AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.457 of 2014

{Arising out of judgment dated 21-4-2014 in Sessions Trial No.86/2012 of the learned Additional Sessions Judge (FTC), North Bastar, Kanker}

Judgment reserved on: 20-7-2022

Judgment delivered on: 17-8-2022

Anant Dutta, S/o Bholanath Dutta, aged about 37 years, R/o Village P.V.-II, Police Station Pakhanjur, District North Bastar Kanker (C.G.)

(In Jail)

---- Appellant

Versus

State of Chhattisgarh, through Station House Officer, Police Station Pakhanjur, District North Bastar Kanker (C.G.)

---- Respondent

For Appellant: Mrs. Savita Tiwari, Advocate.

For Respondent/State: Mr. Sudeep Verma, Deputy Government Advocate and Mr. Arjit Tiwari, Panel Lawyer.

Hon'ble Shri Sanjay K. Agrawal and
Hon'ble Shri Sanjay S. Agrawal, JJ.

C.A.V. Judgment

Sanjay K. Agrawal, J.

1. This criminal appeal preferred under Section 374(2) of the CrPC is directed against the judgment of conviction recorded and sentence awarded by the learned Additional Sessions Judge (FTC) by which the appellant has been convicted for offences under Sections 302 & 201 of the IPC and sentenced to undergo imprisonment for life and further sentenced to pay a fine of ₹ 100/-, in default, to further undergo rigorous imprisonment for six months and to undergo rigorous imprisonment for three years and further sentenced to pay

a fine of ₹ 100/-, in default, to further undergo rigorous imprisonment for one month, respectively.

2. Case of the prosecution, in brief, is that on 7-5-2012 at 3 p.m., in Village PV-II, Police Station Pakhanjur, District North Bastar Kanker, the accused strangulated his wife namely, Dullu Dutta by saree and knowing well that she is dead, in order to cause disappearance of evidence and to screen himself, hanged the dead body in the room and fled away from the open area reserved for ventilation after widening that area and thereby committed the above-stated offences. On 8-5-2012, brother of the appellant herein namely, Dhruva Dutta informed Jatin Vishwas (PW-1) that Smt. Dullu Dutta has committed suicide by hanging. Thereafter, Jatin Vishwas (PW-1) on 8-5-2012 got registered morgue intimation (Ex.P-1) stating that his elder sister Smt. Dullu Dutta was married to the appellant and out of their wedlock, they have three children (two sons aged about 12 years & 9 years and one daughter aged about 7 years) and on being informed that she has committed suicide, he visited the house of the appellant and the appellant was treating his sister with cruelty and also assaulting her for last one year and on account of that she has committed suicide. Thereafter, after morgue enquiry, it was revealed that she has not committed suicide and inquest was conducted vide Ex.P-6 and dead body was sent for postmortem. According to the postmortem Ex.P-14, cause of death was asphyxia due to throttling and nature of death was homicidal. The postmortem report is proved by Dr. Sukhdev Shende (PW-14). Thereafter, on being enquired from the appellant,

it was found to be a case of throttling by sari and in order to cause disappearance of evidence and to screen himself from the offence, the appellant has hanged the dead body of the deceased. Thereafter, Dehati Nalishi Ex.P-16 was registered against the appellant for offences under Sections 302 & 201 of the IPC and FIR was also registered vide Ex.P-17.

3. Statements of the witnesses were recorded under Section 161 of the CrPC. After usual investigation, the accused / appellant was charge-sheeted for offences under Sections 302 & 201 of the IPC and charge-sheet was filed before the jurisdictional criminal court and the case was committed to the Court of Sessions from where the Additional Sessions Judge (FTC), North Bastar, Kanker received the case on transfer for hearing and disposal in accordance with law.

4. The accused / appellant abjured the guilt and entered into witness. In order to bring home the offence, the prosecution examined as many as fifteen witnesses and exhibited 24 documents. The defence has examined none and no document has been exhibited.

