A.F.R.

Reserved

Case :- CRIMINAL APPEAL No. - 3813 of 2016

Appellant :- Smt. Meena
Respondent :- State of U.P.
Counsel for Appellant :- Tapan Kumar Mishra,Heera Lal Yadav,Rajesh Kumar Mishra,Sukhvir Singh
Counsel for Respondent :- G.A.

With

Case :- CRIMINAL APPEAL No. - 4374 of 2016

Appellant :- Gyan Singh Shakya
Respondent :- State of U.P.
Counsel for Appellant :- Raj Bahadur Verma,Akash Mishra,Akash Mishra, A/C,Rajendra Kumar Dubey,Santosh Kumar Pandey,Sukhvir Singh
Counsel for Respondent :- G.A.

Hon'ble Bachchoo Lal,J.
Hon'ble Subhash Chandra Sharma,J.

(Delivered by Hon'ble Subhash Chandra Sharma,J.)

1. Both criminal appeals emanate from the common judgment and order dated 09.06.2016 passed by learned Additional District & Sessions Judge, Court No. 2, Farrukhabad in Sessions Trial No.122 of 2014 (State Vs. Gyan Singh Shakya) and Session Trial No. 90 of 2015 (State Vs. Smt. Meena) arising out of Crime No. 1116 of 2009 under Section 302/34 IPC, Police Station & District Farrukhabad by which appellants have been convicted and sentenced under Section 302 read with Section 34 IPC with rigorous imprisonment for life and fine of Rs. 10,000/- for each, in default of payment of fine to undergo additional imprisonment for a period of ten months, therefore these appeals are heard and being decided together.

2. The prosecution case in brief is that Girish Chandra Dubey, r/o village Khera Guleriya, Police Station Jahanganj, District Farrukhabad, real brother of deceased Umesh Dubey is informant. Deceased was living with his sister Munni Devi in her house at Chatta Dalpat Rai, Farrukhabad. On 22/23.06.2009 at about 4 a.m. Girish Chandra Dubey got information that his brother (deceased) had been murdered. On this information, he along with his brothers Dinesh Chandra, Mahesh Chandra, Ram Vilash, Anand Mohan and Ram Datt arrived at Muhalla Adiyana where dead body of his brother Umesh Dubey was lying in the field and there was blood on a cot in the courtyard (Aagan) of one Gyan Singh Shakya near to that place. There were blood stains from *Aagan* to field where dead body was lying. On query he came to know that after committing murder of his brother with sharp-edged weapon, his dead body had been thrown in the field. On this, he believed that Gyan Singh Shakya, his wife and his companion have committed murder and threw the dead body in the field. In this regard, t*ahreer* was got scribed by Anand Mohan Dubey at Kotwali, Farrukhabad on 23.06.2009 at 7.30 a.m. on the basis of which F.I.R. was lodged as crime no. 1116 of 2009 under Section 302 IPC against accused Gyan Singh Shakya and Smt. Meena (hereinafter referred to as appellants).

3. Investigation of the case was handed over to S.S.I. Nasir Husain who proceeded to place of occurrence.

4. He started preparing inquest of deceased Umesh Dubey on 23.6.2009 at 9 a.m. in presence of witnesses. Dead body was got sealed. Other essential papers for the purpose of conducting post-mortem of the deceased were prepared. Sealed dead body was handed over to constable Sukhram and constable Govind with papers who brought it to mortuary, Fatehgarh, Farrukhabad.

5. Blood stained and plain soil were collected from the courtyard of appellant-Gyan Singh Shakya and took into possession the ropes used in the cot and bed sheet which were also blood stained. These articles were sealed and recovery memo Ext. Ka-11 and Ka-12 were prepared. Thereafter, these articles were sent to F.S.L. for Chemical Examination.

6. Post-mortem of deceased Umesh Dubey was conducted on the same day at about 4.50 p.m. by Dr. Singh Vikram Katiyar and post-mortem report Ext. Ka-5 was prepared, details of which are as below:-

External Examination: Time after death was about half day. He was aged about 40 years. Average built body. Eyes closed, mouth partially opened, dry clotted blood at place of body. Rigormortis was present in upper extremities.

Ante-mortem injuries:(1) Incised wound 12 in number. Both side face and cheecks measuring 7 cm x 1 cm to 3 cm x 0.5 cm muscle to bone deep.

(2) Incised wound 18 cm x 4 cm x muscle deep in front of neck middle part, on dissection all neck structure cut, body of C5 and C6 partially cut.

(3) Incised wound 9 x 3 cm x bone deep on top of left shoulder.

(4) Multiple incised wounds 18 in number in front of abdomen both side measuring 11 c.m. X 4 c.m. To 4 cm x 1.5 cm. Abdominal cavity deep, abdominal cavity exposed, loop of intestines coming out.

