

Allahabad High Court

Ramasankar Kushwaha And 3 Others vs State Of U.P. on 29 October, 2021

Bench: Sunita Agarwal, Sadhna Rani (Thakur)

HIGH COURT OF JUDICATURE AT ALLAHABAD

A.F.R.

Reserved on 31.8.2021.

Delivered on 29.10.2021

Case :- CRIMINAL APPEAL No. - 4025 of 2013

Appellant :- Ramasankar Kushwaha And 3 Others

Respondent :- State of U.P.

Counsel for Appellant :- Chandra Shekhar Kushwaha, Lav Srivastava

Counsel for Respondent :- Govt. Advocate

With

Case :- CRIMINAL APPEAL No. - 4160 of 2013

Appellant :- Pappu @ Manoj Kumar Thakur

Respondent :- State of U.P.

Counsel for Appellant :- S.K. Tiwari, Ramesh Kumar Shukla

Counsel for Respondent :- Govt. Advocate

Hon'ble Mrs. Sunita Agarwal, J.

Hon'ble Mrs. Sadhna Rani (Thakur), J.

[ Devlivered by Hon'ble Mrs. Sadhna Rani (Thakur), J.] As both the appeals arise from the same incident and common judgment, we have heard them together and they are being disposed of by this common judgment.

Both the above mentioned criminal appeals have been filed by the appellants Ramashankar Kushwaha, Mohan Gaur, Ravindra Prasad @ Doctor, Bacchan Gaur and Pappu @ Manoj Kumar Thakur against the judgment and order dated 27.8.2013 passed by the learned Additional Sessions Judge, Court No. 7, Deoria in S.T. No. 219 of 2010 ( State Vs. Mohan Gaur and others) whereby the appellants have been convicted and sentenced under sections 147, 328/149, 302/149, 201 and 118/149 I.P.C. Police station Bankata, District Deoria.

As per the prosecution story, the first information report was lodged by one Shakul Gaur on 08.02.2010 at the police station Bhatni, District Deoria stating therein that his sister Indu Devi was married to Mohan Gaur son of late Baharan Gaur. Out of their wedlock, they had three sons namely Harikesh, Rakesh and Vikash and two daughters Sita and Shilpi. His brother-in-law had developed bad association and started taking liquor. He had purchased a tractor after selling his land but due to his bad habit of drinking, he had agreed to sell the tractor to one Bhola Singh for Rs. 2,50,000/-. Out of the sale amount, he took rupees one lac as advance and had spent the money on his friends enjoying liquor. At this, the complainant's sister namely, Smt. Indu Devi asked Bhola Singh (the vendee of the tractor) to give the rest of money in her hands so that she could deposit the same in the bank. His brother-in-law ( Mohan Gaur) being annoyed with that had started harassing his sister. She had narrated her plight to the complainant and other family members. They tried to pacify the matter but Mohan Gaur paid no heed. On 07.02.2010, they came across a news in the newspaper that near Bankata railway station, six people were crushed over by a train and died. They suspected the dead bodies being of their sister and her children. The complainant along with other villagers then reached the railway station Bankata. The complaint's brother Ajay and Vijay went to the postmortem house and had identified the dead bodies as of their sister, nephews and nieces. They cremated the dead bodies in the village Bhaishahi. The house of the complainant's sister was found to be washed and cleaned. Near the railway line, the wheat crop was lying down. It was asserted that the deceased persons appeared to have been first murdered in their house in the night and then to give the whole incident the colour of suicide their dead bodies were thrown on the railway line by the accused Mohan Gaur (his brother-in-law) and his friends. Near the railway line, no blood was found. The complainant stated that he also came to know that upto 8.00 A.M. in the morning on 6.2.2010 accused Mohan Gaur was in his house and after that he had absconded.

Shrawan Kumar, the Assistant Station Master, Bankata, reported the incident to the G.R.P. Bhatni station at about 8.45 A.M. on 6.2.2010. Received the information, the police concerned reached the spot, recorded the requisite statements, prepared site plan, collected samples of blood stained stones from the railway track. The house of the deceased was also searched wherefrom a bottle of liquor (Royal Vat Premium Whisky) and a mobile phone without SIM were recovered. Inquest reports were prepared. The dead bodies were sent for the postmortem on 6.2.2010. Near the railway track, from the Corn-field of Nathuni Gupta one woolen shawl was recovered. From the field of Ram Sakal Maurya some broken pieces of red bangles and red thread were recovered. From the nearby wheat field of Indrajeet Maurya one steel glass, one hair clip, one necklace, one plastic bottle of liquor, a half piece of blade broken into two pieces with its cover and one pen were recovered. From the open field of Vijay Maurya, recovery of one plastic glass, one liquor bottle of 'Banti - Babli', two pairs of plastic slippers had been made, and one bottle of 'Banti-Babli' liquor was recovered from the drain of Chakroad.

The recovery memos were prepared. The Sub- inspector Gyan Prakash Pathak (P.W.-11) took over the investigation, collected blood stained stones from the place of recovery of dead bodies and recovery memos were prepared. During the investigation, the offence was suspected to have been committed inside the house of the deceased, so the investigation was transferred to the police station Bankata on 9.2.2010.

