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Reserved on : 12.07.2022

Delivered on : 06.08.2022

Court No. - 44

Case :- CRIMINAL APPEAL No. - 3603 of 2018

Appellant :- Anurag Sharma
Respondent :- State of U.P.
Counsel for Appellant :- Anil Mullick,Dinesh Kumar Shukla,Narendra Mohan,Rekha Pundir,Sunil Vashisth
Counsel for Respondent :- G.A.

Hon'ble Dr. Kaushal Jayendra Thaker,J.
Hon'ble Ajai Tyagi,J.

(Oral Judgment by Hon'ble Ajai Tyagi, J.)

1. This appeal is preferred against the judgment and order dated 27.6.2018, passed by Additional Sessions Judge, Court NO.11, Meerut, in Sessions Trial No.553 of 2015 (State vs. Anurag Sharma) arising out of Case Crime No.64 of 2015 under Section 302 IPC, Police Station-Kotwali, Meerut by which the accused appellant was convicted under Section 302 IPC and sentenced with life imprisonment and fine of Rs.25,000/- with one year additional imprisonment in case of default of fine.

2. The brief facts of the case as culled out from the record are that a Written-report (Ex.ka1) was submitted by the complainant, namely, Shail Kumari Sharma (mother of the accused and wife of the deceased) to the Police Station-Kotwali, Meerut on 12.3.2015 with the averments that on that date at about 12:30 p.m., she had gone to the house of her brother at Devpuri and from there she went to Nagar

Palika with her nephew, namely, Shivanshu Sharma s/o Promod Kumar Sharma to deposit the house-tax. She had left her husband Prem Kishan Sharma aged about 70 years and her son Anurag Sharma at home. After depositing the house-tax in Nagar Palika at about 2:30 p.m., she returned to her house with her nephew and saw there that her husband was lying in dead condition in the corridor of first-floor of the house and there was pool of blood in corridor and inside the room and her son Anurag, who was drug addict and used to demand the money for it from his father, was absent from the house. It is also averred that her husband was retired from the post of clerk in Electricity department in the year 2005. His dead-body is lying. He has murdered by inflicting injuries on the head.

3. On the basis of aforesaid written report, a first information report (Ex.ka3) was registered at Police Station-Kotwali under Section 302 IPC and investigation was taken up by S.I. Mukesh Kumar. During the course of investigation, Investigating Officer visited the spot and collected the plain and blood-stained earth from the place of occurrence and prepared the recovery memo with bed-sheet and towel.

4. The accused-appellant was arrested on the same day of the occurrence and I.O. Recovered the hammer on the pointing out of the accused from inside the box, which was in the room, adjacent to the kitchen of the house. The hammer was having blood on it, which was used for the commission of the crime. Investigating Officer also took the clothes of the accused in his possession, which were having blood-stains and inquest report was prepared. The postmortem of the body of the

deceased was conducted and postmortem report was prepared. Recovered articles from the place of occurrence, clothes of deceased including the recovered hammer were sent to Forensic Science Laboratory, Agra for Chemical examination. On all above articles, blood-stains were found and on pant and shirt of the accused and on bed-sheet and towel, human blood was found. After completion of the investigation, charge-sheet was submitted against accused-appellant Anurag Sharma.

5. The case being triable exclusively by the court of session, it was committed to the Sessions Judge for trial. Trial court framed charge against the accused under Section 302 IPC. The accused denied the charge and claimed to be tried. The prosecution so as to bring home the charges, examined 8 witnesses, namely:-

1.	Shail Kumari Sharma	PW1
2.	Rakesh Kumar Sharma	PW2
3.	Shivanshu	PW3
4.	Sanjeev Kumar	PW4
5.	Aman Pal Singh	PW5
6.	Vijay Kumar	PW6
7.	Ravi Prakash	PW7
8.	Mukes Prakash	PW8

6. The accused was examined under Section 313 of Cr.P.C. by putting evidence against him. Accused denied the evidence against him and stated that his father was murdered in order to rob his house or committing dacoity and police had falsely implicated him to suppress the said heinous offence. It is also stated by the accused that he was handicapped to the tune of 60%, he was never drug addict. He was under depression due

to disability, hence the doctors used to administer him sleeping medicines. In his defence the accused examined three witnesses, namely, Rajhans Singh (DW1), Aruna Bhargava (DW2) and R.M. Gupta (DW3).

7. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:-

1.	FIR	Ext. Ka-3
2.	Written-report	Ext. Ka-1
3.	Recovery Memo of 'Ala-katl' 'hathoda'	Ext. Ka-9
4.	Recovery Memo of accused's clothes	Ext. Ka-13
5.	Recovery Memo of plain & blood-stained concrete, bedsheet and towel	Ext. Ka-12
6.	Postmortem Report	Ext. Ka-10
7.	Report of FSL	Ext. Ka-17
8.	Report of FSL	Ext. Ka-16
9.	Panchayatnama	Ext. Ka-2
10.	Charge sheet	Ext. Ka-15

8. Heard Shri Sunil Vashishta, learned counsel for the appellant and Shri N.K. Srivastava, learned AGA for the State as well as perused the record.

9. Learned counsel for the appellant submitted that first information report of the occurrence is based on suspicion. There is no eye witness of the occurrence. Learned counsel submitted that the complainant is mother of the appellant, but she had to name the appellant in FIR under the pressure of police because she and her nephew were picked up by the police and kept in the lock-up and she was pressurized to sign the written-report (Ex.ka1), which was written by some

unknown person. Learned counsel invited our attention towards the statement of complainant (PW1) in which she has stated that Ex.ka1 has her signature, but she does not know who has written it. She was pressurized to put her signature on Ex.ka1 under the threat of putting her and her nephew in the lock up. Learned counsel preferred the statement of PW1 that police had kept her at police station whole night and released thereafter. Learned counsel also submitted that PW3 is nephew of the complainant, who has also supported the aforesaid facts in his evidence and deposed in his testimony that they had told the police that dacoity is committed in the house of complainat and her house is robbed, but police did not lodge the FIR. Police kept complainant and accused in the lock up and released me. On the basis of aforesaid statement of PW1 and PW3, the learned counsel for the appellant submitted that FIR of the case was lodged by the complainant in which her son accused was named under the pressure of the police.

10. Learned counsel for the appellant further submitted that as per prosecution case, the clothes of the accused were blood-stained, but the blood came on the clothes of the accused when he lifted the body of the deceased-father.

11. Learned counsel for the appellant next submitted that recovery of hammer, which is said to be used in the commission of the crime, is said to be on the pointing out of the accused, but in fact, the recovery is planted. A fake recovery memo is prepared by the police. Learned counsel made submission that no reliance can be placed on such type of recovery because there is no independent witness of the recovery. Section 27 of Arms Act cannot be made applicable

because as per the statement of Investigating Officer, the accused had told him that he had hide out the hammer in the box, which is lying in the room adjacent to the kitchen of the house. Learned counsel argued when a particular place is disclosed by the accused then in that case weapon could be recovered by I.O. himself. There was no need to take the accused to that box and make the recovery on his pointing out. It is further submitted that no finger-prints were taken from the hammer.

12. Learned counsel for the appellant next submitted that as per prosecution story, the arrest of the case was made at the platform of the railway station by chauki in-charge of Government Railway Police and its entry was made in G.D. But neither the chauki in-charge was examined by the prosecution nor aforesaid GD was proved. Hence, prosecution has failed to prove the factum of place of arrest of the accused. Learned counsel submitted that in fact the accused was not in his house at the time of occurrence and had gone out, he came to his house after returning her mother.

13. Learned counsel for the appellant also submitted that learned trial court has wrongly invoked the provision of Section 106 of Indian Evidence Act,1872 because the burden to prove the case lies on the shoulders of prosecution, this burden cannot be shifted on the accused.

