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IN THE HIGH COURT OF KARNATAKA,

KALABURAGI BENCH

DATED THIS THE 22ND DAY OF SEPTEMBER, 2022

PRESENT

THE HON'BLE Dr. JUSTICE H.B. PRABHAKARA SASTRY

AND

THE HON'BLE Mr. JUSTICE ANIL B. KATTI

CRIMINAL APPEAL No.200104 OF 2017

BETWEEN:

Siddappa

.. Appellant

(By Sri. Vishal Pratap Singh, Advocate)

AND:

The State of Karnataka
Represented by the Public Prosecutor,
High Court of Karnataka,
At: Kalaburagi Bench.

.. Respondent

(By Sri. Veeranagouda Biradar, Additional Govt. Advocate)

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This Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure, 1973, with the following prayer:

"Wherefore, it is most respectfully prayed that, the Hon'ble High Court may kindly be pleased to call for the records in S.C.No.39/2016 on the file of IV Additional Sessions Judge, Vijayapura and examined the legality, propriety of the proceedings of the impugned judgment, after hearing the prosecution and appellant kindly set aside the judgment of conviction and sentence and penalty imposed by the Trial Court dated:30-12-2016 in S.C.No.39/2016 and set the appellant at liberty holding that the prosecution has not proved the guilt of the appellant in the interest of justice and equity."

This Criminal Appeal having been heard through physical hearing/video conferencing and reserved on **09-09-2022**, coming on for pronouncement of judgment this day, ***Dr.H.B. Prabhakara Sastry J***. delivered the following:

J U D G M E N T

The present appellant, who is accused in Sessions Case No.39/2016, in the Court of the learned IV Additional Sessions Judge, Vijayapura, (hereinafter referred to as `the Sessions Judge's Court' for brevity), has in this appeal challenged the impugned judgment of conviction and order on sentence dated 30-12-2016, convicting him for the offence punishable under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as `the IPC' for brevity) and sentencing him accordingly.

2. The summary of the case of the prosecution in the Session's Judge's Court is that, the deceased Meenaxi is the wife of present accused Siddappa Sharanappa Samagaar and they were the residents of Tenihalli Village since seven to eight years prior to the incident. The accused was suspecting the illicit relationship of his wife Meenaxi with one Annappa Gurappa Namdar of the same Village. In this regard, on several occasions, both the accused and his wife had altercations, still, the deceased continued her illicit relationship with the said Annappa Gurappa Namdar. On the date 20-04-2015, in the night at about 11:30 p.m., the deceased Meenaxi and the accused, in a room in their house, had a quarrel about the alleged illicit relationship of Meenaxi with Annappa Namdar. In the said quarrel, the accused, with an intention to commit the murder of his wife, took a sugar cane cutting chopper (mentioned as 'koyata' in the evidence of the prosecution witnesses) and assaulted his wife Meenaxi several times on her left cheek, left ear, face, head and other parts of the body, thus inflicted multiple injuries upon her, to which

multiple injuries, deceased Meenaxi succumbed to the same on the spot. Thus, the accused has committed the offence punishable under Section 302 of the IPC.

3. Since the accused pleaded not guilty, in order to prove the allegations made against the accused, the prosecution got examined in all twenty two (22) witnesses from PW-1 to PW-22, got marked documents from Exhibits P-1 to P-35 and Material Objects from MO-1 to MO-10.

Neither any witnesses were examined nor any documents were got marked from the side of the accused.

4. After hearing both side, the learned Sessions Judge's Court by its impugned judgment, convicted the accused for the offence punishable under Section 302 of the IPC and sentenced him accordingly. It is against the said judgment of conviction and order on sentence, the accused has preferred this appeal.

5. The complainant – State is being represented by the learned Additional Government Advocate.

6. The records from the Sessions Judge's Court were called for and the same are placed before this Court.

7. Perused the materials placed before this Court, including the memorandum of appeal, impugned Judgment and the records from the Sessions Judge's Court.

8. For the sake of convenience, the parties would be referred to as per their rank before the Sessions Judge's Court.

9. After hearing the learned counsels from both side, the points that arise for our consideration in this appeal are:

> *[i] Whether the prosecution has proved beyond reasonable doubts that, on the date 20-04-2015, in the night, at about 11:30 p.m., the accused, in his house at Tenihalli Village, within the limits of the complainant Police Station, has committed the murder of his wife Smt. Meenaxi, and thereby committed the offence punishable under Section 302 of the Indian Penal Code, 1860?*

[ii] Whether the Judgment of conviction and Order on sentence under appeal warrants any interference at the hands of this Court?

10. Among the twenty two(22) witnesses examined by the prosecution from PW-1 to PW-22, except the official witnesses, all other witnesses including the alleged eye witnesses have not supported the case of the prosecution.

