

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE: -

The Hon'ble Justice Soumen Sen
And
The Hon'ble Justice Uday Kumar

CRA 623 of 2017

Jadav Sarkar

Vs.

State of West Bengal

For the Petitioner : Mr. Swapan Kumar Mallick, Adv.
Ms. Sudeshna Das, Adv.

For the State : Mr. Madhusudan Sur, APP,
Mr. Dipankar Pramanick, Adv.

Hearing concluded on : 26th June, 2024

Judgment on : 2nd July, 2024

Soumen Sen, J.:

1. The appeal is arising out of a judgement of conviction awarded under Section 302/201 IPC.

2. The appellant is the husband of the deceased. On the basis of a complaint lodged by Shri Susanta Majumdar (PW1) the brother of Kalpana Sarkar (since deceased) disclosing that his sister was physically and mentally tortured by her husband Yadav Sarkar and ultimately on 22nd May, 2007 in the night he was informed by Yadav at about 11.00 p.m that his sister Kalpana was not traceable. He immediately rushed to S.S Chemical factory where Yadav was residing with his family but could not immediately

trace out her sister. It was reported by Yadav that Kalpana had gone out of the room at 10.15 p.m. to attend nature's call and since then she is untraceable.

3. In the next morning at about 11.00 a.m. dead body of Kalpana was recovered with the help of a fish net from the nearby pond. Susanta alleged that after killing her sister she was thrown into the pond by Yadav as he had an illicit relation with a lady residing at Tinbathimore. This complaint was lodged on 22nd July, 2005 at 13.25 hrs. On the basis of such complaint the investigating officer initiated investigation and examined the witnesses and recorded their statement under Section 161 Cr.P.C. The inquest of the dead body was held and the body was sent to post mortem examination. The IO collected the P.M report and other connected documents and send the visera for the forensic examination. On completion of investigation, the charge-sheet was submitted against the accused under Section 498A/302/201 IPC.

4. After completion of the prosecution and defence witness, the accused appellant was examined under Section 313 in which he had pleaded his innocence.

5. Undoubtedly, the case is based on circumstantial evidence. The law with regard to conviction on the basis of circumstantial evidence has been lucidly explained in ***Sharad Birdhichand Sarda v. State of Maharashtra***¹, wherein it has been held as under:

“152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and

¹ (1984) 4 SCC 116 : 1984 INSC 121

essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh (1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra (1972) 4 SCC 625 : AIR 1972 SC 656. It may be useful to extract what Mahajan, J. has laid down in Hanumant case: (1952) 2 SCC 71: AIR 1952 SC 343: 1952 SCR 1091: 1953 Cri LJ 129:

‘12. 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.’

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an Accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793 : 1973 SCC (Cri) 1033: 1973 CrL LJ 1783] where the observations were made:

‘19.....Certainly, it is a primary principle that the Accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.’

(2) the facts so established should be consistent only with the hypothesis of the guilt of the Accused, that is to say, they should not be explainable on any other hypothesis except that the Accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) 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 act must have been done by the Accused.

*154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.”
(emphasis in original)*

6. In ***Musheer Khan @ Badshah Khan & Anr. Vs State of Madhya Pradesh***,² the nature of circumstantial evidence and the burden of proof of prosecution have been stated as under:

“39. In a case of circumstantial evidence, one must look for complete chain of circumstances and not on snapped and scattered links which do not make a complete sequence. This Court finds that this case is entirely based on circumstantial evidence. While appreciating circumstantial evidence, the Court must adopt a cautious approach as circumstantial evidence is "inferential evidence" and proof in such a case is derivable by inference from circumstances.

40. Chief Justice Fletcher Moulton once observed that "proof does not mean rigid mathematical" formula since "that is impossible". However, proof must mean such evidence as would induce a reasonable man to come to a definite conclusion. Circumstantial evidence, on the other hand, has been compared by Lord Coleridge "like a gossamer thread, light and as unsubstantial as the air itself and may vanish with the merest of touches". The learned Judge also observed that such evidence may be strong in parts but it may also leave great gaps and rents through which the accused may escape. Therefore, certain rules have been judicially evolved for appreciation of circumstantial evidence.

41. To my mind, the first rule is that the facts alleged as the basis of any legal inference from circumstantial evidence must be clearly proved beyond any reasonable doubt. If conviction rests solely on circumstantial evidence, it must create a network from which there is no escape for the accused. The facts evolving out of such circumstantial evidence must be such as not to admit of any inference except that of guilt of the accused. {See Raghav Prapanna Tripathi and Ors. v. State of U.P. : AIR 1963 SC 74}.