5. The trial Court upon appreciation of oral and documentary evidence on record and considering the homicidal nature of death of the deceased and also considering that it is the appellant who has caused the murder of his wife, proceeded to convict and sentence him under Sections 302 & 201 of the IPC in the manner mentioned in the opening paragraph of this judgment against which the instant appeal under Section 374(2) of the CrPC has been preferred.

6. Mrs. Savita Tiwari, learned counsel appearing for the appellant,

would submit as under: -

1. It is a case of commission of suicide by the deceased and the appellant has not committed the offence.

2. The prosecution has not led any evidence to hold that it is the appellant who has committed the offence, as the room in question was found locked from inside which is admitted by investigating officer Bhagwat Chalki (PW-11).

3. Panch witness Khokhan Das (PW-2) has turned hostile and has not proved the panchnama Ex.P-7.

4. It is also not clear that it is the appellant who has committed the offence. Merely on the basis of provision contained in Section 106 of the Indian Evidence Act, 1872, the appellant having not explained his position, cannot be convicted with the aid of Section 106, as the appellant was residing with his three children. The prosecution has neither examined the three children nor Dhruva Dutta who has informed Jatin Vishwas (PW-1) – brother of the deceased, about the incident. There is no other evidence to connect the appellant with the offence in question, therefore, he deserves to be acquitted. Reliance has been placed upon the decision of the Supreme Court in the matter of **Narendra Singh and others v. State of M.P.**[1] in support of her case.

7. Mr. Sudeep Verma, learned Deputy Government Advocate appearing for the State / respondent, would support the impugned judgment and would submit that death of the deceased was

1 (2004) 10 SC 699

homicidal in nature and it is the appellant who has caused the death of his wife Smt. Dullu Dutta by throttling and thereafter, in order to screen himself from the above-stated offence, he hanged the dead body of the deceased and fled away from the open area reserved for ventilation which is duly proved by Ex.P-7 panchnama and furthermore, investigating officer Bhagwat Chalki (PW-11) has also proved the said fact. As such, with the aid of Section 106 of the Evidence Act, the appellant has rightly been convicted under Sections 302 & 201 of the IPC.

8. We have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the original records of the trial Court with utmost circumspection and carefully as well.

9. Now, the following two questions arise for consideration: -

    1. Whether the death of deceased Smt. Dullu Dutta was homicidal in nature?

    2. If yes, whether the appellant herein is the author of the crime in question?

<u>Re. Reference to Question No.1</u>:

10. It is the case of the appellant that death of Dullu Dutta (deceased) was suicidal in nature, whereas it was the case of the prosecution that death was homicidal in nature, which the trial Court has answered in favour of the prosecution by holding that death of the deceased (Smt. Dullu Dutta) was homicidal in nature.

11. In order to hold the death of the deceased to be homicidal, the trial

Court has relied upon the statement of Medical Officer Dr. Sukhdev Shende (PW-14), who has conducted postmortem over the body of the deceased and submitted report vide Ex.P-14 and also proved the same by making statement on oath before the Court. In order to understand the dispute, it would be appropriate to notice the internal examination of the dead body of the deceased conducted by Dr. Sukhdev Shende (PW-14) who has stated in paragraph 1 of his evidence as under: -

