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SUPREME COURT OF INDIA

Bench: Justices J.B. Pardiwala and Manoj Misra

Date of Decision: 3rd May 2024

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 437 OF 2015

ANEES …APPELLANT

VERSUS

THE STATE GOVT. OF NCT …RESPONDENT

Legislation and Rules:

Indian Penal Code, 1860 (IPC) – Section 300, 302

Indian Evidence Act, 1872 – Sections 8, 27, 106, 145

Code of Criminal Procedure, 1973 (Cr.P.C.) – Sections 161, 162, 313, 315

Subject: Criminal appeal concerning conviction for the murder of the appellant's wife within the domestic sphere, focusing on evidentiary matters including witness testimony, discovery of weapon, and application of Section 106 of the Evidence Act.

Headnotes:

Criminal Law – Murder Conviction – Appellant convicted for the murder of his wife with a knife, sustaining multiple stab wounds – Trial court's judgment affirmed by High Court – Supreme Court rejects appeal, highlighting issues of witness reliability, particularly the testimony of the appellant's minor daughter, who was declared hostile – The court emphasizes the application

of Section 106 of the Evidence Act, stressing the burden on the appellant to explain circumstances peculiarly within his knowledge [Paras 1-88].

Witness Testimony – Reliability and Hostility – Sole eyewitness, the appellant's daughter, initially supports prosecution but later declared hostile during trial – Supreme Court criticizes the prosecution's handling of hostile witnesses, indicating procedural deficiencies in dealing with key testimonies – Underlines the importance of meticulous cross-examination to uncover the truth [Paras 62-70].

Discovery of Weapon – Application of Sections 27 and 8 of the Evidence Act – Court notes weapon discovery led by appellant, considered under Section 8 for conduct, despite hostile panch witnesses – Reinforces that conduct alone cannot convict but is a significant corroborative factor [Paras 57-61].

Section 106 of the Evidence Act – Burden of Proof – Discusses when Section 106 applies, requiring the accused to explain facts specifically within his knowledge – Court finds Section 106 properly invoked given the circumstances of the case where facts surrounding the murder were within the appellant's knowledge [Paras 34-48].

Exception 4 to Section 300 IPC – Not applicable – Court finds no evidence of sudden fight or absence of cruelty; appellant used a deadly weapon, inflicting fatal injuries disproportionately – Emphasizes that all elements of the exception must be satisfied, which were not in this case [Paras 75-82].

Decision: Appeal dismissed – Conviction and sentence affirmed – Court grants liberty to appellant to seek state government remission of sentence considering mitigating factors and time already served.

Referred Cases:

- Shambhu Nath Mehra v. The State of Ajmer, AIR 1956 SC 404
- Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681

- State of W.B. v. Mir Mohammad Omar and Ors., (2000) 8 SCC 382
- Zahira Habibulla H. Sheikh & Anr. Vs. State of Gujarat & Ors., (2004) 4 SCC 158
- Vishal Singh v. State of Rajasthan, (2009) Cri. LJ 2243
- Kikar Singh v. State of Rajasthan, AIR 1993 SC 2426

J U D G M E N T

J. B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided in the following parts: -

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1. This appeal is at the instance of a convict accused for the offence punishable under Section 302 of the Indian Penal Code, 1860 (for short, **"the IPC"**) and is directed against the judgment and order dated 23.05.2014 passed by the High Court of Delhi in Criminal Appeal No. 320 of 1998 filed by

the appellant herein by which the High Court dismissed the appeal and thereby affirmed the judgment and order of conviction passed by the Additional Sessions Judge, Karkardooma Court, Delhi in Sessions Case No. 176 of 1996 holding the appellant guilty of the offence of murder punishable under Section 302 of the IPC and sentencing him to undergo life imprisonment with a fine of Rs. 5,000/-. In the event of default in the payment of the fine, the appellant was directed to undergo further rigorous imprisonment for six months.

A. CASE OF THE PROSECUTION

2. The deceased, namely, Saira was married to the appellant. The marriage of the deceased with the appellant was solemnised in 1982 in accordance with the Muslim rites and customs. In the wedlock, a daughter named Shaheena was born, who, at the time of the incident in 1995, was five years of age.

3. On 29.12.1995, at about 4:00 am, a wireless operator of the Delhi Police informed one lady constable who was on duty in a PCR that a woman had been stabbed in House No. 220, Gali No. 3, Mustafabad and that a responsible police officer may be asked to reach at the spot of occurrence. The said information was conveyed by the lady constable to the duty officer at P.S. Gokulpuri, who, in turn, reduced the same in writing and forwarded a copy thereof to S.I. Mohkam Singh for inquiry.

4. When S.I. Mohkam Singh, along with the SHO of the concerned Police Station, reached the place of occurrence, he found the deceased lying in a pool of blood, having suffered multiple deep stabbed wounds in the abdomen and other parts of the body. The appellant herein was also present at the place of occurrence. It was noticed that the appellant had also suffered a few superficial injuries. Both, the deceased and the appellant, were sent to the hospital where the deceased was declared as brought dead and the appellant was declared fit for the purpose of interrogation and was discharged after some preliminary treatment.

5. The investigation revealed that the marital relationship of the appellant with the deceased was strained on account of the deceased leaving the house all of a sudden without the permission of the appellant and thereafter returning late in the night hours. This was not liked by the appellant. On several occasions, altercations used to take place between the appellant and the deceased on such issues. It is the case of the prosecution that on the fateful night of the incident, an altercation took place between the appellant and the deceased, as a result, the appellant is alleged to have inflicted stab injuries

indiscriminately with a knife all over the body of the deceased. It is also the case of the prosecution that the minor daughter Shaheena was the sole eyewitness to the incident.

6. In such circumstances referred to above, a rukka was prepared by the Investigating Officer and sent to the concerned Police Station based upon which the First Information Report No. 728 of 1995 was registered against the appellant for the offence punishable under Section 302 of the IPC.

7. The contents of the FIR are reproduced herein below:

"FIRST INFORMATION REPORT

First Information of a Cognisable Crime Reported under Section 154 Cr.PC.

FIR NO. 728/95

Date and hour of occurrence

1	*Date AND*	*29-12-95 AT 4 AM*
2	*Name and residence of information and complainant*	*DD No. 2A Dt: 20.12.95 at 7 AM Writing of Information S.I. Mohkam Singh.*
3	*Brief description of the offence (with section) and of property carried off, if any*	*Under Section 302 IPC*
4	*Place of occurrence and distance and direction from Police Station*	

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5	*Name and Address of the Criminal*	*House No. 220 Old Hustafabi Uttar Pradesh, Distance 1 ½*
6	*Steps taken regarding investigation explanation of delay in recording information*	*No one stand responsible for such delay in this regard.*
7	*Date and time of dispatch from police station*	*Thro special way.*

Through wireless information was received that in Gali No.2 in House No. 222 near illegible factory knife blow has been given and some one be sent to the place of occurrence. On receiving the information, Constable Belt No.1 and SI Karam Singh left the police station in government vehicle and constable illegible on the spot House no. 220 Gali No. 3 Old Mustaffa Bad. Over there the dead body of the deceased Saira was found on whose neck and stomach there were deep injuries and blood was pouring out over there, Aneesh husband of Saira was also present on the spot illegible. From there, we took them in government vehicle PR from the spot by constable available 1258 in government vehicle to GTB Hospital and ML No. illegible was prepared in which Saira was mentioned in writing illegible. On relatives coming, statements were recorded on the basis of illegible offence under Section 302/324 IPC was registered on diary at No.1175. Information may be noted in the rojnaamcha and myself illegible with crime team along with photographer proceeded of the occurrence and prepared report. On
29.12.95 at about 4 p.m. went to the House no. 220 Gali No. 3 Old Mustaffa Bad and the writing was made on 29.12.95 illegible signed of local SI PS Gokulpuri 27.12.95 police proceeding at this time on receipt

of these writing in Hindi the case regarding the office by constable Gayasudeen No.11751. Case has been registered in the register."

