AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Reserved on 13/12/2024

Pronounced on 03/01/2025

CRA No.169 of 2016

1 - Domendra Ojha S/o Jagdev Ojha, Aged About 23 Years, R/o Village Ghughsidih, Police Station Utai, Revenue and Civil District Durg, Chhattisgarh

--- **Appellant(s)**

versus

1 - State Of Chhattisgarh Through Police Station Utai, District Durg, Chhattisgarh

--- **Respondent(s)**

CRA No.1303 of 2024

1 - Smt. Malti Bai @ Mona Ojha W/o Domendra Ojha, Aged About 20 Years R/o Ghughsidih, Police Station- Utai, District- Durg (C.G.).

---**Appellant(s)**

Versus

1 - State Of Chhattisgarh Through- Station House Officer, Police Station- Utai, District- Durg (C.G.).

--- **Respondent(s)**

For Appellant (s)	:	Smt. Fouzia Mirza, learned Senior Advocate appears along with Smt. Smita Jha, Advocate
For Respondent(s)	:	Shri Sanjeev Pandey, Dy. AG

D.B.: Hon'ble Shri Justice Sanjay S. Agrawal &

Hon'ble Shri Justice Sanjay Kumar Jaiswal

C A V Judgment

Per Sanjay S. Agrawal, J.

1) Both these appeals arise out of the common judgment of conviction and order of sentence dated 17.11.2015 passed by the learned 7th Additional Sessions Judge, Durg (CG) in Sessions Trial No.81/2015, whereby they have been convicted for murder of their niece-Bhuneshwari and nephew-Mohan under Section 302 (two counts) of IPC and each of them have been sentenced for the rigorous imprisonment for life and fine of Rs.500/-, in default, they have to undergo additional rigorous imprisonment for one month, they are being disposed of by this common judgment.

2) Briefly stated the case of the prosecution is that one Ghanshyam Ojha lodged the merg intimations (Ex.P-1 & P-2) on 11.05.2015 at 14.50 hours before the Police Station-Utai (Machandur), District Durg, alleging, inter alia, that on the said date, around 7 AM, he had gone to Mines along with Jagnu Dhimar and Gurudayal for doing labour work and his wife-Renu and mother- Gangotri Ojha had also gone for their labour work, while his two children, namely, Ku. Bhuneshwari and Mohan, aged about 6 years and 3 years, respectively, were at home along with his younger brother-Domendra Ojha and daughter-in-law (younger brother's wife) Smt. Malti Bai, who used to take care of his children. It is alleged further that at around 1.30 PM, he received a telephonic call from one Netram Ojha that his children are not well at home and upon knowing the said information, he returned home along with said Jagnu and Gurudayal, where he found both of his children

ablazed in the room, while cot of his daughter-in-law was being burnt and, came to know that she (Malti Bai) was taken by his brother-Domendra to the hospital. In the said report, he has raised a doubt upon his daughter-in-law (Malti Bai) that she might have killed them by pouring kerosene oil as she often not only used to complain about his children, but used to assault them also. On the basis of the alleged merg intimations, an FIR (Ex.P/3) was registered on 11.05.2015 at 15.10 hrs. in connection with Crime No.114/2015 against said Malti Bai for the offence punishable under Sections 302, 436 and 450 of IPC and, during investigation, inquests of the dead bodies were prepared vide Exs.P/6 and P/7, where, a 'Dabba' filled with kerosene oil, match sticks and broken bangles in green colour were found on the spot on 11.05.2015 at 13 hours. Dead bodies were sent for autopsy, which were conducted by Dr. R.K. Nayak (PW-16) and cause of death was opined to be shock due to extensive burn injuries and accordingly, death was opined to be homicidal in nature vide reports Exs.P-36 and P-37. The appellants were arrested on 12.05.2015 and based upon the disclosure statement (Ex.P-15) of Malti Bai, a plastic jerrycan filled with 1½ litre of kerosene oil and broken bangles in green colour were recovered vide seizure memo (Ex.P-18), while match sticks and two pieces of burnt match sticks were recovered from the appellant–Domendra vide seizure memo (Ex.P-17) based upon his disclosure statement (Ex.P-16) and after completion of usual investigation, the charge-sheet was submitted before the Judicial Magistrate First Class, Durg against the appellants for the offence punishable under Sections 302, 436 read with Section 34 IPC and after committal, charges were framed by the learned trial Court on 13.08.2015 under Sections

302 (two counts) of IPC, which were denied by them and claimed to be tried.