Internal examination: Head-NAD, neck-noted, Scalp-NAD, skull-NAD, membranes-NAD, brain-NAD, base-NAD, vertebrae-NAD, spinal cord-not opened. Thorax: walls-NAD, ribs & cartilages

NAD. Larynx & trachea-noted, right & left lungs-NAD, pericardium-NAD. Heart-empty. Blood vessels-NAD. Abdomen: Walls, peritonium, cavity-noted. Buccal cavity & teeth 16/16. Pharynx, oesophagus-noted. Stomach and contents-blood mixed pasty material about 150 gm. Small and large intestine cut. Gall Bladder-half filled. Pancreas, spleen, kidneyes-NAD. Urinary bladder-20 ml. Generation organs-NAD.

Cause of death is shock and haemorrhage as a result of ante-mortem injuries.

7. Investigating Officer having recorded the statements of informant-Girish Chandra, inspected the spot and prepared site plan. He further recorded the statements of constable-Kunwar Pal, Ram Vilash Dixit, Mahesh Chandra Dubey, Anand Mohan Dubey, Smt. Prabha Devi, Dr. S.V. Katiyar and concluded the investigation and submitted the charge sheet against appellants-Gyan Singh Shakya and Smt. Meena under Section 302 IPC.

8. The court concerned took cognizance of the offence and summoned the appellants for trial.

9. After providing copies of prosecution papers in compliance of Section 207 Cr.P.C. the court concerned committed the case for trial to the court of Session.

10. The case was opened by the prosecution and on the basis of material on record charge under Section 302 read with Section 34 IPC was framed against the appellants-Gyan Singh Shakya and Smt. Meena. It was explained to them. They did not plead guilty but denied and claimed for trial.

11. The prosecution examined P.W.1 Girish Chandra Dubey, P.W.2 Dinesh Chandra, P.W.3 Prabha Devi as witnesses of fact. P.W.4 Head constable Kunwar Pal Singh Yadav chick/G.D. writer.

P.W.5 Dr. Singh Vikram Katiyar, P.W.6 S.I. Nasir Husain who conducted investigation of the case. P.W.7 Awadesh Kumar who proved the writing of S.H.O. T.P. Singh and P.W.8 Kalu Ram Dohare, C.O., the then inspector Kotwali, Farrukhabad who proved test report from F.S.L. as Ext. Ka-13.

12. After conclusion of prosecution evidence statements of appellants were recorded under Section 313 Cr.P.C. in which appellant-Gyan Singh Shakya alleged that his involvement was false and further stated that he was not present on the place of occurrence. Appellant-Smt. Meena also alleged that her involvement is false, she further stated that she had no concern with the case, she did know nothing about the murder of deceased. She had been falsely implicated. No any other evidence has been adduced on the part of appellants in their defence.

13. After hearing the argument for prosecution as well as appellants, the trial court has convicted the appellants under Section 302/34 IPC and sentenced to each of them with rigorous imprisonment for life and with fine of Rs. 10,000/- in default of payment of fine to undergo ten months' additional imprisonment. Against this conviction and sentence, this appeal has been preferred.

14. We heard Sri Sukhvir Singh, learned counsel for the appellants as well as Sri Ratan Singh, learned A.G.A. for the State and perused the record.

15. Learned counsel for the appellants submits that in this case, there is no any witness who had seen the occurrence. Informant had lodged the F.I.R. only on the basis of suspicion against the appellants. Even during their examination, they (prosecution witnesses) stated that they had not seen the occurrence themselves. P.W.2 is brother of informant who had also not seen

the occurrence. P.W.3 Smt. Prabha Devi was said to be witness of occurrence but she turned hostile during examination and she faced gruel cross-examination on the part of prosecution but nothing came out likely to support the prosecution version. In this way, there is no evidence at all to support the prosecution version against the appellants. The dead body of deceased was found lying in open field which was seen by stranger and information was given to the informant. It has also been alleged that blood stained cot and bed-sheet was found in the courtyard of appellants and also blood stains were present from the courtyard to place where dead body was lying. On the basis of this fact conviction has been made while presuming that appellants had committed the murder of deceased and threw the dead body in open field. Appellants were not present at that very night in their house and none had seen them present there. Only on the basis of blood stained cot and bed sheet found in the courtyard of appellants, it cannot be concluded that appellants had committed the murder. P.W.3 Smt. Prabha who is neighbour has also stated in her examination-in-chief that she was not present at her house in the night, the incident took place. No any kind of recovery relating to weapon or other articles used in the commission of the crime had been recovered from inside the house or from the possession of the appellants. There was no any motive present in the minds of appellants to commit murder of deceased. In fact, this case is of no evidence and conviction and sentence held against the appellants is based only on assumption. The link of circumstances is not so complete to indicate that the appellants had committed the murder of deceased. The burden of proof lies on the prosecution to prove beyond reasonable doubt that appellants had committed the murder of deceased but this burden had not been discharged by the prosecution. Only on the basis of assumption, conviction cannot be made. In this way the

conviction and order passed by the trial court is not based on sound principles of law but on assumption. It is further submitted that in this case trial court had taken aid of Section 106 of Evidence Act but in this case the position is different. Section 106 of Evidence Act could only be invoked where it is proved beyond reasonable doubt that the appellants were in exclusive possession of the place where incident took place or it was inside the room where no other person except the appellants could be present, which is lacking in this case. On mere probability, appellants cannot be convicted and sentenced, therefore the impugned judgment and order passed by the learned trial court dated 09.06.2016 is not good in eye of law and is likely to be set aside.