8. In the course of the investigation, the Investigating Officer recorded the statement of Shaheena, the five-year old daughter of the deceased. Shaheena in her police statement stated that upon hearing the cries and shouts in the night hours, she woke up and witnessed her father, i.e., the appellant herein inflicting knife injuries on the body of her mother, i.e., the deceased.

9. The post-mortem of the dead body of the deceased was performed at the G.T.B. Hospital, Shahdara, Delhi. In the post-mortem report, the following injuries came to be noted:

"1. Incised wound 4 cm x 1.04 cm present over outer aspect of wound of left thumb.

2. Incised wound 2 cm x 0.8 cm x 0.7 cm present over palmar aspect of proximal phalanx of left thumb.

3. Incised wound 1 cm x 0.3 cm 0.3 cm present over dorsal aspect of middle phalanx of left ring finger.

4. Linear scratch 2 cm x 0.1 present over front of left arm, 4 cm above elbow joint.

5. Incised wound 6 cm x 1 cm x 0.6 cm present over front and inner aspect of left knee joint.

6. Incised wound 5 cm x 1 cm x 2 cm present over outer aspect of right thigh placed 7 cm above the knee joint.

7. Incised wound 1.3 cm x 0.1 x 0.5 cm present over palmer aspect of terminal phalanx of right middle finger.

8. Incised wound 2 cm x 0.3 x 0.5 cm present over palmar aspect of phalanx of right ring finger cutting the underlined wound.

9. Liner scratch 4 cm x 0.2 cm present over outer aspect of top of right shoulder.

10. Incised stab wound 4 cm x 0.5 cm present over front of abdomen in midline 2.5 cm below the xphoid process.

It is obliquely placed clean cut margin and one angle of the wound being more acute than the other on dissection. The track of the wound is going laterally, upwards and posteriorly, cutting the left lobe of liver cutting the pericardia sec. and dominated on cutting an entry the right auricle of heart. Haemorrhages and extravasation of blood presentation with the track of wound. Depth of wound is 9 cm.

11. Incised stab wound present obliquely in midline over front of abdomen with interesting protruding out of the wound. It measures 4.5 x 0.2 cm and is placed 5 cm above the umbilicus. It has clean cut margin and one angle of the wound is more acute than the other. On dissection, the track of the wound is going up posteriorly and laterally and dominated by cutting the mesenteric blood vessels. Haemorrhage present in the mesentery depth of wound is 8 cm.

12. Incised cut through wound of neck measuring 10 cm x 2 cm into 4 cm present horizontally above the thyroid cartilage. Upper margin of the wound is placed 55 cm below chin and lower margin is 6 cm above the sterna notch. All soft tissues of the neck, measure blood vessel trachea and oesophagus have been cut through into till the vertebral column. Haemorrhage and extra vacation or blood present in the soft tissues of the wound.

13. Red abrasion 2.5 cm x 0.3 cm present in midline over front of neck 1.5 cm below chin.

14. Red abrasion 2 cm. x 0.3 cm over left side of face 1.5 cm below the left eye.”

10. The weapon of offence, i.e., the knife was also discovered at the instance of the appellant herein by drawing a panchnama under the provisions of Section 27 of the Indian Evidence Act, 1872 (for short, ‘**the Evidence Act**’). The blood-stained clothes of the deceased as well as those of the appellant herein were collected and sent to the Forensic Science Laboratory for chemical analysis. The statements of various other witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short, the “**Cr.P.C.**”).

11. Upon completion of the investigation, the Investigating Officer filed a chargesheet for the offence punishable under Section 302 of the IPC in the Court of Metropolitan Magistrate, Karkardooma Courts, Delhi, who, in turn,

committed the case to the Court of Sessions Judge, Karkardooma Courts, which culminated in the Sessions Case No. 176 of 1996.

12. The appellant pleaded not guilty to the charge framed by the Sessions Court and claimed to be tried.

13. The prosecution examined 17 witnesses in support of the charge. Shaheena (**PW-3**), was examined as the sole eye-witness to the incident. Shakeel Ahmad (**PW-4**), the brother of the deceased, and Rafiq (**PW-11**), the father of the deceased, were examined to establish the demand of dowry by the appellant from the deceased, and the harassment caused by him towards his deceased wife. Dr. Sayed Ali (**PW-9**), the neighbour of the appellant, was examined as a panch witness to prove the contents of the discovery panchnama of the knife used in the commission of the crime.

14. It is the case of the prosecution that the knife was discovered from a drain outside the house of the appellant, as pointed out by him, in the presence of the Investigating Officer and the panch witnesses.

15. The prosecution also examined the following official witnesses:

a. Constable Munni Khan, who was on duty at the PCR at the time of the incident (**PW-5**)
b. Constable Govind Singh, duty officer at the Gokulpuri P.S. at the time of the incident (**PW-8)**
c. Constable Giasuddin, witness to the discovery of the knife (**PW-**

16)

d. S.I. Mohkam Singh, Investigating Officer of the case (**PW-17**) 16. It is pertinent to note that Shaheena (PW-3), the sole eye-witness to the incident, failed to support the case of the prosecution and was declared a hostile witness. She deposed before the trial court that upon hearing the noise and shrieks of her parents, she woke up in the night hours and saw that thieves had entered into their house and were assaulting her parents. She deposed that the thieves had a knife and they inflicted knife injuries on both her parents. She, however, admitted that she saw her mother lying on the floor bleeding profusely. However, she denied that it was the appellant who had inflicted injuries upon the deceased with a knife. She also denied that the relations of her parents were strained.

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17. Dr. Sayed Ali, PW-9, the panch witness to the discovery panchnama also did not support the case of the prosecution and was declared as a hostile witness.

18. Dr. Anil Kohli, PW-1, who conducted the post-mortem on the dead body of the deceased, deposed that all the injuries were ante-mortem in nature and were sufficient in the ordinary course of nature to cause death, and more particularly the injuries no. 1-12 respectively were possible by a dagger/knife.

19. Upon conclusion of the oral evidence, the further statement of the appellant was recorded by the trial court. In his statement recorded under Section 313 of the Cr.P.C., the appellant stated as under:

"I along with my wife deceased and my daughter Shaheena was sleeping in my house. Two persons caused injuries to my wife. I tried to save her but I was also hurt by those persons. I do not know as to why those strangers caused injuries to my wife. I am innocent. After causing the injuries those persons fled away from there."

