

**A.F.R.**

**RESERVED : 16.10.2019**  
**DELIVERED : 18.12.2019**

**Court No. - 82**

**Case :- CRIMINAL APPEAL No. - 4855 of 2015**

**Appellant :- Dharmendra Kumar**

**Respondent :- State Of U.P.**

**Counsel for Appellant :- Rajeev Kumar Saxena,Rajesh**

**Kumar Singh Ac,Satya Dheer Singh Jadaun**

**Counsel for Respondent :- G.A.**

**Hon'ble Harsh Kumar,J.**

**Hon'ble Umesh Kumar,J.**

**(Delivered by Hon'ble Harsh Kumar, J)**

1. The instant Criminal Appeal has been filed against judgment and order of conviction passed by Sessions Judge, Auraiya in Sessions Trial No.52 of 2015 (State Vs. Dharmendra Kumar), Case Crime No.16 of 2015 under Sections 498A, 304-B & 302 I.P.C. and Section 4 D.P. Act P.S. Phaphund District Auraiya whereby the Sessions Judge acquitted the appellant of the charges under Sections 498-A, 304-B I.P.C. and Section 4 D.P. Act and convicted him for the offence under Section 302 I.P.C. and sentenced with life imprisonment and fine of Rs.20,000/- and in case of default in payment of fine with rigorous imprisonment for an additional period of one year.

2. The brief facts relating to the case are that Vikram Singh lodged F.I.R. at P.S. Phaphund on 9.1.2015 at 8.3.0 a.m. against appellant and 5 members of his family with the averment, that "he had solemnized marriage of his sister Laxmi hereinafter referred as "deceased" with appellant Dharmendra Kumar on 21.4.2008 with all dowry according to his capacity but thereafter she was being harassed and treated with cruelty for non-fulfillment of demand of a motorcycle & gold chain and on 8.1.2015 her husband Dharmendra Kumar, Sasur Ram Dayal, two

*Jeths* Sunil and Anil, *Sas* Shanti Devi and *Nanad* Rani harassed her and after committing *marpeet* at about 4.00 p.m. strangled her to death". On the F.I.R. Case Crime No.16 of 2015 was registered at police station Phaphund and during investigation, after preparing inquest report, getting the postmortem of body of deceased conducted, preparing site plan and collecting evidence, the Investigating Officer submitted charge sheet only against appellant Dharmendra Kumar, husband of deceased. The C.J.M. after taking cognizance of the offence committed the case to sessions and the Sessions Judge on 11.4.2015 framed charges against appellant under Section 498-A, 304-B I.P.C. and Section 4 D.P. Act and on 14.5.2015 framed alternate charge against him on 14.5.2015 under Section 302 I.P.C. for causing death of his wife Smt. Laxmi by strangulation. The accused appellant denied the charges and demanded trial.

3. The prosecution in order to prove its case produced Vikram Singh, first informant the brother of deceased as P.W.-1, Santosh Kumar relative of deceased as P.W.-2, Sarvesh, brother of deceased as P.W.-3, Shiv Kumar *Chacha* of accused as P.W.-4 and Panchilal neighbour of deceased as P.W.-5, all of whom did not support prosecution case and were declared hostile. After completion of prosecution evidence Dr. Sushil Yadav who conducted postmortem examination of body of deceased, was summoned and examined as C.W.-1. Thereafter statement of accused was recorded under Section 313 Cr.P.C. wherein he stated that "deceased, his wife Laxmi was suffering from fits of epilepsy due to which she was mentally disturbed and on the day of incident she committed suicide in his absence". The accused appellant produced Harish Chand and Subhash Chand as D.W.-1 and D.W.-2 in his defence. The trial court after hearing parties counsel, perusal of record and analization of evidence on record passed impugned judgment and order of conviction, hence this appeal.

4. We have heard Shri S.D.Singh Jadaun, Advocate for appellant and Sri Anil Kumar Kushwaha, learned A.G.A. for State and perused the record, paper book as well as trial court record summoned in appeal.

