AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 97 of 2011

(Arising out of judgment of conviction and order of sentence dated 30-11-2010 passed by the Sessions Judge, Mahasamund, ST No.33 of 2010)

1. Kheduram Soni @ Rabi Soni, S/o Late Chhedilal Soni, Caste Sonar, aged about 44 years.

2. Ashadevi Soni, W/o Kheduram Soni @ Rabi Soni, Caste Sonar, aged about 40 years.

Both are R/o Komakhan Ward No.10, Police Station Bagbahara, District Mahasamund, C.G.

---- Appellants

Versus

1. State Of Chhattisgarh, through Station House Officer, Bagbahara, District Mahasamund, C.G.

---- Respondent

For Appellants	Shri Sachin Singh Rajput, Advocate
For Respondent/State	Shri Bhaskar Payashi, Panel Lawyer

Hon'ble Shri Justice Prashant Kumar Mishra

Hon'ble Smt. Justice Vimla Singh Kapoor

Judgment on Board

By

Prashant Kumar Mishra, J.

22/06/2018

1. Assail in this appeal is to the judgment of conviction rendered by the Sessions Judge, Mahasamund, convicting the appellants under Section 302 read with Section 34 and Section 201 read with

Section 34 of the Indian Penal Code ('the IPC' in short) for committing murder of Mokshada Soni (since deceased) during the period between 13.00 hours to 17.00 hours on 4-3-2010.

2. Facts necessary to appreciate the prosecution case are that appellant No.1 Kheduram Soni, his brothers Mohan Soni, Beena Lal Soni & Late Shital Prasad Soni were residing in one common premises having separate portions occupied by each of them. After death of Shital Prasad Soni, his wife Mokshada Soni was occupying one part of the house whereas brother Beena Lal Soni (PW-6), being mentally disturbed, was not allotted any room and was living on the mercy of appellant Kheduram or brother Mohan. Deceased Mokshada Soni was Headmistress in the Saraswati Shishu Mandir, Komakhan. Appellant Kheduram has a cloth shop in the same town whereas Mohan has a jewelery shop. Mokshada Soni has one son and one daughter namely; Alok Kumar Soni (PW-2) and Roshni Soni (PW-3), respectively. While Roshni Soni (PW-3) resides in a different place after her marriage; Alok Kumar Soni (PW-2) has engaged himself as a Document Writer in the premises of the office of the Sub Registrar, Mahasamund.

3. The merg intimation (Ex.P/12) was recorded at 19.15 hours on 4-3-2010 on the information of appellant Kheduram to the effect that Aditi Soni (PW-8) informed him that the dead body of Mokshada Soni is floating in the well. Kheduram went towards the

well and saw the dead body floating in the well with only blouse & petticoat over her body and one bucket was also found inside the well. Kheduram apprehended that the deceased might have fallen into the well while drawing water and nobody has witnessed the deceased falling into well otherwise efforts would have been made to save her. After receiving the information, the police went to the spot; brought out the dead body; and prepared the inquest (Ex.P/4) in the morning of 5-3-2010. The inquest could not be prepared in the evening/night of 4-3-2010 because it was getting dark and the minute inspection of the dead body may not be possible. On 5-3-2010 itself appellant Kheduram was treated to be a suspect and the bloodstains on the door frame of his house were scratched by using a wet cotton (Ex.P/5). Curtain, trouser & lungi were also recovered from the house of Kheduram vide Ex.P/6 mentioning that Kheduram is an accused even though till this time there was no evidence that he might have committed the crime. By Ex.P/7, wrist watch, cargo jeans pant & blackish brown trouser were recovered from the bed room of the appellant Kheduram. One Alpha Plus Phenyle bottle having 10 gms. of Phenyle was recovered vide Ex.P/8. From Kheduram's shop another trouser was recovered vide search memo (Ex.P/9) & seizure memo (Ex.P/10). One chocolate coloured saree allegedly belonging to the deceased was recovered at 15.15 hours on

5-3-2010 vide Ex.P/11.