> मृतिका का शरीर ठण्डा था, रायगर मार्टिस नहीं था, मृतिका ने काले रंग का ब्लाउज, लाल रंग का पेटीकोट, आरेंज कलर का प्रिंटेड साड़ी पहनी हुई थी, शरीर सीधा था दोनों हाथ, पैर सीधे थे, दोनों कलाई और उगलियां अकड़ी अवस्था में थी। दोनों कलाई में सफेद व लाल रग चुड़ी थी, मुंह फुला, जीभ बाहर थी तथा दातो के बीच दबी थी, शरीर पर फफोले थे। गर्दन के चारों ओर नीले व काला निशान मौजूद था जो हायडबोन टुटा हुआ था। चेहरा सुज कर नीला पड़ गया था, ऑखे बाहर निकल रही थी, आंखो के अंदर का पर्दा अंदर धंस गया था दोनो पुतलियां फैली हुई थी। मुंह के दोनों तरफ खुन युक्त फात के निशान थे। हाथों के उगलियों में नीलापन था, ट्रेकिया के रिंग और थायराईड कार्टिलेज फेक्चर था, सिर की तरफ जाने वाली बड़ी खुन की धमनी में इंजुरी पायी गई। शरीर के बहुत से हिस्सो पर खरोच के निशान मौजूद थे जैसे (1) पीट पर और दोनो कन्धों के पिछले भाग पर मौजूद थे जिनका आकार लगभग 5 सेमी गुणा 1.5 सेमी था, दोनो टकनों पर खरोच के निशान थे जिनका आकार लगभग 3 सेमी गुणा 1 सेमी था, दोनों एड़ियों के पिछले भाग पर खरोच के निशान थ जिसका आकार लगभग 3 सेमी. गुणा 1.5 सेमी था। (2) मृतक के शरीर के सिर में बालों में तथा ब्लाउज व साड़ी में घर की मिट्टी लगी हुई थी। छाती के सामने भाग में खरोच के निशान थे, जिनका आकार लगभग 3 सेमी गुणा 1 सेमी था।
>
> आंतरिक परीक्षणः—
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> कण्ठ एवं स्वास नली में खुन युक्त फाक था, दोनों फेफड़े सुजन थी, शरीर के बाकी आंतरिक अंग कन्जेस्टेड थे। मृतिका के गले में लगी हुई साड़ी को सीलबंद कर उसी आरक्षक को सौप दिया था।
>
> अभिमतः—
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> मेरे मतानुसार मृतिका की मृत्यु गला दबाने से श्वास अवरूद्ध होने पर हुई है मृत्यु की प्रकृति होमी साईडल (मानव वध)की थी, समय लगभग 14 से 16 घन्टे के बीच की थी। मेरी रिपोर्ट प्र0पी0—14 है जिसके ब से ब भाग पर मेरे हस्ताक्षर हैं। दिनांक 06.07.2012 को थाना पखांजूर के सहायक उप निरीक्षक भागवत चालकी द्वारा मृतिका द्वारा फासी में उपयोग की गई साड़ी जिसका रंग औरेंज कलर की प्रिंटेड साड़ी जिसकी लम्बाई लगभग साढ़े पांच मीटर थी। जिससे गला घोटा जाना सम्भव है।

क्वेरी रिपोर्ट प्र0पी0–23 है जिसके अ से अ भाग पर मेरे हस्ताक्षर हैं।

दिनांक 09.05.12 को दोपहर 1:05 बजे आरोपी आनंत दत्ता को मेरे समक्ष शारीरिक परीक्षण हेतु आरक्षक क–932 भुपेंद्र साहू द्वारा प्रस्तुत किया गया था। जिसका परीक्षण करने पर उसे शारीरिक रूप से स्वस्थ पाया तथा उसके शरीर में कोई चोट के निशान नहीं पाया मेरी रिपोर्ट प्र0पी0–24 है जिसके अ से अ भाग पर मेरे हस्ताक्षर हैं।

12. A careful perusal of the aforesaid statement of Dr. Sukhdev Shende (PW-14), who has proved the postmortem, would show that cause of death was due to throttling and nature of death was homicidal. It is also apparent from the record that around the neck, there was blue & black mark present and hyoid bone was found fractured. The doctor has further opined that there was swelling on both lungs and internal organs were congested. While answering a query vide Ex.P-23, he has also stated that throttling can be caused by the printed saree which was seized. As such, the finding of the learned trial Court that death of deceased Smt. Dullu Dutta was homicidal in nature, is a finding of fact based on the evidence available on record, it is neither perverse nor contrary to the record and we hereby affirm the said finding that death was homicidal in nature.