5. Learned counsel for appellant contends that appellant has been falsely implicated; that appellant had no motive to cause death of his wife; that the allegations of demand of a motorcycle and gold chain as dowry from deceased as well as her harassment for non-fulfillment of above demand are absolutely false and incorrect; that prosecution utterly failed to prove above charges of demand of dowry or harassment of deceased for non-fulfillment of demand of dowry as all the prosecution witnesses have denied from any such demand or harassment; that in absence of any evidence regarding alleged demand of dowry or harassment there may be no motive to appellant for causing dowry death of his wife; that deceased, the wife of appellant was suffering from fits of epilepsy since before marriage (as has also been stated by prosecution witnesses) due to which she was mentally disturbed and committed suicide in absence of appellant; that at the time of incident appellant was not at home and he may not be considered to be the author of strangulation resulting in her death; that appellant is an innocent person and has been acquitted of the charges under Section 498A, 304B I.P.C. and Section 4 of Dowry Prohibition Act and is also entitled for acquittal from the charges of offence under Section 302 I.P.C; that the impugned judgment and order of conviction is liable to be set aside and appellant is liable to be acquitted.

6. Per contra, learned A.G.A. supported the impugned judgment and order of conviction and contended that it is fully proved from the evidence on record that appellant is the main culprit; that it is absolutely wrong to say that deceased was suffering from fits of epilepsy since before marriage or after marriage or was living under mental tension due to alleged ailment or committed suicide after 6 years and 9 months of

marriage in absence of appellant; that there is no evidence on record to suggest that deceased was ever treated for alleged ailment of fits of epilepsy in her *maika* or *Sasural*, before or after marriage; that the prosecution witnesses of fact including the first informant were won over by accused-appellant and consequently resiled from the allegations of demand of dowry and harassment of deceased for non-fulfillment of demand of dowry due to which trial court very rightly acquitted the appellant of the charges of offences under Section 498-A, 304-B I.P.C. and Section 4 D.P. Act; that it is clear from the evidence on record that prosecution witnesses having been won over by appellant did not dare to depose truth before Court and went saying falsely that deceased was suffering from fits of epilepsy since before marriage and committed suicide due to tension on account of alleged ailment; that postmortem report of deceased duly proved by C.W.-1 clearly states that there was continuous ligature mark of 29 cm x 2 cm over neck of deceased with an abrasion over her chin and death of Laxmi deceased did take place due to asphyxia as a result of strangulation; that it is absolutely wrong to say that she committed suicide rather it is a clear case of homicide; that the appellant has failed to prove facts specially within his knowledge, that the appellant also failed or to take or prove any specific plea of alibi; that it is also not the case of appellant that some unknown persons or miscreants entered in his house in his absence and during loot, strangulated his wife; that learned trial court has categorically discussed entire evidence on record; that appellant has failed to prove the facts especially within his knowledge as death of his wife Laxmi did take place within his dwelling house and he has failed to show that he was not at home; that there are material contradictions in the statement of defence witnesses; that from the evidence on record the charges under Section 302 I.P.C. stands fully proved against appellant beyond any shadow of reasonable doubt; that the trial court has rightly convicted appellant for the offence under Section 302 I.P.C; that appeal has been filed with wrong and baseless allegations and is liable to be dismissed.

7. Upon hearing parties counsel and perusal of lower court record as well as paper book and before proceeding further, we find that in view of arguments advanced by both side, following points for determination arises in this appeal :-

(1) Whether despite turning hostile of prosecution witnesses of fact and acquitting appellant from the charges of offences under Section 498A & 304B I.P.C. and Section 4 D.P. Act, trial Court was justified in convicting him for offence under Section 302 I.P.C.?

(2) Whether prosecution succeeded in establishing charges of offence under Section 302 I.P.C. against appellant ?