20. The trial court, upon appreciation of the oral as well as documentary evidence on the record, held the appellant guilty of the offence of murder punishable under Section 302 of the IPC and sentenced him to undergo imprisonment for life and pay a fine of Rs. 5,000/-. In the event of default in the payment of the fine, the trial court directed the appellant to undergo further rigorous imprisonment for six months.

21. The appellant, feeling dissatisfied with the judgment and order of conviction passed by the trial court, went in appeal before the High Court. The High Court dismissed the appeal and thereby affirmed the judgment and order of the conviction passed by the trial court. The High Court, while affirming the judgment and order of conviction passed by the trial court, held as under:

"10. PW-17's testimony that the appellant refused to make the statement as to the incident and on the other hand, his disclosure that he would make the statement later on, on arrival of his relatives speaks volume that the appellant wanted to invent some story by gaining time. Had two intruders actually caused injuries on the person of deceased Saira as has been subsequently propounded by the appellant, he would have immediately informed the police about the same so that the culprits are immediately caught and brought to book. PW-17's

testimony that the appellant wanted to make the statement later on only on arrival of his relatives was not challenged by the appellant in PW-17's cross examination. At this stage, it would be appropriate to advert to the explanation given by the appellant in reply to question No. 12 in his statement under Section 313 Cr.P.C. which is extracted as under:-

*"**Q.12** Have you anything else to say?*

***Ans.** I along with my wife, deceased, and my daughter Siana was sleeping in my house. Two persons caused injuries to my wife. I tried to save her but I was also hurt by those persons. I do not know as to why those strangers caused injuries to my wife. I am innocent. After causing the injuries those persons fled away from there."*

11. The explanation that two persons had caused injuries on the person of deceased Saira was admittedly not put to PW17 in his cross examination. Had there been any truth in the explanation propounded by the appellant, he would not have been content to simply state that the injuries were caused by two persons, he would have given the detailed description (as far as possible) of the assailants as also the motive as to why the deceased alone was targeted particularly, when robbery was not the motive of the injuries alleged to have been inflicted by the two unknown intruders. Intrusion into the house by unknown third persons would have resulted in tell tail and revelatory evidence. There is no indication or suggestion relating to the said evidence.

xxx xxx xxx

18. *As stated earlier, it is proved by overwhelming evidence and is not even disputed by the appellant that deceased Saira was inflicted injuries inside the matrimonial home (of the appellant and the deceased). Initially, the appellant was completely silent as to how his deceased wife suffered injuries. He told the I.O. that he would make a statement later on only when his relations would arrive. As we have pointed out earlier, in cross-examination of the I.O. and even in his statement under Section 313 Cr.P.C., the appellant has not given the details of the intruders. From the appellant's conduct in not disclosing to the I.O. as to how his deceased wife suffered fatal injuries, there was a lurking*

doubt even at that very time that it was only the appellant who was responsible for causing the injuries unless something material was really brought out by the appellant. Nothing prevented the appellant to have disclosed about the incident immediately when the police reached the spot that the injuries were inflicted on his deceased wife by two unknown intruders. There was no indication or giveaway to show the presence of third parties who intentionally targeted the deceased. All these facts taken together, i.e. nondisclosure of the information about the incident to the police, not giving the details of the two intruders even in his statement under Section 313 Cr.P.C. etc. would really show that the explanation given by the appellant was false which would become an additional link in the chain of circumstantial evidence in view of Manu Sao v. State of Bihar, (2010) 12 SCC 310.

19. *In Munna Kumar Upadhyay @ Munna Upadhyaya v. State of Andhra Pradesh, (2012) 6 SCC 174, it was reiterated that if the accused gave incorrect or false answers during the course of his statement under Section 313 Cr.P.C., the Court can draw an adverse inference against him. In para 76 of the report, the Supreme Court observed as under:-*

"76. If the accused gave incorrect or false answers during the course of his statement under Section 313 Cr.P.C., the court can draw an adverse inference against him. In the present case, we are of the considered opinion that the accused has not only failed to explain his conduct, in the manner in which every person of normal prudence would be expected to explain but had even given incorrect and false answers. In the present case, the Court not only draws an adverse inference, but such conduct of the accused would also tilt the case in favour of the prosecution."

20. *We are conscious of the fact that Shaheena (PW-3) the appellant's daughter has not supported the prosecution version that the appellant was the perpetrator of the crime. She, in fact, came out with the story which is in line with the explanation given by the appellant in his examination under Section 313 Cr.P.C. But at the same time, as stated above, no such explanation was given by the appellant to the I.O. when he reached the spot immediately on getting information of the incident. No such question was even put to the I.O. when he entered the witness*

box as PW-17. The appellant did not choose himself to enter the witness box under Section 315 Cr.P.C. and subject himself for cross-examination in order to explain the peculiar circumstances in which his wife was murdered within his small house. What is more intriguing is why the intruders would keep their hands off in inflicting injuries on the appellant's person who as per his own showing tried to save his wife when she was being inflicted injuries by the two intruders. Therefore, we totally reject the so-called explanation given for the first time by the appellant in his examination under Section 313 Cr.P.C. The fact that the deceased's murder was committed within the four corners of the small house in the appellant's presence and the fact that the appellant even failed to disclose to the I.O. as to how his deceased wife suffered injuries and the giving of a false explanation unerringly point to the guilt of the appellant. It is firmly and clearly established that it was the appellant and the appellant alone who was the perpetrator of the crime.

21. *It is true that S.I. Mohkam Singh (PW-17) had admitted in his crossexamination that the appellant's daughter had disclosed even before sending the rukka to the Police Station that the appellant had committed the gruesome act and that this fact not been mentioned in the rukka does not in any way belies the prosecution version. Perhaps the I.O. thought that it would be inappropriate to record the statement of a child aged about five years for the purpose of registration of an FIR against her father and to first independently investigate and come to more solid evidence. It may also be mentioned that during the investigation of this case, an application was moved by the appellant's father for getting the statement of Shaheena (PW-3) recorded under Section 164 Cr.P.C. which was not recorded by the learned Metropolitan Magistrate as the child was found to be tutored. It seems that the I.O. preferred not to be criticised for getting the case registered on the basis of statement of a child of tender age. And so he did not record Shaheena's (PW-3) statement in the rukka.*

22. *We are conscious of the fact that Shaheena (PW-3) has not supported the prosecution version that her father, the appellant had caused injuries on the person of her deceased mother. The same, however, is of no consequence as the child was of tender years and as observed by the Trial Court was tutored by the appellant's father. The appellant,*

however, cannot make any advantage if PW-3 did not support the prosecution version.

23. We are not going to attach much importance to the alleged harassment and the demand of dowry by the appellant because of the contradictions and the discrepancies in the statements of PWs 4 and 11. Otherwise also, this is not a case under Section 306/304-B IPC and thus, the alleged harassment was of no consequence and could at best have provided some motive for commission of the crime.

24. In view of the foregoing discussion, we are of the view that the appeal is devoid of any merit; the same is accordingly dismissed. The judgment and order on sentence passed by the Trial Court are affirmed.