16. Learned A.G.A. vehemently opposed the submissions made by learned counsel for the appellants and urged that in this case, blood stained cot and bed sheet were found in the courtyard of the appellants from where blood stains were found continuously up-to the field where dead body was found. Forensic Science Laboratory Report has also proved that human blood was there on the cot and bed sheet. Deceased was lying on the cot there in the courtyard of the appellants. His dead body was found in the morning. The possibility of presence of other persons in the courtyard of appellants was nil but facts relating to the commission of crime were specifically in the knowledge of appellants as the house being in their possession. Only they could disclose as to how deceased was murdered while lying in the courtyard in the night and as to how his dead body was brought from there to the open field. The appellants had not given satisfactory explanation in their statements recorded under Section 313 Cr.P.C. Prosecution could not be expected to bring such evidence which is beyond its control. In such circumstances, only appellants are to explain the true fact. If they fail or give explanation which is wrong, they cannot absolve

themselves from the liability. In this way, learned trial judge has passed the judgment dated 09.06.2016 on the sound principles of law and had convicted and sentenced the appellants properly as per law. The evidence on record is sufficient on the basis of which learned trial judge has concluded the conviction of appellants which is right in the eye of law. There is no illegality or impropriety. The appeals are force less and liable to be dismissed.

17. Before we deal with the contentions raised by learned counsel for the appellants, it will be convenient to take note of the evidence as adduced by the prosecution.

18. P.W.1 Girish Chandra is the informant and brother of deceased who deposed that Umesh Dubey (deceased) was his real brother. On the day of occurrence, he was living in Datta Dalpatrai, Farrukhabad with his sister Munni Devi. On 23.6.2009 in the morning at about 3-4 o'clock his relative Suresh informed him on telephone that Umesh Dubey has been murdered. On this information, he along with his brother Dinesh Chandra, Mahesh Chandra, Ram Vilash, Anand Mohan and Ramdatt went to Mohalla Adiyana from the village where in a field the dead body of his brother was lying. There was house of Gyan Singh Shakya near to it. In the house of Gyan Singh Shakya, there was blood on a cot and bed sheet. On query, he came to know that last night Gyan Singh Shakya and his wife Smt. Meena have thrown the dead body in the field after committing the murder with sharp-edged weapon. There were blood stains visible from the house of Gyan Singh Shakya to the place of dead body. Seeing this, he was assured that Gyan Singh Shakya and his wife Smt. Meena has thrown the dead body of Umesh Dubey in the field after committing murder. He got *tahreer* written by his uncle Anand Mohan Dubey and after making his signature on it tendered to the police station. Paper no. 5-A *tahreer* was exhibited to the witness which he asserted. He further

stated that police went to the place and prepared inquest in his presence. He also made signature on the inquest report, paper no. 10-A/2, 10-A/3. The witness was cross-examined by defence in which he stated that he met to deceased prior to one and half months at the house in the village. Deceased was married and had three children. Children with his wife lived in the village. His village was 20 Km. distant from the place of occurrence. He along with his brothers went to the place of occurrence straightly without going to the house of his sister. At the place of occurrence, 20-25 people were present whose names, he did not know. At that time, dead body of his brother was in the field. He did not see the dead body in the house. It was 20 meters distant in right direction. Nothing was recovered from the place where dead body was lying. He and his companion had entered the house and saw the cot in which ropes were cut with a bed sheet near about 5 x 4 feet long. Except this, there were 2-3 blood stained cloths on the cot. Door in the house was towards the east direction, width of door was 3-4 feet and it was not in fit condition but having *fatkiya*. The house of Gyan Singh Shakya was in the west direction. He further stated that he named accused persons on the basis of suspicion. He did not see his brother Umesh while going to the house of Gyan Singh Shakya. He came to know that deceased Umesh Dubey used to go to the house of Gyan Singh Shakya. He was told about this by some people those were gathered at the place of occurrence. He did not know as to whether deceased had illicit relation with the wife of Gyan Singh Shakya, Smt. Meena. He also did not know as to whether Smt. Meena was an unchaste lady. He further reiterated that he had not seen any person committing the murder. It was told by the people when he reached there. He went into the house of Gyan Singh Shakya where blood stained cot was found outside with a bed sheet. There was no other thing. No any weapon was

there. During cross-examination on behalf of appellant Gyan Singh Shakya, he again reiterated that he had not seen with his eyes the murder of his brother Umesh Dubey but narrated about it as told by the people.