4. Postmortem of the dead body was conducted by Dr. V.P. Singh (PW-17) who submitted his report (Ex.P/17) finding the following injuries :

(1) Above right eyebrow region lateral aspect incised wound in the size of 3 x 1/2 x 1 cm. Sharp clear cut margin present.

(2) Left side lower jaw superficial incised wound present in the size of 3 x 1/2 x 1cm. Sharp margin.

(3) In right hand at the base of index finder dorsum side incised wound present in the size of 4 1/2 x 1 x 1 cm.

(4) Abrasion present in right hand between wrist and forearm mid portion and blood stain present. Abrasion size 13 x 4.5 cm.

(5) In left hand between index and thumb incised would present size 4 x 1 x 2 cm. Regular sharp margin.

(6) Back side abdomen right side post trunk incised wound present in the size of 6 x 2 x 1 cm, sharp margin.

(7) Below incised wound right side post trunk abrasion present in the size of 17 x 6 cm.

(8) Over the verterbra column lumber region abrasion present in the size of 3 x 2 cm

(9) In head occipital region incised wound present in the size of 5 1/2 x 1 x 2 cm sharp clear cut margin.

(10) In head top region left side parietal region cross like (+) incised chauk wound present (i) size 8 x 1 x 1 1/2 cm (ii) size 7 x 1 x 1 1/2 cm sharp margin. Diagram of cross like (+) chauk incised

wound. On opening skull left side parietal bone depressed and sharp mark, cut mark present and brain hemorrhage present.

(11) Below right knee front medial side abrasion present in the size of 7 x 4 cm.

(12) Left side thigh lateral aspect contusion present bluish colour in the size of 3 x 3 cm.

(13) Left thigh front side abrasion present in the size of 17 x 7 cm bluish colour

(14) Left side over breast abrasion mark present in the size of 13 x 1/2 cm.

(15) Anterior aspect left shoulder contusion in the size of 14 x 6 cm.

(16) Lateral aspect left arm abrasion present in the size of 4 1/2 x 4 cm.

The cause of death was mentioned in the postmortem report to be cardio respiratory arrest due to excessive hemorrhage through skull and brain due to deep incised wound present over head and other parts of the body; the nature of the death was homicidal; and duration of death between 21 to 23 hours prior to postmortem.

5. Once having found that the death was homicidal in nature and on the basis of the investigation, appellant Kheduram was formally taken into custody and his memorandum statement was recorded on 7-3-2010 vide Ex.P/1. Kheduram disclosed to the police that two stones used to cause injuries to the deceased have been thrown inside the well, which he can get recovered. Thereafter,

the stones were recovered from inside the well vide Ex.P/2 on 8-3-2010. Both the stones were sent to Dr.V.P. Singh (PW-17) with a query as to whether the injuries sustained by the deceased could have been caused by these stones on which Dr.V.P. Singh (PW-17) submitted his report (Ex.P/19) over which sketch of the stones was also drawn after examining the articles. The places over the stones on which the blood stains were found have also been marked. Clothes of the deceased as well as those recovered from appellant Kheduram and stones were sent for FSL examination regarding which the report Ex.P/22 was submitted giving positive report of presence of blood on petticoat (A/1), blouse (A/2) & bra (A/3) all belonging to the deceased; full shirt (B/3) & half shirt (B/4) both belonging to appellant Kheduram; stone (C/1) & stone (C/2) recovered at the instance of Kheduram and; cotton (D) containing blood stains drawn from the door frame. Negative report was submitted in respect of trouser (B/1), trouser (B/2), lungi (B/5) & curtain (B/6) all recovered from the house of Kheduram and curtain (E) from the door frame. The articles were sent for serological examination to confirm presence of human blood matching the blood group of the deceased which was found on the articles recovered from the house or at the instance of Kheduram vide Ex.P/28, however, there is no serological report available in the record.