13. Now, the next question is, whether the appellant is the author of the offence in question?

14. The aforesaid question has been answered by the trial Court in favour of the prosecution by holding the appellant guilty relying upon the statements of Jatin Vishwas (PW-1) & Ravi Vishwas (PW-8) – brothers of the deceased and Smt. Jaya Vishwas (PW-12) – sister-in-law of the deceased (bhabhi) being wife of Jatin Vishwas, who have categorically stated in their statements before the Court that the appellant had illicit relationship with a woman staying at

Village PV-129 and the appellant used to visit her place and on that account it was asked by the deceased to refrain from that act, but the appellant did not change his way to conduct himself and on that count, used to assault his wife (deceased) and strangulated their sister by saree by which she died. The aforesaid finding recorded by the trial Court is based on the evidence available on record which establishes that the appellant had strong motive to commit the offence. However, now, the question remains, whether it is the appellant who has throttled the deceased, as it is the finding of the trial Court that on the date of incident, the room, in which the deceased & the appellant were staying, was found bolted from inside and the appellant has absconded from open place reserved for ventilation. Ex.P-7 is the panchnama in which it has been found by the trial Court that in order to widen the open space reserved for ventilation, 14 bricks have been dismantled from that place and that has been done in order to escape from the room where the deceased was found murdered and the panchnama has been proved by Khokhan Das (PW-2). Thereafter, the trial Court has further held that the appellant after throttling the deceased ran away from the open area kept reserved for ventilation and absconded from the village after hanging the dead body of the deceased in the room in order to screen himself from the offence and showing it to be a case of suicide by the deceased herself. Since the appellant has not explained as to how his wife died on account of strangulation, burden was open him to explain that under what circumstances his wife died in the room where he and

his wife both were residing exclusively and it is a case of house murder.

15. The trial Court relying upon the provision of Section 106 of the Indian Evidence Act, 1872, proceeded to convict the appellant under Sections 302 & 201 of the IPC holding that it is the appellant who has throttled the deceased by saree and hanged her body in the room and jumped from the open area reserved for ventilation by dismantling 14 bricks and absconded from the spot. The appellant did so because he had illicit relationship with another woman residing at PV-129 which the deceased asked him not to remain involved in such activity. The appellant has failed to explain under what circumstances the deceased i.e. his wife, died in the room in which he and the deceased both were residing.

16. In order to consider the plea, it would be appropriate to notice the statement of Jatin Vishwas (PW-1), who is brother of the deceased. In para 2 of his statement, he has stated that he was informed by one of the brothers of the appellant – Dhruva Dutta that Smt. Dullu Dutta has committed suicide and when he reached to the spot, the appellant was sitting along with his children.

17. Thus, from oral and documentary evidence on record, the following facts are quite established: -

    1. On the date of incident, in the house, apart from the appellant and the deceased, their two sons and one daughter, aged about 12 years, 9 years and 7 years, respectively, were also staying with them which is apparent from the evidence of Jatin Vishwas (PW-1) (paragraph 1), Ravi Vishwas (PW-8)

(paragraph 5) and Smt. Parvati (PW-15) (paragraph 5).

2. The appellant had illicit relationship with a woman staying at PV-129 on account of which the appellant used to quarrel with his wife / deceased on being asked to refrain from that act and also used to beat her on being opposed by her of his illegitimate act of having relationship with woman staying at PV-129.

3. It has been claimed that the room in which the deceased was found hanging, was bolted from inside, but it was not broken in presence of the police or the Executive Magistrate and it was broken by the appellant himself. As per the statement of Bhagwat Chalki (PW-11) – investigating officer, before the police party reached the house, where the offence is said to have been committed, the room was already opened and no panchnama has been prepared before opening the door of the said house in question, as it was already opened prior to the police party reached to the spot.

4. The appellant has not been seen running away from the area kept reserved for ventilation just before or after the incident.