19. P.W.2 Dinesh Chandra is also brother of deceased Umesh Dubey who deposed that his brother Umesh Dubey was living with his sister Munni Devi at Datta Dalpatrai in Farrukhabad. On 23.6.2009 in the morning, he received information on telephone that in the night Umesh Dubey had been murdered and his dead body was lying in the field. On this information, he along with his brothers Girish Chandra Dubey and Mahesh Chandra went to Muhalla Adiyana where dead body of his brother Umesh Dubey was lying. The house of Gyan Singh Shakya was near about 10 steps distant from where dead body was lying. From the place of dead body to courtyard of Gyan Singh Shakya, there were blood stains. This witness was also cross-examined on behalf of appellants in which he stated that he saw his brother prior to two years. He had not seen anyone while committing murder. On the basis of suspicion, he named, Gyan Singh Shakya and Smt. Meena.

20. P.W.3 Prabha Devi has deposed that the house of Gyan Singh Shakya was adjacent to her house. Deceased Umesh Dubey used to come and go to Gyan Singh Shakya. This fact was known to entire *muhalla* in addition to her. The name of wife of Gyan Singh Shakya was Smt. Meena and both of them were living in their house. In the night Umesh Dubey was murdered, she was not present at her house. On the next day, she came to her house. She did not know whether there were illicit relations between Meena and Umesh Dubey.

This witness was declared hostile and cross-examined by

learned A.D.G.C. In cross-examination, she had denied the statement made by her before Investigating Officer about illicit relations between Meena and Umesh Dubey. She did not see anyone while coming and going to the house of Gyan Singh Shakya. On the day, Umesh Dubey was murdered she was not at home. Afterwords she came back then she was told by the residents of Muhalla about the murder. She did not see the dead body of Umesh Dubey, even Investigating Officer did not record her statement. She expressed inability in explaning as to how the Investigating Officer had recorded her statement.

21. P.W.4 Head-constable Kunwar Pal Singh Yadav has proved the first information report in his hand-writing which is exhibited as Ext. Ka-2 and also carbon Copy of G.D. As Ext. Ka-3.

22. P.W.5 Dr. Singh Vikram Katiyar had conducted the post-mortem of deceased Umesh Dubey on 23.6.2009 and prepared post-mortem report which he proved as Ext. Ka-5 in his hand-writing and signature.

23. P.W.6 S.I. Nasir Husain who investigated the case has proved the papers prepared by him during investigation of case that is the inquest of deceased as Ext. Ka-7 and site-plan as Ext. Ka-6

24. P.W.7 Constable Awadhesh Kumar has proved charge sheet as Ext. Ka-14 in hand-writing of S.H.O. Tribhuwan Pratap Singh who had been posted with him.

25. P.W.8 Kaluram Dohare, C.O. And then inspector has proved report received from Forensic Science Laboratory as Ext. Ka-13.

26. From the perusal of statements as deposed by P.W.1 & P.W.2, it is evident that both of them had not seen the occurrence. They came there after getting information from some relative,

namely, Suresh. They had also not seen appellants in company of deceased before the occurrence. They had named them in F.I.R. only on the basis of suspicion.Therefore, P.W.1 & P.W.2 are not eye witnesses of the occurrence.

27. P.W.3 was not present at her house which is adjacent to the house of appellants, on the day, the incident took place. She knew about it after she returned on the next day. She is also not the witness of last seen, therefore, P.W.3 is also not the eye witness of the incident.

28. P.W.6 Investigating Officer has also stated on page 11 that he did not mention from Parcha no. 1 to 5 that someone had seen the commission of murder.

29. Thus, there is no eye witness account regarding commission of murder of deceased by the appellants in their courtyard (Aagan) and then throwing the dead body in the field, about 20 meters, away from their house.

30. Now, we are to consider the circumstances in which incident of murder of deceased took place on that unfateful night of 22/23.6.2009 in the courtyard of appellants' house and then dead body was thrown in the field, about 20 meters for from the place of occurrence.

31. The blood stained cot and bed sheet was found in the courtyard of appellants' house. Blood stained and plain soil were taken from the place by Investigating Officer along with some ropes and a piece of bed-sheet from the cot and sent to Forensic Science Laboratory for Chemical Examination. The test report Ext. Ka-13 shows that there was human blood present on these articles. Site plan Ext. Ka-6 also shows the place of occurrence in the house (courtyard) of the appellants. P.W.1 & P.W.2 also deposed that they

saw blood stained cot and bed-sheet lying in the courtyard of appellants. Drops of blood were also lying on the ground from the courtyard to the place where dead body was lying in the field.

32. This account of testimony of P.W.1 & P.W.2 regarding place of occurrence in the courtyard of appellants gets support with the F.S.L. test report Ext. Ka-13 and site plan Ext. Ka-6. So place of occurrence, where murder of deceased was committed, stands proved to be in the courtyard of appellants.

33. The courtyard has been shown to be a part of appellants' house in the site plan Ext. Ka-6. The house is consisted of one room and the courtyard. The courtyard is open as stated by Investigating Officer P.W.6 S.I. Nasir Husain on page 7 in his statement. P.W. 1 has also stated in Page 6 that the door in the house was not in good condition but *fatakia* were fitted. This situation clears that the courtyard (Angan) where incident took place was not covered with ceiling or roof but open place having room in one side.

34. Admittedly, in the present case there is no occular evidence on record proving the complicity of the appellants in the commission of murder of deceased. It is a case of circumstantial evidence.