6. The First Information Report (Ex.P/23) was registered at 21.05 hours on 6-3-2010 against unknown persons. Appellants Kheduram & Ashadevi Soni were arrested on 8-3-2010 vide Ex.P/26 & Ex.P/27, respectively. On 7-3-2010 itself the Investigating Officer recorded the statement of Abhishek @ Piyush Soni (PW-1) S/o Mohan Soni vide Ex.P/3 whereon five persons appended their signatures as witnesses. In his statement Abhishek @ Piyush Soni (PW-1) informed the Police that he has seen Kheduram committing murder of the deceased and later on Kheduram & Ashadevi thrown the dead body of Mokshada Soni into the well. With this evidence the charge sheet was filed and both the appellants were sent for trial.

7. In course of trial the prosecution examined Abhishek @ Piyush Soni (PW-1), Alok Kumar Soni (PW-2), Roshni Soni (PW-3), Ajay Agrawal (PW-4), Arun Shukla (PW-5), Beena Lal Soni (PW-6), Harishankar Yadav (PW-7), Aditi Soni (PW-8), Manoj Singh (PW-9), Bhushan Upadhyay (PW-10), Santosh Kumar (PW-11), Thakur Das (PW-12), Arjun Soni (PW-13), Shyam Kumar Soni (PW-14), Prabha Sharma (PW-15), Sewakram Dhruv (PW-16), Dr. V.P. Singh (PW-17), Bhaiyaram Yadu (PW-18), Akash Soni (PW-19), Bhajan Lal (PW-20), Avinath Singh (PW-21), Chaman Lal Thakur (PW-22), Virendra Seth (PW-23) & Ram Lal Chouhan (PW-24) to

bring home the charges whereas the appellants abjured the guilt, but did not examine any defence witness.

8. The trial Court has convicted the appellants mainly after relying upon the contents of the document Ex.P/3 and other circumstantial evidence, *inter alia*, the strained relationship between the parties; property dispute; quarrel taken place between the appellant Kheduram and the deceased in the morning of the date of the incident; seizure of stones at the instance of the appellant; and presence of blood over the seized articles.

9. Shri Sachin Singh Rajput, learned counsel appearing for the appellants, would assail the impugned judgment on submission that Ex.P/3 is not a panchanama, therefore, it cannot be relied upon to record finding of guilt against the appellant. According to the learned counsel, Abhishek @ Piyush Soni (PW-1) having turned hostile, Ex.P/3 has no evidentiary value. Elaborating his submission, Shri Rajput would submit that the alleged motive is a double edged weapon because while it may be a cause for committing murder, it may also constitute a cause for falsely implicating the appellants. Shri Rajput would criticise the manner in which the investigation was carried on with preconceived notion about the guilt of the appellant. According to him, the memorandum was recorded on 7-3-2010 whereas the seizure of

stones was made on 8-3-2010, therefore, both the documents are not reliable.

10. Arguing for appellant No.2 Ashadevi Soni separately, Shri Rajput would submit that even if the prosecution case is believed, there is no iota of evidence against the appellant No.2, therefore, her conviction is otherwise not maintainable. Shri Rajput would submit that in absence of any evidence that the articles recovered at the instance of appellant Kheduram or from his house having confirmed presence of human blood, as there is no report of the serologist, the recovery of the articles would otherwise fail to connect the appellant with the crime in question.

11. Shri Rajput would next submit that the trial judge was unnecessarily swayed away by the smell of Phenyle from the house and the evidence that the appellant's son Akash Soni (PW-19) has proved purchase of Phenyle and naphthalene balls on the date of incident. Learned counsel would submit that purchase of these articles are in no way connected with the commission of crime. Shri Rajput would specifically argue that presence of blood on the articles recovered from the house of the appellant or at his instance has not been put to him as a circumstance against him while the appellants were examined under Section 313 of the Cr.P.C., therefore, this evidence cannot be used against him. Shri Rajput would also submit that injuries found on the person of the

deceased could not be caused by stones, therefore, the medical evidence does not tally with the prosecution story.