The Police Officer, at P.S. Bankata (P.W.10) started investigation on 12.2.2010 visited the house of the deceased on 13.2.2010, and recorded requisite statements, prepared site plan and arrested the accused Pappu @ Manoj Kumar Thakur and Ravindra Prasad from the market on 14.2.2010. He had recovered a shawl used in wrapping and throwing the dead bodies at the instance of accused Ravindra Prasad on 14.2.2010. Rest of the accused persons were also arrested later. The statements of all the accused persons were recorded. After receiving the post mortem reports the viscera of the deceased persons was sent to the Forensic Science Laboratory Varanasi and Lucknow on 18.2.2010 along with the clothes of the deceased. From the house of the deceased, two blood stained shalwars were recovered on 13.2.2010. On 18.4.2010 and 29.4.2010, reports of the Forensic Science Laboratory, Varanasi and Lucknow; respectively, were received. In viscera report, Aluminum Phosphate poison was found. The first information report registered under section 302/ 201 I.P.C. was amended and Section 328 I.P.C. was added to the same. After completion of the investigation charge sheet no. 44 / 10 under Sections 118, 147, 149, 34, 328, 302 and 201 I.P.C. was filed on 5.5.2010 against the five accused persons namely Mohan Gaur, Ravindra Prasad @ Doctor, Pappu @ Manoj Kumar Thakur, Ramashanker Kushawaha and Bachchan Gaur.

The learned trial court framed the charges on 23.3.2011 against all the accused persons under Sections 147, 328/149, 302/149, 201 and 118/149 I.P.C. For the prosecution, 18 witnesses were produced. The formal witnesses proved the documents and materials filed by the prosecution. The statements of accused persons under Section 313 Cr.P.C. were recorded. No defence evidence was adduced. The learned trial court held the accused persons guilty under the charged sections and passed the sentence, accordingly.

The grounds to assail the judgment of the learned trial court are:-

That the prosecution has failed to prove its case beyond reasonable doubts. All the witnesses of fact had been declared hostile. Nothing helpful in their cross examination had come out which can support the prosecution version. The entire prosecution version and the impugned judgment are based on suspicion. The appellant Pappu and co-accused Mohan Gaur had enmity prior to the alleged incident, and therefore, the association of the appellants Pappu and Mohan Gaur to commit the present offence is highly improbable. The trial court had convicted all the accused persons being swayed away by the gravity of the offence as six persons had been put to death. The contention is that in the alleged crime there is no cogent much less material evidence on record to implicate the accused persons beyond all reasonable doubts.

Heard the learned counsel for the appellants and the learned A.G.A. for the State and perused the record.

It is argued by the appellants counsel that there is no eye witness of the alleged incident and there is no witness of the last seen as well. The case is of circumstantial evidence wherein the chain of circumstances is no way complete. Several links between the circumstances brought forth by the prosecution are missing. There was no motive for the accused persons for committing the murder of the deceased persons. No incriminating material had been recovered by the police from the accused persons. Mere recovery of the liquor bottles from here and there or to say that the accused persons were drunkard will not make it a case of conviction. There is nothing on record to show that the poison was administered to the deceased persons by any of the accused person. Only one accused i.e. Mohan Gaur, the brother-in-law of the complainant ( husband and father of the deceased persons) was initially named in the first information report. All the other accused persons whose names came into light during the investigation are stated to be the friends of the main accused Mohan Gaur and on this premise only they had been implicated in the crime by taking aid of Section 149 I.P.C.

Per contra, the learned A.G.A. argued that as the accused Mohan Gaur was a drunkard person he used to harass his wife, the deceased Indu Devi and their children. Just few days before the incident, he had sold his tractor and the advance money was spent by him on his friends. The deceased Indu Devi was opposed to the same and in order to get rid of her, the accused Mohan Gaur had invited his friends on feast and with their help, he had administered poison to his wife namely Indu Devi and their five children in fish curry and after their death Mohan Gaur with the help of his abovenamed friends threw the dead bodies on the railway track to give the incident the colour of suicide. From the viscera reports, it came into light that all the deceased died of consuming "Aluminum phosphate" poison and all the injuries found on their persons were postmortem injuries. As it was not possible for a single person, i.e. the main accused Mohan Gaur to carry the dead bodies to the railway track, it was established by the prosecution that with the help of the co-accused persons after wrapping them in shawls, the dead bodies were thrown on the railway track. The police had also recovered one of such shawls at the instance of the accused Ravindra Prasad from the field of Nathuni Gupta after he was arrested. The dead bodies of Sita and Shilpi were said to have been wrapped in the said shawl and thrown on the railway track. One more shawl had been recovered by the police from the Corn-field of Nathuni Gupta, on their own.

It was also argued that the recovery of a liquor bottle from the house of the deceased, recovery of a plastic glass and two pairs of slippers ( chappals) and a liquor bottle from the field of Vijay Maurya, pieces of red bangles from the field of Ram Sakal Maurya, recovery of two shawls from the field of Nathuni Gupta, recovery of one steel glass, one hair clip, blade, liquor bottle, a pen and necklace ( mala ) from the field of Indrajeet, show that the incident did not occur at the railway track rather initially the deceased persons were administered poison at their residence and then with the help of the rest of the accused persons dead bodies were dragged to the railway line after wrapping them in the shawls to cause disappearance of the evidence and to give the incident the colour of suicide.

It is vehemently argued that it was not possible for a single person to carry all the dead bodies to the railway track. This fact itself clearly suggests the involvement of the husband of the deceased i.e. brother-in-law of the complainant as well as all the other accused persons, moreover, all the accused persons had feast that night at the residence of Mohan Gaur. As per the prosecution case, the husband wanted to get rid of his wife so he committed the offence with the help of his friends. It is,

thus, argued that the involvement of the main accused Mohan Gaur along with the other co-accused cannot be ruled out.

From the appellants side, it is further argued that the deceased persons had consumed poison themselves because there was no motive before the father to kill his young children and there was no motive to murder his wife also. There is no evidence of any quarrel prior to the incident. There is no evidence of administering poison by the accused persons to the deceased nor there is any evidence of throwing the dead bodies by them on the railway track. All the witnesses of fact had turned hostile. Nothing incriminatory had come in their cross examination. Thus, there is no evidence on the record to bring home the guilt of the accused persons. The prosecution can not take benefit of Section 106 of the Evidence Act in absence of any other evidence that the poison was administered to the deceased in their house. Only circumstance of being a drunkard or the main accused Mohan Gaur having absconded from his house after the incident would not be the grounds to hold him guilty along with other accused. The prosecution from any angle can not be said to have proved its case beyond all reasonable doubts. All the appellants deserve to be acquitted, accordingly.