25. The appeal stands disposed of in above terms."

22. In such circumstances referred to above, the appellant is here before this Court with the present appeal.

B. <u>SUBMISSIONS ON BEHALF OF THE APPELLANT</u>

23. Mr. Rishi Malhotra, the learned counsel appearing for the appellant, submitted that the entire case of the prosecution rests on circumstantial evidence and thus all the circumstances from which the conclusion of guilt is to be drawn should be carefully established by the prosecution and the facts so established should be consistent only with the hypothesis of the guilt of the accused and inconsistent with the innocence of the accused. The counsel placed reliance on the decision of this Court in ***Sharad Birdhichand Sarda v. State of Maharashtra*** reported in (1984) 4 SCC 116 to fortify his submission that the prosecution could be said to have failed to prove its case beyond reasonable doubt and could not have taken recourse to Section 106 of the Evidence Act in the absence of any foundational facts being laid for the same.

24. He further submitted that the sole eye-witness, Shaheena (PW-3), did not support the case of the prosecution and her oral evidence rather fortified the defence taken by the accused that some strangers entered the house in the night hours and caused injuries to the appellant and the deceased.

25. He submitted that Sayed Ali (PW-9), the panch witness examined by the prosecution to prove the discovery of the knife, also turned hostile and failed to prove the contents of the discovery panchnama.

26. One another submission canvassed was that the S.I. Mohkam Singh (PW-17), in his testimony before the trial court, admitted that he had questioned Shaheena (PW-3) before forwarding the written report/rukka to the police station. However, the said fact is missing in the written report/rukka prepared after completing the inquiry. This according to the learned counsel indicates that the testimony of S.I. Mohkam Singh (PW-17) is unworthy of reliance.

27. He submitted that the sole basis to convict the appellant was that the explanation offered by him was not sufficient to save him from the adverse inference drawn against him under Section 106 of the Evidence Act. However, the High Court failed to appreciate that the prosecution has to stand on its own legs and prove its case beyond reasonable doubt. Prosecution cannot throw the entire burden on the accused to prove his innocence.

28. He submitted that the courts below ought to have taken into consideration the conduct of the appellant at the time of the alleged incident. Had the appellant been the assailant, he would not have stayed back at the place of occurrence, but would have rather ran away after committing the alleged crime.

29. He also submitted that the prosecution could not establish any motive on the part of the appellant to commit the alleged crime. Both the trial court and the High Court proceeded on the assumption that as the deceased might have arrived at home late in the night, the same perhaps could have led to an altercation between the two leading to the incident. However, no witness has been examined in this regard.

30. In the last, the learned counsel submitted that even if the entire case of the prosecution is believed or accepted to be true, still the case would fall within the Exception 4 to Section 300 of the IPC. In other words, the submission is that the alleged crime could be said to have been committed without pre-meditation in a sudden fight upon a sudden quarrel.

C. SUBMISSIONS ON BEHALF OF THE STATE

31. Mr. Apoorv Kurup, the learned counsel appearing for the State submitted that no error, not to speak of any error of law, could be said to

have been committed by the High Court in dismissing the appeal filed by the appellant and thereby affirming the judgment and order of conviction passed by the trial court.

32. He submitted that the following incriminating circumstances, in the form of foundational facts, were rightly taken into consideration by both the courts below for the purpose of invoking Section 106 of the Evidence Act.

a. The incident occurred inside the house in which the appellant and the deceased resided. The deceased was found lying practically dead in a pool of blood.

b. The appellant was present at the place of the incident till the time the Investigating Officer reached the house of the appellant upon receiving the information from the PW-8.

c. The appellant failed to disclose before the Investigating Officer at the earliest point of time that two unidentified individuals entered the house and laid an assault.

d. The explanation, or rather the defence, put forward by the appellant that two unidentified individuals entered the house and inflicted injuries on the deceased is falsified by the other circumstances on record.

e. False explanation offered by the accused in his further statement recorded under Section 313 of the Cr.P.C. is an additional incriminating circumstance.

f. The clothes worn by the appellant at the time of the incident had blood stains matching with the blood group of the deceased, i.e.,
'AB' positive.

g. Although the prosecution might not have been able to establish the discovery of the weapon at the instance of the appellant in accordance with Section 27 of the Evidence Act, yet the fact that the appellant made a statement before the Investigating Officer in this regard and led the Investigating Officer along with the panch witnesses to a nearby drain from where the knife is said to have been discovered, would reflect on his conduct, which is a relevant fact under Section 8 of the Evidence Act.

33. In such circumstances referred to above, the learned counsel appearing for the State submitted that there being no merit in the appeal the same may be dismissed.

D. ANALYSIS

34. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court committed any error in passing the impugned judgment and order.

i. Principles of law governing the applicability of Section 106 of the Evidence Act

35. Section 106 of the Evidence Act reads as follows:

> *"**106. Burden of proving fact especially within knowledge**.— When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*
>
> *Illustration*
>
> *(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.*
>
> *(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."*

36. Section 106 of the Evidence Act referred to above provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The word "especially" means facts that are pre-eminently or exceptionally within the knowledge of the accused. The ordinary rule that applies to the criminal trials that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the rule of facts embodied in Section 106 of the Evidence Act. Section 106 of the Evidence Act is an exception to Section 101 of the Evidence Act. Section 101 with its illustration (a) 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 the facts which are, "especially within the knowledge of the accused and which, he can prove without difficulty or inconvenience".

37. In ***Shambhu Nath Mehra* v. *The State of Ajmer***, AIR 1956 SC 404, this Court while considering the word "especially" employed in Section 106 of the Evidence Act speaking through Vivian Bose, J., observed as under: *"11. … The word "especially" stresses that it means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not.*

It is evident that that cannot be the intention & the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle *v.* The King, *1936 PC 169 (AIR V 23) (A) and* Seneviratne *v.* R. *1936-3 All ER 36 AT P. 49 (B)."*

38. The aforesaid decision of ***Shambhu Nath*** (supra) has been referred to and relied upon in ***Nagendra Sah* v. *State of Bihar***, (2021) 10 SCC 725, wherein this Court observed as under:

"22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the court can always draw an appropriate inference.

23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused."

(Emphasis supplied)

39. In ***Tulshiram Sahadu Suryawanshi and Anr.*** **v.** ***State of Maharashtra***, (2012) 10 SCC 373, this Court observed as under:

"23. It is settled law that presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above position is strengthened in view of Section 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilised. We make it clear that this section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. It is useful to quote the following observation in State of W.B. *v.* Mir Mohammad Omar and Ors. *[(2000) 8 SCC 382 : 2000 SCC (Cri) 1516] : (SCC p. 393, para 38)*

"38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In Shambhu Nath Mehra *v.* The State of Ajmer *[AIR 1956 SC 404 : 1956 Cri LJ 794] the learned Judge has stated the legal principle thus :*

'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 pre-eminently or exceptionally within his knowledge.'""
(Emphasis supplied)

40. In ***Trimukh Maroti Kirkan v. State of Maharashtra***, (2006) 10 SCC 681, this Court was considering a similar case of homicidal death in the confines of the house. The following observations made therein are considered relevant in the facts of the present case:

"14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland *v.* Director of Public Prosecutions *[1944 AC 315 : (1944) 2 All ER 13 (HL)] — quoted with approval by Arijit Pasayat, J. in* State of Punjab *v.* Karnail Singh *[(2003) 11 SCC 271 : 2004 SCC (Cri) 135].) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:*

"(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him."