12. Shri Bhaskar Payashi, learned counsel appearing for the State, *per contra*, would argue that from the very beginning appellant Kheduram gave misleading information to the police, therefore, coupled with the seizure of articles; effort to wipe off of the evidence of crime by using Phenyle; previous animosity between the parties; and the quarrel which was taken place in the morning as proved by Beena Lal Soni (PW-6) would categorically establish the guilt of the appellants. Shri Payashi would further submit that the appellant No.2 has assisted the appellant No.1 in concealing the evidence of crime, therefore, she has rightly been convicted. Shri Payashi would next submit that the deceased was a lady weighing about 90 kgs. therefore, it was not possible for Kheduram alone to commit murder and throw the dead body into the well, therefore, the entire crime has been committed by both the appellants.

13. We have heard learned counsel appearing for the parties at quite length and perused the record.

14. The trial Court has devoted too much space in its judgment to the document Ex.P/3 and the evidence of the witnesses who have signed over this document in proof of the fact that Abhishek @ Piyush Soni (PW-1) has made that statement, therefore, we shall

first deal with the nature of evidence vide Ex.P/3 and its admissibility.

15. In criminal investigation, statement of a witness is recorded under the provisions contained in Sections 161 & 162 of the Cr.P.C. The examination under Section 161 of the Cr.P.C. is oral examination which is required by the police officer to be reduced into writing as also by audio-video electronic means. Under Section 162 of the Cr.P.C. such statement to the police is not to be signed by the person making it and that such statement may be used for contradicting the witness in the manner provided under Section 145 of the Indian Evidence Act,1872 and that the Courts are prohibited from using such statements as corroboration of the statement made in the Court.

16. The document Ex.P/3 is captioned as '*kathan*' (statement) and not as panchanama. A panchanama is prepared in proof of a fact either during search operation or when a new fact is discovered which is required to be mentioned in the panchanama in presence of witnesses. A panchanama is never prepared to prove that a witness has given such statement to the police. If that be so, along with every statement under Section 161 of the Cr.P.C. the police would record a separate panchanama in proof of the fact that the witness has given such statement under Section 161 of the Cr.P.C. to the police.

17. In the case at hand, there is no separate statement of Abhishek @ Piyush Soni (PW-1) recorded under Section 161 of the Cr.P.C. It is because of this difficulty the trial Court has not treated the document as one under Section 161, but has relied upon the same by treating the document as panchanama even though it is captioned as '*kathan*' (statement).

18. When examined in the Court Abhishek @ Piyush Soni (PW-1) has denied to have seen the incident, however, he was not confronted with the document Ex.P/3 to bring on record that he has, in fact, made such statement to the Investigating Officer. If Ex.P/3 is treated as a panchanama, the statement given by Abhishek @ Piyush Soni (PW-1) before the Court is his first statement without there being any statement under Section 161 of the Cr.P.C. Conversely, if the document is treated to be one under Section 161 of the Cr.P.C., the same having not been confronted to him after being declared hostile, the document losses its evidentiary value, as a statement under Section 161 of the Cr.P.C. cannot be used for any other purpose than contradicting the witness who has resiled from his earlier statement. In either condition Ex.P/3 is of no help to the prosecution and the same cannot be used as a lawfully admissible evidence against the appellants. The approach of the trial Court in believing the document Ex.P/3 is not supported by any provision of law.

19. The Supreme Court in **Baldev Singh v. State of Punjab**[1] held that statement under Section 161 of the Cr.P.C. by itself is not substantial evidence.

20. We shall now deal with the issue as to what weapon was used for commission of crime and whether the prosecution has successfully proved by producing an article co-relating with the medical report.

21. The basic prosecution case, as was tried to be placed on record vide Ex.P/3 or in the statements of Ajay Agrawal (PW-4) & Chaman Lal Thakur (PW-22), is that when Abhishek @ Piyush Soni (PW-1) was examined, he kept quiet on the question as to which weapon was used by Kheduram for assaulting the deceased. The Investigating Officer, thereafter, drawn sketches of *pharsa*, sickle & axe. Abhishek @ Piyush Soni (PW-1) pointed towards the sketch of *pharsa* to suggest that Kheduram used *pharsa* for causing injuries to the deceased, however, when memorandum statement of the accused was recorded on 7-3-2010 he informed that injuries have been caused by using two stones, which were, later on, recovered from the well and sent to Dr.V.P. Singh (PW-17) for examination and answering the query.

