

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.407 of 2016**

Arising Out of PS. Case No.-167 Year-2011 Thana- MANIHARI District- Katihar

Umesh Sharma S/o Late Babulal Sharma R/o Vill- Dilarpur, P.S.- Manihari,
Distt- Katihar.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Kumar Uday Singh, Advocate
Mr. Vijay Shankar Sharma, Advocate
For the Respondent/s : Mr. Abhimanyu Sharma, APP

**CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE JITENDRA KUMAR
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)**

Date : 29-07-2024

We have heard Mr. Kumar Uday Singh, the learned Advocate for the appellant and Mr. Abhimanyu Sharma, the learned APP for the State.

2. The appellant has been convicted under Section 302 of the Indian Penal Code, *vide* judgment dated 19.04.2016 passed by the learned Additional District & Sessions Judge-II, Katihar in Sessions Trial No. 333 of 2012 arising out of Manihari P.S. Case No. 167 of 2011. By order dated 21.04.2016, he has been



sentenced to undergo imprisonment for life, to pay a fine of Rs.5,000/- and in default of payment of fine, to further suffer S.I. for three months for the offence under Section 302 of IPC.

3. The deceased/Parwati Devi was allegedly killed at the hands of her husband/appellant and other in-laws on 25.10.2011 in her house. She had been married to the appellant for eight years and had given birth to two daughters, who are still residing with the appellant. The information about the killing of the deceased was first received by Nandlal Sharma, her brother who has been examined as P.W. 6 at the trial. He lodged the FIR on 25.10.2011 at about 01:20 P.M. alleging that on 24.10.2011, when he had met his sister, she had disclosed that she was being ill-treated by her in-laws and the appellant. They had threatened her that she would be killed one day. After meeting his sister, P.W. 6 went back home. In the morning of 25.10.2011 at about 7.00 O' Clock in the



morning, he was informed by a villager that his sister has been killed. He wanted to immediately rush to the matrimonial home of the deceased but was prevented from doing so for about an hour. Later, when he went to the matrimonial home of the deceased, he found her lying dead. The persons of the neighbourhood, were lamenting that the accused persons ought not to have done this to the hapless lady. He has also alleged in the FIR that his sister was always troubled for not bringing sufficient dowry from her home. The aforementioned fardbeyan/statement was given by P.W. 6 in presence of one Madan Yadav, a co-villager.

4. On the basis of the aforementioned statement, Manihari P.S. Case No. 167 of 2011 dated 25.10.2011 was registered for investigation under Section 302/34 of the IPC against the appellant and others.

5. Though nothing has been recorded in the judgment impugned but Mr. Kumar Uday Singh,



learned Advocated has informed this Court that the trial of other accused persons was separated and the parents of the appellant ultimately died. The sister-in-law of the deceased is presently facing trial for the offence of killing the deceased.

6. The charge under Section 302 of the IPC was framed against the appellant. The Trial Court, after having examined eight witnesses on behalf of the prosecution, convicted and sentenced the appellant as aforesaid.

7. Out of the aforementioned eight witnesses referred to above, Heera Ravidas and Jaiprakash Ravidas (P.Ws. 1 and 2 respectively) have been declared hostile; whereas Sekhar Singh and Pradip Kumar Rai (P.Ws. 3 and 8 respectively) are only formal in nature.

8. The only evidence before the Trial Court was the deposition of the parents of the deceased and the informant, who is the brother of the



deceased.

9. Motilal Sharma (P.W. 4) has supported the prosecution case but has stated that for about 5-6 years the deceased lived happily in her matrimonial home. He was informed about the murder by his son Nandlal Sharma (P.W. 6). He admitted the fact that the deceased had given birth to two daughters, both of whom are residing with the appellant.

10. With respect to demand of dowry, a general and vague statement was made by him that the appellant had come to his house for demanding additional dowry. He has further told the Trial Court that he and the appellant, both, are very poor.

11. Nothing substantial was offered by the aforementioned witness; especially with respect to the immediate cause of the deceased having been strangled to death.