14. Lastly, learned counsel for the appellant submitted that there is no eye-witness of the occurrence of this case and it is a case of circumstantial evidence and chain of circumstances is not complete by the evidence led by the prosecution. There was no motive with the accused-appellant to commit the

murder of his father. Recovery, as alleged, is also not proved and there was no recovery of any hammer on the pointing out of the accused rather PW3 has categorically stated in his evidence that he had seen the hammer near the dead-body. Place of arrest of the accused is also not proved. Hence, entire case rests upon suspicion and trial court has wrongly convicted and sentenced the accused.

15. Learned AGA submitted that the first information report was voluntarily lodged by the mother of the accused-appellant naming him. There was no pressure on complainant because FIR is very prompt. It was lodged on the same day just after one and half hour when the murder of her husband came into her knowledge. Hence, in such a prompt FIR, there was no occasion or reason with the complainant to falsely implicate her own son. Learned AGA further submitted that only the accused and his father were left at home when the complainant went to Nagar Palika for depositing the house tax. There was none other at the house, hence the burden shifts on the appellant to prove his innocence, but he could not discharge the burden under Section 106 of Indian Evidence Act,1872. Learned AGA also submitted that there is no cross-examination from the hostile witnesses that accused was not at home when his mother went out. Learned AGA next submitted that the recovery of hammer, which is used for commission of the crime was made on the pointing out of the accused-appellant because it was recovered from inside the house of the appellant and no other could know where the hammer lies. It is next submitted that the report of FSL also substantiates the fact that offence is committed by the appellant because human blood was found on the clothes of the appellant and on

the recovered bed-sheet of the bed on which the body of the deceased was found.

16. *Per contra*, learned counsel for the appellant submitted that there was no such fact, which was in the special knowledge of the appellant, hence there is no applicability of Section 106 of the Indian Evidence Act and learned trial court had wrongly taken the recourse of said provision of law of evidence.

17. Accused-appellant is named in FIR. Although, the complainant, mother of the accused, has turned hostile, but the testimony of hostile witness cannot be appreciated only on the ground of hostility. That part of testimony of a hostile witness can be accepted, which supports the prosecution and that part can be relied upon. The maxim '*falsus in uno falsus in omnibus'* is not applied in criminal law in India. The grain has be separated from the chaff. Needless to say that the testimony of hostile witnesses should be scrutinized meticulously and very cautiously.

18. Hon'ble *Apex Court* in ***Koli Lakhmanbhai Chandabhai vs. State of Gujarat*** *[1999 (8) SCC 624],* as held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.

19. In ***Ramesh Harijan vs. State of U.P.*** *[2012 (5) SCC 777],* the Hon'ble *Apex Court* has also held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

20. In ***State of U.P. vs. Ramesh Prasad Misra and another*** *[1996 AIR (Supreme Court) 2766],* the Hon'ble *Apex Court* held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defence.

21. It is stated by PW1, mother of the accused, that she was kept by police in police station through out the night and forcibly took her signature on written-report on the basis of which FIR was lodged. We are unable to rely on the aforesaid statement of the complainant because there is no evidence on record that she had ever made any complaint to higher authorities of police if her signature was taken forcibly on written-report. Moreover, there is also no evidence on record that her house was burgled and it cannot also be believed that to hide the offence of dacoity, police falsely implicated the accused through his mother. It is also pertinent to mention that

the first information report was lodged very promptly as it was lodged just after one and half hour when the complainant first saw the dead-body of her husband. Hence, there was no opportunity or any reason with her to falsely implicate her son.

22. The complainant (PW1) although turned hostile, but in her examination-in-chief, she has corroborated the version of FIR to the extent that on the day of occurrence, she had gone to deposit the house-tax in Municipal Corporation and when she returned at about 2:50 p.m., the occurrence had already taken place. It is also admitted by her in cross-examination when she returned home, the accused was not at home. He came later on. It also indicates that after committing the offence, accused fled away. Hence, the version of FIR cannot be doubted even though the author has turned hostile.