Considering the above submissions and having perused the record, we may note that it is an admitted fact that all the six dead bodies were found on the railway track in the dismembered condition. It has come out in the viscera report that the death of all the deceased persons was caused due to poisoning of Aluminum phosphate poison. Postmortem reports reveal that all the injuries on the persons of deceased were postmortem injuries. There is no doubt, thus, that the deceased persons were first poisoned and after their death with the intention of causing disappearance of the evidence of offence, their dead bodies were thrown on the railway track.

As per the defence version, the deceased had consumed poison themselves but how their dead bodies had reached on the railway track could not be explained. However, the fact that the deceased persons were administered poison by the accused persons is to be proved by the prosecution.

The family lived together and all the deceased persons were residents of one house along with the main accused Mohan Gaur being their husband / father, is an assumption to implicate him as the accused who could have administered poison to his whole family. According to the prosecution, the onus as per section 106 of the Evidence Act, is, thus, on the accused Mahan Gaur to explain as to how the deaths had been caused and how the dead bodies had reached on the railway track.

On the issue of applicability of the above provisions, both sections 101 ( the general rule) and 106 ( exception to the same) of the Evidence Act are relevant to be noted for ready reference:-

**Section 101:-** Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

**Section 106:-** When any fact is specially within the knowledge of any person, the burden of proving that fact is upon him.

On the application of Section 106 Evidence Act, the judgment placed by the learned Senior Counsel for the appellants are:-

In the case of Attygalle Vs. Emperor 1936 (38) Bombay LR 700 the Privy Council held that Section 106 of the Evidence Act does not affect the onus of prove and throw upon the accused the burden of establishing the innocence.

In Shambu Nath Mehra vs The State Of Ajmer, 1956 SC 404, 1956 Cr.L.J. 794, it was held that the Section 106 of Evidence Act is an exception to Section 101 which lays down general rule that in a criminal case the burden of proof is on the prosecution and Section 106 of Evidence Act is certainly not intended to relieve it of that duty.

In Shambhu Nath (supra), it was held by the Apex Court as under:-

"11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are preeminently or exceptionally within his knowledge. 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 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. Emperor(1) and Seneviratne v. R. (2).

12. Illustration (b) to section 106 has obvious reference to a very special type of case, namely to offences under sections 112 and 113 of the Indian Railways Act for travelling or attempting to travel without a pass or ticket or with an insufficient pass, etc. Now if a passenger is seen in a railway carriage, or at the ticket barrier, and is unable to produce a ticket or explain his presence, it would obviously be impossible in most cases for the railway to prove, or even with due diligence to find out, where he came from and where he is going and whether or not he purchased a ticket. On the other band, it would be comparatively simple for the passenger either to produce his pass or ticket or, in the case of loss or of some other valid explanation, to set it out; and so far as proof is concerned, it would be easier for him to prove the substance of his explanation than for the State to establish its falsity.

13. ....

This is a section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section 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."

In the judgment of Chaudhary Razik Ram Vs. Ch. J.S.Chauhan, AIR 1975 SC 667, it was held that the principle underlying Section 106 of the Evidence Act which is an exception to the general rule governing the burden of prove applies only to such matter of defence which are supposed to be specially within the knowledge of the defendant respondent. It cannot apply when the fact is such as to be capable of being known also by the persons other than the respondent.

In Sucha Singh Vs. State of Punjab (2001) 4 SCC 375, it was held that:-

"19. Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference".

In Vikramjit Singh Vs. State of Punjab, (2006) 12 SCC 306, the Supreme Court held that Section 106 of Evidence Act, does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused the onus may be shifted to the accused for explaining the same subject to certain statutory exceptions.

In Vikramjit Singh Alias Vicky (supra), the discussion in paragraph Nos.14 & 15 are relevant to noted as under:-

14. Section 106 of the Indian Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule, e.g., where burden of proof may be imposed upon the accused by reason of a statute.

15. It may be that in a situation of this nature where the court legitimately may raise a strong suspicion that in all probabilities the accused was guilty of commission of heinous offence but applying the well-settled principle of law that suspicion, however, grave may be, cannot be a substitute for proof, the same would lead to the only conclusion herein that the prosecution has not been able to prove its case beyond all reasonable doubt.

In the judgment of Nupur Talwar vs. State of UP and others, 2018 (102) ACC 524, the Division Bench of this Court had extensively dealt with the consequence of Section 106 of the Evidence Act by referring to the landmarks decisions of the Apex Court and held in paragraphs Nos.246, 247, 248 & 249:-

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

247. Section 101 to Section 114A of Chapter-VII of the Indian Evidence Act, 1872 deal with subject "OF THE BURDEN OF PROOF." Section 106 of the Indian Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proof to prove that fact is upon him. Section 106 is an exception to Section 101 of the Evidence Act which stipulates that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Section 106 of the evidence act has to be read in conjunction with and not in derogation of section 101 Evidence Act. Section 106 of the Indian Evidence Act does not relieve prosecution of it's primary and foremost duty to establish the guilt of the accused beyond all reasonable doubts independent of weaknesses of the defence. It is only when prosecution, for well perceptible and acceptable reasons, is unable to lead evidence because of circumstances beyond it's control including the reason that the fact required to be proved was "within the special knowledge of an accused alone" and prosecution could not have known it by due care and diligence, that Section 106 can be resorted to by shifting burden on the accused to divulge that fact which is "in his special knowledge" and if accused fails to offer any reasonable explanation to satiate judicial inquisitive scrutiny, he is liable to be punished. Section 106 is not meant to be utilized to make up for the prosecution's inability to establish its case by leading, cogent and reliable evidence.