35. The principles how the circumstance be considered weighed are well-settled and summed up by the Hon'ble Apex Court in the case of **Hanumant Vs. State of Madhya Pradesh, 1952, SCR1090.** Para no. 12 is quoted as under:

> 12. It is well to remember that in cases where the evidence in 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 pendency 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.

36. In case of **Sharad Birdhi Chand Sarda Vs. State of Maharashtra, 1984 (4) SCC 116,** which was observed as under:

"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 and another Vs. State of Maharashtra 1973 2 SCC 793 where the observations were made :

(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."

51. In Sujit Biswas Vs. State of Assam (2013) 12 SCC 406 the Apex Court ruled that in judging the culpability of an accused the circumstance adduced when collectively considered must lead to the only irresistible conclusion that the

accused alone is the perpetrator of a crime in question and the circumstances established must be of a conclusive nature consistent only with the hypothesis of the guilt of the accused and observed as here under :

59. A reference in the passing however to the of quoted decision in Sharad Birdhichand Sarda (supra) construed to be locus classicus on the relevance and decisiveness of circumstantial evidence as a proof of the charge of a criminal offence would not be out of place. The relevant excerpts from paragraph 153 of the decision is extracted herein below.

"153.(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused...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.

** * * (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."*

52. In Dhan Raj @ Dhand Vs. State of Haryana (2014) 6 SCC 745, (Hon. Ghose,J.) while dwelling on the imperatives of circumstantial evidence ruled that the same has to be of highest order to satisfy the test of proof in a criminal prosecution. It was underlined that such circumstantial evidence should establish a complete unbroken chain of events so that only one inference of guilt of the accused would ensue by excluding all possible hypothesis of his innocence. It was held further that in case of circumstantial evidence, each circumstance must be proved beyond reasonable doubt by independent evidence excluding any chance of surmise or conjecture."

37. The legal proposition which emerges out from the reading of the aforesaid authorities is where a case is based upon circumstantial evidence the same has to be of highest order to satisfy the test of proof in a criminal prosecution and as such circumstantial evidence should establish a complete unbroken chain of events so that only one inference of guilt of the accused

would ensue by excluding all possible hypothesis of his innocence, each circumstance must be proved beyond reasonable doubt by independent evidence excluding any chance of surmise or conjecture.

38. We now proceed to scrutinize whether the circumstances which weighed with the trial court are conclusive in nature and have tendency which could be considered against the appellants in the background of the evidence adduced by the prosecution and the defence and to see if those circumstances bring home the case of the prosecution.

39. In these two appeals preferred by the appellants challenging the correctness of judgment and order of conviction, we have gone through the entire record and considering the rival submissions and the question which arises in this matter for our consideration is that whether the circumstances on record satisfy the principle laid down by the Hon'ble Apex Court in its various judgments as regards appreciation of cases based on circumstantial evidence.

40. The circumstances which have weighed with the learned trial court are that the dead body of deceased was found in a field, about 20 meters from the house of appellants and blood stains were found continuously between the house and place where dead body was found lying in the field. Thirdly, the cot and bed sheet was also found blood stained in the courtyard of the appellants.

41. In this case appellants had been named in the F.I.R. on the basis of suspicion. During, their examination before the court P.W.1 & P.W. 2 had categorically stated that they had named the appellants on the basis of suspicion and knowledge as gathered from the people at the place of occurrence but they had not seen anyone causing murder of deceased or taking the dead body to the field from the courtyard (aagan) at all. No doubt, the offence is

shocking one but the gravity of the offence cannot by itself over-weigh as far as legal proof is concerned. In the judicial adjudication suspicion, however strong cannot be allowed to take the place of proof. It is well settled that suspicion, however great it may be, cannot be substituted for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of circumstantial evidence.

42. With that caution in mind we shall now proceed to examine the facts and circumstances as put forward and various arguments advanced.

43. The present case is a case of circumstantial evidence, hence motive assumes considerable significance and it is well settled that in case based upon circumstantial evidence the prosecution has to prove the motive.

44. The motive suggested by the prosecution in the present case for committing the murder of deceased by the appellants is illicit relationship between the deceased and appellant Smt. Meena wife of appellant Gyan Singh Shakya. It has been argued by the learned counsel for the appellants that prosecution has failed to prove by leading any evidence about the motive in this case. None of the witness has asserted this fact.

45. In the first information report, there is none mention of motive to murder the deceased by the appellants. P.W.1 & P.W.2 both are real brothers of the deceased. They had also not stated even a single word about the illicit relationship between the deceased and Smt. Meena. P.W.3 is neighbour of appellants, she had also stated categorically that she did not know whether there was illicit relation between deceased Umesh Dubey and appellant Smt. Meena or not. Even during her cross-examination, she had not acceded the statement as recorded by the Investigating Officer under Section

161 Cr.P.C. No question in this regard had been put before the Investigating Officer by the prosecution during his examination. Thus, in view of the evidence on record, we have no hesitation in holding that prosecution has failed to prove by any reliable or cogent evidence the motive suggested by the prosecution for the appellants to commit the murder of deceased on account of illicit relationship with the appellant Smt. Meena.