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led

by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

xxx xxx xxx

22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. …"
(Emphasis supplied)

41. The question of burden of proof, where some facts are within the personal knowledge of the accused, was examined by this Court in the case of ***State of W.B.* v. *Mir Mohammad Omar and Ors.*,** (2000) 8 SCC 382. In this case, the assailants forcibly dragged the deceased from the house where he was taking shelter on account of the fear of the accused, and took him away at about 2:30 in the night. The next day in the morning, his mangled body was found lying in the hospital. The trial court convicted the accused under Section 364, read with Section 34 of the IPC, and sentenced them to ten years rigorous imprisonment. The accused preferred an appeal against their conviction before the High Court and the State also filed an appeal challenging the acquittal of the accused for the charge of murder. The accused had not given any explanation as to what happened to the deceased after he was abducted by them. The Sessions Judge, after referring to the law on circumstantial evidence, had observed that there was a missing link in the chain of evidence after the deceased was last seen together with the accused persons, and the discovery of the dead body in the hospital, and concluded that the prosecution had failed to establish the

charge of murder against the accused persons beyond any reasonable doubt. This Court took note of the provisions of Section 106 of the Evidence Act, and laid down the following principles in paras 31 to 34:

"31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a recognized doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognized by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the Court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to Mahesh at least until he was in their custody."

(Emphasis supplied)

42. Applying the aforesaid principles, this Court while maintaining the conviction under Section 364 read with Section 34 of the IPC, reversed the order of acquittal under Section 302 read with Section 34 of the IPC, and convicted the accused under the said provision and sentenced them to imprisonment for life.

43. Thus, from the aforesaid decisions of this Court, it is evident that the court should apply Section 106 of the Evidence Act in criminal cases with care and caution. It cannot be said that it has no application to criminal cases. The ordinary rule which applies to criminal trials in this country that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the provisions contained in Section 106 of the Evidence Act.

44. Section 106 of the Evidence Act cannot be invoked to make up the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. This section cannot be used to support a conviction unless the prosecution has discharged the onus by proving all the elements necessary to establish the offence. It does not absolve the prosecution from the duty of proving that a crime was committed even though it is a matter specifically within the knowledge of the accused and it does not throw the burden on the accused to show that no crime was committed. To infer the guilt of the accused from absence of reasonable explanation in a case where the other circumstances are not by themselves enough to call for his explanation is to relieve the prosecution of its legitimate burden. So, until a *prima facie* case is established by such evidence, the onus does not shift to the accused.

45. Section 106 of the Evidence Act obviously refers to cases where the guilt of the accused is established on the evidence produced by the prosecution unless the accused is able to prove some other facts especially within his knowledge, which would render the evidence of the prosecution nugatory. If in such a situation, the accused offers an explanation which may be reasonably true in the proved circumstances, the accused gets the benefit of reasonable doubt though he may not be able to prove beyond reasonable doubt the truth of the explanation. But, if the accused in such a case does not give any explanation at all or gives a false or unacceptable explanation, this by itself is a circumstance which may well turn the scale against him. In the language of Prof. Glanville Williams:

"<u>All that the shifting of the evidential burden does at the final stage of the case is to allow the jury (Court) to take into account the silence of the accused or the absence of satisfactory explanation appearing from his evidence</u>."

(Emphasis supplied)

46. To recapitulate the foregoing : What lies at the bottom of the various rules shifting the *evidential burden* or burden of introducing evidence in proof of one's case as opposed to the *persuasive burden* or burden of proof, i.e., of proving all the issues remaining with the prosecution and which never shift is the idea that it is impossible for the prosecution to give wholly convincing evidence on certain issues from its own hand and it is, therefore, for the accused to give evidence on them if he wishes to escape. Positive facts must always be proved by the prosecution. But the same rule cannot always apply to negative facts. It is not for the prosecution to anticipate and eliminate all possible defences or circumstances which may exonerate an accused. Again, when a person does not act with some intention other than that which the character and circumstances of the act suggest, it is not for the prosecution to eliminate all the other possible intentions. If the accused had a different intention that is a fact especially within his knowledge and which he must prove (see Professor Glanville Williams—Proof of Guilt, Ch. 7, page 127 and following) and the interesting discussion—para 527 negative averments and para 528 — "require affirmative counter-evidence" at page 438 and foil, of *Kenny's outlines of Criminal Law*, 17th Edn. 1958.

47. But Section 106 of the Evidence Act has no application to cases where the fact in question, having regard to its nature, is such as to be capable of being known not only to the accused but also to others, if they happened to be present when it took place. The intention underlying the act or conduct of any individual is seldom a matter which can be conclusively established; it is indeed only known to the person in whose mind the intention is conceived. Therefore, if the prosecution has established that the character and circumstance of an act suggest that it was done with a particular intention, then under illustration (a) to this section, it may be assumed that he had that intention, unless he proves the contrary.

48. A manifest distinction exists between the burden of proof and the burden of going forward with the evidence. Generally, the burden of proof upon any affirmative proposition necessary to be established as the

foundation of an issue does not shift, but the burden of evidence or the burden of explanation may shift from one side to the other according to the testimony. Thus, if the prosecution has offered evidence, which if believed by the court, would convince them of the accused's guilt beyond a reasonable doubt, the accused, if in a position, should go forward with counter-vailing evidence, if he has such evidence. When facts are peculiarly within the knowledge of the accused, the burden is on him to present evidence of such facts, whether the proposition is an affirmative or negative one. He is not required to do so even though a *prima facie* case has been established, for the court must still find that he is guilty beyond a reasonable doubt before it can convict. However, the accused's failure to present evidence on his behalf may be regarded by the court as confirming the conclusion indicated by the evidence presented by the prosecution or as confirming presumptions which might arise therefrom. Although not legally required to produce evidence on his own behalf, the accused may, therefore, as a practical matter find it essential to go forward with proof. This does not alter the burden of proof resting upon the prosecution [See: ***Balvir Singh v. State of Uttarakhand***,
2023 SCC OnLine 1261]

ii. What is "*prima facie case*" (foundational facts) in the context of Section 106 of the Evidence Act?

49. The Latin expression *prima facie* means "at first sight", "at first view", or "based on first impression". According to *Webster's Third International Dictionary* (1961 Edn.), "prima facie case" means a case established by "prima facie evidence" which in turn means "evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted". In both civil and criminal law, the term is used to denote that, upon initial examination, a legal claim has sufficient evidence to proceed to trial or judgment. In most legal proceedings, one party (typically, the plaintiff or the prosecutor) has a burden of proof, which requires them to present prima facie evidence for each element of the case or charges against the defendant. If they cannot present prima facie evidence, the initial claim may be dismissed without any need for a response by other parties.

50. Section 106 of the Evidence Act would apply to cases where the prosecution could be said to have succeeded in proving facts from which a reasonable inference can be drawn regarding guilt of the accused.