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

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

Placing reliance upon the above decisions, the learned counsel for the appellants had argued that as it was incumbent the prosecution to establish by cogent and reliable evidence inter-alia that the poison was administered to the deceased persons by the accused Mohan Gaur in connivance with the other accused persons and all the accused persons then collectively threw the dead bodies on the railway track.



It was further argued that Section 106 of the Evidence Act can not be understood to provide that the prosecution is absolved of its burden from proving its case and the burden of proving the entire case was entirely upon the accused persons.

Having carefully gone through the above decisions and the related law in the light of the language of Section 101 of the Evidence Act, there can be no two opinions that it was the duty of the prosecution to prove that the fact, 'as to how and when the deceased persons had consumed or administered poison', was within the special knowledge of the husband of the deceased Indu Devi, the main accused Mohan Gaur. The prosecution is not relieved of its burden to prove the existence of the said fact; or in other words, the presence of the accused Mohan Gaur either alone or along with other accused persons in his house at the time when the deceased had consumed or administered poison was to be proved by the prosecution.

From the facts on the record, it is evident that there is no eye witness or the witness of the last seen of either the incident or the presence of the accused persons much less the accused Mohan Gaur, the husband / father in the house on the date of the incident. This case admittedly is of circumstantial evidence and the chain of circumstances has to be completed by the evidence lead by the prosecution. The explanation of the main accused to discharge the onus laid upon him, if any, once prosecution discharged its initial burden, as per Section 106 of the Evidence Act, would be only an additional circumstance. To put it differently, the silence of the accused in the above situation would be only a link in the chain of the circumstances put forth by the prosecution. In any case, the burden to prove the existence of the circumstances leading to the guilt of the accused cannot be shifted entirely on the accused Mohan Gaur as he, in any case, cannot be asked to prove his innocence.

The prosecution had produced as many as 18 witnesses. Out of whom 12 are witnesses of fact. None of them had supported the prosecution version and all of them had been declared hostile and had been cross-examined by the Public Prosecutor.

P.W.-1 and 2, brothers of the deceased Indu Devi, were admittedly the residents of another village. They came to know about the incident through a local newspaper. They then went to the police station concerned and had identified the dead bodies and lodged the first information report. P.W.-1 Shakul Gaur had deposed that his sister and her husband who were married for 26 years were having cordial relations. There was no suggestion of any fight or quarrel between them and his sister had never complained against her husband. In the cross examination, this witness had clearly denied his statement recorded under section 161 Cr.P.C. and stated that his brother-in-law (Mohan Gaur) was working outside the village for the last 3-4 months prior to the incident and came back only after getting the information of the incident. Regarding the first information report, he had stated that it was written on the dictation of the police and he had just put his signatures on it. He did not even know the scribe of the F.I.R. He had denied that the contents of the F.I.R. were read over or explained to him. He had also denied the presence of co-accused Pappu @ Manoj Kumar Thakur in the village on the date of the incident.

P.W.-2 Ajay Prasad, another brother of the deceased Indu Devi had stated that he had identified the dead bodies of his sister and her children in the postmortem house. He denied his statement under

section 161 Cr.P.C. having been recorded by the police and stated that when they reached at the residence of his sister, the accused Pappu @ Manoj Kumar Thakur was out of the village for employment.

P.W.-3 Nanhe Giri who was projected as the witness of last seen, i.e. spotting the accused persons carrying the dead bodies had denied that he saw Ramashankar, Ravindra, Bacchan Gaur, Manoj and Mohan Gaur carrying / something hanging. Rather he had asserted that he was sleeping in his house with his family. In his main and cross examination, he had categorically denied his version recorded under Section 161 Cr.P.C. that he did go to the Bankata Railway Station to catch the train on the fateful night of 5/6.2.2010 and while returning back for the train being late, he witnessed the accused persons carrying something.

P.W.-4 Chandra Shekhar Giri, the witness of extra judicial confession of the accused Ravindra Prasad @ Doctor and Pappu @ Manoj Thakur stated that on 13.2.2010, they did not come at the gate of the house of Thakur Ajay Singh when he was present and nor there was any talk of the feast having been arranged at the house of accused Mohan Gaur. This accused had denied his statement under section 161 Cr.P.C. and he having any knowledge about the incident.

P.W.- 5 Rudal Kushwaha though had verified his signatures on the inquest report but stated that his signatures were taken on the blank papers and his 161 statement was also recorded at the dictation of the Investigating Officer. He had denied having knowledge regarding the incident. He had stated that he reached the railway station on getting the news and was part of the crowd collected on the spot.

P.W.-6 Sudhir Chandra Shah had stated that on 6.2.2010, the night of the incident he did not see the accused persons sitting and enjoying feast in the house of Mohan Gaur. In the cross examination, this witness had stated that Pappu @ Manoj Thakur and Mohan Gaur are having some property dispute and for the last 5-7 years prior to the incident, they were not on the talking terms and Pappu @ Manoj generally remained outside the village in relation of his job and on the date of incident he was not in the village.

P.W.-7 Hasanu Ali had stated that the work of digging the pond under 'MANREGA' was going on which was being supervised by Pradhanpati Sri Rama Shankar Kuswaha (accused). On 5.2.2010, Bacchan Gaur and Mohan Gaur did not come to the pond nor the accused persons sat near the pond to enjoy liquor. No such incident of consumption of liquor had occurred near the pond on 5.2.2010. In the cross examination, he had denied his statement under Section 161 Cr.P.C. and that he met the Investigating Officer to record the said statement.