46. The perusal of record shows that in this case prosecution witnesses are not the eye-witnesses of the occurrence. There is nothing on record to show that deceased was seen in company of appellants prior to unfateful night, the incident took place and that the appellants were present at their house. Even the presence of appellants in their house had also not been tried to be proved by prosecution. No any other last seen witness had been produced. P.W.3 Smt. Prabha Devi who was neighbour of the appellants had been examined but she had not supported the prosecution case and she said nothing about the presence of appellants in their house on that day. She had also declined the version of prosecution about illegal relationship of deceased with the appellant Smt. Meena Devi. Except this, there is no other reason shown to be present as motive for causing murder of the deceased by the appellants. Though, P.W.3 had stated that deceased used to come and go to the house of appellants but on the day of incident, she was not present at her house. So, she could not be in a position to tell about the presence of appellants in their house with the deceased. There is no evidence that appellants absconded from their house after committing the crime. In the statement under Section 313 Cr.P.C. appellants had denied their presence in their house. They were also not seen by any person at their house even throughout the night or day prior to or after the incident. They had also not been seen by anyone while taking the dead body from

their courtyard (aagan) to the field where it was found lying in the morning. Nothing was recovered from the possession of the appellants or on the instance of their pointing out. Nothing incriminating was recovered from inside their dwelling house (room). Courtyard (aagan) where blood stained cot and bed-sheet was found, was open and uncovered. The door was not in fit condition but only *fatkiya* was fitted. It has also not been brought on record by the prosecution that entry of some other person could not be possible into the courtyard (aagan) by opening *fatkiya* or otherwise. This possibility of entry by someone else except the appellants had not been ruled out by the prosecution. P.W. 6 Investigating Officer, had also not provided any detail in this regard either in the site plan Ext. Ka-6 or in his statement made before the court during examination but he had categorically stated that it was open courtyard (aagan) where cot was lying blood stained. All injuries found on the body of deceased were incised wounds but no any weapon had been recovered either from the possession of the appellants or on their pointing out or from their living room. How and when did the deceased go there to the courtyard (aagan) of the appellants is unknown to everyone.

47. In the background of facts as narrated above, it is apparent that the prosecution has not been able to prove the link of circumstances which connect the appellants with the commission of murder of deceased.

48. The said three circumstances that blood stained cot and bed sheet was found in the courtyard (aagan) of the appellants, absence of appellants as well as continued blood stains upto the place where dead body was found lying in the field, in our opinion cannot be said to be inconsistent with innocence of the appellants and on the basis of these three circumstances alone, it cannot be held that the appellants had caused the murder of deceased.

49. There is no other circumstance to rope appellants with the commission of murder of deceased.

50. It is well settled that if there is clinching and reliable circumstantial evidence, then that would be the best evidence to be safely relied upon which is lacking in this case.

51. Learned trial court has also taken aid of Section 106 of Evidence Act and held on the basis of blood stained cot and bed sheet to have been found in his courtyard that the fact of commission of crime was specially in the knowledge of appellants, therefore, burden of disclosing that special fact was on them, which they failed as a consequence conviction was made in the evidence of aforesaid circumstance.

52. At this juncture, it is expedient to consider the legal position regarding invocation of Section 106 of Evidence Act in such a case by the trial judge.

53. One of the earliest cases in which Section 106 of Evidence Act was examined and explained are **Attygalle versus Emperior reported in (1936) 38 Bombay LR 700. Stephen Seneviratne versus King reported in (1937) 39 Bombay LR 1**.

> *"In the aforesaid decisions, Their Lordships of the Privy Counsel dealt with Section 106 of Ordinance No. 14 of 1895 (corresponding to Section 106 of the Indian Evidence Act). It was held that Section 106 of the Evidence Act does not affect the onus of proof and throw upon the accused the burden of establishing innocence."*

54. Scope of section 106 of the Indian Evidence Act was examined inconsiderable detail by the Apex Court in the case of **Shambhu Nath Mehra versus State of Ajmer reported in AIR 1956 SC 404**, wherein learned Judges spelt out the legal principle in paragraph 11 which read as under :

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 preeminently or exceptionally within his knowledge."

55. In **Ch. Razik Ram versus Ch. J.S. Chouhan reported in AIR 1975 SC 667** it has been held as under:-

"116. In the first place, it may be remembered that the principle underlying Section 106 Evidence Act which is an exception to the general rule governing burden of proof - applies only to such matters of defence which are supposed to be especially within the knowledge of the defendant-respondent. It cannot apply when the fact is such as to be capable of being known also by persons other than the respondent."

56. In **State of West Bengal versus Mir Mohammad Umar reported in 2000 SCC(Cr) 1516** it has been reiterated as under:-

"36. In this context we may profitably utilise the legal principle embodied in Section 106 of the Evidence Act which reads as follows : "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section 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 his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference.

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."

