The High Court of Madhya Pradesh : Bench At Indore

DIVISION BENCH: HON'BLE MR. JUSTICE VIVEK RUSIA &
HON'BLE MR. JUSTICE AMAR NATH (KESHARWANI)

Criminal Appeal No.314/2014

Appellants - 1. Jitendra S/o Kalu Singh Rajput
Age – 25 years
Occupation - Labour

2. Kalu Singh S/o Hindu Singh Rajput
Age - 58 years
Occupation - Labour

3. Gulab Bai W/o Kalu Singh Rajput
Age - 50 years, Occupation - Labour,
All R/o Village - Gogakhedi,
District - Indore (M.P.)

versus

Respondent(s) - State of Madhya Pradesh,
Through Police Station – Khudel
District – Indore (M.P.)

Indore, dated 26.02.2022

As per Vivek Rusia, J:

Shri Vivek Singh, learned counsel for the appellants.

Shri Kamal Kumar Tiwari, learned Government Advocate for the respondent / State.

J U D G M E N T

With the consent of the parties, this criminal appeal is heard finally instead of hearing the application on suspension.

The present Criminal Appeal has been filed under Section 374 of the Code of Criminal Procedure, 1973 against the judgment of conviction and sentence dated 15.02.2014 passed by the XV Additional Sessions Judge, Indore in Sessions Trial No.796/2013, whereby the appellants have been convicted for the offences punishable under Section 302 of the Indian Penal Code and sentenced to undergo Life Imprisonment along with fine of

Rs.10,000/-. With default clause to further undergo three months' additional rigorous imprisonment.

02. As per the prosecution story, appellant No.1 is the son of appellants No.2 and 3, who was married to Mona @ Monika (the deceased) on 21.01.2013 under Hindu customs and rituals. After marriage, she was living with appellants, but she was subjected to cruelty for not fulfilling the demand of a gas burner and a cash amount of Rs.10,000/-. The mother of the deceased sent Rs.10,000/- to appellant No.3 despite that cruelty continued with her. On the date of the incident, Kamal elder brother of the appellant No.1 along with one other took the deceased to the hospital where she was reported to be died by consuming a poisonous substance but later on it was revealed that she died due to strangulation. On arriving at the local hospital in serious condition, *Merg* No.38/13 (Ex-P/12) was registered and after her death, F.I.R. (Ex-P19) was registered at Crime No.311/2013 under Sections 304(B), 498-A/34 of the I.P.C. against all appellants. Spot map (Ex-P/11) and *Naksha Panchayatnama* (Ex-P/2). Vide Ex-P/15, P/16 and P/17, the appellants were arrested. The dead body was sent for autopsy which was conducted by Dr. Bharat Bajpai who opined that the death was due to asphyxia resulted in throttling and a report vide Ex-P/27 was submitted. Seized articles were sent to the Forensic Science Laboratory and reports were received vide Ex-P/24 and P/25. Statements of witnesses were recorded under Section 161 of the Cr.P.C., thereafter, the charge-sheet was filed under Section 304(B), 498-A/34 of the IPC against appellants before the JMFC from where the trial was committed to Sessions Court. Appellants denied the charges and pleaded for trial. The prosecution has examined nine

witnesses and marked 28 documents in support of the charges. The appellants did not examine any witnesses and pleaded their false implications.

03. After evaluating the evidence came on record, the appellants were convicted vide judgment dated 15.02.2014. The learned Additional Sessions Judge has acquitted the appellants from the offences punishable under Section 304(B), 498-A of the IPC and Section 4 of Dowry Prohibition Act but convicted under Section 302 of the IPC. Hence, the present criminal appeal is before this Court.