11. The prosecution examined the complainant in the case, i.e. Shankar Chaabukasavaara as PW-1 (CW-1). The said witness, in his examination-in-chief has stated that, the deceased is his daughter and the accused is the husband of the deceased. The couple had three living children as on the date of the incident. In the month of April-2015, one day, the Police telephoned him stating that his daughter has been murdered, as such, he was required to come to Indi Police Station. Accordingly, he, joined by the Police, went to the house of the accused, where they saw his murdered daughter. She had cut injuries on her neck. The witness stated that he does not know who had

committed the murder of his daughter, however, the Police got a complaint written through CW-17 – Ramesha and obtained his (of this witness) thumb mark on the same. The witness has identified the said complaint as Ex.P-1. He has also stated that, in the spot, the Police also took his photograph making him stand along with two/three persons, which photographs, the witness has identified as Exs.P-2, P-3 and P-4. Further, stating that at the time of inquest panchanama also, the Police took a photograph, the witness has identified the same at Ex.P-5. One more photograph, stating that the same was taken at the spot along with the accused, the witness has identified it at Ex.P-6. He has categorically stated that he does not know what the contents of the complaint were and also he does not know the details of the seizure made by the Police, if any, in the spot.

Even though this witness was expected to speak about the marital relationship between the accused and the deceased and also the motive behind the alleged crime and also his knowledge about the role of the accused in

the alleged commission of the crime, but the witness did not speak anything about those aspects.

At the request of the prosecution, the witness was treated as hostile and the prosecution was permitted to cross-examine the witness. Even during the cross-examination, the witness did not support the case of the prosecution.

12. The prosecution examined PW-9, PW-10, PW-13, PW-14 and PW-21 as the eye witnesses to the alleged incident.

13. PW-9 (CW-11) – Rukmawwa Samagaara is admittedly the mother of the accused and PW-10 (CW-12) – Akasha Samagaara is undisputedly the son of the accused. Both these witnesses, except stating about their relationship with the deceased, have not stated anything about the alleged incident. Both of them have categorically stated that, they do not know anything about the incident. Though both these witnesses were treated as hostile and the prosecution was permitted to cross-

examine them, however, the prosecution except reading to them their alleged statements before the Investigating Officer, has not attempted to elicit any further details from them about the incident and the role of the accused in the alleged incident. The alleged statements of PW-9 and PW-10 before the Investigating Officer were marked as Exs.P-14 and P-15 respectively.

14. PW-13(CW-13) – Suresha Sannatangi, PW-14 (CW-14) – Maantayya Hiremath and PW-21 (CW-15)- Kannavva Alura were examined by the prosecution projecting them as neighbours of the accused and also the eye witnesses to the alleged incident. However, all these three witnesses, except stating that they are the neighbours of the accused, have pleaded their total ignorance about the incident. They categorically stated that they have not seen the alleged incident and have not stated before any one that they have seen the alleged incident. Even after getting them treated as hostile and

examining them, the prosecution could not get any support from any of these three witnesses.

Thus, from none of the material witnesses, who, according to the prosecution, were eye witnesses, the prosecution could get any support in their evidence.

15. The other set of witnesses, according to the prosecution, who were aware of the incident and the role of the accused in the commission of the alleged offence are, PW-3(CW-5) – Yallavva Chaabukasavaara, PW-4(CW-6) - Shreeshaila Chaabukasavaara, PW-5 (CW-7)- Mahadeva Chaabukasavaara, PW-6(CW-8) – Revanasiddappa Honnakatti, PW-7 (CW-9) – Hanamantha Chaabukasavaara and PW-8 (CW-10) – Siddappa Chaabukasavaara.

16. PW-3 – Yellawwa Chaabukasavaara, PW-4- Shreeshaila Chaabukasavaara and PW-5 – Mahadeva Chaabukasavaara are the mother, younger brother and paternal uncle of the deceased respectively.

In their evidence, all these three witnesses have uniformly stated that, they do not know anything about

the incident and that they have not given any statement before the Police. The prosecution was permitted to treat them as hostile and to cross-examine them. Even in their cross-examination, the prosecution except reading the contents of their alleged statements before the Investigating Officer and getting them marked at Exs.P-8, P-9 and P-10 respectively, could not able to extract any evidence favourable to the prosecution. Even the statements at Exs.P-8, P-9 and P-10 read over to them were not admitted as true by the witnesses. Thus, from the evidence of PW-1, PW-9 and PW-10, though the prosecution had ample opportunity to extract several details with respect to the marital life of the deceased with the accused and their cohabitation, but for the reasons best known to it, it did not make any attempt to elicit several of the required preliminary details from the evidence of these three witnesses, though they were mother, younger brother and paternal uncle of the deceased respectively.

17. PW-6 (CW-8) – Revanasiddappa Honnakatti, PW-7(CW-9)- Hanamanta Chabukasavaara and PW-8 (CW-10) – Siddappa Chaabukasavaara, whom the prosecution examined as the persons knowing the family of the deceased and her marital relationship with the accused, could not get any support from them. All these three witnesses, like their predecessors, only stated that they do not know anything about the incident and that they have not given any statements before the Police. Like the previous set of witnesses, even in the case of these three witnesses also, the prosecution instead of making effort to elicit favourable statements from them in their cross-examination, satisfied itself by suggesting that they have given their statements before the Police as per Exs.P-12, P-13 and P-14 respectively and reading the contents of the statements to them only to get their response that they have not stated anything what is shown in their respective alleged statements before the Investigating Officer.

18. PW-15 (CW-17) – Ramesha Bhaavikatti, though has stated that at the request of PW-1 (CW-1 – Shankara Chaabukasavaara), who could neither read nor write, he has written a complaint for him and as stated by him, which complaint he has identified at Ex.P-1, but the said PW-1 since has stated in his evidence that it was the Police who got written the complaint as per Ex.P-1 through CW-17 Ramesha and obtained his thumb mark to the said complaint, as such, he does not know what is written in the complaint, the evidence of PW-15 cannot be inferred that the contents of Ex.P-1 was to the knowledge of PW-1 and that those contents are true. Therefore, the evidence of PW-15 which is bereft of any corroboration from PW-1 would be of no help to the prosecution.