42. The second principle is that all the links in the chain of evidence must be proved beyond reasonable doubt and they must exclude the evidence of guilt of any other person than the accused.

² 2010 (2) SCC 748

{See: *State of UP v. Ravindra Prakash Mittal* : 1992 CrL.J 3693(SC) - (Para 20)}

43. While appreciating circumstantial evidence, we must remember the principle laid down in *Ashraf Ali v. Emperor* 43 Indian Cases 241 at para 14 that when in a criminal case there is conflict between presumption of innocence and any other presumption, the former must prevail.

44. The next principle is that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and is incapable of explanation upon any other reasonable hypothesis except his guilt.

45. When a murder charge is to be proved solely on circumstantial evidence, as in this case, presumption of innocence of the accused must have a dominant role. In *Nibaran Chandra Roy v. King*: 11 CWN 1085 it was held the fact that an accused person was found with a gun in his hand immediately after a gun was fired and a man was killed on the spot from which the gun was fired may be strong circumstantial evidence against the accused, but it is an error of law to hold that the burden of proving innocence lies upon the accused under such circumstances. It seems, therefore, to follow that whatever force a presumption arising under Section 106 of the Indian Evidence Act may have in civil or in less serious criminal cases, in a trial for murder it is extremely weak in comparison with the dominant presumption of innocence.

46. The Same principles have been followed by the Constitution Bench of this Court in *Govinda Reddy v. State of Mysore* : AIR 1960 SC 29 where the learned Judges quoted the principles laid down in *Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh* : AIR 1952 SC 343. The ratio in *Govind* (supra) quoted in paragraph 5, page 30 of the reports in *Govinda Reddy* (supra) are:

In cases where the evidence of a circumstantial nature, the circumstances which lead to the conclusion of guilt should be in the first instance fully established, and all the facts so established should be consistent only with 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 complete as not to leave any reasonable doubt for a conclusion consistent with the innocence of the accused and it must be shown that within all human probability the act must have been committed by the accused.

The same principle has also been followed by this Court in Mohan Lal Pangasa v. State of U.P. AIR 1974 SC 1144.”

7. It can thus clearly be seen that it is necessary for the prosecution that the circumstances from which the conclusion of the guilt is to be drawn should be fully established.

8. The prosecution in the instant case is required to establish the following links in the chain of incriminating circumstantial evidence:

- I. Motive;
- II. Last seen together;
- III. Medical evidence establishing that the cause of death of the deceased was homicidal;
- IV. Wrong and/or false explanation given by the accused in his statement under Section 313;
- V. Failure of the accused to offer explanation for the homicidal death of his wife in the night time when only the accused and deceased were present in the house.

9. Keeping in mind, the aforesaid elements and factors to be taken into consideration the prosecution, defence and the statement of the accused under Section 313 are required to be assessed.

10. Before we advert to the evidence we may summarise the submission made on behalf of the parties.

11. Mr. Swapan Kumar Mallick, Advocate assisted by Ms. Sudeshna Das, Advocate appearing on behalf of the appellant has submitted that this is a case of accidental drowning and not murder.

12. It is submitted that Kalpana Sarkar died because of atypical drowning. The learned Counsel relied upon the evidence of Dr. Pratap Chandra Sharma Professor and Head of the Department of Forensic Medicine of Sikim, Manipal University and submits that DW1 on examination of the P.M report has clearly stated that it cannot be said from the P.M report that it was not an accidental death. The opinion of P.M. Doctor regarding the cause of death was not complete as the doctor did not explain whether it was ligature strangulation or manual strangulation. Injury no.1 as mentioned in the P.M. report can take place if the body fell down in the water and touches hard object. The injury sustained by the deceased could never be caused by application of force by use of Gamcha.

13. The learned Counsel refers to the book Synopsis of Forensic Medicine and Toxicology by Dr. K.S. Reddy to show that it was a case of dry drowning so the water did not enter the lung and the death resulted from immediate sustained laryngeal spasm due to inrush of water into the nasopharynx or larynx. Three possible reasons have been suggested as the cause of death:

- a. Cardiac arrest due to vehicle inhibition as a result of cold water stimulating the nerve endings of the surface of the body.

b. Water striking the epigastrium.

c. Cold water entering eardrums, nasal passage or mucosa of the pharynx and larynx”

14. It is submitted that DW1 although admitted that nail marks on the neck can be avoided by using gloves but there has been no seizure of gloves or any explanation offered as to how in the instant case finger marks was avoided.

