

Court No. - 44

**Case :-** CRIMINAL APPEAL No. - 703 of 2017

**Appellant :-** Anil

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

**Counsel for Appellant :-** Apul Misra, Ramendra Pal  
Singh, Veerendra Kumar Shukla

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

Hon'ble Dr. Kaushal Jayendra Thaker, J.

Hon'ble Ajai Tyagi, J.

(Per Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred against the judgement and order dated 08.11.2016 passed by Additional Sessions Judge/Special Judge, E.C. Act, Budaun in Session Trial No.826 of 2013, arising out of Case Crime No.100 of 2013, Police Station- Ughaiti, District- Budaun, whereby the appellant was convicted and sentenced under Section 302 IPC for life imprisonment along with fine of Rs.20,000/-, in default of the payment of fine to further undergo one year simple imprisonment.

2. The brief facts of the case as culled out from the record are that a written report is filed at Police Station- Ughaiti, District- Budaun with the averment that the marriage of sister of the informant was solemnised with appellant Anil, in which dowry was given as per his financial condition but the in-laws of his sister started demanding Rs.50,000/- as additional dowry. On 24.06.2013 at about 4:00 pm he received, a call phone from the neighbour of his sister that his sister has been done to death by her in-laws for want of dowry. On hearing the news, he

reached to the matrimonial home of his sister along with other family members and saw that his sister was done to death by her in-laws by way of administering the poison.

3. On the basis of aforesaid written report, a first information report was registered as Case Crime No.100 of 2013 u/s 498A, 304B of IPC and under Section 3/4 Dowry Prohibition Act. Investigation was taken up by the I.O. He visited the spot and prepared the site-plan. The statements of witnesses were recorded u/s 161 Cr.P.C. by the investigating officer. Inquest proceedings had taken place and inquest report was prepared. The post mortem of dead body was conducted and post mortem report was prepared. The cause of death was not ascertained in post mortem and, hence, Viscera was preserved and sent to Forensic Science Laboratory for chemical examination. From where the report was received, in which organophosphorus insecticides poison was found in Viscera. After completion of investigation, the FIR was culminated into charge sheet against accused Anil, Lalu Prasad and Jaleshwari. The Magistrate took the cognizance and committed it to the Court of Sessions because the case was triable exclusively by Court of Sessions.

4. Learned trial court framed charges against all the accused persons u/s 304B IPC with alternative charge u/s 302 IPC and u/s 498A IPC and 3/4 Dowry Prohibition Act. Accused persons denied the charges and claimed to be tried.

5. The prosecution so as to bring home the charges, framed against the accused, examined the following witnesses:

1.	Nirottam	PW1
2.	Chatra Pal	PW2
3.	Om Shankar	PW3
4.	Smt. Santoshi Kumari	PW4
5.	Netrapal	PW5
6.	Shaukuntala Devi	PW6
7.	Bhikam Singh	PW7
8.	Dr. Ashok Prasad	PW8
9.	Mahesh Chandra	PW9
10.	Narendra Pal Singh	PW10
11.	Radhey Shyam Sharma	PW11

6. Following documentary evidence was filed by prosecution, which was proved by leading evidence:

1.	FIR	Ex.ka3
2.	Written Report	Ex.ka1
3.	P.M. Report	Ex.ka2
4.	Report of Vidhi Vigyan Pryogshala	Ex.ka12
5.	Panchayatnama	Ex.ka7
6.	Charge sheet (Mool)	Ex.ka6
7.	Site Plan with Index	Ex.ka5

7. After completion of prosecution evidence, statements of accused persons were recorded u/s 313 of Cr.P.C., in which they have stated that false evidence has been led against them and specifically stated that co-accused Anil and deceased used to reside in separate house from other co-accused, namely, Lalu Prasad and Smt. Jaleshwari. No witness is examined by accused persons in defence.

8. After hearing both the parties, learned trial court convicted the accused appellant Anil for the offence u/s 302 IPC and sentenced life imprisonment and fine. Other co-

accused Lalu Prasad and Smt. Jaleshwari were acquitted from all the charges. Hence, this appeal.

9. Heard Shri Tripurari Pal, learned counsel for the appellant and Shri Patanjali Mishra along with Shri N.K. Srivastava, learned AGA appearing on behalf of the State.

10. Learned counsel for the appellant submitted that appellant has been falsely implicated in this case. This is a case of no evidence. Prosecution has examined seven witnesses of fact in this case, but nobody has supported the prosecution case and they have been declared hostile, even after cross-examining by the State, no evidence is emerged, which could go against the appellant. All the witnesses of fact have stated that there was no demand of dowry on the part of the appellant. It is submitted by learned counsel for the appellant that in fact the deceased consumed insecticide, which was taken by her mistakenly in the place of medicine. This stand is taken by the appellant in his statement u/s 313 Cr.P.C. also.