Thus from the evidence of the above analysed material witnesses, the prosecution could neither prove the death of the deceased Meenaxi nor the role of the accused in the alleged death of the deceased Meenaxi.

19. Interestingly, none of the above analysed witnesses have even whispered about the nature of the death of the

deceased Meenaxi. Therefore, in order to ascertain the nature of death of deceased Meenaxi, the other set of witnesses upon whom the prosecution relied upon is to be considered.

The first among them would be, PW-2 (CW-3) Narasawwa Honakatti and PW-11(CW-2) – Shivananda Nandaragi. Both these witnesses were examined projecting them as panchas for the inquest panchanama at Ex.P-7. Though these two witnesses have stated that the Police have obtained their thumb mark and signatures respectively in the said panchanama, however, they have categorically and clearly stated that, not any panchanama, much less inquest panchanama was drawn in their presence by the Police. Even in their cross-examination from the prosecution, they denied a suggestion that the inquest panchanama was drawn in their presence. Therefore, in the absence of any support from these two witnesses regarding the inquest panchanama, mere statement of the Investigating Officer i.e. PW-18(CW-25) –

Mallikarjuna Asode that, he drew the inquest panchanama in the presence of these two witnesses won't prove the panchanama.

20. The next witness who could speak about the nature of death of deceased Meenaxi is, the Doctor who conducted autopsy on the dead body of the deceased Meenaxi.

21. PW-20 (CW-23) – Dr. Rajesh Kolekara, the Medical Officer of Taluka General Hospital, Indi, has stated that, at the request of the respondent Police, on the date 21-04-2015, he conducted post-mortem examination on the dead body of deceased Meenaxi in the afternoon and noticed the following injuries:

> *(1) incised wound once (left) mandibular aspect which extends upto (left) Nasal aspect measuring 10 cm x 1 cm x 1 cm with the presence of bleeding margins which will define Zigzag shape.*

(2) Lacerated wound once (left) middle aspect of external ear extends upto chin aspect 6 ½ cm x 1 ½ cm x 1 ½ cm with bleeding.

(3) Lacerated wound on the chin aspect 3" x 1 ½" x 1 ½" with bleeding.

The Doctor could not find any abnormalities in the internal organs. He has opined that the cause of death was due to acute respiratory failure as a result of assault with sharp object over face, causing multiple injuries with heavy blood loss.

The witness has further stated that he has also examined the weapon 'chopper' (but stated as 'koyata' in his evidence) sent to him for examination for opinion by the Investigating Officer. After examining the said weapon, its measurement, blade and after comparing them with the injuries sustained by the deceased Meenaxi, he opined that the injuries found on the deceased may be caused by the weapon sent to him for examination. In that regard, he has issued the opinion in writing which the witness has identified at Ex.P-34.

The finding of the Doctor regarding the injuries on the deceased Meenaxi and the relation of the said injuries with the weapon has not been denied in his cross-examination. However, the learned counsel for the appellant, in his argument vehemently submitted that, the photograph of the deceased, more particularly, the one at Ex.P-3 would clearly go to show that there were more than three major lacerated injuries on the left side face and neck of the deceased Meenaxi which are clearly visible in the photograph, as such, the opinion of the Doctor that there are only three injuries, two in the form of lacerated wounds/injuries and one in the form of an incised wound is highly unbelievable.

A perusal of the colour photograph of the deceased at Ex.P-3 which has mainly focused on the face and head portion, would go to show that, there are multiple injuries on the left side of the face, head and neck of the deceased, which, by a naked eye, appears to be more than three in number. Ignoring the said aspect, still, if we take the

medical evidence at its face value, the same would only go to show that the deceased had sustained an incised wound and two lacerated wounds on the face which were ante-mortem in nature, as such, due to infliction of those injuries on the face, due to heavy bleeding and acute respiratory failure, deceased Meenaxı has died. There is no evidence from the Doctor (PW-20) that those injuries are either accidental or self-inflicted, but are caused by another human being by assaulting the deceased with any sort of weapon. His opinion that the weapon at MO-3 can cause those injuries cannot be taken that those injuries were caused with the very same weapon, that too, by another human being. Still, assuming for a moment, that the injuries have been caused by the act of a human being, who assaulted the deceased with the weapon, may be, particularly with the weapon at MO-3, still, it is for the prosecution to establish that it was the accused and accused alone who inflicted those injuries upon the deceased Meenaxi and caused her death.

22. As observed above, none of the material witnesses examined by the prosecution as family members of the deceased and other independent witnesses have spoken about either the nature of the death of the deceased or the role of the accused in the alleged death of the deceased Meenaxi. Therefore, admittedly, there is no evidence through prosecution witnesses to establish the link between the death of the deceased and the accused. If at all it is assumed that the injuries on the deceased were inflicted using chopper at MO-3, then, at least the relation of the said weapon with the accused should have been established by the prosecution.