12. Similar statements have been made by Domni Devi (P.W. 5)/mother of the deceased. She had



not visited the matrimonial home of the deceased on her death. Members of the society and her family had actually gone there. She was aware of the fact that there was a strangulation mark on the body of the deceased. She has also alleged that her grand-daughters complained before her about the bad treatment in the appellant's house.

13. The informant (P.W. 6) has stated that the deceased was married in the year 2003, and that the two daughters born out of the wedlock are still residing in the house of the appellant. However, he could not tell the name of the villager who had informed him that the deceased had been killed. He reiterated before the Trial Court that a day before the deceased was killed, he had an occasion to go to her house and the deceased had made complaints about ill-treatment at the hands of the appellant and his family members.

14. During the course of investigation, he



had told the investigator that the appellant was demanding a cow as part of dowry and that he had seen black ligature mark on the right side on the neck of the deceased. With respect to the domestic violence, P.W. 4 claimed that long time back he had seen the deceased being beaten up by the appellant and others.

15. The post-mortem was performed on 26.10.2011 at 9.00 A.M. by Dr. Sushil Kumar Gupta, (P.W. 7) one of the members of the team which had undertaken such exercise. The post-mortem report though is signed by one Dr. Tanvir Haider but Dr. Sushil Kumar Gupta (P.W. 7) only came to the witness-stand. Externally, he had found that rigor mortis was present in all the four limbs. The face was puffy and the mouth and eyes were closed. Froth was coming out of her mouth. The conjunctiva was found to be congested. There was a ligature mark on the neck below the thyroid cartilage which encircled the neck horizontally and the circle was complete.



However, the ligature mark was more prominent on the front of the neck than on the back.

16. In the internal examination, P.W. 7 had found blood under the tissues. The larynx and trachea were congested; there was presence of haemorrhagic blood below the tissues.

17. What is most noticeable in his finding is that he had found no external injuries on the exposed body parts of the deceased. According to P.W. 7, the death was caused due to asphyxia on account of strangulation and the time of death was fixed at 24 hours.

18. P.W. 7 further confirmed that though the post-mortem bears the signature of Dr. Tanvir Haider but did not give any reason for his not having come to the witness-stand. In any view of the matter, the post-mortem examination report stood proved.

19. It appears that the Trial Court employed the tool of Section 106 of the Evidence Act,



1872 to convict the appellant. The reasoning of the Trial Court is that since the deceased died in the house of the appellant and there is no explanation whatsoever regarding the cause of her death, which is homicidal, there is no way in which the appellant could escape the liability of being punished for her death.

20. That apart, the evidence of P.W. 6 was taken into consideration, especially of his having visited the house of the deceased a day prior to she died and his disclosure about the deceased having been assaulted in the immediate past.

21. True it is that if an occurrence takes place within the secrecy of the house, it would be very difficult for the prosecution to lead any evidence with respect to what had happened and the real cause of death.

22. Does this absolve the prosecution to prove the basic prosecution version?

23. From the evidence on record, we get



no idea about the time when the relationship between the deceased and the appellant worsened. The parents of the deceased, have testified to the fact that the deceased lived in her matrimonial home for 6-7 years very happily.

24. Could there have been a demand for a cow as additional dowry after 6-7 years of marriage?

25. Was that the bone of contention between the spouses?

26. Who all were present in the house when the occurrence had taken place?

27. What was the location of the house and whether there were any neighbours residing nearby?

28. Did any neighbour complained of the deceased having been assaulted on the day when the murder was reported?

29. Was there any evidence of bad relation between the spouses along the continuum of the



married life of the deceased?

30. The answers to all these are difficult to be found from the evidence on record.

31. On top of it, the investigator because of his death could not be examined by the prosecution. The death of the investigator is an acceptable explanation for the non-examination, but very many questions remain unanswered and very many issues remain unresolved because of such non-examination of the investigator.

32. This would and has prejudiced the case of the appellant. There is no definite proof of the fact that the appellant was present in the house when the occurrence had taken place.

33. In this context, we again go back to the evidence of P.W. 6, the informant, who was not forthcoming about the source of information to him regarding the death of the deceased. All that he stated before the Trial Court was that he was first prevented



from going to the house of the appellant. Who prevented him? Where was he prevented? Was he not allowed to enter the house of the appellant when he had reached there? Where did he wait for one hour before he could get an opportunity of going inside the house? Only during the trial, he has named the appellant as the person who stopped him from entering his house.