04. Shri Vivek Singh, learned counsel for the appellants has argued that initially the F.I.R. was registered against the appellants alleging that the deceased was subjected to cruelty for demand of dowry, thereafter, they were trialed for the offences punishable under Sections 304(B) and 498-A/34 of the IPC but all the witnesses like mother, father and brother of the deceased have categorically denied any demand of dowry by the appellants, hence, these appellants ought to have been acquitted from all charges. The prosecution has not established the charge under Section 302 of the Indian Penal Code against the appellants but they have been convicted only by relying on Section 106 of the Indian Evidence Act as they have failed to explain under what circumstance, Mona @ Monika died. The said conviction based on Section 106 of the Indian Evidence Act only, is bad in law and contrary to the law laid down by the Apex Court in the case of ***Nagendra Sah v/s The State of Bihar*** *reported in* ***2021 SCC OnLine SC 717***, in which the Apex Court has held that when a case is resting on circumstantial evidence if the accused fails to offer a reasonable explanation in the 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 that 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. It has been further held that when the chain is not complete, the falsity of the defence is no ground to convict the accused. Learned counsel for the appellant submits that appellants are entitled for acquittal in this appeal, therefore, instead of suspending the jail sentence, the appellants may kindly be acquitted. It is further submitted by the learned counsel that out of three appellants, mother-in-law and father-in-law i.e. Kalu Singh and Gulab Bai are already on bail by way of suspension of jail sentence. Against them also, there is no evidence for convicting them under Section 302 of the IPC.

05. It is further submitted by the learned counsel that motive is an important factor if 304(B) and 498-A/34 has not been established then there was no motive to murder the deceased by the appellants. In absence of failure to establish the motive, the chain has not been established by the prosecution to shift the burden on appellants under Section 106 of the Evidence Act.

06. Learned Government Advocate for the respondent / State opposes the aforesaid prayer by submitting that appellant No.1 is the husband of the deceased and the doctor has found various injuries on the dead body while conducting the autopsy as she died due to strangulation. The appellants being husband, father-in-law and mother-in-law were residing with her in the same house, therefore, the burden has rightly been shifted upon them

under Section 106 of the Evidence Act to explain as to what circumstances she died. Since they have failed to give any explanation, therefore, they have rightly been convicted under Section 302 of the IPC even after acquittal from the offences punishable under Section 304(B) and 498-A/34 of the IPC.

07. We have heard learned counsel for the parties at length and perused the record.

08. The prosecution came up with a case that the marriage of appellant No.1 was held with Mona @ Monika in the year 2013. She lived 2 – 3 days in the house, thereafter, she went to her parent's house and after one month, the elder brother of appellant No.1 *(Jeth)* Kamal took her back to the deceased to the matrimonial house and after six months she was found died in suspicious circumstances. P.W-1 and P.W-2, who are the mother and father of the deceased received information from appellant No.1 – Jitendra that the deceased had consumed some poisonous substance and died. The postmortem was carried out which has established that she died due to strangulation. Other injuries were also found on the body of the deceased which establish that some force was used before strangulating her. Initially the parents of the deceased alleged demand of dowry and atrocities but before the trial Court they have denied any demand of dowry after the marriage by the appellants, and accordingly, the trial Court has held that the deceased was not subjected to cruelty soon before her death for the demand of dowry, hence, they have been acquitted from Section 304 (B) of the IPC. Even charge under Section 498-A has also not been found proved, therefore, it has not been established that there was no cruelty meted out to the deceased by these appellants for the demand of gas burner and an

amount of Rs.10,000/-.

09. The trial Court has held that since the deceased died due to the strangulation which is homicidal in nature, hence, the appellants are liable to be convicted for the offence punishable under Section 302 of the Indian Penal Code. The trial Court has placed reliance upon judgments delivered in the cases of ***Preetpal Singh v/s The State of Punjab*** *reported in* ***AIR 2003 SC 215***, ***Aftab Ahmed Ansari v/s The State of Uttranchal*** *reported in* ***2010 AIR SC 773***, ***Neel Kumar @ Anil Kumar v/s The State of Haryana*** *reported in* ***(2012) 5 SCC 766*** and ***The State of Rajasthan v/s Kashiram*** *reported in* ***AIR 2007 SC 144*** in which it has been held that under Section 106 of the Evidence Act, the burden is on the accused to disclose that on what circumstance deceased died.