51. The presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved.

52. To explain what constitutes a *prima facie* case to make Section 106 of the Evidence Act applicable, we should refer to the decision of this Court in ***Mir Mohammad*** (supra), wherein this Court has observed in paras 36 and 37 respectively as under:

"36. In this context we may profitably utilize the legal principle embodied in Section 106 of the Evidence Act which reads as follows: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

37. The section 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 from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference."
(Emphasis supplied)

53. We should also look into the decision of this Court in the case of ***Ram Gulam Chaudhary & Ors. v. State of Bihar***, (2001) 8 SCC 311, wherein this Court made the following observations in paragraph 24 as under:

"24. Even otherwise, in our view, this is a case where Section 106 of the Evidence Act would apply. Krishnanand Chaudhary was brutally assaulted and then a chhura-blow was given on the chest. Thus chhura-blow was given after Bijoy Chaudhary had said "he is still alive and should be killed". The appellants then carried away the body. What happened thereafter to Krishnanand Chaudhary is especially within the knowledge of the appellants. The appellants have given no explanation as to what they did after they took away the body. Krishnanand Chaudhary has not been since seen alive. In the absence of an explanation, and considering the fact that the appellants were

suspecting the boy to have kidnapped and killed the child of the family of the appellants, it was for the appellants to have explained what they did with him after they took him away. When the abductors withheld that information from the court, there is every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be 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 like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference. We, therefore, see no substance in this submission of Mr. Mishra."

(Emphasis supplied)

54. Cases are frequently coming before the courts where the husband, due to strained marital relations and doubt as regards the character, has gone to the extent of killing his wife. These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. No member of the family, like in the case at hand, even if he is a witness of the crime, would come forward to depose against another family member.

55. If an offence takes place inside the four walls of a house and in such circumstances where the accused has all the opportunity to plan and commit the offence at a time and in the circumstances of his choice, it will be extremely difficult for the prosecution to lead direct evidence to establish the guilt of the accused. It is to resolve such a situation that Section 106 of the Evidence Act exists in the statute book. In the case of ***Trimukh Maroti Kirkan*** (supra), this Court observed that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. The Court proceeded to observe that a Judge also presides to see that a guilty man does not escape. Both are public duties. The law does not enjoin a duty on the prosecution to lead evidence of such character, which is almost impossible to be led, or at any rate, extremely difficult to be led. The duty on the prosecution is to lead such evidence, which it is capable of leading, having regard to the facts and circumstances of the case.

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56. We are of the view that the following foundational facts, which were duly proved, justified the courts below in invoking the principles enshrined under Section 106 of the Evidence Act:

a) The offence took place inside the four walls of the house in which the appellant, deceased and their 5-year-old daughter were living. The incident occurred in the early morning hours between 3.30 am and 4.00 am. When the Investigating Officer reached the house of the appellant, he found the deceased lying in a pool of blood. The appellant was also present at his house.

b) The defence put forward by the appellant that two unidentified persons entered the house and inflicted injuries on the deceased and also on his body is found to be false.

c) The clothes worn by the appellant at the time of the incident were collected by the Investigating Officer. The clothes had blood stains. According to the Forensic Science Laboratory report, the blood stains on the clothes of the appellant matched with the blood group of the deceased i.e., AB+

d) The conduct of the appellant in leading the Investigating Officer and others to a drain nearby his house and the discovery of the knife from
the drain is a relevant fact under Section 8 of the Evidence Act. In other words, the evidence of the circumstance simpliciter that the appellant pointed out to the Investigating Officer the place where he threw away the weapon of offence i.e., knife would be admissible as ‘conduct’ under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act.

iii. Discovery of weapon under Section 27 of the Evidence Act

57. In ***Madan Singh* v. *State of Rajasthan***, 1979 SCC (Cri) 56, it was observed that where the evidence of the Investigating Officer who discovered the material objects is convincing, the evidence as to discovery need not be rejected on the ground that the panch witnesses did not support the prosecution version. Similar view was expressed in ***Mohd. Aslam* v. *State of Maharashtra***, (2001) 9 SCC 362.

58. In ***Anter Singh v. State of Rajasthan***, (2004) 10 SCC 657, it was further held: -

"10. … even if Panch witness turn hostile which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated."

59. Even while discarding the evidence in the form of discovery panchnama, the conduct of the appellant herein would be relevant under Section 8 of the Evidence Act. The evidence of discovery would be admissible as conduct under Section 8 of the Evidence Act quite apart from the admissibility of the disclosure statement under Section 27 of the Evidence Act, as this Court observed in ***A.N. Venkatesh and Anr.* v. *State of Karnataka***, (2005) 7 SCC 714: -

"9. By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in Prakash Chand v. State (Delhi Admn.) [(1979) 3 SCC 90 : 1979 SCC (Cri) 656 : AIR 1979 SC 400]. Even if we hold that the disclosure statement made by the accused-appellants (Ex. P-15 and P-16) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8. …"

60. In the ***State (NCT of Delhi)* v. *Navjot Sandhu alias Afsan Guru***, (2005) 11 SCC 600, the two provisions i.e. Section 8 and Section 27 of the Evidence Act were elucidated in detail with reference to the case law on the subject and apropos to Section 8 of the Evidence Act, wherein it was held:

"205. Before proceeding further, we may advert to Section 8 of the Evidence Act. Section 8 insofar as it is relevant for our purpose makes the conduct of an accused person relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. It could be either a previous or subsequent conduct. There are two Explanations to the section, which explains the ambit of the word 'conduct'. They are: "Explanation 1.- The word 'conduct' in this section does not include statements, unless those statements accompany and explain acts

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other than statements, but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2.- When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant."

The conduct, in order to be admissible, must be such that it has close nexus with a fact in issue or relevant fact. Explanation 1 makes it clear that the mere statements as distinguished from acts do not constitute "conduct" unless those statements "accompany and explain acts other than statements". Such statements accompanying the acts are considered to be evidence of res gestae. Two illustrations appended to Section 8 deserve special mention:

"(f) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence— 'the police are coming to look for the man who robbed B', and that immediately afterwards A ran away, are relevant.

* * *

(i) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant."

206. We have already noticed the distinction highlighted in Prakash Chand case (supra) between the conduct of an accused which is admissible under Section 8 and the statement made to a police officer in the course of an investigation which is hit by Section 162 Cr.P.C. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where stolen articles or weapons used in the commission of the offence were hidden, would be admissible as "conduct" under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct, falls within the purview of Section 27, as pointed out in Prakash Chand case. In Om Prakash case (supra) this Court held that: (SCC p.262, para 14)

> *“Even apart from the admissibility of the information under Section 27, the evidence of the investigating officer and the panchas that the accused had taken them to PW 11 (from whom he purchased the weapon) and pointed him out and as corroborated by PW 11 himself would be admissible under Section 8 of the Evidence Act as conduct of the accused.””*
>
> (Emphasis supplied)

61. However, in the aforesaid context, we would like to sound a note of caution. Although the conduct of an accused may be a relevant fact under Section 8 of the Evidence Act, yet the same, by itself, cannot be a ground to convict him or hold him guilty and that too, for a serious offence like murder. Like any other piece of evidence, the conduct of an accused is also one of the circumstances which the court may take into consideration along with the other evidence on record, direct or indirect. What we are trying to convey is that the conduct of the accused alone, though may be relevant under Section 8 of the Evidence Act, cannot form the basis of conviction.

iv. Cross-examination by the public prosecutor of a hostile witness

62. In the case at hand, Shaheena (PW-3) was the most important witness for the prosecution, being the solitary eye witness to the incident. Shaheena (PW-3) at the relevant point of time was just five years old. Her childhood might have been very disturbed on account of the strained relations of her parents. The unfortunate incident must have had a lasting effect on her. However, when she entered the witness box, she decided to resile from her previous statement. Had she deposed as stated by her in her police statement then, probably, the prosecution would not have felt the need to invoke Section 106 of the Evidence Act. There could be innumerable reasons for a witness to resile from his/her police statement and turn hostile. Here is a case in which a five-year-old daughter might have resiled thinking that having lost her mother, the father was the only person who may take care of her and bring her up. However, why she turned hostile is not important. What is important is the role of the public prosecutor after a prime witness, more particularly a child witness of tender age, turns hostile in a murder trial. When any prosecution witness turns hostile and the public

prosecutor seeks permission of the trial court to cross-examine such witness then that witness is like any other witness. The witness no longer remains the prosecution witness.