P.W. 14 Bhola Singh stated that he had no knowledge about Mohan Gaur being a drunkard type of person nor any dispute between him and his wife about the money for the sale of tractor. He stated that the tractor was purchased by him in the year 2009 for Rs. 2,65,000/- and that he had paid the entire money in one go. This witness had also denied his statement under Section 161 Cr.P.C. and stated that he never met the Investigating Officer and came to know about the incident after about 10 days.

P.W.-15 Ajay Kumar had refused to acknowledge the recovery of one shawl from the field of Nathuni Gupta in his presence. In his cross examination, he had stated that some property dispute was going on between Mohan Gaur and Manoj Thakur prior to the incident.

P.W.- 16 Ram Narain a worker in the country liquor shop located near the railway station in his evidence had refused to identify the accused persons and had stated that he did not witness them coming to his shop with Mohan Gaur, and on the date when dead bodies were found he was on leave. He did not even know the Mauja or the police station where accused persons were residing. This witness had also denied his statement under Section 161 Cr.P.C.

P.W.-17 Kundan Gaur a worker in 'MANREGA' scheme stated that he was working on the pond on 5.2.2010 but denied having knowledge about any feast having been arranged on the fateful day / night of 5.2.2010 at the residence of the accused Mohan Gaur. He had denied having witnessed the accused persons together anywhere anytime on 5.10.2010.

P.W.-18 Dharmendra Madhesiya had denied having knowledge of the fact that on 5.2.2010, Bachchan Gaur had purchased liquor from the liquor shop where he was working and that the accused persons used to come to the shop to enjoy the liquor.

Rest of the prosecution witness are formal witnesses who had proved the documents prepared by them and recoveries made before them.

From the above statements of fact, it is clear that all the witnesses of fact did not support the prosecution story. They had been declared hostile by the prosecution and cross examined but nothing incriminatory had come out in their cross examination that could support the prosecution version. Mere finding some liquor bottles and other materials such as shawl, slippers, clips and necklace ( maala) etc. from the field adjacent to the railway track can not be said to prove the guilt of the accused persons. Mere being drunkard or enjoying liquor itself cannot constitute an offence. Apart from the oral testimony no incriminating material had been collected by the prosecution from the house of the deceased or else where to prove that the accused persons were collected to form an assembly. Neither any leftover food had been collected from the house of the accused Mohan Gaur nor any incriminating material had been sent to the Forensic Science Laboratory to prove the allegation of administering poison in the house or the presence of other accused persons in the house of the deceased. There is not even a suggestion of any traces of poison having been found in any of the edible or utensils recovered from the house of the accused Mohan Gaur. There is no collection of the finger prints of any of the accused persons over the utensils or any other material recovered from the house of the accused Mohan Gaur. There is no evidence nor even suggestion of the first Investigating Officer (P.W.-11) posted in the G.R.P., Bhatni that the scene of the crime was made up to remove all traces of the crime / poison, when he visited the house of the accused Mohan Gaur on 9.10.2010. In his examination-in-chief P.W.-11 only proved the recovery memo exhibited as Exhibit 'Ka-69' for the recovery of one liquor bottle and a mobile phone from the house of the deceased.

There is no evidence on record to even suggest any ill-relation between the deceased Indu Devi and her husband, the accused Mohan Gaur. Rather P.W. 1, the brother of deceased Indu Devi had stated that his sister and her husband were having cordial relations in their marriage of 26 years. There was no quarrel or fight between them before the incident and there was no report of any quarrel between Mohan Gaur and his wife or children, otherwise.

There is only one instance against the accused Mohan Gaur that he was normally the resident of the house where according to the prosecution the deceased were administered poison. But there is no witness of last seen of accused Mohan Gaur in his house or even in the village. No witness had testified the presence of accused Mohan Gaur in the village on the date of the incident, rather the testimony is otherwise. Even if it is assumed for a moment that the accused Mohan Gaur had absconded from the village, this fact itself cannot prove him guilty of the offence of murder. The accused Mohan Gaur can not be compelled to give evidence against him nor he or his alleged friends can be held liable for the charge of administering poison in absence of any prosecution evidence and, thus, committing murder. There is absolutely no evidence to put forth any of the circumstance against the accused persons including husband / father of the deceased Mohan Gaur. The prosecution has failed to discharge its burden to shift onus on the accused persons to offer any explanation.

The offence allegedly started from the house of the accused Mohan Gaur having extended upto the railway track can not be said to be only within the special knowledge of the accused Mohan Gaur as there is no iota of evidence that the offence was committed inside the four walls of the house of Mohan Gaur only, of which he can be said to have special knowledge. As the offence had continued upto the railway track, some other persons might have seen those circumstances which could bring home the guilt of the accused persons but none of the witnesses produced by the prosecution had supported its version. Without even proving the version of the first information report or any of the circumstance of presence of the accused Mohan Gaur along with other accused persons before the incident in his house, the prosecution cannot take benefit of Section 106 of the Evidence Act to shift the onus upon the accused persons to explain the circumstance where the allegations are made of commission of the offences under Section 302 and 328 with the aid of Section 149 I.P.C.

The prosecution without bringing any other incriminating circumstance and sufficient material on record to make out a prima facie probable case against the accused Mohan Gaur cannot shift the burden on him and cannot assert that no plausible explanation is forthcoming from the accused regarding the fact within his special knowledge about the incident.

The prosecution cannot successfully argue that in all probability because the offence had been committed within the house of the accused Mohan Gaur so it was within his special knowledge only as to how the deaths had been caused and the onus, thus, had been shifted on him to explain the cause of death or to prove his innocence.