(3) Whether provisions of Section 106 of Indian Evidence Act, were attracted in this case and appellant was required to prove facts especially within his knowledge, but failed to discharge his burden?

8. It will not be unnecessary to mention that it is settled principle of law that in criminal cases until by any express provision of law with regard to presumption of guilt of an offence, such as under Section 113 B of Evidence Act for the offence under Section 304B I.P.C., there is presumption of innocence of accused, unless his guilt is proved beyond reasonable doubts. In cases based on circumstantial evidence it is required that circumstances from which inference of guilt of accused is sought to be drawn must be cogently and firmly established, unerringly pointing towards guilt of accused and chain of circumstances should be so complete that there can be no escape from the conclusion that within all human probability crime was committed by accused and none else and circumstances must also be incapable of explanation to any other hypothesis than that of guilt of accused and such evidence should not only be consistent with the guilt of accused but should also be inconsistent with his innocence.

9. Undisputedly, the instant case is not based on ocular/ direct evidence. According to F.I.R., lodged under Sections 498-A, 304-

B, I.P.C. and 3/4 D.P. Act deceased Smt. Laxmi, the sister of first informant was married to appellant in April, 2008 and her dowry death was committed within 7 years of marriage on 08.01.2015 in her matrimonial house by strangulation. During trial, all prosecution witnesses of fact turned hostile, so charges under Section 498-A I.P.C. were found to be not proved and consequently presumption of dowry death under Section 113-B of Indian Evidence Act was not available to prosecution for the presumptive guilt of accused under Section 304-B I.P.C. In absence of any such presumption the burden to prove charges under Section 302 I.P.C. against appellant was on prosecution. Since the case is not based on ocular evidence and there is no eye witness account of the incident of murder of Smt. Laxmi, the prosecution case is to be treated as one based on circumstantial evidence.

10. Now it is to be seen as to whether in view of the evidence on record, prosecution has succeeded in proving the chain of circumstances completely, leaving no possibility of any other hypothesis except guilt of appellant.

11. Though the burden of proving the guilt of an accused always lies on prosecution, but there may be certain facts and circumstances pertaining to a crime that can be especially known only to the accused, or are virtually impossible for the prosecution to prove. The law does not enjoin a duty on 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 prosecution is to lead such evidence which is capable of being lead, having regard to the facts and circumstances of each case. Certain facts and circumstances which are especially within knowledge of accused, are required to be explained by him and if he does not do so, then it may be a strong circumstance for drawing inference of his guilt.

12. The first informant P.W.-1 has not supported the allegations of dowry death and has turned hostile but in his examination in chief he has proved F.I.R. Ext. A-1 having been lodged by him. It

is settled principle of law that if the F.I.R. registered under Section 154 Cr.P.C. is proved, it will not be proper for the Court to ignore its evidentiary value. In the case of Bafle vs. State of Chattisgarh AIR 2012 SC 2621 the Apex Court has held that

*"merely for the reason that first informant turned hostile, it cannot be said that F.I.R. would lose all of its relevancy and cannot be looked into."*

13. From postmortem report Ex. A-9 of deceased duly proved by statement of C.W.-1 Dr. Sushil Yadav, it is very much clear that cause of death of Smt. Laxmi was asphyxia as a result of strangulation which is a definite case of homicidal death. A death by strangulation may only be homicidal death and may not be suicidal death under any imagination. The postmortem report of deceased states that there was ligature mark 29 cms x 2 cms below thyroid all around the neck of deceased which was horizontal and continuous while her thyroid bone was fractured and trakia was congested.

14. As per medical jurisprudence fracture of thyroid bone is very strong indication of violent asphyxia death by compression of neck by use of external force.

15. In lengthy cross examination with autopsy surgeon, Dr. Sushil Yadav, nothing material has come out to disbelieve prosecution case and even no suggestion was put to him about death of deceased being suicidal as a result of hanging, rather to the contrary it was suggested that there was no ligature mark at all around her neck.