23. It is admitted case that when the mother of the accused left home for Municipal Corporation, she left her husband and accused son at home. In examination-in-chief, the complainant (PW1) has specifically deposed as under:

> *"..... जब मैं हाऊस टैक्स भरने नगर निगम गई थी तो मैं अपने पति प्रेम किशन शर्मा व हाजिर अदालत मुल्जिम अनुराग को घर छोड़ कर गई थी।"*

In her cross-examination also, she has accepted the suggestion of the public prosecutor when she was examined by him after being hostile. The relevant portion of it is quoted as under:

> *"..... यह कहना सही है कि मैं प्रेम किशन शर्मा व अनुराग शर्मा को घर पर घटना वाले दिन छोड़कर गयी थी क्योंकि अनुराग शर्मा का ईलाज चल रहा था।"*

Hence, the mother of the deceased PW1 confirms the version of FIR that she had left deceased and accused at home and no one else was present there. It means that when the deceased was murdered, it was accused only, who was in the house with the deceased. Hence, Section 106 of the Indian Evidence Act comes into application.

24. Section 106 of the Indian Evidence Act,1872 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. 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.*

25. The Apex Court in ***Sabitri Samantaray vs. State of Odisha, AIR 2022 SC 2591*** has also observed as under:

> *"18. Section 106 of the Evidence Act postulates that the burden of proving things which are within the special knowledge of an individual is on that individual. Although the Section in no way exonerates the prosecution from discharging its burden of proof beyond reasonable doubt, it merely prescribes that when an individual has done an act, with an intention other than that which the circumstances indicate, the onus of proving that specific intention falls onto the individual and not on the prosecution. If the accused had a different intention than the facts are specially within his knowledge which he must prove.*
>
> *19. Thus, although Section 106 is in no way aimed at*

relieving the prosecution from its burden to establish the guilt of an accused, it applies to cases where chain of events has been successfully established by the prosecution, from which a reasonable inference is made out against the accused. Moreover, in a case based on circumstantial evidence, whenever an incriminating question is posed to the accused and he or she either evades response, or offers a response which is not true, then such a response in itself becomes an additional link in the chain of events. [See Trimukh Maroti Kirkan Vs. State of Maharashtra, (2006) 10 SCC 681]"

26. The accused has not discharged his burden under Section 106 of the Indian Evidence Act. In his statement under Section 313 Cr.P.C., he has taken a stand that his father was murdered during the robbery or dacoity in his house and police falsely implicated him to suppress this heinous crime, but no iota of evidence is on record regarding any robbery and dacoity in the house hence the appellant has failed to discharge his burden.

27. The recovery of hammer used for commission of the crime is made on the pointing out of the accused-appellant from a very specific and such place which was only in his knowledge. Recovery of hammer was made by Investigating Officer from the box, kept in the adjacent room of kitchen of the house of the accused. He had told to I.O. that he had hide out the hammer inside the box, which is kept in the adjacent room of the kitchen. Learned counsel for the appellant has submitted that as per prosecution version, the appellant had already told to the I.O., the specific place where he had hid the hammer, therefore, in such a situation this discovery cannot be turned as discovery under Section 27 of Indian Evidence Act.

28. Recently, while upholding the conviction, the Division Bench of this Court in Criminal Appeal No.2135 of 2013 has held in paragraph Nos.16, 17 & 27 as follows:

16. *In the present case, the events complete the chain and, therefore, we are satisfied that the conviction of the accused-appellant requires to be upheld. Reference to the decision penned by His Lordship Justice M.R. Shah (as he then was) in the case of* ***Nayan alias Yogesh Sevantibhai Soni Vs. State of Gujarat in Criminal Appeal No.37 of 2010*** *decided on 1.9.2015 where similar situation had arisen, reliance can be easily placed.*

