Supreme Court of India
Sawal Das vs State Of Bihar on 9 January, 1974
Equivalent citations: 1974 AIR 778, 1974 SCR (3) 74
Author: M H Beg
Bench: Beg, M. Hameedullah

PETITIONER:
SAWAL DAS

Vs.

RESPONDENT:
STATE OF BIHAR

DATE OF JUDGMENT09/01/1974

BENCH:
BEG, M. HAMEEDULLAH
BENCH:
BEG, M. HAMEEDULLAH
BHAGWATI, P.N.

CITATION:
1974 AIR 778 1974 SCR (3) 74
1974 SCC (4) 193

ACT:
Indian Penal Code (Act 45 of 1860),s. 34 and 302--Circumstantial evidence Accused charged under s.302/34--When accused may be convicted under s. 302, when the others are acquitted under s. 302/34--Offence under s. 201--Sentence.
Evidence Act (1 of 1872) Ss. 103 and 106--Scope of

HEADNOTE:
The appellant is the husband of the deceased. The evidence in the case established that, the relations between the deceased and her mother-in-law; were very strained; that, on the morning of the murder following a quarrel between them the appellant went with his wife, the deceased, into a room, into which his father and mother then followed; that, immediately thereafter, cries of the murdered woman were heard to save her from being killed; and, that, a little while later, the appellant and his father conveyed the dead body of the deceased and disposed it of by burning it at the burning that without informing the relations of the deceased who were living in the town and without performing any funeral rites.
On this evidence, rejecting the appellant's contention that the deceased died accidentally of injuries caused by fire,

the trial court convicted the appellant, his father, and mother for offences under s. 302/34 1. P. C. The trial court also convicted the appellant and his father under s. 201, I. P. C. On appeal, the High Court acquitted them of the offence under s. 302/34 I. P. C. but found the appellant ,alone guilty of the offence under s. 302 1. P. C. The High Court also found the appellant and his father guilty under s. 201 1. P. C. and passed a sentence of three years against the father. No separate sentence on the appellant was passed in view of the sentence of life imprisonment for the offence under s. 302.

In appeal to this Court,

HELD : (1) The evidence regarding death by burning consisted mostly of rumours and beliefs. It was clearly hearsay and was rightly excluded by the lower courts.

(2) Under Ss. 103 and 106, Evidence Act, the burden of proving such a plea specifically set up by an accused, which may absolve him from criminal liability, lies upon him; though, the quantum of evidence by which he may succeed in discharging the burden, may be lower than the burden resting upon the prosecution to establish the guilt of the accused beyond reasonable doubt. The best evidence would have been that of a doctor who could have been called by the appellant on his phone, but no doctor was called. [79B]

(3) But, neither the application of s. 103 nor of s. 106 , Evidence Act, could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a prima facie case that the question arises of considering facts of which the burden of proof may lie upon the accused. [79D]

(4) In the present case, after the acquittal of the appellant's father and mother for murder under Ss. 302/34, 1. P. C., the individual liability of the appellant has to be established by the prosecution before he could be convicted under s. 302 I. P. C. simpliciter. There is nothing in the present case which could fasten or conclusively fix the liability for any particular or separate act of the appellant which may be said to have caused his wife's death. [79H]

K. G. Patil v. State of Maharashtra, [1964] 1 S.C.R. 678, Sohan Lal v. State of U. P., [1971] S.C.C. 498 and Yashwant and Ors. v. State of Maharashtra, [1973] 1 S.C.R. 291, followed.

75

A (5) Further, the prosecution has not examined an important witness namely,. the maid servant, who was on the varandah at the time of the occurrence. Her evidence was necessary for unfolding the prosecution case and hence, the prosecution should not have withheld her evidence whatever may be its effect upon the case. The appellant could, there ask

the Court to give him the benefit of the presumption under s. 114 illustration (g), Evidence act and to infer that, if she had' been produced, her evidence would have damaged the prosecution case against the appellant. Her statement under s. 164, Cr. P. C. could only be used as evidence to corroborate or contradict her if she had appeared as a witness at the trial,and could not be relied upon by the prosecution. [80 G, H]

Stephan Sneviratne v. The King. A.I.R. 1936 P. C. 289, 300, referred to.

(6) Therefore, although it must be held that, the deceased was murdered it was not possible to find conclusively that the person who could have throttled or done some other act which actually killed the deceased was the appellant and not his father or mother.

(7) So far as the case of disposal of the body by the appellant was concerned the circumstantial evidence was rightly believed and held to be conclusive by both the Courts below. [82G]

(8) As regards sentence, the appellant deserves the maximum sentence that can be imposed under s. 201, 1. P. C. A distinction between the case of the appellant and his father, as regards sentence is justified because; (a) It was the duty of the appellant as a husband to have done something to protect his wife even if It is assumed for the sake of argument, that the actual death may have been brought about by the acts of others, and, (b) the appellant had taken a leading part in disposing of the body of the murdered woman. [83B]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 70 1972.

Appeal by Special Leave from the Judgment and Order dated the 16th September, 1971 of the Patna High Court in Criminal Appeal No. 90 of 1968.