3) The prosecution has examined as many as 16 witnesses and exhibited 37 documents in order to bring home the guilt of the accused/appellants, while none was examined by the appellants in their defence.

4) The trial Court, after considering the evidence led by the prosecution arrived at a conclusion that since both the appellants were with the deceased children at the time of occurrence of the alleged incident at home and, as they failed to explain as to how they died as per the provisions prescribed under Section 106 of the Indian Evidence Act, therefore, they have been held guilty for the commission of the alleged crime.

5) Smt. Fouzia Mirza, learned Senior counsel appearing for the appellants submits that the finding recorded by the trial Court holding the appellants guilty while applying the provisions prescribed under Section 106 of the Indian Evidence Act, is apparently contrary to law. While inviting attention to the inquests (Exs.P-6 and P-7), it is contended that the alleged articles were, in fact, recovered on 11.05.2015 from the spot, therefore, the recovery of those articles shown to be recovered from the appellants on 12.05.2015 vide seizure memos (Exs.P-17 and P-18) is ex-facie contrary to the materials available on record, yet the same has been relied upon while holding the appellants guilty as such. It is contended further that the entire

case is based upon the circumstantial evidence and motive would be an important factor under such circumstances, however, even in absence of its proof, coupled with the failure of the prosecution to prove its case beyond all reasonable doubts, the burden of proof shifts upon the appellants under Section 106 of the Indian Evidence Act while holding them guilty, is, therefore, apparently contrary to law and conviction as made is, therefore, liable to be set aside. In support, she placed her reliance upon the decision rendered by the Supreme Court in the matter of **Nagendra Sah Vs. State of Bihar,** reported in **(2021) 10 SCC 725.**

6) On the other hand, learned counsel appearing for the State has supported the impugned judgment of conviction and order of sentence as passed by the learned trial Court.

7) We have heard learned counsel appearing for the parties and perused the entire record carefully.

8) From perusal of the judgment impugned, it appears that the trial Court while taking note of the provisions prescribed under Section 106 of the Indian Evidence Act, has held the appellants guilty for the commission of the alleged crime as they have been found at home along with the deceased children on the date of the occurrence of the alleged incident and have failed to explain as to how they died. It is, therefore, necessary to examine the evidence led by the prosecution, particularly, the testimonies of the relatives of the deceased children in order to ascertain the fact as to whether the appellants were at home

along with the deceased children at the relevant point of time or not, and, also to determine the fact whether the alleged seized articles were recovered from the appellants, as alleged by the prosecution.

9) Ghanshyam Ojha (PW-1) is the father of the deceased children. According to him, he and other of his family members had gone for their work on the date of the alleged incident and his deceased children and the appellants were at home, who were looking after the children. He states further that upon knowing the information that his children are not well at home, therefore, he along with said Gurudayal and Jagnu reached home, where his children were found to be dead in burnt condition, while cot of the room was being burnt and at the relevant time, neither his brother-Domendra nor his wife-Malti Bai were there at home and came to know later on that she was taken to hospital by his said brother. At paragraph 4 of his testimony, a doubt has been raised upon the appellants that they might have burnt his children. He deposed further that the relations of the said brother with his children were cordial and unable to state as to why they burnt his children. In his cross-examination, at paragraph 7, it was stated that the brother and daughter-in-law (appellants) were not happy owing to behavior of his deceased children and because of that, they killed them by pouring kerosene oil. It was stated further by him, at paragraph 10, that the marriage of his brother-Domendra with said Malti Bai was solemnized two months prior to the occurrence of the alleged incident and his relations with them are cordial and quarrel had never taken place amongst them. Further of his statement would show that when he went for his work on the date of the incident, his father,

mother, wife and the appellants were at home and was unable to state that at what time, they (father, mother and wife) have left the home for their work. He states further, at paragraph 11, that his children were happy with said Malti Bai.

10) Renu (PW-2), mother of the deceased children has deposed in her statement that when she and other family members had gone for work, she left over her children with the appellants, who used to live happily with Malti Bai. It is stated further that since her children might have disturbed said Malti Bai, therefore, the appellants might have burnt them. According to her further testimony, it appears that the appellants and her in-laws were living together, while she and her other brother-in-laws lives separately and the behavior of the appellant (Domendra) with her was good and he never quarreled with her and, has levelled the alleged allegations against the appellants merely on the basis of suspicion.