1 AIR 1991 SC 31

22. Although, Dr.V.P. Singh (PW-17) answered that incised wound found on the person of the deceased could be caused by *pharsa pattar* and the contusions found over the body of the deceased could be caused by marble stone, no blood stains were found on the edges of *pharsha pathar* as is clear from the sketches drawn by Dr.V.P. Singh (PW-17) vide Ex.P/19. It is also to be seen that Chaman Lal Thakur (PW-22) has stated in para 12 of his cross examination that neither *pharsa* nor the marble stone have any sharp edge like knife. Considering the sketch of both the stones and the statement of Chaman Lal Thakur (PW-22) it is highly doubtful as to whether incised wound could be caused by any of these stones. No other weapon has been recovered by the prosecution.

23. Interestingly, the star document of the prosecution i.e. Ex.P/3 refers to use of weapon and not stone. It is precisely for this reason when Abhishek @ Piyush Soni (PW-1) was examined by the Investigating Officer, the Investigating Officer drew figures of weapons and not of stones. This is apart from the fact that the memorandum statement of appellant Kheduram was recorded on 7-3-2010 but the recovery of stones was made on 8-3-2010 whereas the witnesses to the seizure memo Ajay Agrawal (PW-4) & Chaman Lal Thakur (PW-22) would specifically say that

recording of memorandum statement and the seizure both were carried on the same day i.e. 7-3-2010.

24. In investigation for offence under Section 302 of the IPC, it is not permissible for the Investigating Officer to explain the discrepancy by saying that it may be a mistake. A mistake may occur when there is some gap in conducting the investigation and the case diary is opened after few weeks, but when for an incident happened on 4-3-2010 the investigation proceeded on day-to-day basis with recoveries being made, statements being recorded and queries being raised on practically every day, such mistake raises serious doubt over the manner of conducting investigation. Even if one such mistake may not prove fatal for the prosecution, in a case based on circumstantial evidence such mistakes do effect the credibility of the prosecution case and if mistakes are bunched together, it may have result of throwing out the prosecution case.

25. In the eventuality, we do not think that the incised wounds found on the person of the deceased, which was the cause of death, could be caused by the stones recovered from the appellant. The incised wounds were of such nature having sharp margins and cuts could not be caused by the recovered stones.

26. The next circumstance relied by the prosecution is presence of blood over the articles full shirt (B/3), half shirt (B/4), stone (C/1), stone (C/2) & cotton (D) recovered at the instance of the

appellant. However, in absence of any serologist report proving presence of human blood on these articles matching with the blood group of the deceased, the finding of the bloodstains alone would not be such evidence which would connect the appellant with the crime.

27. In **Sattatiya @ Satish Rajanna Kartalla v. State of Maharashtra**[2] their Lordships of the Supreme Court have highlighted the importance of blood group over the seized articles. It is held thus in para 23 :

> "23.....The credibility of the evidence relating to recovery is substantially dented by the fact that even though as per the Chemical Examiners Report the blood stains found on the shirt, pant and half blade were those of human blood, the same could not be linked with the blood of the deceased. Unfortunately, the learned Additional Sessions Judge and High Court overlooked this serious lacuna in the prosecution story and concluded that the presence of human blood stains on the cloths of the accused and half blade were sufficient to link him with the murder."

28. The other circumstance relied by the prosecution is the property dispute between the family of the appellant and that of the deceased, however, the prosecution witnesses namely Alok Kumar Soni (PW-2), son of the deceased and Roshni Soni (PW-3), daughter of the deceased, have themselves stated that it

2 AIR 2008 SC 1184

was the appellants and uncle Mohan who have grabbed the kitchen garden part and got recorded their names in the revenue record, therefore, the property dispute was not between the appellant and the deceased alone, but another person namely Mohan was also involved in that dispute. The other aspect of inimical relation like creating problem in the marriage and feeling jealous about their progress are not such serious, which may provoke the appellant to commit murder of the deceased. Since the motive concerning property dispute can also be attributable to Mohan, it will not be out of place to appreciate that during entire prosecution case statement of Mohan was not recorded. He was kept out of the purview of investigation either for or against the prosecution as if he is not residing in the same *chal* or premises.