15. The learned Counsel has placed reliance on the inquest report over the dead body of Kalpana Sarkar prepared in presence of witnesses Prasanto Majumder, Jharna Dey Sukla Paul and constable B.N. Basak and submits that it is clear from the said report that the cause of death is accidental drowning and not murder as claimed by the prosecution.

16. Mr. Mallick has referred to the chapter on Strangulation of Modi's Medical Jurisprudence and Toxicology, 16th Edn. page 167 at page 167 and submits that in order to arrive at a finding of homicidal strangulation there should be some evidence of external injury and struggle and marks of violence. Absence of any such external injury supports the case of the appellant that it is a case of accidental drowning.

17. Per contra, Mr. Madhusudan Sur, the learned APP appearing on behalf of the prosecution has submitted that PW6 the Doctor who prepared the post mortem report has clearly suggested that the cause of death was due to strangulation, ante mortem and homicidal in nature.

18. The learned Counsel has referred to the specific evidence of the Doctor where the Doctor has clearly opined that strangulation was manual

in nature and at the relevant point of time the victim was one and half month pregnant.

19. It is submitted that DW1 has admitted in cross-examination that one can avoid nail mark by using gloves. In the instant case, Gamcha of the accused was found around the neck in a tied condition and on the basis of such post mortem report the learned Trial Judge has correctly concluded that by using Gamcha manual strangulation was done by the accused that resulted in the death of his wife.

20. It is submitted that man generally do not keep long nails. The accused has cleverly used the Gamcha to avoid the nail mark upon the neck/body of the victim but on dissection of the neck the neck muscle was found congested and presence of one contusion measuring $\frac{3}{4}$ " * $\frac{1}{2}$ " over the thyroid cartilage and another contusion measuring $\frac{1}{2}$ "* $\frac{1}{2}$ " over the right side of hyoid bone with sublaxation was found and mentioned in the autopsy report.

21. It is submitted that the inquest report would show that there has been bleeding from the nose. The Post Mortem report shows contusion present over the right side of hyoid bone with sublaxation of right corner of hyoid which means it was a clear case of manual strangulation.

22. The learned APP has pointed out that absence of external injury would suggest that the victim did not try to save herself in the pond because of prior strangulation by the accused.

23. In response to the argument of the learned Counsel of the appellant that death was due to accidental drowning it is submitted that even if it is assumed that victim fell down and died because of atypical

drowning there should be some external injury upon the body of the victim but no such injury was found in the post mortem report.

24. It is submitted that the P.M. Doctor has opined death of the victim as ante mortem and even in cross-examination he has stated that it is not an accidental death. The post mortem report would reveal that stomach contains semi digested food and no untoward smell which would mean that considerable time had lapsed after taking food and accordingly the story of the accused that his wife went to toilet around 10/11 p.m. of the night was not correct.

25. The learned Counsel has referred to the evidence of PW4 and PW6 to show that the pond was small from where the dead body was recovered and hence possibility of atypical drowning is far removed.

26. The learned APP has referred to the authorities relied upon by the learned trial court in arriving at a finding that death is caused by manual strangulation. It is submitted that all the authorities are consistent in their view that fracture of hyoid bone and superior cornua of the thyroid cartilage are sure indication of manual strangulation which may not result from atypical drowning.

27. The issue before the court is whether the victim died due to manual strangulation or accidental drowning.

28. The incident occurred between 10.15 p.m to 11 p.m on 21.05.2007. The appellant with his family was residing inside the factory compound. A small pond is situated near the residence of the appellant. The room has an attached privy. The appellant claimed that his wife went out to attend nature's call with the Gamcha of the husband. She had