Admittedly, none of the witnesses have spoken about the relation of the weapon with the accused. Even according to the prosecution, the said weapon at MO-3 was found in the spot of the alleged offence. Though the said weapon is said to have been found stained with blood and which blood, according to Forensic Science Laboratory (FSL) report at Ex.P-27, was human blood with 'O' Group,

by that itself, no nexus between the accused and the weapon chopper at MO-3 can be inferred. Merely because the said chopper was found in the house of the accused, it is not safe to infer that the accused had made use of the said chopper and using the same has inflicted fatal injuries upon his wife Meenaxi. Therefore, at the maximum, the evidence of the Doctor, as PW-20, would go to show that the death of the deceased Meenaxi was unnatural, may be homicidal, but, there is nothing to infer that the said death was caused by the act of the accused.

23. The remaining witnesses examined by the prosecution are, PW-11 (CW-2) – Shivananda Nandaragi and PW-12 (CW-4) - Revappa Teli.

Both these witnesses, though were projected by the prosecution as panch witnesses for the scene of offence panchanama as per Ex.P-16, the seizure of the cloths panchanama of the deceased as per Ex.P-17 and seizure of cloths panchanama of the accused as per Ex.P-18 and PW-11, in addition, was also shown to be a pancha even

for inquest panchanama at Ex.P-7, but neither of these witnesses have supported the case of the prosecution, even to the slightest extent. Both of them have uniformly stated that the Police have neither drawn any panchanamas in their presence nor seized any articles in their presence, however, the Police have obtained their signatures to four panchanamas. Though the witnesses have identified their signatures in those four panchanamas, but categorically stated that they do not know what was written in the said panchanamas.

No doubt the witnesses have identified their presence in the photographs at Exs.P-6 and P-19 and no doubt PW-16 (CW-16) – Zakeera Lalasangi - the photographer has stated that he has captured those photographs, but looking at those photographs, it cannot be deduced that PW-11 and PW-12 were the panchas to those four panchanamas and that it is in their presence, those four panchanamas were drawn. Therefore, even the alleged place of offence, seizure of cloths panchanama of deceased

and seizure of cloths panchanama of accused also could not be established by the prosecution.

24. As has already been observed above, even the prosecution also did not elicit the basic details from the mouth of any of the material witnesses that it examined including the parents and the family members of the deceased. For the reasons best known to the prosecution, it did not even put a simple question to the mother of the both the accused and the deceased as well to the son of the accused as to when and where the deceased Meenaxi died, as such, even with respect to the place of offence, neither there is any support from the panch witnesses nor from the family members.

25. Thus, the remaining witnesses would be only the Police witnesses.

PW-17 (CW-24) – Vijayakumara Sinnura, the then Police Sub-Inspector of the complainant Police has stated that, the complainant appeared before him, lodged a complaint as per Ex.P-1, based upon which, he prepared

an FIR as per Ex.P-30 and submitted it to the Court. He also stated that on the next date, based upon the direction of the Circle Inspector of Police, he arrested the accused. However, since the alleged complainant who was examined as PW-1 himself has denied the contents of the complaint at Ex.P-1 and has stated that the Police have got written the complaint but obtained his thumb mark upon the same, it cannot be inferred that the contents of the complaint at Ex.P-1 was to the knowledge of PW-1.

At this stage itself, it appears to be worth to notice that the Sessions Judge's Court, observing that a suggestion was made to the scribe of the complaint (PW-15/CW-17) that he has written the complaint, as stated by the complainant, proceeded to observe that the contents of the complaint was to the knowledge of PW-1.

The said finding of the Sessions Judge's Court is not convincing for the reason that, the very alleged complainant having categorically denied that the contents of the complaint at Ex.P-1 was to his knowledge and has abandoned the case of the prosecution, merely because of

a suggestion made to PW-15 - the scribe, it cannot be inferred that PW-1 was aware of the contents of the complaint and it was at his instance the averments were made in the complaint at Ex.P-1.

26. The evidence of PW-18 (CW-25) – Mallikarjuna Asode, one among the Investigating Officers has stated that, he visited the spot and drew the scene of offence panchanama, drew the inquest panchanama, prepared the sketch of the panchanama, have all received no corroboration from the participants in those panchanamas as panchas. The evidence of this witness that he got the post-mortem examination of the dead body of deceased Meenaxi done by the Doctor (PW-20) alone stands corroborated by the evidence of PW-20 - the Doctor.

The further evidence of the witness (PW-18) that, he seized the cloths of the deceased and also the cloths of the accused also have remained uncorroborated from any of the other witnesses. Therefore, the evidence of either

PW-17 or PW-18 also does not take the prosecution case any further.

27. PW-19 (CW-26) – Mahadeva Shirahatti has stated that, he got the sketch of the scene of offence panchanama drawn by the Assistant Engineer of the PWD of Indi and also collected a Certificate from GESCOM about the supply of electricity to Tenihalli Village on the date of the incident and requested the Doctor for an opinion on the relation of the weapon and the injuries found on the deceased also, would not take the case of the prosecution any further in the absence of any support by the other relevant material witnesses.

28. Similarly, the evidence of PW-22 (CW-27) - Ramappa Saavalagi – the Circle Inspector of Police that, he received the post-mortem report and sent the seized articles to the Regional Forensic Science Laboratory (RFSL) at Belagavi for their examination and collected the Doctor's opinion on the weapon as per Ex.P-34 and filed the charge sheet against the accused would also fail in

taking the case of the prosecution any further, in the absence of their insufficiency to prove the alleged guilt against the accused.