5. Death of the deceased was homicidal in nature and it was not suicidal in nature.

18. The prosecution has only proved motive on the part of the appellant to commit murder of his wife, as he had illicit relationship with a woman staying at PV-129 which is being opposed by his wife and she asked him from time to time to discontinue that relationship and

secondly, death of the deceased was homicidal in nature by throttling. But, apart from that, no other incriminating circumstance has been brought to the fore by the prosecution and the trial Court has proceeded to convict the appellant relying upon Section 106 of the Indian Evidence Act, 1872, ignoring the fact that apart from the appellant and the deceased, three children of the appellant and the deceased were also staying in the same house.

19. Now, the question would be, whether Section 106 of the Evidence Act would be applicable or not?

20. Section 106 of the Indian Evidence Act, 1872, states 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."

21. This provision states that when any fact is specially within the knowledge of any person the burden of proving that fact is upon him. This is an exception to the general rule contained in Section 101, namely, that the burden is on the person who asserts a fact. The principle underlying Section 106 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 other side. To invoke Section 106 of the Evidence Act, the main point to be established by prosecution is that the accused persons were in such a position that they could have special knowledge of the fact concerned.

22. In the matter of **Shambhu Nath Mehra v. The State of Ajmer**[2], their Lordships of the Supreme Court have held that the general rule that

2 AIR 1956 SC 404

in a criminal case the burden of proof is on the prosecution and Section 106 of the Evidence Act 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 Supreme Court while considering the word “especially” employed in Section 106 of the Evidence Act, speaking through Vivian Bose, J., observed as under: -

> “11. … The word "especially" stresses that it means facts that are preeminently 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. The King, 1936 PC 169 (AIR V 23) (A) and Seneviratne v. R. 1936-3 ER 36 AT P. 49 (B).”

Their Lordships further held that Section 106 of the Evidence Act 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.

23. The decision of the Supreme Court in **Shambhu Nath Mehra** (supra) was followed with approval recently in the matter of **Nagendra Sah**

v. State of Bihar[3] in which it has been held by their Lordships of the Supreme Court as under: -

> "22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the court can always draw an appropriate inference.
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> 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."

24. Similarly, the Supreme Court in the matter of Gurcharan Singh v. State of Punjab[4], while considering the provisions contained in Sections 103 & 106 of the Evidence Act, held that the burden of proving a plea specially set up by an accused which may absolve him from criminal liability, certainly lies upon him, but neither the application of Section 103 nor that of 106 could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It was further held by their Lordships that it is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a *prima facie* case, that the question

3 (2021) 10 SCC 725
4 AIR 1956 SC 460

arises of considering facts of which the burden of proof may lie upon the accused. Their Lordships also held that the burden of proving a plea specifically set up by an accused, which may absolve him from criminal liability, certain lies upon him.

25. The principle of law laid down by their Lordships of the Supreme Court in **Gurcharan Singh** (supra) has been followed with approval by their Lordships in the matter of **Sawal Das v. State of Bihar**[5] and it has been held that burden of proving the case against the accused was on the prosecution irrespective of whether or not the accused has made out a specific defence.

26. Now, the question is, whether the prosecution has discharged its initial or general burden or primary duty of proving the guilt of the accused beyond reasonable doubt?

27. In this regard, the findings of the trial Court recorded in paragraphs 31 & 32 of the judgment are relevant which are as under: -