29. Albeit the Investigating Officer, Ram Lal Chouhan (PW-22) has stated that during interrogation Mohan has stated that he was not present in the house, therefore, his statement is not recorded, at the same time prosecution has recorded statement of Beena Lal Soni (PW-6), who was also not present in the house at the time of incident. Statement of Sobha Soni, wife of Mohan, has also not been recorded nor she has been produced as a witness even though she was present in the house at the time of incident. As per the statement (Ex.P/3) of Abhishek @ Piyush Soni (PW-1) his mother (Sobha Soni) was sleeping in one of the room. The

manner in which the investigation was carried and the charge sheet was filed without recording statements of such material witnesses, who were present in the premises at the time of incident compels us to think that there is something which the prosecution is not willing to share with the Court.

30. Another facet of motive putforth by the prosecution is in form of evidence of Beena Lal Soni (PW-6), brother of appellant Kheduram. This witness has stated that in their ancestral house he, his brother Kheduram, Mohan and deceased Mokshada were residing in four different portions and that on the date of incident he had gone to Bagbahara at about 10.00 am where from he returned in the evening. After declaring him to be a hostile witness he has been cross-examined during which he would state that at about 6.00 – 7.00 am on the date of incident there was altercation between Kheduram and the deceased. Kheduram had given two blows by club to the deceased. He admits that he is not in a fit mental state and that he is being treated under a psychiatrist and is under medication for the said ailment. He also admits that he suffers from loss of memory and that he had not given any statement to the police. In cross-examination he would categorically admit that no dispute has occurred between Kheduram and the deceased in his presence. At one stage he says that he had gone to Bagbahara at about 10.00 am and at

some different stage he says that he had gone to Bagbahara at 7.30 am and that before proceeding for Bagbahara he was sleeping in his room and went away without meeting any person meaning thereby that he is not aware about any event which has happened in the house on the date of the incident. This witness is not stable during his entire statement and would make different statement in each paragraph. Since the witness himself admits that he is not mentally fit and is under medication, it is not proper to give much credence to his statement. If any such incident would have happened in the morning it would have been definitely narrated by Alok Kumar Soni (PW-2), who is son of the deceased. This witness has admitted that he resides with his mother at Komakhan. Even if he has not stated as to at what time he left Komakhan for going to Mahasamund, there is also no evidence that on the date of incident he was not present in village Komakhan. A complete reading of statement of this witness compels us to infer that he left Komakhan to attend his work at Sub Registrar's office at Mahasamund and returned at about 6.30 pm as stated in para 2 of his statement. If any incident or altercation, as stated by Beena Lal Soni (PW-6), would have happened it would have been known to Alok Kumar Soni (PW-2) also. Therefore, for this reason also statement of Beena Lal Soni (PW-6) is not reliable on the aspect of alleged

motive because of the event which allegedly happened in the morning.

31. The trial Court has pressed into service the circumstance of purchase of Phenyle and naphthalene balls and the smell of Phenyle from the house to draw an inference that after having committed the murder the appellant might have washed the house to cause disappearance of evidence. As per the trial Court, since purchase of Phenyle and naphthalene balls has been proved by Manoj Singh (PW-9) from whose shop the same have been purchased by Akash Soni (PW-19), it is established that it is treated as one of the circumstance.