29. Thus, the prosecution case is totally bereft of any support from the alleged eye witnesses, alleged material witnesses and panch witnesses. However, the Sessions Judge's Court has proceeded to pass the impugned judgment on the surmise that since the alleged incident has taken place in the house of the accused, it is for the accused to explain the facts of the incident and also the manner as to how the death of his wife Meenaxi had occurred, since the same was to his exclusive knowledge. In the said process, it nastily relied upon Sections 106 and 114 of the Indian Evidence Act, 1872 (hereinafter for brevity referred to as "the Evidence Act").

30. The Sessions Judge's Court proceeded to observe that, the prosecution contended that the deceased was living in the house of the accused. Thus, it further proceeded to observe that, under Section 114 of the

Evidence Act, it will presume that the deceased and the accused being husband and wife were residing together and that on the night of the date of the alleged incident also, both of them being the husband and wife were sleeping in a separate room to the exclusion of others in their house.

31. Section 114 of the Indian Evidence Act, 1872, reads as below:

> *"114. **Court may presume existence of certain facts**. - The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."*

Further, relying upon Section 106 of the Evidence Act, it proceeded to hold that, since the accused was the only one who was with the deceased at the time of the death of the deceased, the burden was upon him to prove the fact especially within his knowledge.

32. With these pre-suppositions on its side, the Sessions Judge's Court, relying upon the judgments of the Hon'ble Apex Court in the case of ***State of Rajasthan Vs. Thakur Singh*** reported in ***(2014) 12 Supreme Court Cases 211*** and ***Gajanan Dashrath Kharate Vs. State of Maharashtra*** reported in ***(2016) 4 Supreme Court Cases 604*** proceeded to hold that, the sole burden was upon the accused to speak as to, what happened on that night when his wife who was with him sustained fatal injuries and succumbed to them. Observing that no explanation was offered by the accused in that regard, the Sessions Judge's Court proceeded to hold the accused guilty of the alleged offence.

It is now to be seen as to, whether the said conclusion arrived at by the learned Sessions Judge's Court sustains?

33. The learned counsel for the appellant/accused, after making submission that, though there was no support from any of the material witnesses to the case of the

prosecution, still, the Court, on its own, invented applicability of Section 106 in the case and erroneously held the accused guilty of the alleged offence, submitted that the prosecution had failed to show that the accused on the date of the alleged incident was staying with his wife in his house and that the accused and deceased were sleeping together in a room of the said house. He also submitted that the case of the prosecution was that, apart from the accused, even the mother of the accused and the son of the accused i.e. PW-9 and PW-10 were also residing in the same house, as such, there was no reason to suspect the alleged accused alone for the death of the deceased Meenaxi.

With this, he submitted that, Section 106 of the Evidence Act is not attracted in the case on hand.

34. Per contra, learned Additional Government Advocate for respondent - State, in his single sentence argument submitted that, the Sessions Judge's Court was justified in applying the principles of Section 106 of the

Evidence Act and holding the accused guilty of the alleged offence.

35. The case of the prosecution is that, the accused was residing with his wife Meenaxi in his house at Tenihalli Village, within the limits of the complainant Police Station. It is its further case that the deceased Meenaxi was found killed in the said house on the night of the date 20-04-2015. Though the prosecution was expecting many of the material witnesses examined by it including PW-9, the mother of the accused, PW-10 – the son of the accused, PW-1 - the father of the deceased, PW-3 - the mother of the deceased and PW-4 - the younger brother of the deceased among others to state that the accused and the deceased were living together in Tenihalli Village and more particularly, on the date of the incident also, both of them were in the said house and they slept together in a room, for the frustration of the prosecution, none of the witnesses including the Investigating Officer has anywhere stated in their evidence that the accused and the deceased

were residing together in Tenihalli Village and also that, on the date of the incident also, the accused and deceased were in their house at Tenihalli Village. Though PW-14 and PW-21 have stated that the house of the accused in Tenihalli Village was behind their house, but neither of them have stated that the accused and deceased were residing in the said house, more particularly, on the date of the alleged incident. Contrary to the case of the prosecution, PW-13, who, according to the prosecution, was the person known to the family of the accused and also an eye witness to the alleged incident has stated that, in the Village Alooru, his house is at a distance of about 200 ft. from the house of the accused. His said undisputed statement would go to show that, the house of the accused was not at Tenihalli Village, but it was at Alooru. Thus, there are contradictions with respect to the place of residence of the accused.

Surprisingly, none of the family members of the accused and his relatives including the mother, son, father-in-law, mother-in-law and brother-in-law of the

accused also have stated as to where the accused and the deceased were residing at the time of incident. Therefore, the very primary burden of the prosecution of proving that the accused and deceased were residing in their house at Tenihalli Village as on the date of the incident has not been discharged by it. However, the Sessions Judge's Court, ignoring the aspect that the primary burden of proving that the accused and the deceased were residing together in a house at Tenihalli was upon the prosecution, expected the accused to set up any specific defence to the effect that, on the date of the incident, during night time or at 11:30 p.m., he was not at all present in his house along with his wife Meenaxi.

Thus, the Sessions Judges Court, from the beginning of its reasoning in the judgment, on its own assumed a defence of *alibi* for the accused and keeping the said aspect as the base aspect throughout, continued with the presumption that, as on the date and time of the incident, the accused was in the company of the deceased Meenaxi

in a room in their house at Tenihalli Village. It is with this basic error, the entire appreciation of the evidence of the prosecution, more particularly, the application of Sections 106 and 114 of the Evidence Act was made by the Sessions Judge's Court.