The argument of the prosecution that none of the accused person in their statements under section 313 Cr.P.C. had denied their presence in the village and admittedly all of them were residents of the same village Bhisahi is neither here nor there. It was the duty of the prosecution to prove the

presence of the accused persons in the village on the date of the incident and not only that it was also required to prove that the accused persons were seen together prior to the incident to prove that they had formed an assembly and the offence was committed during the course of the said assembly.

The lower court simply noticing the statements of the accused under section 313 Cr.P.C. and injuries on the persons of the deceased being postmortem injuries had held that since the recovery of a shawl was made at the pointing out of the accused Ravindra Prasad @ Doctor, by the first Investigating Officer and all the deaths were proved to have been caused as a result of consuming poisoning, the accused persons were guilty of poisoning and murder.

It had opined that a mother cannot give poison to her children and there was no reason as to why the major girl and four children would consume poison on their own. Further the main accused Mohan Gaur had absconded from the spot.

Regarding the motive, the trial court had held that there was a dispute between the accused Mohan Gaur and his wife Indu Devi regarding the remaining money of the sold tractor which had led to the murder by the drunkard husband / father. Only evidence against the accused are that the P.W.-18-Dharmendra Madesiya, in his statement under section 161 Cr.P.C., has supported the prosecution case that Mohan Gaur and his friends had gone to the liquor shop of witness and they purchased and consumed two bottles of the liquor there. Further the P.W.-17, Kundan Gaur, who worked in MGNREGA had stated that on that fateful day, Mohan Gaur and all other co-accused had consumed the liquor. It has further held that the Investigating Officer had recovered the liquor bottles from the nearby fields and house of the accused Mohan Gaur. The recovery memos of the same had been proved by the Investigating Officer in the Court.

In our opinion, the trial court had ignored the settled law that the prosecution has to prove its case beyond reasonable doubt. The witnesses of the prosecution had not supported its case. All the witnesses of fact had been declared hostile. Even with the help of Section 106 of the Evidence Act, the burden of proving the guilt cannot be shifted upon the accused persons.

So far as the relevance of the statements of witnesses under Section 161 Cr.P.C., the Apex Court in Mahabir Singh Vs. State of Haryana reported in (2001) 7 SCC 148 has made clear in paragraph no. '14' that "a reading of Section 172 Cr.P.C. makes the position clear that discretion given to the Court to use case diary is only for aiding the Court to decide on a point. It is made abundantly clear in sub section (2) itself that the Court is forbidden from using the entries of such diary as evidence. What cannot be used as evidence against the accused cannot be used in any other manner against him. If the Court uses the entries in a case diary for contradicting a police officer, it should be done only by giving the author of the statements of opportunity to explain the contradiction." It is settled law that the statement under Section 161 Cr.P.C. is not on oath, so such statement cannot be said to be relied for bringing home the guilt of the accused persons.

So far as the motive is concerned, as this is a case of circumstantial evidence and no eye witness of the incident is there, the motive assumes importance. The motive suggested by the prosecution is that the husband and the deceased wife were having strained relations over the money received

from the sale of the tractor and the wife had demanded the remaining amount which had become the reason to commit the crime.

Two witnesses P.W.-1 and P.W.-14 had been produced to prove the motive. P.W.-1 the brother of the deceased Indu Devi had stated in the examination-in-chief that during 26 years of marriage the relations between his sister and her husband were cordial. There was no dispute between Mohan Gaur and Indu Devi. Indu Devi had never complained against her husband. P.W.-14- Bhola Singh the vendee of the tractor had stated in his examination-in-chief that he had no knowledge whether there was any dispute regarding money received from the sale of the tractor between Mohan Gaur and his wife. He had further stated that he had paid the entire money to the accused Mohan Gaur in one go. Meaning thereby the prosecution story regarding motive that since the advance paid by P.W.-14 (Bhola Singh) for the purchase of tractor was wasted by the accused Mohan Gaur on the liquor and his deceased wife being annoyed had demanded the second installment to keep it safe, itself falls.

So the only evidence of strained relations between the deceased Indu Devi and Mohan Gaur could not establish the motive to commit murder of wife by the accused Mohan Gaur. As far as the other accused persons are concerned, as per own case of the prosecution, they had no independent motive to commit murder of the deceased persons, wife and children of Mohan Gaur.

Absence of motive becomes a missing link in the chain of the circumstances and creates a dent in the prosecution story. On the law of appreciation of circumstantial evidence, the appellants' counsel has placed reliance upon the following decisions of the Apex Court.

In the case of *Devi Lal Vs. State of Rajasthan* reported in 2019 (19) SCC 447, the Supreme Court has held that to establish conviction on the basis of circumstantial evidence, the chain of circumstances against the accused persons must be complete and coherent to sustain the conviction on the basis of the above.

In the case of *Sharad Birdhichand Sardar Vs. State of Maharashtra*, reported in 1984 SCC (CrL) 487, the Apex Court has held that circumstances in the chain of circumstantial evidence should be conclusive and complete giving no room of doubt or alternative theory. Where there are two possibilities; one pointing towards the guilt of the accused and another towards his innocence, the benefit of doubt has to go to the accused.

In the case of *Vikramjit Singh Vs. State of Punjab* ( 2006) 12 SCC 306 the Supreme Court has opined that where two views of the prosecution story appear to be probable, the one that is in favour of the accused should be accepted.