11) Jagdev (PW-7) is the grand-father of the deceased children and, it appears from his testimony that his said son-Domendra had also gone for work and deceased children were at home along with daughter-in-law, namely, Malti Bai and since the children were at home along with her, therefore, she might have burnt them. In his cross-examination, it was stated that the deceased children were used to live happily with said Malti Bai and deposed further that his son (Domendra) had left home prior to him on the fateful day for doing fishing work and, almost similar is the statement of his wife-Gangotri (PW-6), the grand-mother of the deceased children.

12) Govardhan Verma (PW-3) and Hemant Sharma (PW-4) are the attesting witnesses to the alleged seizure memos (Exs.P-17 and P-18), but have not supported the same. Other prosecution witnesses are formal in nature.

13) What is, therefore, reflected from a bare perusal of the statements of the above-mentioned prosecution witnesses that although, the alleged incident had taken place on 11.05.2015 around 13 hours, but, it cannot be said that the appellants were at home along with the deceased children of said Ghanshyam (PW-1) at the relevant point of time, as the prosecution witnesses are not found to be stuck to this effect, nor even the relations of the appellants with the deceased children were strained, rather it was found to be cordial in nature. The prosecution has, thus, failed to establish the fact that the appellants were at home along with the deceased children at the relevant point of time, nor even have succeeded to prove the 'motive' of theirs for the commission of the alleged crime and merely on the basis of suspicion, the alleged allegations have been levelled against them. No reliance, therefore, could be placed upon their testimonies.

14) Pertinently to be noted here further that even the alleged articles cannot be held to be recovered from the appellants, as it reflects from a bare perusal of the inquests (Exs.P-6 and P-7), made on 11.05.2015, that the same were recovered on 11.05.2015 from the spot. In such circumstances, it cannot be said to be recovered from the appellants on 12.05.2015 vide seizure memos (Exs.P-17 and P-18) as projected by the prosecution. It, thus, appears that the

prosecution has taken a false plea in order to attribute the appellants for the commission of the alleged crime. The entire case was based upon the circumstantial evidence, however, none of the circumstances were found to be established by the prosecution by way of any cogent and reliable evidence, yet the trial Court, while taking note of the provisions prescribed under Section 106 of the Indian Evidence Act, has convicted the appellants by shifting the burden of proof upon them.

15) Since the conviction has been made by taking recourse to the provisions prescribed under Section 106 of the Indian Evidence Act, it is, therefore, necessary to examine the same, which reads as under :-

> "**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."

16) A bare perusal of the aforesaid provision would show that it has been intended to meet certain exceptional cases in which it would be impossible or extremely difficult for the prosecution to prove the fact which is especially within the knowledge of the accused and the knowledge of that fact is not available to the prosecution. The said provision, however, cannot be utilized to cast the burden upon the accused to prove his innocence by relieving the prosecution from its

burden of proof as the prosecution has to stand on its own footings and, cannot derive any strength or support from the weakness of defence.

17) The aforesaid provision has been interpreted by the Supreme Court in the matter of **Nagendra Sah** (supra) and observed at paragraphs 21 to 23, as under :-

> 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, AIR 1956 SC 404, which has stood the test of time. The relevant part of the said decision reads thus :-
>
> > “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 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.**, 1936 SCC Online PC 20 and **Seneviratne v. R., 1936 SCC Online PC 57.**

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 recognize 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 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. 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."

18) Applying the aforesaid principles to the case in hand, where the prosecution has failed to establish the fact that the appellants were at home along with the deceased children at the relevant point of time, nor even the alleged seized articles were found to be recovered from them, coupled with the failure of the prosecution to prove the 'motive' of theirs, the trial Court has, therefore, committed an illegality in convicting the appellants for the commission of the alleged crime while taking recourse to the provision prescribed under Section 106 of the Indian Evidence Act. The conviction of the appellants is, therefore, liable to be set aside.

19) Consequently, both these appeals are allowed and the impugned judgment of conviction and order of sentence dated 17.11.2015 passed by the 7th Additional Sessions Judge, Durg (CG) in Sessions Trial No.81/2015 is hereby set aside and the appellants are directed to be released forthwith, if not required in connection with any other case.

20) Let a certified copy of this judgment along with the original record be transmitted to the trial Court concerned for necessary information and action, if any. A certified copy of the judgment may also be sent to the concerned Jail Superintendent forthwith wherein the appellants are suffering the jail sentence.

~~SD/-~~
(Sanjay S. Agrawal)
Judge

SD/-
(Sanjay Kumar Jaiswal)
Judge

Tumane