Though it is the case of the prosecution that the deceased Meenaxi was given in marriage to the accused who was of Tenihalli Village, but by that itself, it cannot be inferred that the accused was residing in the Village at Tenihalli along with the deceased Meenaxi as on the date of the incident.

36. Secondly, the Sessions Judge's Court, at more than one place, in its judgment, particularly, in paragraph 29 and paragraph 32, observed that the prosecution has contended that on the date, time and place of the incident, the accused was also present along with his wife in a room of his house. With the said observation, the mere contention of the prosecution in the charge sheet was treated as a proven fact by the Sessions Judge's Court and

it proceeded further. It failed to make out a difference between the contention of the prosecution and the proof of the same.

Admittedly, when none of the material witnesses including the panchas have supported the case of the prosecution, even to a smallest extent, it was very much necessary for the prosecution to establish that on the date of incident, the accused was in his alleged house at Tenihalli Village in the company of his wife Meenaxi. However, as observed above, the mere contention of the prosecution was taken as a proven fact by the Sessions Judge's Court and it proceeded further.

37. To the height of the above, the Sessions Judge's Court even proceeded to observe at paragraph 32 (page 39 of the judgment) as below:

> *"…It is relevant to note that the alleged incident was took place within the room of the house of accused on that day during night time i.e., at 11.30 p.m. When the prosecution has contended that on the above said date, time and place the*

accused was also present along with his wife in a room of his house and at that time the accused has committed murder of his wife by using MO.3 weapon, in such circumstances, the accused has to explain as to where he was present at that time and also he has to explain who is responsible for the death of his wife. Admittedly the deceased Meenaxi is none other than the wife of accused. As the relationship of accused and deceased is that of husband and wife, in view of Section 114 of the Evidence Act the court may presume that on the day of incident during night time i.e., at 11.30 p.m. the accused and his wife who being the husband and wife were present in a room of their house due to their relationship. Therefore, in view of the above facts and circumstances of the case and for the reasons as stated supra it can be stated that on the day of incident during night time i.e., at 11.30 p.m. the accused was present along with his wife Meenaxi in a room of his house. In the circumstances, the prosecution has proved the fact that at the time of incident i.e., on 20.4.2015 at about 11.30 p.m. the accused was present along with his wife in a room of his house…."

The above observation once again would go to show that the Sessions Judge's Court has taken for granted the

mere contention of the prosecution in its charge sheet that, the accused and deceased were living in a house at Tenihalli Village, as a proven fact that the accused was residing in his house at Tenihalli Village along with the deceased Meenaxi even on the date of the alleged incident. Added to the same, it also presumed that apart from the accused and the deceased being taken as residing in their house at Tenihalli Village, both of them being the husband and wife were also present in a room in their house by virtue of their relationship. We do not know how come the Sessions Judge's Court assumed on its own that, the accused and the deceased, who, according to PW-1 - the father of the deceased, were married about seventeen years back and had four children (among them one was dead) were sleeping together in a room in their house. Thus, the Sessions Judge's Court has erred in presuming on its own that, the accused and deceased were sleeping together in a separate room in their house on the night of the incident without there being any material to arrive at such a presumption and also there being nothing to

consider the common course of natural events, human conduct in their relation to the facts of this particular case. It is for this reason, it was observed above by this Court that though the prosecution could have elicited some preliminary and basic essential details from the family members of the deceased and accused in their evidence, i.e. in the evidence of father-in-law, mother-in-law, brother-in-law, mother and son of the accused, as to the place of residence of the accused's accommodation in the house and the accused and the deceased being present on the date of the incident in the night at home, however, for the reasons best known to it, the prosecution did not elicit any such details which were very much essential for arriving at any presumption even under Section 114 of the Evidence Act.

38. The Sessions Court heavily relied upon Section 106 of the Evidence Act and shifted the burden on the accused to explain as to what had happened on the night

when his wife Meenaxi was found dead in his house at Tenihalli Village.

39. Section 106 of the Indian Evidence Act, 1872, reads as below:

> *"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."*

A bare reading of the above Section would go to show that, the primary responsibility to prove a particular fact which is especially within the knowledge of the accused would be upon the prosecution. It is only if the prosecution could able to show that the facts and circumstances of the case would clearly go to show that a particular fact is especially within the knowledge of the accused, only then the burden of proving that fact would be upon the accused.

40. In the instant case, as observed above, the prosecution could not able to show the primary alleged fact that the accused and the deceased were residing

together in their house at Tenihalli Village, much less its contention that, on the night of the date of the incident, both accused and the deceased were sleeping together in a room in their house. However, the Sessions Judge's Court, relying upon ***Thakur Singh's case (supra)*** and ***Gajanan Dashrath Kharate's case (supra)***, proceeded to hold that, the deceased was since found to be lastly in the company of the accused in his house at the time of alleged incident, it was for the accused to explain as to how the death of the deceased was caused. With this, it further observed that since the accused failed to give any satisfactory explanation in that regard it has to be held that, it was the accused and accused alone who has caused the murder of his wife.