63. Section 162 Cr.P.C. bars the use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such witnesses as indicated therein. The statement made by a witness before the police under Section 161(1) Cr.P.C. can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the proviso to Section 162(1) Cr.P.C. The statements under Section 161 Cr.P.C. recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purpose: (*i*) of contradicting such witness by an accused under Section 145 of the Evidence Act; (*ii*) the contradiction of such witness also by the prosecution but with the leave of the Court; and (*iii*) the re-examination of the witness if necessary.

64. The court cannot *suo motu* make use of statements to police not proved and ask questions with reference to them which are inconsistent with the testimony of the witness in the court. The words *'if duly proved'* used in Section 162 Cr.P.C. clearly show that the record of the statement of witnesses cannot be admitted in evidence straightaway, nor can be looked into, but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the Investigating Officer. The statement before the Investigating Officer can be used for contradiction but only after strict compliance with Section 145 of the Evidence Act, that is, by drawing attention to the parts intended for contradiction.

65. Section 145 of the Evidence Act reads as under:

*"**145.Cross-examination as to previous statements in writing**. — A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."*

66. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his crossexamination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need of further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter, when the Investigating Officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the Investigating Officer who, again, by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot *suo motu* make use of statements to police not proved in compliance with Section 145 of the Evidence Act, that is, by drawing attention to the parts intended for contradiction." [See: ***V.K. Mishra v. State of Uttarakhand*** : (2015 9 SCC 588]

67. In the case at hand, not only proper contradictions were not brought on record in the oral evidence of the hostile witnesses, but even those few that were brought on record, were not proved through the evidence of the Investigating Officer. Does the State expect Section 106 of the Evidence Act to come to its aid in every criminal prosecution. At times, such procedural lapses may lead to a very serious crime going unpunished. Any crime committed against an individual is a crime against the entire society. In such circumstances, neither the public prosecutor nor the presiding officer of the trial court can afford to remain remiss or lackadaisical in any manner. Time and again, this Court has, through its judgments, said that there should not be any element of political consideration in the matters like appointment to

the post of public prosecutor, etc. The only consideration for the Government should be the merit of the person. The person should be not only competent, but he should also be a man of impeccable character and integrity. He should be a person who should be able to work independently without any reservations, dictates or other constraints. The relations between the Public Prosecution Service and the judiciary are the very cornerstone of the criminal justice system. The public prosecutors who are responsible for conducting prosecutions and may appeal against the court decisions, are one of judges' natural counterparts in the trial proceedings and also in the broader context of management of the system of criminal law.

68. A criminal case is built upon the edifice of evidence (whether it is direct evidence or circumstantial evidence) that is admissible in law. Free and fair trial is the very foundation of the criminal jurisprudence. There is a reasonable apprehension in the mind of the public at large that the criminal trial is neither free nor fair with the Prosecutor appointed by the State Government conducting the trial in a manner where frequently the prosecution witnesses turn hostile.

69. Over a period of time, we have noticed, while hearing criminal appeals, that there is practically no effective and meaningful crossexamination by the Public Prosecutor of a hostile witness. All that the Public Prosecutor would do is to confront the hostile witness with his/her police statement recorded under Section 161 of the Cr.P.C. and contradict him/her with the same. The only thing that the Public Prosecutor would do is to bring the contradictions on record and thereafter prove such contradictions through the evidence of the Investigating Officer. This is not sufficient. The object of the cross-examination is to impeach the accuracy, credibility and general value of the evidence given in-chief; to sift the facts already stated by the witness; to detect and expose the discrepancy or to elicit the suppressed facts which will support the case of the cross-examining party. What we are trying to convey is that it is the duty of the Public Prosecutor to cross-examine a hostile witness in detail and try to elucidate the truth & also establish that the witness is speaking lie and has deliberately resiled from his police statement recorded under Section 161 of the Cr.P.C. A good, seasoned and experienced Public Prosecutor will not only bring the contradictions on record, but will also cross-examine the hostile witness at length to establish that he or she had actually witnessed the incident as narrated in his/her police statement.

70. In the case at hand, we have noticed that after Shaheena (PW-3) was declared hostile, all that the public prosecutor did was to put few suggestions to her for the purposes of cross-examination. Surprisingly, even proper contradictions were not brought on record. In other words, the PW-3 was not even appropriately confronted with her police statement. It is not sufficient for the public prosecutor while cross-examining a hostile witness to merely hurl suggestions, as mere suggestions have no evidentiary value.

71. The trial judge also failed to play an active role in the present case.

The trial judge should have been conscious of the fact that Shaheena (PW3) was asked to depose in the open court in a charged atmosphere and that too in the presence of the accused who was none other than her own father. 72. The impact of a court appearance on a child and the duty of the court towards a child witness have been very succinctly explained by the Constitutional Court of South Africa in the case of ***Director of Public Prosecutions, Transwal v. Minister of Justice and Constitutional Development*** reported in (2009) 4 SA 222 (CC). We quote the relevant observations as under:

"101. A court operates in an atmosphere which is intended to be imposing. It is an atmosphere which is foreign to a child. The child sits alone in the witness stand, away from supportive relatives such as a parent. The child has to testify in the presence of the alleged abuser and other strangers including the presiding judicial officer, the accused's legal representative, the court orderly, the prosecutor and other court officials. While the child may have met the prosecutor before - at least one assumes that the prosecutor would have interviewed the child in preparing for trial - the conversation now takes place in a context that is probably bewildering and frightening to the child. Unless appropriately adapted to a child, the effect of the courtroom atmosphere on the child may be to reduce the child to a state of terrified silence. Instances of children who have been so frightened by being introduced into the alien atmosphere of the courtroom that they refuse to say anything are not unknown."