10. There is no challenge to the finding that the deceased died due to strangulation. The ligature mark was found on the neck of the deceased. Although viscera was preserved but no poison was found as per Ex-P/24. However, as per FSL report (Ex-P/24), human sperms were found on the swab of the deceased, however, the Court has not given any indulgence as she was married to appellant No.1. It is not in dispute that the deceased was residing with the appellants in a common house after marriage but the issue is whether the prosecution has established that at the time of the incident the appellants were in the house with her. Had the incident taken place in the night the presumption can be drawn that the appellants were with the deceased in the common house. The deceased was taken to the hospital by Kamal *(Jeth)* and one unknown person on a motorcycle.

11. The prosecution has examined Pinki ((P.W-3), who is the

cousin sister of the deceased and residing in the same village. According to her, she informed her aunt (mother of the deceased) on the phone that Kamal *(Jeth)* and another person took the deceased to Index Hospital. Thereafter, she along with her husband went to the Index Hospital and found the deceased on oxygen, but later on, died. According to her, she was not aware that why the deceased consumed the poison.

12. The prosecution has examined Kamal as P.W-10. According to him, he has three brothers, one is appellant No.1 and another is Inder and all the appellants reside at a distance of 1.5 km from his house. He received a phone call from the Index Hospital, he went there and saw that the deceased died. He has been declared hostile. In his 161 statement, he has stated that he received a phone call from his brother i.e. appellant No.1 who has instructed him to see what is happening in the house. He went to the house and found the deceased unconscious lying on the doorstep. Thereafter, he called Vishnu Meena by giving him a call, who brought the bike and they took her to the hospital. He was confronted with Section 161 statements but he denied of giving such statement. In cross-examination, he has given another statement that he went with Bhupendra on the motorcycle but Bhupendra has not been examined. Police have not collected any evidence from Index Hospital to establish that Kamal or any other family member took the deceased to Index Hospital. Any treating doctors of Index Hospital have also not been examined. The only evidence available on record is the statement of Pinki (P.W-3) who saw that Kamal and another person took the deceased to the hospital on a motorcycle. Even the statement of Kamal recorded under Section 161 of the Cr.P.C. although not

admissible, according to which he received a call from appellant No.1-Jitendra which does not confirm that the appellants were in the house when the incident took place. The motive which was tried to establish by the prosecution has not been found proved, hence the appellants have wrongly been convicted with the aid of Section 106 of the Evidence Act.

13. There is no direct evidence in the case and the case is based on circumstantial evidence. The Apex Court in the cases of State ***Through Central Bureau of Investigation v/s Mahender Singh Dahiya*** *reported in* ***(2011) 3 SCC 109*** and S***ubhasish Mondal Alias Bijoy v/s The State of West Bengal*** *reported in* ***(2014) 4 SCC 180*** has held that in a case based on circumstantial evidence, motive assumes great importance. When the swab of the deceased was collected, it ought to have been sent for DNA test to match with the DNA of appellant No.1 to establish his presence in the house and the prosecution has failed to collect this evidence to connect appellant No.1

14. The Apex Court in the case of *Nagendra Sah (supra)* has held that the burden of proof is on the prosecution to establish the culpability of the accused and Section 106 of the Indian Evidence Act does not discharge that burden. Section 106 constitutes an exception to Section 101 of the Evidence Act. The Apex Court has further held that 106 of the Evidence Act will apply to those cases where the prosecution succeeded in establishing the fact 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 a proper explanation of the existence of such other facts, the Court can always draw an appropriate inference. In the present case, the

Court has presumed that at the time of the incident, the appellants were in the house, hence, shifted the burden on them to prove as to how the deceased died or what did happen inside the house. The burden is on the prosecution to establish that they were in the house at that time then only the appellants ought to have been called upon to explain it. Although we have held that the prosecution has failed to establish the appellants were inside the house, the motive has not been proved in this case and the burden under Section 106 of the Evidence Act has wrongly been shifted. Recently in the case of ***Nandu Singh v/s The State of Madhya Pradesh (Now Chhatisgarh) [Criminal Appeal No.285 of 2022 @Special Leave Petition (Crl.) No (s).7998 of 2021)]*** *reported in* ***2022 LiveLaw 229*** again the importance of 'Motive' has been considered in the case of murder. The relevant paragraph of the aforesaid judgment are reproduced below:-