> **31.** बचाव पक्ष के द्वारा अपने मौखिक तथा लिखित तर्क में मुख्य रूप से यह सिद्ध करने का प्रयास किया जा रहा है कि मृतिका की मृत्यु स्वयं फांसी लगाकर आत्महत्या करने से हुई है किन्तु निर्णय में चिकित्सक साक्षी के कथन के रूप में पूर्व में यह निष्कर्ष दिया जा चुका है कि चिकित्सक साक्षी ने मृतिका के शव विच्छेदन किये जाने के उपरांत अपनी रिपोर्ट में मृतिका की मृत्यु गला दबाने से श्वांस अवरोध के कारण बताया है तथा मृत्यु की प्रकृति मानव वध स्वरूप की होना पाया है। ऐसी अवस्था में बचाव पक्ष का यह तर्क कि मृतिका ने आत्महत्या की, न तो उसकी ओर से किसी विशेषज्ञ साक्षी एवं न ही किसी दस्तावेजी साक्ष्य के द्वारा सिद्ध किया गया है एवं न ही अभियोजन की ओर से प्रस्तुत किसी दस्तावेज में मृतिका के शव विच्छेदन रिपोर्ट के विपरीत कोई मत दिया गया है। ऐसी स्थिति में प्रकरण में यह स्थापित है कि मृतिका ने आत्महत्या नहीं की है तथा उसका गला दबाकर उसकी हत्या कर उसे आत्महत्या स्वरूप देने के लिये फांसी पर लटका दिया गया था।
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> **32.** मृतिका, आरोपी तथा उनके बच्चे उसी घर (घटना वाले घर)में रहते थे, जहां मृतिका की मृत्यु हुई है, ऐसी अवस्था में उस कमरे में जिसमें मृतिका तथा आरोपी रहते हैं, में मृतिका का शव गला दबाकर हत्या किये जाने के उपरांत उस कमरे में फांसी पर लटका पाया गया तथा उस कमरे के रोशनदान से ईंटों को हटाकर हत्या के उपरांत उस

5 AIR 1974 SC 778

कमरे को अन्दर से बंद कर बाहर निकला गया। ऐसी अवस्था में प्रमाण–भार आरोपी के उपर चला जाता है कि घटना के समय वह घर में नहीं था तथा किसी अन्य स्थान पर था, जिसे आरोपी के द्वारा प्रकरण में मौखिक या दस्तावेजी साक्ष्य के आधार पर कहीं भी सिद्ध नहीं किया गया है। प्रकरण में यह प्रमाण–भार भी आरोपी पर है कि जिस घर में वह अपनी पत्नी के साथ रहता था, उस घर के उसके कमरे में उसकी पत्नी को उसके अलावा किस अन्य व्यक्ति द्वारा हत्या करने के उपरांत उसकी लाश को फांसी पर लटकाकर रोशनदान से फरार हो गया। जबकि प्रकरण में आरोपी के द्वारा यह कहीं भी सिद्ध नहीं किया गया है कि उसकी पत्नी का किसी अन्य व्यक्ति से ऐसा कोई शत्रुता हो कि उसकी पत्नी का किसी अन्य व्यक्ति के द्वारा हत्या किया गया है एवं न ही बचाव पक्ष के द्वारा किसी भी साक्षी से प्रतिपरीक्षण में ऐसा कोई प्रश्न किया गया है कि उसकी पत्नी की हत्या किसी अन्य व्यक्ति ने की है। ऐसी स्थिति में यह पाया जाता है कि आरोपी जो कि उसके घर में अपनी पत्नी के साथ रहता था, के द्वारा अपनी पत्नी की हत्या करने के उपरांत उसकी हत्या के साक्ष्य का विलोपन करने के आशय से उसे आत्महत्या का स्वरूप देकर उसकी पहनी हुई साड़ी का फंदा बनाकर उसे कमरे में ही लटका दिया गया तथा उस कमरे को अंदर से बंद कर रोशनदान के ईंटों को हटाकर आरोपी निकल गया। अतः यह पाया जाता है कि आरोपी का अन्य महिलाओं से संबंध होने के कारण उसका अपनी पत्नी से लड़ाई–झगड़ा होता था, जिस कारण उसने अपनी पत्नी की गला घोटकर हत्या करने के उपरांत हत्या के साक्ष्य को विलोपन करने के आशय से उसके शव को कमरे में ही उसकी की साड़ी से फांसी पर लटकाकर उसे फांसी का स्वरूप देते हुये हत्या के साक्ष्य का विलोपन किया गया।

28. A careful perusal of the aforesaid findings recorded by the trial Court would show that the prosecution has established that,

    1. death of deceased Smt. Dullu Dutta was homicidal in nature;

    2. on the date of offence, the appellant, the deceased and their three children were staying in the house and the appellant had illicit relationship with a woman; and

    3. it is the appellant who has murdered his wife by throttling and he came out of the room after bolting it from inside from the area kept open for ventilation and thereafter, in order to screen himself, the appellant hanged the dead body in the room.