17. *Reliance can be placed on the decision of the Apex Court in* ***Raja @ Rajinder Vs. State of Haryana, JT 2015 (4) SC 57.*** *Relevant paragraph of the aforesaid judgment is as under :*

> *"14. Thus, if an accused person gives a statement that relates to the discovery of a fact in consequence of information received from him is admissible. The rest part of the statement has to be treated as inadmissible. In view of the same, the recovery made at the instance of the accused-appellant has been rightly accepted by the trial Court as well as by the High Court, and we perceive no flaw in it.*
>
> *15. Another circumstance which has been taken note of by the High Court is that the blood-stained clothes and the weapon, the knife, were sent to the Forensic Science Laboratory. The report obtained from the Laboratory clearly shows that blood stains were found on the clothes and the knife. True it is, there has been no matching of the blood group. However, that would not make a difference in the facts of the present case. The accused has not offered any explanation how the human blood was found on the*

clothes and the knife. In this regard, a passage from ***John Pandian v. State[7]*** *is worth reproducing:*

"The discovery appears to be credible. It has been accepted by both the courts below and we find no reason to discard it. This is apart [pic]from the fact that this weapon was sent to the forensic science laboratory (FSL) and it has been found stained with human blood. Though the blood group could not be ascertained, as the results were inconclusive, the accused had to give some explanation as to how the human blood came on this weapon. He gave none. This discovery would very positively further the prosecution case."

In view of the aforesaid, there is no substantial reason not to accept the recovery of the weapon used in the crime. It is also apt to note here that Dr. N.K. Mittal, PW-1, has clearly opined that the injuries on the person of the deceased could be caused by the knife and the said opinion has gone unrebutted."

27. From the depositions of P.W.1, the prosecution is successful in establishing and proving that it was the accused who had moved with the deceased and that the dead body was that of the deceased whose missing report was filed.

29. We are unable to accept the submission of appellant because the place of hiding the hammer was only, only and only within the knowledge of the accused. It was not known to any other person. We are giving emphasis on the word 'only'

as we interpret that place is only in the exclusive knowledge of the accused ruling out the possibility of anyone else knowledge. If the place of hiding the weapon is exclusively within the knowledge of accused and that place cannot be or is not in the knowledge of any other person and the weapon is recovered from the same place, such type of recovery is absolutely reliable and it cannot be doubted or it cannot be presumed that weapon is planted. In this case at hand, the hammer was recovered by IO after getting the knowledge from the appellant and at the time of the recovery IO took the appellant with him and appellant entrusted the hammer to the IO after taking out it from the box himself. The Investigating Officer (PW6) has also proved the factum of recovery in his testimony before the learned trial court. It is also pertinent to mention that the hammer was blood-stained. It was sent to FSL for chemical examination and the report of laboratory (Ex.ka11) also goes against the appellant because as per aforesaid report, the blood was found on the hammer.

30. Accused-appellant has tried to establish the fact that he was disabled to the tune of 60%. His disability is in one hand and one leg. This statement is made by appellant in his statement under Section 313 Cr.P.C. and to substantiate this fact a defence witness, namely, Dr.R.M. Gupta (DW3) is examined by accused. This witness was one of the signatories of disability certificate of the accused, but in his cross-examination by public prosecutor his testimony also goes against the accused-appellant, which is quoted as under:

> *"….. दायें हाथ से अभियुक्त लगभग 10 से 15 किलो वजन उठा सकता है। बायां हाथ ठीक है। दोनो हाथो को मिलाकर*

अभि० अनुराग 20 से 25 किलो वजन उठा सकता है। बांये हाथ से अभियुक्त सामान्य व्यक्ति की तरह वजन उठा सकता है तथा सामान्य व्यक्ति की तरह काम कर सकता है। अभियुक्त अपनी पे आ जाये, भारी तनाव व गुस्से में हठ इच्छा शक्ति के साथ हथौड़े से शरीर पर वार करके गम्भीर चोटें पहुँचा सकता है। अभियुक्त हथौड़ा उठाकर उसका इस्तेमाल करने में सक्षम है।"

31. Hence, learned trial court has rightly concluded that the accused was in a position to use the hammer so forcibly that the ante-mortem injuries mentioned in postmortem report could be inflicted.