carried the towel due to rain. If it were raining then it was unusual for victim to go near the pond or enter inside the pond for relieving herself instead of the privy attached to the room. Moreover, she should have covered her head with the towel instead of encircling the towel and tied it around the neck. She could not be traced immediately. The appellant did not inform the police. The appellant has stated that his wife had gone to the pond but he immediately did not make any search to find her out. On 22nd July, 2015 at around 11.55 hours after searching inside the pond with net the body of the deceased was caught in the net and recovered. After recovery it was found that her eyes were open and mouth was closed, hands are half fisted and raised upward in the half folded condition of legs. A Gamcha was seen around the throat in tied condition. After turning round the body again and again no marks of injury could be seen on the dead body. The ligature mark is circular as it completely encircles the neck. The ligature mark is transverse, circular continues and low down in the neck. Blood was oozing out from nose and the deceased was pregnant. This appears to be sum and substance of the inquest report. The sketch prepared during the inquest report shows pond and a latrine is attached to the house. The inquest report was marked as exhibit. The post mortem report shows the case of death was due to the effects of strangulation anti mortem and homicidal in nature. The appellant has not contended that the death is suicidal or as a result of hanging. The appellant all throughout contended that the case is of accidental drowning. The evidence would show that the appellant has an extra marital affairs. The de facto complainant, PW1 in his cross-examination has clearly stated that Jadav continuously

reiterated that the dead body was perhaps in the pond and that raised doubt in his mind. The de facto complainant is the elder brother of the deceased. The fishing net was spread in the pond in presence of the police and this has led to the recovery of the body. The de facto complainant, the mother of the deceased and the sister of the deceased are consistent in their evidence that Jadav had developed an illicit relationship with a lady at Tinbatimore and he used to torture the victim mentally and physically. Prosecution however, could not identify the lady with whom, the appellant had an extra marital affairs. The prosecution case is essentially based on the post mortem report and last seen together. The appellant admittedly was last seen with the wife before she claimed to have gone to the pond. The towel of the husband was found around the throat in a tied condition. The celebrated authors on Medical Jurisprudence and Toxicology opined that ligature mark on the neck demands closure and detailed observation and examination as strangulation by ligature is often presumed to be homicidal. The material used can be anything handy and available near the place of occurrence like the towel as used in the instant case. Normally the ligature is applied with a single or double turn and is then very tightly fastened with the help of more than one simple knot. Presence of two or more knots on tightly applied ligature situated on the nape of the neck is almost a sure case of homicidal strangulation. The inquest report in the instant case would show that the Gamcha was seen around the throat in a tied condition. Bruising of the subcutaneous tissue and of the neck muscles specifically underneath the ligature and its knots is common in strangulation by ligature. The rings of trachea may sustain fracture when

considerable force is applied. If a throat is seized suddenly and firmly compressed the victim would not be able to cry or shout to attract the attention of others nearby.

29. Dr. J.B. Mukherjee in his celebrated book Forensic Medicine and Toxicology, 1st Edn. has referred to the following mode of death that can be caused by manual strangulation:

- a) Asphxia from obstruction or mechanical interference of respiration.
- b) Congestive Suboxia from interference with cerebral circulation.
- c) Vagal inhibition from pressure on the carotid nerve plexus consisting of fibres of vagus, sympathetic and glossopharyngeal nerves.

30. The celebrated author has clearly stated that if any soft material such as scarf etc. is interposed between the neck and the fingers of the assailant, external marks of injury on the neck may be absent, so also will be, if the assailant maintains his pressure on the neck until the victim dies, since the compression of the skin, will empty the vessels under it during life and because of stoppage of circulation, no filling will occur as a result of sustained pressure. Injury to hyoid is the most important finding of throttling. It is very difficult to fracture the hyoid in any way other than by manual strangulation. In some cases horns of hyoid and thyroid may get fractured simultaneously. The author noticed avulsion of thyrohyoid ligament with fracture of greater horn of hyoid bone, in a case of manual strangulation. The autopsy surgeon is to dissect the part thoroughly to note any evidence of fracture or fracture dislocation of one or both the cornua with evidence of extravasation in and around.

31. The authors are unanimous that fracture of cricoid cartilage is almost conclusive of throttling. Absence of ligature material at the place of occurrence when strangulation was done by ligature suggest of its homicidal character. Ligature strangulation is livid, congested and full of petechial and fracture is rare. Fracture of hyoid bone, laryngeal cartilages, and tracheal rings are commonly noticed especially in case of throttling by ligature with force.