29. From the facts and evidence available on record, it is quite vivid that death of the deceased was homicidal in nature and cause of

death was throttling, as the prosecution has proved that death of the deceased was by throttling and to be homicidal in nature. This finding of the trial Court is the correct finding in view of the finding arrived into by us in the foregoing paragraphs and thereafter, except motive to commit murder on the part of the appellant that he had illicit relationship with some woman staying at PV-129 which he has refuted in his statement recorded under Section 313 of the CrPC in answer to question No.6, no further incriminating circumstances have been established by the prosecution. Furthermore, from the finding recorded by the trial Court in paragraph 32, it is quite vivid that it is not the appellant and his wife alone residing in the house in question, but their three children were also residing in the same house and none of them have been examined by the prosecution, as they could have been the important witnesses to throw some light on the death of the deceased. Though the trial Court has recorded a finding that the room in question was bolted from inside, but in the statement before the Court, Bhagwat Chalki (PW-11) has clearly stated that before reaching on the spot, in the house of the appellant, the door of the house where the dead body of the deceased was hanging, had already been opened. As such, it is also not established that the door in question was bolted from inside and the appellant went outside from the area reserved for ventilation, as even there is no iota of evidence on record that the appellant was seen running away from the area in question immediately after the incident, as the house in question is situated in a residential area. Therefore,

the prosecution has failed to discharge its primary burden of proving its case beyond reasonable doubt. As held by their Lordships of the Supreme Court in **Sawal Das** (supra), Section 106 of the Evidence Act can be applied only when the prosecution has led evidence which if believed will sustain conviction, or makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused.

30. As such, in our considered opinion, the prosecution has failed to discharge its primary burden of proving its case beyond reasonable doubt and merely on the basis of proving the death to be homicidal in nature and motive for offence, Section 106 of the Evidence Act cannot be invoked and the appellant cannot be held guilty of the offence under Section 302 of the IPC. In a case of 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.

31. At this stage, it is contended on behalf of the State / respondent that since death has been proved to be homicidal in nature by throttling, conviction would sustain. In the considered opinion of this Court, same cannot be a ground to convict the appellant for the offence under Section 302 of the IPC, as postmortem report should be in corroboration with the evidence on record and cannot be an evidence sufficient to reach to conclusion for convicting an accused, in view of the decision of the Supreme Court in the matter

of **Balaji Gunthu Dhule v. State of Maharashtra**[6].

32. In view of the aforesaid analysis, we are unable to sustain conviction and sentences imposed upon the appellant under Sections 302 & 201 of the IPC. Accordingly, the impugned judgment dated 21-4-2014 passed in Sessions Trial No.86/2012 by the Additional Sessions Judge (FTC), North Bastar, Kanker, is hereby set aside. The appellant stands acquitted from the charges framed against him for the offences punishable under Sections 302 & 201 of the IPC and he shall be forthwith set at liberty, unless he is required in connection with any other case.

33. The appeal is allowed to the extent indicated herein-above.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Sanjay S. Agrawal)
Judge

Soma

6 (2012) 11 SCC 685

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.457 of 2014

Anant Dutta

Versus

State of Chhattisgarh

Head Note

Section 106 of the Evidence Act would apply in a case where the prosecution has discharged its primary burden of proving the guilt of the accused beyond reasonable doubt.

साक्ष्य अधिनियम की धारा 106 उस मामले में लागू होगा जहॉ अभियोजन ने आरोपी को युक्तियुक्त संदेह से परे दोषी सिद्ध करने के अपने प्राथमिक भार का निर्वहन किया है।