

(2023) 09 CHH CK 0029
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 1189 Of 20 15

Dhwajaram Rathiya @ Dhajaram

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

Date of Decision : 11-09-2023

Acts Referred:

Indian Penal Code, 1860 — Section 302, 323

Code Of Criminal Procedure, 1973 — Section 175, 313, 374(2)

Evidence Act, 1872 — Section 101, 103, 106

Citation : (2023) 09 CHH CK 0029

Hon'ble Judges : Sanjay K. Agrawal, J; Radhakishan Agrawal, J

Bench : Division Bench

Advocate : Vineet Kumar Pandey, Afroz Khan

Final Decision : Allowed

Judgement

Sanjay K. Agrawal, J

(1) This criminal appeal preferred by the appellant-accused under Section 374(2) of Cr.P.C. is directed against the impugned judgment of conviction and order of sentence dated 16.12.2014, passed by the Sessions Judge, Raigarh in Sessions Case No.184 of 2014, whereby he has been convicted for offences: under Section 302 of IPC and sentenced to undergo life imprisonment with fine of Rs.5,000/- and, in default of payment of fine, additional rigorous imprisonment for 02 years and also under Section 323 of IPC with fine of Rs.500/- only, and in default of payment of fine, sentenced to undergo simple imprisonment for 15 days.

(2) The case of the prosecution, in short, is that on 23.06.2014, at about 15:00 in the afternoon, at Village Jobaro within the ambit of Police Station Tamanar, Raigarh, the accused-appellant herein assaulted his father, namely, Munna Ram Rathiya and his mother, namely, Sumitra Rathiya (PW-02) by means of 'tangiya' (axe), due to which Munna Ram Rathiya (for short the "deceased") suffered grievous injuries and died and Sumitra Rathiya (PW-02) suffered voluntary hurt, and, thereby, the appellant is said to have committed offence

under Sections 302 & 323 of IPC.

(3) The aforesaid incident was reported to the police by Rajaram Rathiya (PW-01), who is elder son of the deceased and brother of the appellant, by stating that he used to reside at Village Palighat and his ancestral house is at Village Jobaro, where his parents and younger brother used to reside. On 23.06.2014 at about 04:00 PM in the evening, while he was returning from his matrimonial house at Village Sarna to Village Palighat, one Tilak Sidar of Village Jobaro met him and informed that some incident had taken place in his house at Village Jabaro and he must go there, pursuant to which, Rajaram Rathiya (PW-01) visited his house at Village Jabaro and saw that many villagers had gathered in front of his house and, on being asked, he got information that his younger brother (appellant herein) had assaulted his father (deceased) and mother- Sumitra Rathiya (PW-02) by means of 'tangiya' (axe), due to which his father (deceased) died and mother-Sumitra Rathiya (PW-02) suffered injuries and further saw the injured dead-body of his father (deceased) lying on the 'khatiya' (bed). Thereafter, on the aforesaid report, the police registered FIR (Ex.P/01) against the appellant and wheels of investigation started running, in which, inquest proceedings were conducted vide Ex.P/02 and summons under Section 175 of CrPC were sent vide Ex.P/08. Naksha Pachayatnama was also prepared vide Ex.P/09. The dead-body of deceased was sent for postmortem examination and in the postmortem examination report (Ex.P/11), conducted by Dr. Savitri Tigga (PW-07), it was opined that the cause of death of deceased is asphyxia due to hemorrhage on the right lung leading to cardio-respiratory arrest and nature of death is homicidal. The appellant-accused was arrested vide Ex.P/10 and his memorandum statement was recorded vide Ex.P/06. Pursuant to the memorandum statement of the accused-appellant, the weapon of the offence i.e. 'tangi' (axe) has been seized vide Ex.P/07. However, the aforesaid seized axe has not be subjected to FSL examination for the reasons best known to the prosecution. Thereafter, statements of witnesses were recorded and, after due investigation, the police filed charge-sheet against the appellant in the Court of Judicial Magistrate First Class and, thereafter, the case was committed to the Court of Sessions for hearing and trial in accordance with law, in which the appellant/accused abjured his guilt and entered into defence by stating that he is innocent and has been falsely implicated.

(4) The prosecution in order to prove its case examined as many as 09 witnesses and exhibited 15 documents, whereas the appellant-accused in support of his defence has neither examined any witness nor exhibited any document.

(5) The learned trial Court after appreciating the oral and documentary evidence available on record proceeded to convict the appellant for offences under Sections 302 & 323 of IPC and sentenced him as mentioned herein-above, against which this appeal has been preferred by the appellant-accused questioning the impugned judgment of conviction and order of sentence.

(6) Mr. Vineet Kumar Pandey, learned counsel appearing for the appellant

submits that the learned trial Court is absolutely unjustified in convicting the appellant for offence under Sections 302 & 323 of IPC, as the prosecution has failed to prove the offence beyond reasonable doubt. He further submits that the appellant has been convicted for offence under Section 302 of IPC only on the basis that the appellant was residing alongwith his father (deceased) and mother- Sumitra Rathiya (PW-02) and he has not explained in his statement recorded under Section 313 of CrPC as to how his father (deceased) and mother suffered injuries, whereas, Rajaram Rathiya (PW-01), who is elder son of the deceased and brother of the appellant, has clearly stated before the Court that the appellant and his parents (including deceased) were living separately, as participation has already taken place between them. Learned counsel also submits that the sole injured eye-witness- Sumitra Rathiya (PW-02) has not supported the case of the prosecution and turned hostile. Thus, the appellant is entitled for acquittal on the basis of benefit of doubt and present appeal deserves to be allowed.