In the case of *Shivaji Sahabrao Babode and another Vs. State of Maharashtra* reported in 1973 SCC (CrL) 1033, the Supreme Court has held that it is the primary principle of Criminal Jurisprudence that the accused 'must be' and not merely 'may be' guilty before a Court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

In the case of Dilavar Hussain and others Vs. State of Gujrat and another reported in 1991 SCC (Cri) 163, Supreme Court has held that the conviction and acquittal of the accused depends upon the consistent of criminological chain leading to only conclusion of guilt of the accused. Heinousness of the crime or cruel mode of its execution is not relevant. It has opined that the acquittal or conviction depends on proof or otherwise of the criminological chain which invariably comprises of "who, when, why, where and how". Each knot of the chain is to be proved beyond the shadow of doubt to bring home the guilt and any crack or loosening in it weakens the prosecution. Each link must be so consistent that the only conclusion which must follow is that the accused is guilty.

In the light of the above position, it is clear that the motive of the crime has not been proved and only because of the one circumstance that one person can not carry six dead bodies from the house of the deceased persons to the railway track, other accused persons in the crime cannot be implicated. The recovery of shawl at the pointing out of the accused Ravindra Prasad @ Doctor is not a circumstance on which conviction can be sustained in absence of any other circumstance holding the other accused persons guilty of murder. In absence of motive, it is not clear as to why would the accused persons administer poison to the deceased persons. It is also not clear that how, when and where poison was administered to the deceased persons. The question as to who had committed the crime has been left to many guesses. The place of crime is also not proved. There is no forensic evidence of any article or of the left over food from the utensils or any other incriminating material having been recovered from the house of the accused Mohan Gaur which would even indicate that poison was administered to the deceased therein. The chain of circumstances which had been collected by the prosecution is broken and do not definitely lead to the guilt of the accused persons. The links in the chain of the circumstances are not consistent that the only conclusion of the accused persons being guilty can be drawn.

So far as the offence under Section 201 I.P.C. is concerned, the argument of the learned counsel for the appellants is that there is no evidence on the record to prove that the accused persons with the intention of causing disappearance of the evidence of offence had thrown the dead bodies of the deceased persons on the railway track. The only argument of the prosecution side is that only one person could not carry six dead bodies, so the involvement of the other accused persons cannot be ruled out.

Dealing with the same, it may be noted that the settled principle of Criminal Jurisprudence is that mere suspicion, however, strong it may be, cannot take place of evidence. The mere suggestion of the prosecution that one person cannot carry six dead bodies to the railway track is not enough to implicate the other accused persons or to hold them guilty.

No one had seen the accused persons in or near the house of the deceased or in the company of the main accused Mohan Gaur at or near the time of the incident or thereafter. There is no other circumstance which could even create a suspicion of them being together on the fateful day / night, before the dead bodies were found on the railway track.

There is absolutely no evidence of any unlawful assembly of the accused persons before or after commission of the murder near the scene of the crime or even elsewhere.

For implicating the other accused persons (other than Mohan Gaur, the husband / father), Section 106 of the Evidence Act cannot be pressed into service. The silence of the accused persons in their statement under section 313 Cr.P.C. or non-denial of their presence in the village on the fateful day / night will not be relevant as there was no burden on them to explain any of the circumstances put forth by the prosecution. No motive had been assigned to them at all. The accused persons other than Mohan Gaur cannot be implicated under Sections 328, 302, 201 and 118 vicariously with the aid of Section 149 I.P.C., as none of the ingredients of Section 149 I.P.C. are found to be existed in the instant case.

Unlawful assembly as designated under Section 141 is an assembly of five or more persons, if the common object of the persons composing the assembly is found to be as provided in clauses first to fifth. The explanation to Section 141, however, provides that an assembly which was initially not unlawful may subsequently become unlawful assembly. Section 142 provides as to who shall be a member of unlawful assembly. Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of that common object of that assembly, every person who, at the time of committing that offence, was a member of the same assembly, is guilty of that offence.

Section 149, thus, makes every and all members of unlawful assembly vicariously liable for the act(s) done by one or any member in prosecution of common object. The section, thus, does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. However, in order to attract Section 149 of the Indian Penal Code, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly. It must be within the knowledge of the other members as one likely to be committed in prosecution of common object. If members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of a common object, they would be liable for the same under Section 149 IPC.

Thus, for making a person(s) vicariously liable under Section 149 of the Code, it is essential for the prosecution to establish that an unlawful assembly of five or more persons was formed and the accused persons were members of that assembly. Then comes the requirement of establishing the fact that in furtherance of common object of that unlawful assembly, offence was committed by one or more persons, member(s) of that assembly. The essential ingredients to attract Section 149 IPC are:-

(i) There must be an unlawful assembly; (ii) commission of an offence by any member of an unlawful assembly; (iii) such offence must be committed in prosecution of the common object of the assembly or must be such as the members of the assembly knew to be likely to be committed.

These conditions must be satisfied for making an accused vicariously liable for commission of offence under Section 149 IPC. Though for applicability of Section 149, there need not be a prior meeting of mind. Even mere presence in the unlawful assembly, with an active mind to achieve the common object, makes such a person vicariously liable for the act of the unlawful assembly. Reference *Amerika Rai & others Vs. State of Bihar* reported in 2011 (4) SCC 677, *Dandu Jaggaraju*



Vs. State of A.P. reported in 2011 (9) SCC 3387, Ramchandran & others Vs. State of Kerala reported in 2011 (9) SCC 257.

But it was obligatory on the prosecution to bring cogent material on record to prove that the other accused persons alongwith the main accused Mohan Gaur had formed an unlawful assembly at the time of commission of the offences, i.e. while administering poison to the deceased persons and carrying the dead bodies to the railway track with the intention to cause disappearance of the evidence. No such circumstance has been brought forth by the prosecution and there is absolutely no evidence of formation of an unlawful assembly.

As far as the charges against the main accused Mohan Gaur are concerned, there is no evidence as all the witnesses of fact had turned hostile. Nothing incriminatory had come out from their cross examinations. There is no evidence of last seen and motive is also not proved.