34. It is true that the deceased died a homicidal death Who strangulated her but remains unresolved.

35. From the post-mortem report, however, we find the defence of the appellant, viz., that it was a case of self-inflicted harm, to be absolutely incorrect. A self-inflicted harm would get reflected from the nature of the injuries on the neck. There is no observation regarding the hyoid bone and the encircling mark of the ligature was almost continuous. The trachea was not fractured but because



of the pressure on the front of the neck, there was haemorrhagic blood inside the tissues which caused congestion and death. But, for the appellant to be held guilty for murder, the evidence is only of P.W. 6 and as disclosed by him, by P.Ws. 4 and 5.

36. Section 106 of the Evidence Act reads as hereunder:-

"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.

37. In plain language, it provides that when any fact is "especially" within the knowledge of any person, the burden of proving that fact is upon



him. The word 'especially' means facts that are pre-eminently or exceptionally within the knowledge of the accused. The ordinary rule that applies to the criminal trials that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the provisions contained in Section 106 of the Evidence Act.

38. Section 106 of the Evidence Act is an exception to Section 101 of the Evidence Act, which lays down the general rule that in criminal cases, the burden of proof is on the prosecution. Section 106 is certainly not intended to relieve the prosecution of its 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 the facts which are especially within the knowledge of the accused and which he can prove without difficulty or inconvenience.

39. Justice Vivian Bose in ***Shambu Nath***



Mehra vs The State of Ajmer, AIR 1956 SC 404 has very pithily observed that the word 'especially' stresses that it means facts that are pre-eminently or exceptionally in the knowledge of the accused.

40. 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 it or did not. He went on to explain that this could not have been the intention of the lawmakers and in fact twice such attempts at interpreting Section 106 of the Evidence Act was repelled by the Privy Council in ***Attygalle and Anr. Vs. the King*** and ***Stephen Seneviratne Vs. the King***.

41. This decision in Sambhu Nath Mehra (*Supra*) was referred to and relied in ***Nagendra Sah v. State of Bihar, (2021) 10 SCC 725***.

42. In the afore-noted case, it has been



held that 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.

43. If an offence like murder is committed inside a house, the initial burden to establish the case would undoubtedly be on the prosecution, but the nature and quantity of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases. The burden would be of a comparatively lighter character.

44. In view of Section 106 of the Evidence Act, there would be a corresponding burden on the inmates of the house to give a cogent explanation as



to how the crime was committed.

45. But then, for triggering the application of Section 106 of the Evidence Act, the prosecution must establish basic facts that the appellant in association with others for non-delivery of cow as additional dowry killed the deceased.

46. The evidence on the contrary is that the deceased was badly assaulted before she was killed. The post-mortem report completely belies such statement as no external injury was found on any exposed part of the body of the deceased. Though there is no explanation about the circumstance under which the deceased died but requiring the appellant to explain the cause, especially in the absence of prosecution having proved the case, would be giving a different interpretation to Section 106 of the Evidence Act.

47. With the non-examination of the I.O., the statement of witnesses recorded during the course



of investigation and the cause of death could not be tested.

48. When did police come to the house of the appellant to conduct the inquest proceedings and on whose information also remains unanswered. According to the FIR, the information was received in the police station at about 09:45 in the morning, but the FIR was registered at about 01:30 P.M., almost contemporaneously with the inquest proceedings.

49. Thus, we do not find it absolutely safe to endorse the opinion of the Trial Court in convicting and sentencing the appellant.

50. Giving benefit of doubt to the appellant, we set aside the judgment and order of conviction and set the appellant free.

51. The appellant is in jail for the last nine years. He is directed to be released forthwith from jail, if not required or detained in any other case.

52. Let a copy of this judgment be



dispatched to the Superintendent of the concerned Jail
forthwith for compliance and record.

53. The records of this case be returned to
the Trial Court forthwith.

54. Interlocutory application/s, if any, also
stand disposed off accordingly.

(Ashutosh Kumar, J)

(Jitendra Kumar, J)

manoj/krishna-

AFR/NAFR	NAFR
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