32. The PW 6 in his evidence has stated as under:

“No external injury could be found (sic ‘find’) in the dead body. However dissecting the neck, muscle are found congested, one contusion measuring $\frac{3}{4}$ ” x $\frac{1}{2}$ ” present over thyroid cartilage, another contusion $\frac{1}{2}$ ” x $\frac{1}{2}$ ” present over right side of thyroid bone, with subluxation of right cornue of hyoid. On dissecting the chest lungs are found oedematous and congested. Evidence of infective changes with pus found in both lung. Scalp congested. Uterus was enlarged and bulky and contained embryo 2 c.m. in length. In my opinion the cause of death was due to the effect of strangulation ante mortem and homicidal in nature. The strangulation as I mentioned in my report is manual in nature. At the relevant point of time victim was pregnant for 1½ month.”

In his cross examination he has stated under:

“In case of strangulation tracheal (sic ‘pechaial’) haemorrhage may be noticed. It is not an accidental death.”

33. The post mortem report conclusively proves ligature strangulation.

34. In **Ponnusamy v. State of Tamil Nadu**,³ it was observed in paragraph 23 that: *existence of fracture of the hyoid bone leads to a conclusive proof of strangulation but absence thereof does not prove contra.*

35. Mr. Mallick has relied upon the following passage from Modis Medical Jurisprudence on Toxicology 16th Edn. at page 167:

“Homicidal strangulation is the commonest of the three forms. Usually there is a single turn of a ligature round the neck with one or more knots. Sometimes there may be more turns, in which case more ligature marks will be found on the neck. In addition to the ligature mark or finger marks there is a probability of evidence of a struggle, marks of violence on the other parts of the body and evidence of sexual interference in females.”

36. The aforesaid passage does not in any way assist the petitioner for the reason I have already stated above. It was a well planned murder. When a murder takes place in secrecy and within the four walls of a room the accused is the only and best person to explain the circumstances under which the victim was found dead.

37. The fact that what exactly happened during his presence at the place of occurrence are matters pre-eminently or exceptionally within the knowledge of the accused and very lucidly stated by Justice Vivian Bose in **Shambu Nath Mehra v. The State of Ajmer**,⁴ paragraph 11 which is reproduced below:

“11.The word “especially” stresses that it means facts that are pre-eminently or exceptionally within his knowledge. If the

³ AIR 2008 SC 2110

⁴ 1956 INSC 15; AIR 1956 SC 404

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.”

38. The aforesaid decision has been recently relied upon by the Hon’ble Supreme Court in ***Nagendra Sah v. State of Bihar***,⁵ in which the Apex Court has observed as under:

“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.”

39. The principles that emanate from the decided cases of interpretation of Section 106 of the Evidence Act is that the said section is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are

⁵ 2021:INSC:475: 2021 (10) SCC 725

particularly within the knowledge of the accused. The said 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 had succeeded in proving facts for which the reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such fact failed to offer any explanation which might persuade the court to arrive at a different inference.

40. In ***Tulshiram Sahadu Suryawanshi & Anr. v. State of Maharashtra***,⁶ the Apex Court observed as under:

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

⁶ 2012:INSC:401: (2012) 10 SCC 373

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 and Ors.* 2000:INSC:422 : (2000) 8 SCC 382: 2000 SCC (Cri) 1516]: (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. The State of Ajmer*: 1956:INSC:15 : AIR 1956 SC 404: 1956 Cri LJ 794] the learned Judge has stated the legal principle thus:

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." (Emphasis supplied)

41. The finding of guilt is based on circumstantial evidence. In the instant case no direct evidence is available and the prosecution rests its case solely on circumstantial evidence. The factors to be taken into consideration and matters to be examined in a case based on circumstantial evidence has been lucidly explained in paragraph 153

in **Sharad Birdhichand Sarda v. State of Maharashtra**⁷. The said legal principles has been succinctly restated in **Mulakh Raj v. Satish Kumar**⁸ in paragraph 4 as under:

“4. Undoubtedly this case hinges upon circumstantial evidence. It is trite to reiterate that in a case founded on circumstantial evidence, the prosecution must prove all the circumstances connecting unbroken chain of links leading to only one inference that the accused committed the crime. If any other reasonable hypothesis of the innocence of the accused can be inferred from the proved circumstances, the accused would be entitled to the benefit. What is required is not the quantitative but qualitative, reliable and probable circumstances to complete the chain connecting the accused with the crime. If the conduct of the accused in relation to the crime comes into question the previous and subsequent conduct are also relevant facts. Therefore, the absence of ordinary course of conduct of the accused and human probabilities of the case also would be relevant. The court must weigh the evidence of the cumulative effect of the circumstances and if it reaches the conclusion that the accused committed the crime, the charge must be held proved and the conviction and sentence would follow.” (emphasis supplied)