11. It is next submitted by the learned counsel for the appellant that learned trial court has also opined that no case of dowry death is made out against the appellant, but he was convicted with the aid of Section 106 of Indian Evidence Act and circumstantial evidence, which is not applicable in this case. Learned counsel further submitted that prosecution has not proved that at the time when the deceased consumed insecticide, he was in the house. It is not sufficient to establish that accused and deceased used to reside in the same house. Moreover, when the learned trial court has opined that this is

not the case of dowry death and no demand of additional dowry is proved, then the motive is also not proved, which is essential circumstance in the case of circumstantial evidence. There is no eye-witness in this case and prosecution has not brought any evidence with regard to the fact that poison was administered to the deceased by the appellant. Hence, trial court has committed a grave error in convicting the appellant for the offence u/s 302 IPC and appeal is liable to be allowed.

12. Learned AGA opposed the submissions made by the learned counsel for the appellant and contended that it is not denied by the appellant that he was not living with the deceased. Hence, learned trial court has not committed any error in convicting the accused by way of provision of Section 106 of Indian Evidence Act because, in case when the deceased and appellant were residing together, the burden was on the appellant to explain and prove that he did not administer the poison, which he could not prove. With regard to the fact of demand of additional dowry, the learned AGA submitted that the witnesses of fact were won over by the accused. Hence, they did not support the prosecution case. Hence, there is no illegality or infirmity in the impugned judgement, which may call for any interference by this Court.

13. Prosecution has set up this case as a case of dowry death. Informant lodged first information report with the averments that appellant along with his family members used to torture the deceased in connection with demand of additional dowry. But this fact could not be proved by the prosecution. The witnesses of fact examined by the prosecution have turned hostile. PW1

Nirottam is informant and brother of the deceased. PW2, PW3 and PW5 are also her brothers, PW4 is *Bhabhi* of deceased. PW6 and PW7 are mother and father of the deceased respectively. They all have deposed that there was no demand of dowry from the side of the appellant and the poison was consumed by the deceased mistakenly. On the basis of aforesaid evidence, learned trial court has also reached to the conclusion that death of the deceased was not within the four corners of dowry death.

14. Learned trial court went further and took the recourse of provision envisaged in Section 106 of Indian Evidence Act, where the learned trial court had held that it is the statement of appellant in his statement u/s 313 of Cr.P.C. that he and deceased used to reside in separate house from his parents. Hence, learned trial court shifted the burden on the shoulders of the appellant to prove the factum of death of deceased as to how she died.

15. In our opinion, learned trial court has misread the provision of Section 106 of Indian Evidence Act, which reads as under:

106. Burden of proving fact especially within knowledge—  
When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations

*(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.*

16. As far as the concept of Section 106 of Indian Evidence Act is concerned, that is misread by the learned trial Judge because when the offence like murder is committed in secrecy inside the house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 Indian Evidence Act, there will be a corresponding burden on the inmates of the house to give 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 challenge on the accused to offer. Then the initial burden of proving that, as on the date of the alleged incident, the accused was present in the house of lastly seen with the deceased or that he was lastly in the company of the deceased at the time of the incident would be primarily upon the prosecution.

17. This High Court in the case of **Santosh Vs. State of U.P. 2021 0 Supreme (All) 173**, in which one of us (Justice Dr. Kaushal Jayendra Thaker,) is signatory, has also discussed the law relating to Section 106 of Indian Evidence Act, which is quoted herein below:

*“35. Recently, this Court in **Dharmendra Rajbhar Vs. State of U.P. (Supra)** in similar situation has considered legal position as far as Section 106 of the Act, 1872 is concerned. We do not want to burden our judgment with reproduction of the said*

*findings and analysis except para 40 of the said judgment wherein the Court has held as under:*

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

18. In our case, it is established fact that the appellant and his deceased wife used to reside in same house. Hence, the burden to prove factum of the death of the deceased cannot be shifted on the shoulders of the appellant unless the prosecution first of all discharges its burden by proving the fact that at the time of alleged occurrence or at the time when the deceased consumed the poison, the appellant was also inside the house. Learned AGA, in this regard, has contended that appellant has not taken the plea that he was not in the house when the poison was consumed by the deceased or administered to her forcibly but this was the negative burden on the appellant accused. The prosecution has not brought forward any evidence which could at least establish the fact that at the time of occurrence, the appellant was inside the house. Hence, there is no applicability of Section 106 of Indian Evidence Act in this case.

19. In view of aforesaid discussion, we are of the considered view that prosecution has not discharged its burden to prove the case beyond reasonable doubt and no reverse burden could be placed on the accused with the aid of Section 106 of Indian Evidence Act when the prosecution has not discharged its burden first.

20. Hence, learned trial Judge has not appreciated the evidence in right perspective and wrongly convicted and sentenced the appellant. We are unable to concur with the findings recorded in impugned judgement and benefit of doubt is given to the appellant. Consequently, the appeal is liable to be allowed.

21. Accordingly, the appeal is **allowed**.

22. Conviction and sentence of appellant u/s 302 of IPC is hereby set aside. The appellant be set free forthwith, if not wanted in any other case. Fine be refunded if already deposited.

23. Record and proceedings be sent back to the court below.

*(Ajai Taygi, J.) (Dr. Kaushal Jayendra Thaker, J.)*

**Order Date :- 08.12.2022**

Ashutosh Pandey