16. It is clearly and fully established from above discussed evidence on record that death of Smt. Laxmi was caused due to asphyxia as a result of ante mortem strangulation, undisputedly inside dwelling house of appellant. It is also proved from the evidence on record that death of Smt. Laxmi is a case of homicidal death and may not be a case of suicidal death (as claimed by hostile prosecution witnesses of fact as well as accused and his defence witnesses). The appellant has not denied to be residing

alone with deceased in the same house where she died and his defence witnesses have stated on oath that only appellant and deceased were living together in the house. Hence it is also fully proved from the evidence on record that deceased was living with accused appellant in the same house (in which homicidal death of his wife Smt. Laxmi did take place as a result of asphyxia due to strangulation), since before the incident. In view of circumstantial evidence on record, appellant must be having especial knowledge of the facts relating to incident and manner in which and by whom she was strangled to death, while circumstances indicates that her death could have been caused only by appellant and none other than appellant. In these circumstances, the provisions of Section 106 of Evidence Act are attracted in instant case.

17. Section 106 of Indian Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proving such fact is upon him. When an offence like murder is committed inside a room of dwelling house, no doubt, the initial burden to establish charges would be on prosecution, but in such type of cases, the nature and amount of evidence to be led to establish the charges, can not be expected of same degree as in any other case of circumstantial evidence. In instant case since the prosecution has succeeded in proving that death of **Smt.Laxmi** was homicidal one under unnatural and suspicious circumstances inside the dwelling house of accused, it will be deemed that prosecution has discharged its burden which now shifts on inmates of house to give a cogent explanation as to how her homicidal death did take place.

18. Before proceeding further the law relating to Section 106 of Indian Evidence Act, in cases of death within dwelling house, as laid down in number of judgments by Apex Court is being reproduced as under.

19. In the case of **(2012) 1 SCC 10(L) - Prithipal Singh Vs. State of Punjab** the Apex Court held that

*"Section 106 is designed to meet certain exceptional cases in which it would be impossible for prosecution to establish certain facts which are particularly within knowledge of accused. It does not relieve prosecution of its burden to prove guilt of accused beyond reasonable doubt and applies to cases where prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding existence of certain other facts, unless accused by virtue of his special knowledge regarding such facts offer any explanation which might drive court to draw a different inference."*

20. In the case of **(2014) 4 SCC 42 - Joshinder Yadav Vs. State of Bihar** where by circumstantial evidence murder was established by poisoning, even though viscera report from F.S.L. was not brought on record – but considering corroborative evidence of father and brother of deceased to be credible, the 3 Judges Bench of Apex Court confirming conviction of husband and 5 of his relatives under Section 302/149, 498-A and 201 I.P.C. held that

*"the attendant circumstances lead to irresistible conclusion of guilt of accused - How the body of deceased was found in the river, was within the special and personal knowledge of husband and his relatives – burden under Section 106 Evidence Act not discharged by accused – rather false explanation given. – Adverse inference was warranted."*

21. In the case of **(2006) 10 SCC 681 Trimukh Maroti Kirkan vs. State of Maharashtra** Apex Court has held that,

*"Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together **or the offence takes place in the dwelling home where***

*the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is strong circumstance which indicates that he is responsible for commission of the crime."*

22. In the case of **(1992) 3 SCC 106 Ganeshlal vs. State of Maharashtra** where the husband was prosecuted for murder of his wife inside his house, the Apex Court held that,

*"since death had occurred in his custody, he was under obligation to give an explanation for the cause of death in his statement under Section 313 Cr.P.C. A denial of prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of accused, but consistent with the hypothesis that the appellant was prime accused in the commission of murder of his wife."*

23. In the case of **(2007) 10 SCC 445 Dnyaneshwar vs. State of Maharashtra** the Apex Court held that

*"since deceased was murdered in her matrimonial home and the appellant had not set up a case that the offence was committed by somebody else or that there was a possibility of an outsider committing the offence, it was for the husband to explain the grounds for the unnatural death of his wife."*