41. In ***Thakur Singh's case (supra)***, though the Hon'ble Apex Court held that Section 106 of the Evidence Act was applicable, however, the fact in the case before the Apex Court was that, as at the time of unnatural death of the wife of the accused in a room in the house, the said room

was occupied by both the accused and the deceased. Furthermore, there was no evidence of anybody else entering the room. It is in the said background of the proven fact, the Hon'ble Apex Court observed that the facts relevant to the cause of death has to be held as 'known' only to the accused and that, he has not explained it. It is holding that the same amounts to a strong presumption that the accused has murdered his wife, the Hon'ble Apex Court, reversed the judgment of acquittal passed by the High Court and restored the judgment of conviction of the accused under Section 302 of the IPC, passed by the Trial Court.

42. In the case of ***Gajanan Dashrath Kharate Vs. State of Maharashtra (supra),*** the murder of the father of the appellant was committed secretly inside the house. Pertaining to the facts of that case, in para.13 of the said judgment, the Hon'ble Apex Court was pleased to observe as below:

> *"13. As seen from the evidence, appellant Gajanan and his father Dashrath and mother*

Mankarnabai were living together. On 7-4-2002, mother of the appellant-accused had gone to another Village Dahigaon. The prosecution has proved presence of the appellant at his home on the night of 7-4-2002. Therefore, the appellant is duty-bound to explain as to how the death of his father was caused. When an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 of the 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 at all on the accused to offer. On the date of the occurrence, when the accused and his father Dashrath were in the house and when the father of the accused was found dead, it was for the accused to offer an explanation as to how his father sustained injuries. When the accused could not offer any explanation as to the homicidal death of his father, it is a strong circumstance against the accused that he is responsible for the commission of the crime."

(emphasis supplied)

43. Thus, the initial burden of proving that, as on the date of the alleged incident, the accused was present in the house or was 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. Thus, it is observed in the above paragraph by the Hon'ble Apex Court that the initial burden to establish the case would undoubtedly be upon the prosecution. It is only when the prosecution discharges the said burden that the accused was found in the company of the deceased, the burden of proving the facts which are exclusively within the knowledge of the accused would fall upon him.

44. In the above mentioned ***Gajanan Dashrath Kharate's case (supra),*** the prosecution had proved that the appellant Gajanan, his father Dashrath and mother Mankarnabai were living together on the ill-fated day of 07-04-2002 and that the mother of the appellant/accused had gone out to another Village. Therefore, the Hon'ble Apex Court observed that the prosecution had proved that,

the appellant Gajanan and his father Dashrath were the only two persons in their home on the night of the date of the incident on 07-04-2002 and hence held that the appellant Gajanan/accused was duty bound to explain as to how the death of his father was caused.

45. In the case of ***Nagendra Sah Vs. State of Bihar*** reported in ***(2021) 10 Supreme Court Cases 725***, with respect to Section 106 of the Evidence Act, the Hon'ble Apex Court in para-22 of its judgment was pleased to observe as below:

> *"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."*

46. In the case of ***Sabitri Samantaray Vs. State of Odisha*** reported in ***2022 SCC OnLine SC 673***, wherein the

appellants had challenged the confirmation of their conviction for the offence punishable under Section 304 (II) of the IPC, the Hon'ble Apex Court had an occasion to discuss the principle under Section 106 of the Evidence Act. In that regard, in paragraph 25 of its judgment, it referred to its previous judgment in the case of ***Ashok Vs. State of Maharashtra (2015) 4 SCC 393*** and reproduced a portion of the said judgment which reads as below:

> *"12. From the study of above stated judgments and many others delivered by this Court over a period of years, the rule can be summarised as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of the accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of the Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused, etc. non-*

explanation of death of the deceased, may lead to a presumption of guilt."

(emphasis supplied)

Thus, it is clear that 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.

47. In the case of ***Satye Singh and another Vs. State of Uttarakhand*** reported in ***(2022) 5 Supreme Court Cases 438***, the Hon'ble Apex Court with respect to Section 106 of the Evidence Act was pleased to observe that, Section 106 is not intended to relieve the prosecution from discharging its duty to prove the guilt of the accused. The prosecution must discharge its primary onus of proof and establish the basic facts alleged against the accused in

accordance with law and only thereafter, Section 106 may be resorted to, depending upon the facts and circumstances of each case.

48. In the case on hand, as analysed above, the prosecution case is that apart from the accused and the deceased, there were two more inmates in the house, i.e. the mother and the son of the accused (PW-9 and PW-10). According to the prosecution, at the time of the alleged incident, the mother and son were also present in the very same house where the incident took place. However, the prosecution had cited them as eye witnesses to the alleged incident. However, as observed above, neither of them have supported the case of the prosecution even to the smallest extent that, the accused and deceased Meenaxi stayed together in a room of the house on the night of the date of the incident. Therefore, the finding of the Hon'ble Apex Court in ***Thakur Singh's case (supra)*** and ***Gajanan Dashrath Kharate's case (supra)***, would not enure to the benefit of the prosecution in the case on hand.

49. However, the Sessions Judge's Court, ignoring the fact that, primarily, the prosecution had to establish that the accused and the deceased were residing in the said house together on the date of the incident and that they stayed together in a room of the house on the night of the date of the alleged incident, presumed certain facts on its own under Section 114 of the Evidence Act, in the absence of any basic evidence about the stay of the accused and the deceased in the said house on the night of the date of the incident. This has led the Sessions Judge's Court to hold that, the accused had failed to explain certain facts which were essentially and exclusively to his knowledge.