(7) Per-contra, learned State counsel supported the impugned judgment of conviction and order of sentence and submits that the prosecution has proved the offence beyond reasonable doubt by leading evidence of clinching nature. In view of the statements of various prosecution witnesses coupled with other material available on record, the learned trial Court has rightly convicted the appellant for offence under Sections 302 & 323 of IPC. Thus, the present appeal deserves to be dismissed.

(8) We have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.

(9) The first and foremost question is as to whether the death of the deceased was homicidal in nature, which the learned trial Court has recorded in affirmative by taking into consideration the postmortem report (Ex.P/11), wherein it has been opined that cause of death of deceased is asphyxia due to hemorrhage on the right lung leading to cardio-respiratory arrest and nature of death is homicidal, which is duly proved by the statement of Dr. Savitri Tigga (PW-07). Accordingly, taking into consideration the postmortem report (Ex.P/11) and the statement of Dr. Savitri Tigga (PW-07), who has conducted the postmortem of the dead-body of the deceased, we are of the considered opinion that the death of the deceased is homicidal in nature, as the same is correct finding of fact based on evidence and same is neither perverse nor contrary to the record. We hereby affirm the said finding.

(10) Now, the next question would be whether the accused-appellant herein is the author of the crime or not ?

(11) The case of the prosecution is based on the testimony of injured eye-witness- Sumitra Rathiya (PW-02) [mother of the appellant and wife of the deceased], who was also present on the spot at the time of incident, but in her

statement before the Court she has not supported the case of the prosecution and turned hostile. Many leading questions were asked from her during the course of her cross-examination, but she did not support the case of the prosecution at all. Even she is said to have informed about the incident to Ramsudhar Rathiya (PW-03) and Beersingh Rathiya (PW-04), but they have also not supported the case of the prosecution. However, the learned trial Court has convicted the appellant based on the fact that the appellant and the deceased alongwith Sumitra Rathiya (PW-02) used to stay together in the same house and by applying Section 106 of the Indian Evidence Act, 1872 drew the inference that the appellant has not explained in his statement recorded under Section 313 of CrPC as to how deceased suffered injuries and died.

(12) At this stage, it would be appropriate to quote Section 106 of the Indian Evidence Act, 1872, which 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."

(13) 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.

(14) In the matter of Shambhu Nath Mehra v. The State of Ajmer AIR 1956 SC 404, their Lordships of the Supreme Court have held that the general rule that 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.

(15) 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* (2021) 10 SCC 725 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.

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."

(16) Similarly, the Supreme Court in the matter of *Gurcharan Singh v. State of Punjab* AIR 1956 SC 460, 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 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.

(17) 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* AIR 1974 SC 778 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.

(18) The Supreme Court in the matter of Trimukh Maroti Kirkan vs. State of Maharashtra (2006) 10 SCC 681 held in Para-22 as under:

"22. 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 a strong circumstance which indicates that he is responsible for commission of the crime. In Nika Ram v. State of Himachal Pradesh (1972) 2 SCC 80 it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with 'khokhri' and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In Ganeshlal v. State of Maharashtra (1992) 3 SCC 106 the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 Cr.P.C. The mere denial of the prosecution case coupled with absence of any explanation were held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. In State of U.P. v. Dr. Ravindra Prakash Mittal AIR 1992 SC 2045 the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that wife had committed suicide by burning herself and that he was not at home at that time."

(19) Next question would be whether the prosecution has been able to discharge its primary burden of proving the offence against the appellant beyond reasonable doubt ?

(20) It is the case of the prosecution that the appellant assaulted his father (deceased) by the blunt side of the axe, due to which he suffered grievous injuries and died, however, Smt. Sumitra Rathiya (PW-02), who is mother of the appellant and wife of the deceased, has not supported the case of the prosecution. Rajaram Rathiya (PW-01), who is elder son of the deceased and brother of the appellant, has clearly stated before the Court that he used to stay at village Palighat, whereas, his brother (appellant herein) used to stay at Village Jobaro, but he was staying separately from his father (deceased) and mother-Sumitra Rathiya (PW-02), as their property has already been subjected to partition. Further, Sumitra Rathiya (PW-02) has stated that the appellant used to stay together with her and her husband (appellant) but their kitchens were separate and his elder son- Rajaram Rathiya (PW-01) used to stay at Village Palighat. However, the learned trial Court in Para-28 of the judgment has held that the appellant and the deceased used to stay together in one house, which is

not established/born out from the record. As per the statement of Rajaram Rathiya (PW-1) [son of the deceased] the appellant and the deceased were residing separately and, similarly, Sumitra Rathiya (PW-02) [mother of the deceased] has only stated that the appellant and the deceased used to reside together, but their kitchens were separate. But, none of the prosecution witnesses have stated that on the date of the offence the appellant and the deceased were staying together in one house. Thus, the prosecution has failed to establish that the appellant and the deceased were staying together on the date of offence in the same house. Therefore, the learned trial Court is absolutely unjustified in applying Section 106 of the Indian Evidence Act, 1872.

(21) In that view of the matter, it is not established beyond reasonable doubt that on the date and time of the offence the appellant has assaulted the deceased and injured- Sumitra Rathiya (PW-02) by means of axe, due to which, the deceased suffered grievous injuries and died and Sumitra Rathiya suffered voluntary hurt. Consequently, the conviction and sentence of the appellant for offences under Section 302 & 323 of IPC, awarded by the learned trial Court, is hereby set aside. The appellant is acquitted from the said charges by giving him benefit of doubt. Since the appellant is reported to be in jail from 25.06.2014, he be released from jail forthwith, if not required in any other matter/crime.

(22) This criminal appeal is allowed.

(23) Let a certified copy of this order alongwith the original record be transmitted to the trial Court concerned as well as to the Superintendent of Jail where the appellant is languishing for necessary information and action, if any.