57. The applicability of Section 106 of the Indian Evidence Act,

1872 has been lucidly explained by the Apex Court in paragraph 23 of its judgement rendered in the case of **State of Rajasthan versus Kashi Ram reported in JT 2006 (12) SCC 254** which runs as here under:-

> "23. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution."

58. When an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer an explanation.

59. The Apex Court in **Trimukh Maroti Kirkan versus State of Maharashtra reported in (2007) 10 SCC 445** reiterated as here under :-

> "14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty

man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecution 1944 AC 315 quoted with approval by Arijit Pasayat, J. in State of Punjab vs. Karnail Singh (2003) 11 SCC 271). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

"(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him."

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

60. **P. Mani Vs. State of T.N. 2006 (3) SCC 161** the Apex Court held as here under :

10. We do not agree with the High Court. In a criminal case, it was for the prosecution to prove the involvement of an accused beyond all reasonable doubt. It was not a case where both, husband and wife, were last seen together inside a room. The incident might have taken place in a room but the prosecution itself has brought out evidences to the effect that the children who had been witnessing television were asked to go out by the deceased and then she bolted the room from inside. As they saw smoke coming out from the room, they rushed towards the same and broke open the door. Section 106 of the Evidence Act, to which reference was made by the

High Court in the aforementioned situation, cannot be said to have any application whatsoever.

61. The Apex court in the case of **Vikramjit Singh Vs. State of Punjab 2006 (12) SCC 306** observed as here under :

> 14. Section 106 of the Indian Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule, e.g., where burden of proof may be imposed upon the accused by reason of a statute.
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> 15. It may be that in a situation of this nature where the court legitimately may raise a strong suspicion that in all probabilities the accused was guilty of commission of heinous offence but applying the well-settled principle of law that suspicion, however, grave may be, cannot be a substitute for proof, the same would lead to the only conclusion herein that the prosecution has not been able to prove its case beyond all reasonable doubt.

62. The Apex Court in the case of **State of Rajasthan v. Thakur Singh reported in (2014) 12 SCC 211**, while allowing the appeal preferred before it by the State of Rajasthan against the judgment and order of the Rajasthan High Court, by which the High Court had set aside the conviction of accused Thakur Singh recorded by the trial court under Section 302 I.P.C. on the ground that there was no evidence to link the respondent with the death of the deceased which had taken place inside the room in the respondent's house, in which he had taken the deceased (his wife) and their daughter and bolted it from within and kept the room locked throughout and later in the evening when the door of the room was broken open the deceased was found lying dead in the room occupied by her and the respondent-accused, held:

> The High Court did not consider the provisions of Section 106, Evidence Act at all. The law is quite well settled, that burden of proving guilt of the accused is on the prosecution, but there

may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused, and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts. In the instant case, since the deceased died an unnatural death in the room occupied by her and the respondent, cause of unnatural death was known to the respondent. There is no evidence that anybody else had entered their room or could have entered their room. The respondent did not set up any case that he was not in their room or not in the vicinity of their room while the incident occurred, nor he did set up any case that some other person entered room and cause to the unnatural death of his wife. The facts relevant to the cause of the death of the deceased being known only to the respondent, yet he chose not to disclose them or to explain them. The principle laid down in Section 106, Evidence Act, is clearly applicable to the facts of the case and there is, therefore, a very strong presumption that the deceased was murdered by the respondent. It is not that the respondent was obliged to prove his innocence or prove that he had not committed any offence. All that was required of the respondent was to explain the unusal situation, namely, of the unnatural death of his wife in their room, but he made no attempt to do this. The High Court has very cursorily dealt with the evidence on record and has upset a finding of guilt by the trial court in a situation where the respondent failed to give any explanation whatsoever for the death of his wife by asphyxia in his room. In facts of the case, approach taken by the trial court was the correct approach under the law and the High Court was completely in error in relying primarily on the fact that since most of the material prosecution witnesses (all of whom were relatives of the respondent) had turned hostile, the prosecution was unable to prove its case. The position in law, particularly Section 106, Evidence Act, was completely overlooked by the High Court, making it a rife at a perverse conclusion in law.

63. A Division Bench of this Court, in the case of **Pawan Kumar versus State of U.P. and reported in 2016 SCC OnLine All 949** held as under:-

"Section 106 of the Evidence Act can not be utilised to make up for the prosecution's in ability to establish it's case by leading cogent and reliable evidence, especially when prosecution could have known the crime by due diligence and care. Aid of section 106 Evidence Act can be had only in cases

> where prosecution could not produce evidence regarding commission of crime but brings all other incriminating circumstances and sufficient material on record to prima facie probablise it's case against the accused and no plausible explanation is forthcoming from the accused regarding fact within his special knowledge about the incident. That section lays down only this much that if a fact is in the "special knowledge of a person" and other side could not have due knowledge of it in spite of due diligence and care then burden of proving that fact lies on that person in whose special knowledge it is. Section 106 Evidence Act has no application if the fact is in the knowledge of the prosecution or it could have gained it's knowledge with due care and diligence."