50. Furthermore, the Sessions Judge's Court in its impugned judgment, without there being any evidence from any of the witnesses to the effect that, as on the date and time of the alleged incident, the accused was present along with his wife Meenaxi, proceeded to hold in para.32 (judgment page.40) that, in the circumstances, the

prosecution has proved the fact that, at the time of incident, i.e. on the date 20-04-2015, at about 11:30 p.m., the accused was present along with his wife in a room of his house. The said finding of the Sessions Judge's Court, being totally unfounded, makes the further expectation of the Sessions Judge's Court from the accused to explain under what circumstance his wife Meenaxi was murdered and who is responsible for the same.

In addition to the above, without there being any evidence either oral or documentary, including in the Forensic Science Laboratory (FSL) Report at Ex.P-27 that, the blood said to have been found on the cloths of the accused was of the deceased, the Sessions Judge's Court also took the presence of the blood on the cloths of the accused as one more evidence in favour of the prosecution. In the said process, it totally failed to notice the fact that none of the prosecution witnesses including the panchas to the alleged seizure of the cloth

panchanamas of the accused and the deceased had supported the case of the prosecution about the seizure of the cloths panchanamas of either of the deceased or of the accused. Therefore, it was not safe for the Sessions Judge's Court to arrive at a conclusion that the cloths that were seized were that of the accused and the deceased and that the blood stains found on the alleged cloths of the accused were of the deceased.

51. The Sessions Judge's Court further observed that the accused has not offered any explanation and also failed to answer as to where he was present after the sunset on the date 20-04-2015 and before sunrise on the date 21-04-2015 or at 11:30 p.m. on the date 20-04-2015 (on the date of incident).

52. A perusal of the statement of the accused recorded under Section 313 of the Code of Criminal Procedure, 1973, would go to show that, no question pertaining to the presence of the accused on the above aspect was either framed or was put to the accused.

Therefore, when the accused was not at all asked about his whereabouts after the sunset on the date 20-04-2015 till sunrise on the date 21-04-2015, the Sessions Judge's Court was not expected to presume itself the said question and give answer to it. As such also, the Sessions Judge's Court has presumed certain things which do not have any supporting material before it.

53. Lastly, the Sessions Judge's Court, in the very same impugned judgment, in para-35 (page Nos.47 and 48 of the judgment) was pleased to observe as follows:

> *"…The accused has not taken any defence to the effect that on the day of incident somebody has committed murder of his wife when he was not present in the house. Let us presume for a moment that if any body or outsider committed murder of his wife on the day of incident when the accused was not present in his house, naturally they will rob any valuable articles or the gold ornaments worn by the deceased. But in the case on hand there was no reporting of theft of valuable articles or the gold ornaments from the house of accused on the day of incident."*

54. The above reasoning of the Sessions Judge's Court is totally unfounded one, when it is nobody's case that, the alleged robbery or attempt to robbery in the house of the accused had taken place. The Sessions Judge's Court, in order to strengthen its reasoning for conviction of the accused, has presumed a possibility on its own and attempted to show that the accused would have failed even if he had taken such a plea also. Since it was nobody's case that the alleged robbery or attempt to robbery had taken place, the Sessions Judge's Court ought not to have presumed such a possibility and given its observation on the same.

55. Thus, the prosecution which primarily ought to have discharged its burden of establishing that accused and the deceased were living together, more particularly, on the date of the incident, as such, certain facts were exclusively to the knowledge of the accused, ought not to have expected the accused to explain the circumstances which had led to the murder of his wife Meenaxi. Thus,

the application of Section 106 of the Evidence Act and expecting the accused to discharge the alleged burden was totally uncalled for, in the facts and circumstance of the present case.

However, the Sessions Judge's Court, even after noticing that, except the official witnesses, all other material and important witnesses, including the parents of the deceased, the mother of the accused, the son of the accused and all the alleged eye witnesses have not supported its case even to a smallest extent, has still erroneously invoked Section 106 of the Evidence Act and held the accused guilty of the alleged offence.

56. Since the said finding of the Sessions Judge's Court, now having been proved to be erroneous and since it has to be necessarily held that the prosecution has failed to prove the alleged guilt against the accused, the judgment of conviction and order on sentence passed by the Sessions Judge's Court under appeal deserves to be

reversed and the accused deserves to be acquitted of the alleged offence.

Accordingly, we proceed to pass the following:

O R D E R

[i] The appeal stands ***allowed;***

[ii] The judgment of conviction and order on sentence dated 30-12-2016, passed by the learned IV Additional Sessions Judge, Vijayapura, in Sessions Case No.39/2016, holding the accused/appellant guilty of the offence punishable under Section 302 of the Indian Penal Code, 1860, stands ***set aside;***

[iii] The accused – Siddappa S/o. Sharanappa Samagar, Age: 40 years, Occ: Coolie, R/o. Tenihalli, Tq: Indi, Dist: Vijayapura, stands acquitted of the alleged offence punishable under Section 302 of the Indian Penal Code, 1860;

[iv] The accused/appellant herein be released in this case, if he is serving the sentence of imprisonment.

The Registry is directed to transmit a copy of this judgment to the learned Sessions Judge's Court, to enable it to proceed further in the matter, in accordance with law.

Sd/-
JUDGE

Sd/-
JUDGE

BMV*