24. In the case of **(2014) 12 SCC 211 State of Rajasthan vs. Thakur Singh** considering scope of Section 106 of the Evidence Act and Burden of proving facts especially within knowledge of such person, – In a case of unnatural death of wife of accused in a room occupied only by both of them and in absence of evidence of anybody else entering the room and facts relevant to the cause of death being only known to accused who was not explaining them, – the Apex Court held that

*"Principles under Section 106 are clearly applicable – to the case with strong presumption that accused murdered his wife – holding that High Court erred in not applying Section 106, reversing conviction of accused and allowing appeal – at restored the Conviction under Section 302 I.P.C. passed by trial court."*

25. The mere fact that all the prosecution witnesses turned hostile clearly gives room for suspicion and creates an impression that there is much more to the case than meets the eyes. Even the complainant Vikram Singh brother of deceased, who squarely blamed Dharmendra in F.I.R. for the murder of his wife, not only turned hostile denying demand of dowry and harassment but also falsely charged his sister Laxmi deceased for committing suicide due to long ailment of epilepsy since before marriage.

26. It is pertinent to mention that the prosecution witnesses of fact have not only resiled from the allegations of demand of dowry and cruelty for non-fulfillment of such demand as well as of dowry death, rather by way of improvement falsely stated that deceased was suffering from epilepsy since before marriage and due to mental tension committed suicide. It indicates that prosecution witnesses have made an attempt to show that (i) deceased was suffering from long ailment of fits of epilepsy and (ii) she committed suicide.

27. The accused-appellant in his statement under Section 313 Cr.P.C. in answer to question no.7 has stated that "मेरी पत्नी लक्ष्मी को मिर्गी के दौरा आते थे इसलिए वो मानसिक रूप से परेशान रहती थी, घटना वाले दिन मैं घर पे मौजूद नहीं था। पत्नी ने स्वयं आत्म हत्या कर ली।".

28. The contention of prosecution witnesses and explanation of appellant about suicidal death of Smt. Laxmi due to tension on account of long ailment of epilepsy is absolutely wrong and incorrect and appears to have been falsely developed in furtherance of winning over of prosecution witnesses by accused-

appellant, because **Istly**, there is nothing on record in the shape of any medical evidence to show that at any point of time deceased was suffering from or was treated for epilepsy before or after marriage and **IIndly**, it is fully proved from evidence on record that it is a case of homicidal death and death of Smt. Laxmi may not be considered to be suicidal death of any imagination. Hence the improvised version of hostile witnesses is found to be false and concocted and may not be relied.

29. In order to support above version as well as to discharge his burden under Section 106 of Evidence Act, accused-appellant has also produced two witnesses Harish Chandra and Subhash Chandra as D.W.-1 and D.W.-2 who are neighbours of appellant and have stated on oath that appellant Dharmendra was living together with his wife Smt. Laxmi while other brothers were living separately, and at about 5.00 p.m. on 08.01.2015 when they were working in fields and appellant Dharmendra was grazing cattle in nearby fields, villagers informed about suicide by his wife but they do not know about manner or reason of suicide as to whether she committed suicide by immolating herself or by consuming poison or by hanging herself. It is also noteworthy that neither the name of such villager, who allegedly informed death of wife of appellant to appellant, D.W.-1 and D.W.-2 in fields has been disclosed, nor such villager has been produced to corroborate.

30. It is pertinent to mention that there is nothing on record to show that deceased was having any cattle. Moreover he could not dare to say that he was grazing his cattle in fields with or near D.W.-1 and D.W.-2 and got information from villagers about suicidal death of his wife (as has been contended by his partisan witnesses D.W.-1 & D.W.-2). The statements of D.W.-1 and D.W.-2 are not in consonance with contention of appellant and are also contradictory to each other as D.W.-1 says that appellant was walking at a distance from him in his field, while D.W.-2 says that he was grazing cattle in another field.