We may note the observations of the trial court that it may not be understandable as to why a mother would poison her children, then also there is no reason as to why a father would administer poison to all his young children both male and female ( 5 in number) over a dispute related to money with his wife, leaving himself alone in the world.

The prosecution story starts with the written report by the brother of the deceased Indu Devi (wife of the accused Mohan Gaur) wherein it was narrated that it seemed that his sister and her children were murdered in their house and, thereafter, the dead bodies were thrown on the railway line by the accused (his brother-in-law) and his friends to give the incident a colour of suicide. The other accused persons had been referred as friends of Mohan Gaur the main accused in the FIR.

The first informant had appeared in the witness box as PW-1. Though he had proved the first information report as 'Exhibit-Ka 1' but in the cross-examination he had stated that whatever was written in the first information report, was written by the writer/scribe on the dictation of the police and he had only put his signatures on the same on the asking of the Investigating Officer. The contents of the first information report were neither read over nor explained to him. This witness had been declared hostile and in the cross by the ADGC he had denied his statement in Section 161 Cr.P.C. Nothing incriminating could come out from the cross-examination of this witness which would be of any aid to the prosecution story. The very basis of implication of other accused persons in the alleged offence of administering poison to wife and children of the main accused Mohan Gaur and carrying their dead bodies to the railway track to cause disappearance of the evidence of offences, is shaken.

As noted above, no incriminating material could be collected by the first Investigating Officer (PW-11) who had first visited the house of the deceased persons. PW-11 in his cross-examination had admitted that he had started investigation on 09.02.2010, three days after the incident which came to his knowledge on 06.02.2010. The first information report was lodged on 08.02.2010 and in the meantime he was collecting all clues. All the recoveries were made by him after the investigation was handed over to him on 09.02.2010 and he had completed the investigation on the same date. Whereafter, it was transferred to another police station. He did not collect any

fingerprint from the spot of the crime or from the liquor bottle which was recovered by him from the house of the deceased. The second Investigating Officer (PW-10) had started investigation on 12.02.2010 and thereafter all the accused persons were arrested from the village itself. The role of the Investigating Officers in the present scenario also becomes questionable. It seems that the entire investigation had been proceeded in one direction treating the main accused Mohan Gaur as guilty from the very inception and all other accused persons were implicated as friends/acquaintances of the main accused Mohan Gaur to sustain the conviction of Mohan Gaur as there were six deaths and dead bodies were found on the railway track. It appears that in a zeal to solve the crime, the second Investigating Officer had proceeded in a hurried manner with preconceived mind and notion that no-one else than the husband/father (main accused Mohan Gaur) could have committed the crime.

The present is not a case where putting all circumstances together, the Court can reach at the conclusion that "no one else than the appellant could be the perpetrator of the crime". Another question which comes in the mind of the Court is "if not the appellants then who else could be the perpetrator of the crime?". We are not finding answer to the question either way, in negative or in affirmative. We are also afraid to give answer to the said question in absence of any cogent material before us. For mere reason that we are not finding the real culprit, we cannot draw the inference that the appellants must have committed the crime.

In this regard, we would like to note the decision of the Apex Court in Shankarlal Gyarasilal Dixit vs. State Of Maharashtra reported in 1981 (2) SCC 35, wherein the Apex Court being in the same position as we are today, observed as under:-

"32. The High Court, it must be said, has referred to the recent decisions of this Court in Mahmood v. State of U.P. [1976 (1) SCC 542] and Chandmal v. State of Rajasthan [1976 (1) SCC 621] in which the rule governing cases of circumstantial evidence is reiterated. But, while formulating its own view the High Court, with respect, fell into an error in stating the true legal position by saying that what the Court has to consider is whether the cumulative effect of the circumstances establishes the guilt of the accused beyond the "shadow of doubt". In the first place, 'shadow of doubt', even in cases which depend on direct evidence is shadow of "reasonable" doubt. Secondly, in its practical application, the test which requires the exclusion of other alternative hypothesis is far more rigorous than the test of proof beyond reasonable doubt.

33. Our judgment will raise a legitimate query: If the appellant was not present in his house at the material time, why then did so many people conspire to involve him falsely? The answer to such questions is not always easy to give in criminal cases. Different motives operate on the minds of different persons in the making of unfounded accusations. Besides, human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions. In the instant case. the dead body of a tender girl, raped and throttled, was found in the appellant's house and, instinctively, everyone drew the inference that the appellant must have committed the crime. No one would pause to consider why the appellant would throw the dead body in his own house, why would he continue to sleep a few feet away from it and whether his house was not easily accessible to all and sundry, as shown by the resourceful Shrinarayan Sharma. No one would even care to consider why the appellant's name was not mentioned to the police until quite late. These are questions for the Court

to consider."

For the above discussion, the judgment and order dated 27.8.2013 passed by the learned Additional Sessions Judge, Court No. 7, Deoria in S.T. No. 219 of 2010 ( State Vs. Mohan Gaur and others) whereby the appellants Ramashankar Kushwaha, Mohan Gaur, Ravindra Prasad @ Doctor, Bacchan Gaur and Pappu @ Manoj Kumar Thakur have been convicted and sentenced under sections 147, 328/149, 302/149, 201 and 118/149 I.P.C. police station Bankata District Deoria, is found to have been passed on surmises and conjectures. The same, therefore, is liable to be set aside. The appellants accused persons are acquitted of all the offences under which they are charged giving them benefit of doubt.

The appeal, is thus, allowed.

The appellants are reported to be in jail. They shall be set at liberty forthwith, unless they are required in any other criminal case.

The office is directed to send back the lower court record along with a certified copy of this judgment for information and necessary compliance.

The compliance report be furnished to this Court through the Registrar General, High Court, Allahabad.

Dated:- 29.10.2021/Gss