64. Thus, what follows from the reading of the law reports referred to herein above, is that prosecution has to establish guilt of the accused filtered of all reasonable prognosis favourable to accused to secure conviction and it is never relieved of its initial duty. It is only when the initial burden has been discharged by the prosecution that the defence of the accused has to be looked into. Section 106 of the Indian Evidence Act can not be applied to fasten guilt on the accused, even if the prosecution has failed in its initial burden.

65. Section 101 to Section 114A of Chapter-VII of the Indian Evidence Act, 1872 deal with subject "OF THE BURDEN OF PROOF." Section 106 of the Indian Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proof to prove that fact is upon him. Section 106 is an exception to Section 101 of the Evidence Act which stipulates that 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. Section 106 of the evidence act has to be read in conjunction with and not in derogation of Section 101 Evidence Act. Section 106 of the Indian Evidence Act does not relieve prosecution of it's primary and foremost duty to establish the guilt of the accused beyond all reasonable doubts independent

of weaknesses of the defence. It is only when prosecution, for well perceptible and acceptable reasons, is unable to lead evidence because of circumstances beyond it's control including the reason that the fact required to be proved was "within the special knowledge of an accused alone" and prosecution could not have known it by due care and diligence, that Section 106 can be resorted to by shifting burden on the accused to disclose that fact which is "in his special knowledge" and if accused fails to offer any reasonable explanation to satiate judicial inquisitive scrutiny, he is liable to be punished. Section 106 is not meant to be utilized to make up for the prosecution's inability to establish its case by leading, cogent and reliable evidence.

66. However once the prosecution establishes entire chain of circumstances together in a conglomerated whole unerringly pointing out that it was accused alone who was the perpetrator of the crime and the manner of happening of the incident could be known to him alone and within his special knowledge, recourse can be taken to section 106 of the Evidence Act. Aid of Section 106 of the Evidence Act can be invoked only in cases where prosecution could produce evidence regarding commission of crime to bring all other incriminating circumstances and sufficient material on record to prima-facie probablise its case against the accused and no plausible explanation is forthcoming from the accused regarding fact within his special knowledge about the incident.

67. Section 106 of the Evidence Act lays down only this much that if a fact is in the "special knowledge of a person" and other side could not have due knowledge of it in spite of due diligence and care then burden of proving that fact lies on such person in whose special knowledge it is.

68. The prosecution failed at all to prove that the appellants were

in occupation of their house with the deceased at the time incident took place or even in the evening on that unfateful night just prior to the commission of crime. In such a situation, it cannot be said that the fact as to how death of deceased was caused in the open courtyard (aagan) of appellants was in their special knowledge. The legal burden on the prosecution to prove the presence of appellants in the house had not been discharged, therefore, the burden of proof cannot be shifted upon the shoulder of the appellants to explain as to how incident took place.

69. Thus before Section 106 of the Evidence Act could be applied in the instant case it was incumbent upon the prosecution to establish by cogent and reliable evidence inter alia that the appellants were in occupation of house at the time incident took place or last seen with the deceased.

70. Perusal of impugned judgment shows that learned Additional Sessions Judge has relied on the statement of P.W.2 in which he had denied the suggestion put by defence that deceased was errant/wanderer and was in bad company on account of which someone had murdered him. On this denial statement of P.W.2 learned court had concluded that deceased was errant and living in bad company. Learned Court had also drawn such inference from the fact of living in his sister's house at Chhatta Dalpal Rai. This is only hypocrisy of the mind of learned Additional Sessions Judge.

71. Further statement of P.W.3 was recorded by Investigating Officer under Section 161 Cr.P.C. that deceased had illicit relation with the appellant Smt. Meena and in this regard there was quarrel between Gyan Singh Shakya and Smt. Meena several times but when she was examined before the court, she denied this statement and said that she had not made such statement before the Investigating Officer. This denial statement of P.W.3 has not

been considered by the learned Additional Sessions Judge but statement under Section 161 Cr.P.C. has been relied and conclusion has been drawn that deceased was errant, living in bad company and having illicit relation with Smt. Meena that was the reason appellants caused murder of deceased and threw his dead body in the field. This conclusion cannot be said to be based on sound principles of law relating to the appreciation of evidence but it is hypothetical based on surmises & conjunctures which cannot be made the basis of conviction.

72. We are conscious that a grave and heinous crime had been committed but when there is no satisfactory proof of the guilt, we have no other option but to give the benefit of doubt to the accused appellants and we are constrained to do so in this case.

73. Accordingly, these appeals are ***allowed***. The conviction and sentence of the appellants is set-aside and they shall be set at liberty forthwith if not required in any other case.

74. It is directed that the appellants shall furnish bail bonds with sureties to the satisfaction of the court concerned in terms of the provision of Section *437-A Cr.P.C.*

75. Copy of this judgment alongwith original record of Court below be transmitted to the Court concerned for necessary compliance. A compliance report be sent to this Court within one month. Office is directed to keep the compliance report on record.

Order Date :- 8th March, 2021

A. Singh

(Subhash Chandra Sharma,J.) (Bachchoo Lal,J.)