> "10. In a case based on substantial evidence, motive assumes great significance. It is not as if motive alone becomes the crucial link in the case to be established by the prosecution and in its absence the case of Prosecution must be discarded. But, at the same time, complete absence of motive assumes a different complexion and such absence definitely weighs in favour of the accused.
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> 11. In **Anwar Ali vs. State of Himachal Pradesh**, (2020) 10 SCC 166 this Court made the legal position clear in following words:-
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> > 24. Now so far as the submission on behalf of the accused that in the present case the prosecution has failed to establish and prove the motive and therefore the accused deserves acquittal is concerned, it is true that the absence of proving the motive cannot be a ground to reject the prosecution case. It is also true and as held by this Court in **Suresh Chandra Bahri v. State of Bihar**, 1995 Supp (1) SCC 80 that if motive is proved that would supply a link in the chain of circumstantial evidence but the absence thereof cannot be a ground to reject the prosecution case.
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> However, at the same time, as observed by this Court in **Babu v. State of Kerala,** (2010) 9 SCC 189, absence of motive in a case depending on circumstantial evidence is a

factor that weighs in favour of the accused. In paras 25 and 26, it is observed and held as under : (Babu case, SCC pp. 200-01)

> "25. In State of U.P. v. Kishanpal, (2008) 16 SCC 73 this Court examined the importance of motive in cases of circumstantial evidence and observed : (SCC pp. 87-88, paras 38-39)
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> '38. ... the motive is a thing which is primarily known to the accused themselves and it is not possible for the prosecution to explain what actually promoted or excited them to commit the particular crime.
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> 39. The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction.'
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> 26. This Court has also held that the absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. (Vide **Pannayar v. State of T.N**., (2009) 9 SCC 152)"
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> 12. In the subsequent decision in **Shivaji Chintappa Patil vs. State of Maharashtra**, (2021) 5 SCC 626 this Court relied upon the decision in Anwar Ali1 and observed as under:-
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> "27. Though in a case of direct evidence, motive would not be relevant, in a case of circumstantial evidence, motive plays an important link to complete the chain of circumstances. The motive... ..."

15. One more significant reason for interfering with the impugned judgment is that the appellants were trialed under Section 304(B), 498-A of IPC and Section 4 of Dowry Prohibition Act that they committed the murder of the deceased for the demand of dowry. The prosecution has failed to prove all these charges, therefore, there was no occasion for appellants to give an explanation that at the time of the incident they were in

the house or to give evidence as required under Section 106 of the Indian Evidence Act. Not a single question has been asked from them by the Court under Section 364 of the Cr.P.C. while examining them in the Court. The deceased was residing with the appellants that do not mean that for all 24 hours of the day, they remained in the same house. The incident said to have been taken place in the daytime and normally elder members go out to earn a livelihood. It cannot be presumed that they all were inside the house when the incident took place, therefore, they have wrongly been convicted by relying on Section 106 of the Evidence Act because other circumstances and motive have not been established by the prosecution.

16. In view of the above discussion, we pass the following order:-

(i) Criminal Appeal filed by the appellants is hereby allowed;

(ii) Judgment of conviction and sentence dated 15.02.2014 passed by the XV Additional Sessions Judge, Indore in Sessions Trial No.796/2013 convicting the appellants under Section 302 of the Indian Penal Code is hereby set aside;

(iii) Appellants – accused be set at liberty, if not required in any other case. Appellants No.2 and 3 are on bail, therefore, their bail bond stand discharged.

The Registry is directed to send back the Trial Court's record forthwith along with the copy of this judgment.

(VIVEK RUSIA)
J U D G E

(AMAR NATH (KESHARWANI))
J U D G E

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