31. It is not the case of accused appellant that some miscreants had entered his house and strangled his wife to death or he had informed the police about unnatural death of his wife by someone else.

32. The accused appellant was the only person residing in the same house with deceased and was having especial knowledge of facts relating to and manner of homicidal death of his wife taken place inside his house and was required to prove such especial facts within his knowledge. The bald statement of accused appellant that he was not at home at the time of incident is not sufficient to prove his plea of alibi as he could not dare to state that (i) where and when he came back home (ii) where and from whom he got knowledge of death of his wife (iii) how he came to know that his wife has committed suicide (iv) upon finding his wife fully unconscious whether he contacted any doctor to confirm as if she is alive and if not, how he was sure that she has died (v) whether he informed family members of *mayaka* of deceased (vi) whether he informed police of unnatural death of his wife.

33. In absence of any such explanation and not proving of the facts especially within the knowledge of appellant, (who alone was living with deceased), there can be no reason to disbelieve the prosecution case and hold appellant to be an innocent.

34. In the instant case in view of evidence on record, under any imagination no inference can be drawn that at the time of homicidal death of deceased, her husband, the accused appellant would have been roaming outside, and someone else would have entered and strangled his wife to death, inside his house, for absolutely no reason. It is not the case of accused appellant that some miscreants entered his house and committed loot during which upon protest his wife was strangled by them. Even in such a case he would have reported the matter to police in ordinary course and his conduct in not reporting the matter to police and opting to abscond, speaks much that how he managed to win over the prosecution witnesses and pressurized them to tell a lie regarding alleged suicidal death of his wife.

35. As far as benefit of doubt is concerned the prosecution has proved its case beyond all reasonable doubts. In ordinary prudence when husband and wife were living together there is presumption of accused being inside home, unless proved otherwise and no inference of his being outside home may be drawn in order to give him unreasonable benefit of doubt.

36. In the case of Lal Singh Vs. State of Gujarat (2001) 3 SCC 221 the Apex Court held that

*"concept of benefit of doubt is vague. The doubt must be reasonable one which occurs to a prudent men and not to a weak or duly vacillating or confused mind. In spite of presumption of innocence, it is to be judged on the basis of a reasonable prudent men. Smelling doubts for the sake of giving benefit of doubt is not the law of land."*

37. In view of the discussions made above the points mentioned in para 7 above, are required to be answered as under :-

(1) The prosecution has proved chain of circumstances from the evidence on record which is so complete as incapable of explanation of any other hypothesis than the guilt of accused and is not only consistent with the guilt of accused but is also inconsistent with his innocence. The prosecution has successfully proved its case beyond reasonable doubt. The attendant circumstances lead to irresistible conclusion of guilt of accused.

(2) Provisions of Section 106 of Indian Evidence Act are attracted to the facts and circumstances of instant case. Accused-appellant has failed to prove facts especially within his knowledge and discharge his burden, rather tried to deny homicidal death of his wife by pretending it to be suicidal death and setting up an alibi, unsuccessfully.

(3) The trial Court rightly analyzed the evidence on record and was not incorrect in convicting appellant for the change of offence under Section 302 I.P.C.

38. In view of the discussions made above, we are of the considered view that there is no illegality, incorrectness or perversity in the impugned judgment and order of conviction. The learned counsel for appellant has failed to prove any incorrectness, perversity or illegality in impugned conviction order and there is no sufficient ground for interfering with or setting it aside the impugned judgment and order of conviction of appellant as well as for reversing it to an order of his acquittal under Section 302 I.P.C.

39. The appeal is devoid of merits and is liable to be dismissed.

40. The appeal is dismissed. The impugned judgment and order of conviction is affirmed.

41. Office is directed to send back the lower court record alongwith copy of judgment for necessary action, if any.

**Order Date :- 18.12.2019**

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