32. Perusal of postmortem report shows that following ante-mortem injuries were found on the body of the deceased:

(i) A lacerated wound 6.0 cm x 5.0 cm on front of forehead, bone deep x muscle deep.

(ii) A lacerated would size 8.0 cm x 3.0 cm on right side of head 5.0 cm above on right ear

(iii) A lacerated wound size 4.0 cm x 1.0 cm right side of head just 9.0 cm above right ear.

(iv) A lacerated wound 4.0 cm x 1.0 cm on right side of head back to right ear.

33. Aforesaid ante-mortem injuries were such, which could be the result of use of hammer recovered on the pointing out of the accused. The doctor conducting the postmortem of the body has examined as PW7 and corroborated the fact that such kind of injuries could be inflicted with the help of a object like hammer. Hence, the medical evidence also corroborates the prosecution case.

34. The appellant had motive also to commit the crime as it

is on record that the appellant was drug addict. In first information report, his mother has stated that he was drug addict and used to quarrel with his father to extract the money for the purpose. In her testimony, although she has retracted this statement, but she has admitted the suggestion of prosecution that for some time he had remained admitted in de-addiction centre.

35. Although the witnesses of fact PW1 and PW3 had turned hostile, their testimony supporting the prosecution case is there, which is rightly accepted by learned trial court. Moreover, nature of circumstantial evidence in this case is also before us.

36. In ***Anwar Ali and another vs. State of Himanchal Pradesh,*** *(2020) 10 SCC 166*, it was held by the Supreme Court that in case of circumstantial evidence, circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the cirme was committed by the accused and by none else and the circumstantial evidence in order to sustain the conviction must be complete and incapable of explanation to any other hypothesis than that of a guilt of the accused and such evidence should not only be consistent with the guilt of the accused, but should be inconsistent with his innocence.

37. Keeping in view the aforesaid position of law in the case at hand, the appellant had motive to commit the crime. PW1 and PW3 even after turning hostile has supported the prosecution version. Accused-appellant has failed to discharge his burden of proof under Section 106 of Indian Evidence Act,

the weapon, namely, hammer used in the crime is also recovered on the pointing out of the appellant. Blood-stains on the hammer are confirmed by the FSL report. Medical evidence also supports the prosecution version as the ante-mortem injuries could be inflicted by the hammer recovered on the pointing out of the accused. No evidence is found with regard to robbery or dacoity in the house of the appellant. Appellant was not found in his house when the complainant returned and firstly saw the dead-body of her husband. Although the GD of arrest of the accused from the platform of railway station is not proved by the prosecution, but it may be laps on the part of the public prosecutor, which cannot shatter the prosecution case and we have to see the cumulative effect of entire evidence available on record. The Investigating Officer has deposed in his testimony that he had taken the appellant into the custody from the chauki of Government Railway Police for which entry was made in the GD. GD number and dates are also deposed by the Investigating Officer. Accused had also failed to substantiate his version under Section 313 Cr.P.C. that he was handicapped to the extent that he could not use the hammer, but his supporting witness, namely DW3 had also not supported the version rather deposed affirmatively in cross-examination that the accused could lift the weight measuring 15-20 kg. while it is in the evidence that the hammer in question was not more than 1 kg.

38. Hence, keeping in view the aforesaid circumstances of this case, the chain of circumstances is so complete and linked with each other that no doubt is left with regard to the guilt of the accused-appellant and the completion of chain of

circumstances goes to prove beyond reasonable doubt that the offence is committed only by the appellant and by none else. Hence, the learned trial court has rightly convicted and sentenced the accused and appeal is liable to be dismissed.

39. Appeal sans merit and is, accordingly, **dismissed.**

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

Order Date :- 06/08/2022
LN Tripathi