42. The statement of the accused under Section 313 is assessed to find out that in view of circumstances strongly suggesting the involvement of the accused in the offence his silence or refusal to offer reasonable and proper explanation could be used against the accused. It is to be remembered that Section 313 provides an opportunity to the accused for his defence by making him aware fully of prosecution allegation against him and to answer the same in support of his

⁷ 1984 (4) SCC 116: AIR 1984 SC 1622

⁸ 1992 (3) SCC 43: 1992 SCC (Cri) 482

innocence but equally there cannot be a generalized presumption of prejudice to an accused merely by reason of any omission or inadequate questions put to an accused thereunder. Ultimately it will be a question to be considered in the facts and circumstances of each case, there will have to be a cumulative balancing of several factors. The circumstances put together create a complete network from which it is difficult to escape and does not admit of any inference except that of guilt of the accused and the inculpatory facts are incompatible with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis except his guilt.

43. In ***Munna Kumar Upadhyay @ Munna Upadhyaya v. State of Andhra Pradesh***,⁹ it was reiterated that if the accused gave incorrect or false answers during the course of his statement under Section 313 Code of Criminal Procedure, the Court can draw an adverse inference against him. In para 76 of the report, the Supreme Court observed as under:

“76. If the accused gave incorrect or false answers during the course of his statement Under Section 313 Code of Criminal Procedure, the court can draw an adverse inference against him. In the present case, we are of the considered opinion that the accused has not only failed to explain his conduct, in the manner in which every person of normal prudence would be expected to explain but had even given incorrect and false answers. In the present case, the Court not only draws an adverse inference, but such conduct of the Accused would also tilt the case in favour of the prosecution.” (emphasis supplied)

⁹ 2012 INSC 211 : (2012) 6 SCC 174

44. The Hon'ble Supreme Court recently in **Indrakunwar v. State of Chhattisgar**,¹⁰ on consideration of various judgments summarized the principles in paragraph 35 with regard to the evidentiary value of a statement under Section 313 of CrPC as under:

“35. A perusal of various judgments rendered by this Court reveals the following principles, as evolved over time when considering such statements.

35.1 The object, evident from the Section itself, is to enable the accused to themselves explain any circumstances appearing in the evidence against them.

35.2 The intent is to establish a dialogue between the Court and the accused. This process benefits the accused and aids the Court in arriving at the final verdict.

35.3 The process enshrined is not a matter of procedural formality but is based on the cardinal principle of natural justice, i.e., audi alteram partem.

35.4 The ultimate test when concerned with the compliance of the Section is to enquire and ensure whether the accused got the opportunity to say his piece.

35.5 In such a statement, the accused may or may not admit involvement or any incriminating circumstance or may even offer an alternative version of events or interpretation. The accused may not be put to prejudice by any omission or inadequate questioning.

35.6 The right to remain silent or any answer to a question which may be false shall not be used to his detriment, being the sole reason.

35.7 This statement cannot form the sole basis of conviction and is neither a substantive nor a substitute piece of evidence. It does not discharge but reduces the prosecution's burden of leading evidence

¹⁰ 2023 SCC Online SC 1364

to prove its case. They are to be used to examine the veracity of the prosecution's case.

35.8 This statement is to be read as a whole. One part cannot be read in isolation.

35.9 Such a statement, as not on oath, does not qualify as a piece of evidence under Section 3 of the Indian Evidence Act, 1872; however, the inculpatory aspect as may be borne from the statement may be used to lend credence to the case of the prosecution.

35.10 The circumstances not put to the accused while rendering his statement under the Section are to be excluded from consideration as no opportunity has been afforded to him to explain them.

35.11 The Court is obligated to put, in the form of questions, all incriminating circumstances to the accused so as to give him an opportunity to articulate his defence. The defence so articulated must be carefully scrutinized and considered.

35.12 Non-compliance with the Section may cause prejudice to the accused and may impede the process of arriving at a fair decision.”
(emphasis supplied)

45. In ***Ravirala Laxmaiah v. State of A.P.***,¹¹ the Hon'ble Supreme Court has considered the principles to be remembered and applied in a case based on circumstantial evidence, where no eye witness account is available and the consequence of the silence if maintained by the accused with regard to the incriminatory circumstances in the following words:

“6. when an incriminating circumstance is put to the accused and the said accused either offers no explanation [for the same], or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete.” (Vide: State of U.P. v. Dr. Ravindra Prakash Mittal: AIR

¹¹ **2013 (9) SCC 283**

1992 SC 2045; Gulab Chand v. State of M.P. : AIR 1995 SC 1598; State of Tamil Nadu v. Rajendran : AIR 1999 SC 3535; State of Maharashtra v. Suresh : (2000) 1 SCC 471; and Ganesh Lal v. State of Rajasthan : (2002) 1 SCC 731).