So far as conduct of the competency assessment of the child is concerned, it was held as follows:

"102. The child would be questioned by the judicial officer in order to satisfy himself or herself that the child understands that he or she is

under a duty to speak the truth or understands the import of the oath. Regrettably this questioning, although well-meaning, is often theoretical in nature and may increase the child's sense of confusion and terror. The child may wonder why he or she is being subjected to this questioning. That is not all.

xxx xxx xxx

104. If the child decides to speak, then the prosecutor will take him or her through his or her evidence. The questioning of a child requires special skills, similar to those required to run day care centres or to teach younger children. Questioning a child in court is no exception: it requires a skill. Regrettably, not all of our prosecutors are adequately trained in this area, although quite a few have developed the necessary understanding and skill to question children in the court room environment…"

(Emphasis supplied)

73. If the questioning by the public prosecutor is not skilled, like in the case at hand, the result is that the State as a prosecuting agency will not be able to elicit the truth from the child witness. It is the duty of the court to arrive at the truth and subserve the ends of justice. The courts have to take a participatory role in the trial and not act as mere tape recorders to record whatever is being stated by the witnesses. The judge has to monitor the proceedings in aid of justice. Even if the prosecutor is remiss or lethargic in some ways, the court should control the proceedings effectively so that the ultimate objective that is the truth is arrived at. The court must be conscious of serious pitfalls and dereliction of duty on the part of the prosecuting agency. Upon failure of the prosecuting agency showing indifference or adopting an attitude of aloofness, the trial judge must exercise the vast powers conferred under Section 165 of the Evidence Act and Section 311 of the Cr.P.C. respectively to elicit all the necessary materials by playing an active role in the evidence collecting process. (See: ***Zahira Habibulla H. Sheikh & Anr. vs. State of Gujarat & Ors***., (2004) 4 SCC 158).

74. The judge is expected to actively participate in the trial, elicit necessary materials from the witnesses in the appropriate context which he feels necessary for reaching the correct conclusion. The judge has uninhibited power to put questions to the witness either during the chief examination or cross-examination or even during re-examination for this purpose. If a judge feels that a witness has committed an error or slip, it is the duty of the judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. (See: (para 12) of ***State of Rajasthan vs. Ani alias Hanif & Ors***., AIR 1997 SC 1023).

v. Whether the appellant is entitled to the benefit of Exception 4 to Section 300 of the IPC?

75. We shall now deal with the alternative submission of the learned counsel for the appellant as regards the applicability of Exception 4 to Section 300 of the IPC.

76. He submitted that even otherwise it is the case of the prosecution that the appellant and the deceased were not leading a happy marital life and used to fight with each other for some reason or the other, more particularly, on account of the deceased returning home very late in the night. The learned counsel tried to develop an argument that on the fateful day of the incident also some verbal altercation might have taken place and this fact is also substantiated by the evidence of Shaheena (PW-3) that she had heard shouts and shrieks of her parents in the night hours. This would indicate that the incident had occurred in the heat of the moment without any pre-meditation. In other words, according to the learned counsel it could be a sudden fight between the two in the heat of passion upon a sudden quarrel. He also tried to fortify his submission pointing out that appellant had also suffered minor injuries.

77. The aforesaid submission of the learned counsel appearing for the appellant is baseless and without any merit. However, since a specific ground has been urged, we should answer the same.

78. The *sine qua non* for the application of an Exception to Section 300 always is that it is a case of murder but the accused claims the benefit of the Exception to bring it out of that Section and to make it a case of culpable homicide not amounting to murder. This plea, therefore, assumes that this is a case of murder. Hence, as per Section 105 of the Evidence Act, it is for the accused to show the applicability of the Exception. Exception 4 reads as under:

"Exception 4.- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

79. A perusal of the provision would reveal that four conditions must be satisfied to bring the matter within Exception 4:

(i) it was a sudden fight;

(ii) there was no premeditation;

(iii) the act was done in the heat of passion; and; that

(iv) the assailant had not taken any undue advantage or acted in a cruel manner.

80. On a plain reading of Exception 4, it appears that the help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or having acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4, all the ingredients mentioned in it must be found.

81. This Court in ***Vishal Singh v. State of Rajasthan*** , (2009) Cri. LJ 2243 has explained the scope and ambit of Exception 4 to 300 of the IPC. A three-Judge Bench observed in para 7 as under:

"*7. The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for, in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reasons and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. <u>A 'sudden fight' implies mutual provocation and</u>*

blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'. These aspects have been highlighted in Dhirajbhai Gorakhbhai Nayak v. *State of Gujrat (2003 (5) Supreme 223]; Parkash Chand* v. *State of H.P. (2004 (11) SCC 381); Byvarapu Raju* v. *State of A.P. and Anr. (2007 (11) SCC 218) and Hawa Singh and Anr.* v. *State of Haryana (SLP (Crl.) No. 1515/2008, disposed of on 15.1.2009)."*

(Emphasis supplied)

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82. If the aforesaid principles, as explained by this Court, are to be applied to the facts of the present case, we have no hesitation in saying that the present case is not one of culpable homicide not amounting to murder but the same is a case of murder. We should not overlook the fact that the appellant inflicted as many as twelve blows with a knife on the deceased who was unarmed and helpless.

83. Where the offender takes undue advantage or has acted in a cruel or an unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is disproportionate, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In ***Kikar Singh* v. *State of Rajasthan*** reported in AIR 1993 SC 2426, it was held that if the accused used deadly weapons against an unarmed man and struck a blow on the head it must be held that using the blows with the knowledge that they were likely to cause death, he had taken undue advantage. A fight suddenly takes place, for which both the parties are more or less to be blamed. It might be that one of them starts it, but if the other had not aggravated it by his own conduct, it would not have taken the serious turn it did. There is then mutual provocation and aggravation and it is difficult to apportion the share of blame which attaches to each fighter. It takes two to make a fight. Assuming for the moment that it was the deceased who picked up a fight with the appellant or provoked the appellant in some manner with her conduct or behaviour, still the appellant could be said to have taken undue advantage & acted in a cruel manner.

84. For all the foregoing reasons, we have reached to the conclusion that the High Court committed no error in affirming the judgment and order of conviction passed by the trial court, holding the appellant guilty of the offence of murder of his wife.

85. Before we close this matter, we are persuaded to look into a few mitigating circumstances emerging from the record of the case. We take notice of the fact that the appellant got married to the deceased in 1982. During those days, triple talaq was prevalent among the Muslims. In the year 1992, the appellant divorced the deceased with the aid of triple talaq. However, thereafter, he once again brought her back home. In the year 1995, the

incident occurred. The appellant came to be convicted by the trial court in the year 1998. On appeal before the High Court, in the year 1998 itself, the substantive order of sentence of life imprisonment came to be suspended and the appellant was ordered to be released on bail. It took 16 years for the High Court to decide the appeal which ultimately came to be dismissed on 23.05.2014. Upon dismissal of the appeal, the appellant was once again taken into custody and since then he has been undergoing the sentence of life imprisonment. We are informed that he has undergone almost 11 years of imprisonment so far. It appears that as on date the appellant must be about 65 years of age. Almost half of his life lived so far has been spent undergoing the ordeal of the criminal prosecution. When a crime is committed, a variety of factors are responsible for making the offender commit the crime. Those factors may be social and economic, may be the result of value erosion or parental neglect; may be because of the stress of circumstances, or the manifestation of temptations in a milieu of affluence contrasted with indigence or other privations.

86. In the facts of this case, more particularly keeping in mind the mitigating circumstances as stated above, we grant liberty to the appellant to prefer an appropriate representation addressed to the State Government praying for remission of sentence. If any such representation is filed by the appellant, the State Government shall look into the same at the earliest and take an appropriate decision on the same in accordance with law within four weeks from the date of the receipt of such representation and communicate the same in writing to the appellant.

87. In the result, this appeal fails and is hereby dismissed in the aforesaid terms.

88. Pending application(s), if any, also stand disposed of.

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