32. It is to be noticed that Phenyle is not an item which was used for commission of offence of murder. In the statements of Alok Kumar Soni (PW-2) & Roshni Soni (PW-3) it has not come that when they entered the house at about 6.00 to 7.00 pm the kitchen room, where the assault was made, was smelling of Phenyle. Alok Kumar Soni (PW-2) has found the smell of Phenyle, but he is not making specific statement as to which part of the house was smelling Phenyle. The map attached with the crime detail form (Ex.P/15) prepared on 5-3-2010 has mentioned that several parts of the house appear to have been washed with Phenyle particularly the area where the deceased and appellant Kheduram were residing, however, this circumstance could have been used

effectively against the appellant had there been conclusive evidence of finding of bloodstains matching with the blood group of the deceased. Once the prosecution has failed to produce the serologist report confirming presence of blood of the same group of the deceased on the articles recovered from the appellant or the door frame, even if the house has been washed, it cannot be taken that the house was washed to conceal evidence. In our considered view, presence of Phenyle is not a circumstance which can be an independent piece of evidence on the basis of which finding of guilt for committing murder can be established.

33. Reverting back to Ex.P/3, it needs consideration that in this document Abhishek @ Piyush Soni (PW-1) has allegedly made a statement that after serving lunch his mother (Smt. Sobha) went to take rest and thereafter, three of his brothers and sisters along with one Aarti Didi (not examined) were playing in the verandah/court yard. In the same breath he says that Kheduram assaulted the deceased. If this statement is correct, there was no reason for the prosecution to not interrogate two other siblings of this witness and Aarti, as at the time of occurrence all of them were playing together. Once again, the prosecution case is discreetly silent as to why other siblings of Abhishek @ Piyush Soni (PW-1) and Aarti were not interrogated and their statements were not recorded before the trial Court.

34. Since the appellants and the deceased were residing in the same premises, in different rooms/portions, it may be argued that it was for the appellants to have disclosed the facts concerning the death of the deceased, which was within their knowledge as required under Section 106 of the Evidence Act, however, in view of the evidence on record that they were residing separate, there is no presumption that all of them were together in one room at the time of incident. If the prosecution would not have recorded the statement of Abhishek @ Piyush Soni (PW-1) vide Ex.P/3 and the offence would have taken place during night hours and no one else was available in the premises, principles of Section 106 of the Evidence Act could have been applied but since Mohan's wife Sobha was also present in the premises, and the offence has taken place in the afternoon, provisions of Section 106 of the Evidence Act would not apply in the factual scenario of the case.

35. The Supreme Court has reiterated, time and again, that suspicion, howsoever, strong cannot take the place of requirement of legal proof for commission of crime. It is the burden of the prosecution to prove the guilt of the accused by producing lawfully admissible evidence and a conviction is not permissible in law merely on the basis of suspicion.

36. In **Sujit Biswas v. State of Assam**[3], the Supreme Court has held that suspicion, howsoever, strong cannot take place of proof. Para 6 is quoted below :

> "6. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that `may be' proved, and something that `will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between `may be' and `must be' is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between `may be' true and `must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between `may be' true and `must be' true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a

3 AIR 2013 SC 3817

> reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. (Vide: Hanumant Govind Nargundkar & Anr. v. State of M.P., AIR 1952 SC 343; State through CBI v. Mahender Singh Dahiya, AIR 2011 SC 1017; and Ramesh Harijan v. State of U.P., AIR 2012 SC 1979)".

37. Yet again in **Kanhaiya Lal v. State of Rajasthan**[4], the Supreme Court has held thus in para 15 :

> 15. The theory of last seen--the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in Madho Singh v. State of Rajasthan.

38. In view of the above discussion, the present is a case where the prosecution has not been able to conclusively prove such circumstantial evidence which points towards the guilt of the accused, therefore, the prosecution has utterly failed to prove its case beyond reasonable doubt.

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4 (2014) 4 SCC 715

39. As a sequel, the appeal is allowed. Conviction and sentence imposed on the appellants under Section 302 read with Section 34 and Section 201 read with Section 201 of the IPC are hereby set aside and they are acquitted of the said charges. The appellants are on bail. Surety and personal bonds earlier furnished at the time of suspension of sentence shall remain operative for a period of six months in view of the provisions of Section 437-A of the Cr.P.C. The appellants shall appear before the higher Court as and when directed.

Sd/-

Judge

Prashant Kumar Mishra

Sd/-

Judge

Vimla Singh Kapoor

Gowri