21. In Neel Kumar @ Anil Kumar v. State of Haryana : (2012) 5 SCC 766, this Court observed:

“30. It is the duty of the accused to explain the incriminating circumstance proved against him while making a statement Under Section 313 Code of Criminal Procedure. Keeping silent and not furnishing any explanation for such circumstance is an additional link in the chain of circumstances to sustain the charges against him. Recovery of incriminating material at his disclosure statement duly proved is a very positive circumstance against him. (See also: Aftab Ahmad Anasari v. State of Uttaranchal : AIR 2010 SC 773).”

46. In a fairly recent decision in **Wazir Khan vs. State of Uttarakhand**,¹² the Hon'ble Supreme Court has clearly stated that when incriminating circumstances that inculpated him in the crime is put to the accused and the accused either offers no explanation or offers explanation which is found to be untrue then the same becomes an additional link in the chain of circumstances to make it complete.

47. The cause of death is within the special knowledge of the accused. The appellant was admittedly last seen with his wife. The deceased was with the accused till she claimed to have left for toilet. What exactly has happened to the victim was within the special knowledge of the petitioner. In spite of raining and having a privy attached to the house it is extremely unusual for a pregnant lady to go to the pond for toilet.

¹² **2023 (8) SCC 597**

Moreover, the Gamcha was found tightly encircled the neck instead of being used to cover the head as usually expected due to rain. Once the prosecution is able to establish that the death was caused by ligature strangulation and the Gamcha of the husband was found around the neck of the victim in tied condition the accused is required to offer an explanation which he has failed to do in the instant case. The petitioner was not having a cordial relationship with Kalpana. On the date when the incident occurred he was in his house with Kalpana. According to the accused Kalpana left the room for toilet and this fact is only known to him. No one had seen Kalpana going to toilet. Accused reported the missing of his wife over phone but did not inform the complainant that his wife has gone to the toilet with his Gamcha. The dead body of Kalpana was recovered from the pond with the help of fishing net. The Gamcha was tied around the neck of the deceased. The accused admitted that the said Gamcha belonged to him but could not offer any explanation as to why the said Gamcha was used by the deceased and it was found tied around her neck. The accused has admitted that the seizure of Gamcha after recovered from the dead body. The accused reiterated that Kalpana might have fallen in the pond. Presumably he was aware of the body of Kalpana would be found inside the pond. The evidence on record would show that the appellant used to reside at Tinbatirmore at the time of the settlement of the dispute between the husband and wife arising out of a complaint made by the wife that the appellant had an illicit relation with a woman at Tinbatirmore. The relationship between the couple was not cordial.

The evidence of DW1 would show that nail marks could be avoided if the accused used gloves. In the instant case Gamcha was used as a weapon found tied around the neck of the deceased. The post mortem report categorically states of contusions and subluxation of hyoid bone. The accused has failed to give satisfactory explanation with regard to the incriminating materials which show his involvement in the death of his wife. The accused has failed to discharge his burden under Section 106 of the Indian Evidence Act. He was also not truthful in his statement recorded under Section 313 of the Evidence Act.

48. Taking into consideration the entire evidence we are of the view that the learned trial Judge has arrived at a finding on proper appreciation of evidence.
49. The involvement of the petitioner in the commission of the offence is established beyond any reasonable doubt. In such view of the matter we do not find any reason to interfere with the order passed by the learned trial Judge.
50. The conviction is upheld.
51. The appeal stands dismissed.
52. A copy of this judgment shall be forwarded to the Secretary, Calcutta High Court Legal Services Committee for information and doing the needful as the appellant is represented by the Legal Aid Counsel appointed by the Calcutta High Court Legal Services Committee. The Secretary shall ensure supply of copy of this judgment upon the accused through the Superintendent of Jalpaiguri Central Correctional Home, Jalpaiguri.

53. LCR to be send down forthwith.

I agree

(Soumen Sen, J.)

(Uday Kumar, J.)