not proved and ask questions with reference to them which are inconsistent with the testimony of the witness in the court. The words in Section 162 CrPC “if duly proved” clearly show that the record of the statement of witnesses cannot be admitted in evidence straightaway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer. The statement before the investigating officer can be used for contradiction but only after strict compliance with Section 145 of the Evidence Act that is by drawing attention to the parts intended for contradiction.

18. Section 145 of the Evidence Act reads as under:

“145. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.”

19. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness

having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo motu make use of statements to police not proved in compliance with Section 145 of the Evidence Act that is, by drawing attention to the parts intended for contradiction.”

67. In ***Parvat Singh And Others (supra)***, the Supreme Court reiterated that, the settled proposition of law is that a statement recorded under Section 161 of the Criminal Procedure Code was inadmissible in evidence and could not be relied upon or used to convict the accused. The statement recorded under Section 161 of the Criminal Procedure Code however could be used only to prove the contradictions and/or omissions.

68. As noted above one of the planks on which, the learned Trial Judge found the appellant to be guilty was the confessional statements recorded under Section 161 of the Criminal Procedure Code and marked as Exhibit ‘A’ Series. Exhibit ‘A’ series could not be marked as an exhibit in view of the fact that that, procedure enunciated in ***V.K. Mishra and Another (supra)*** was not followed. The records of the present case do not establish that such a procedure was adopted.

69. However, as noted above, the appellant was last seen together with the victim. The appellant failed to explain the death of the victim and the recovery of the dead body of the victim from a canal which was about 5 minutes walking distance from the place where, the victim was sleeping with the appellant.

70. The appellant claimed at the trial that, there were a number of enemies of him. The claim was made by the appellant in his examination under Section 313 of the Criminal Procedure Code. He also claimed that he entered into an altercation with his paternal cousin brother and that such brother filed a criminal case against him regarding the construction of the house. Such brother used to threaten him regarding his sons.

71. PW 1 in her evidence claimed that her cousin brother in-laws became jealous when PW 1 and the appellant constructed a house. They became their enemies. They filed a civil case against PW 1 and the appellant.

72. No document relating to the criminal case or the civil case spoken of by the appellant or the PW 1 respectively was produced at the trial. The particulars of such cases were not provided at the trial. The wife of one of the cousin brothers of

the appellant deposed as PW 5. She was declared hostile by the prosecution. She was cross-examined by the defence when, nothing transpired about the civil or criminal case.

73. There was no material on record to accept the contention of enmity causing the death of the victim.

74. In the facts and circumstances of the present case, prosecution was able to establish a chain of circumstances as not to leave any reasonable ground for the conclusion consistent with the innocence of the appellant. The evidence establish that in all human probability the acts were done by the appellant.

75. Consequently, we uphold the conviction of the appellant under Section 302 of the Indian Penal Code, 1860 and uphold the impugned order of sentence passed by the learned Trial Judge.

76. The period of detention undergone by the convict during investigation, enquiry or trial be set off under Section 428 of the Criminal Procedure Code.

77. CRA 189 of 2020 is disposed of accordingly.

78. Trial Court records along with a copy of this judgement and order be sent down at once to the appropriate Court for necessary action.

79. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

[DEBANGSU BASAK, J.]

80. I agree.

[MD. SHABBAR RASHIDI, J]