A. N. Mulla, S. N. Misra, S. S, Jauhar and Sudha Misra, for the appellant.

R. C. Prasad, for the respondent.

The Judgment of the Court was delivered by BEG, J.-The appellant before us by special leave, Sawal Das, his father Jamuna Prasad, and his stepmother Kalawati Devi, were charged with offences punishable under Section 302 Indian Penal Code simpliciter on the allegation that they had intentionally caused the death of Smt. Chanda Devi, the wife of the appellant, on 28-5-1965, in their house in Mohalla Andi Gola, in Muzaffarpur, in Bihar. The appellant Sawal Das, his father Jamuna Prasad, their motor driver Sita Ram, and eight other persons were charged under Section 201 Indian Penal Code for having caused the disappearance of the body of' Smt. Chanda Devi with a view to

concealing the murder. Furthermore, Smt. Kalawati Devi was charged under Section 302/109 Indian Penal Code for having instigated the murder of Chanda Devi. The Trial Court had amended and converted the charges against the appellant and Jamuna Prasad and Kalawati Devi into those under Sections 302/34 Indian Penal Code and convicted each of them with the aid of' Section 34 Indian Penal Code for the offence of murder and sentenced:

them to life imprisonment. It had also convicted the appellant and his father under Section 201 Indian Penal Code, but it did not pass separate sentences against them for this offence. The driver Sita Ram was also convicted under Section 201 Indian Penal Code and sentenced to three years rigorous imprisonment. It acquitted all the other accused persons. On appeal, the High Court of Patna had acquitted the appellant, his father, and his step-mother of offences punishable under Section 302 /34 Indian Penal Code, but it found the appellant alone guilty of an offence punishable under Section 302 Indian Penal Code simpliciter and sentenced him to life imprisonment. It had also found the appellant and his father guilty under Section 201 Indian Penal Code, but, while passing a sentence of three years rigorous imprisonment on Jamuna Prasad, it had not passed a separate sentence on the appellant in view of his conviction under Section 302 Indian Penal Code. It had allowed appeals of Kalawati Devi and Sita Ram and acquitted them. The whole case against the appellant depends upon circumstantial evidence. There is no eye witness of the murder which was alleged to have been committed by the appellant, his father, and step-mother conjointly on the morning of 28-5-1965 at about 8.00 a.m. The Sessions Judge had relied upon the following proved facts and circumstances to convict the three accused persons of murder under Sections 302/34 Indian Penal Code

1. The relations between Smt. Chanda Devi and her step- mother-in-law, Smt. Kalawati Devi, who were living in the same house with their respective husbands and children, were strained so that there were frequent quarrels between them.

2. The appellant as well as his father Jamuna Prasad used to take the side of Smt. Kalawati in the quarrels between the murdered wife and her mother-in-law.

3. On the morning of the murder, there was a particularly sharp quarrel between the deceased and Smt. Kalawati so that Smt. Kalawati, who was living in a room adjoining that of, Smt. Chanda Devi on the first floor of the house, called out to the appellant that his "rascal wife" was quarrelling with her and informed him as well as Jamuna that either she or Chanda Devi will live in the house henceforth.

4. The appellant and his father Jamuna Prasad went upstairs to the Verandah where the quarrel was taking place and the appellant took or pushed Chanda Devi inside her room followed by the appellant's father and his stepmother.

5. Immediately after that, cries of atleast "Bachao" "Bachao", were heard from inside the room. No body heard the voice of Smt. Chanda Devi after that.

5. Immediately after these cries, the children of Chanda Devi were heard crying and uttering words indicating that their mother was either being killed or had been killed.

7. A short while after that, the appellant and his father Jamuna Prasad were seen bringing a gunny bag with the help of their driver, Sita Ram, and another person, and keeping it in the luggage boot of the car which had been brought there by the driver.

8. The car, containing the body of the deceased Chanda Devi,was driven fast and taken to what is known as Pahleza- Ghat,50 miles away, to be burnt there at night. The car was shown to have crossed Sonepur Bridge at 9.00 p.m.

9. The relations of the deceased Smt. Chanda Devi, who were living in the town, were not at all informed by the appellant or other members of his family, that she had died either naturally or accidentally.

10. No persons who usually performed the funeral rites in the family were shown to have been informed and there was no funeral procession of the usual kind. But, some of those related to the appellant, who were co-accused for the offence of illegal disposal of the body, were said to have followed in a truck.

11. Some blood', which was said to have distintegrated so much that its origin could not be determined, was shown to have been scraped from the boot of the car as well as from inside the car.

The Trial Court had come to the conclusion that, upon the established circumstances listed above, no other inference was left open to the Court except that the appellant and his father and step-mother- had conjointly committed the murder of the deceased Smt. Chanda Devi on the morning of 28-5-1965 and that the appellant and his. father had then hastily and stealthily disposed of the body in order- to conceal the commission of the offence. It had also taken into, account, in coming to this conclusion, the fact that the appellant had unsuccessfully set up a plea, in his written statement, that Smt. Chanda Devi, who was alleged by him to be wearing a Nylon Saree, said to have caught fire accidentally while she was using a Kerosene stove in her room, died of extensive burns on her body and collapsed. The. appellant had alleged that Smt. Chanda Devi was debilitated and kept a bad health due to frequent pregnancies and was also suffering from Asthma, a weak heart, and abdominal complaints. She had given birth to six children. The Trial Court observed that no Doctor- was called in to substantiate the appellant's plea. Furthermore, it pointed out that, as a highly qualified Doctor, Dr. G. B. Sahai, had deposed, normally death would not take place immediately as a result of accidental burning of the kind alleged by the appellant and that there would have been evidence of rolling on the ground or other acts of the deceased in attempts to save herself in such an event. The Trial Court had also believed the evidence of the relations of Chanda Devi that she was enjoying good health so that the bare assertions of the appellant that she had a weak heart could not be accepted. It also observed that no burnt pieces of cloth or marks of smoke or soot on the walls or roof of the room in which Smt. Chanda Devi had admittedly died were shown to exist.

Learned Counsel for the appellant drew our attention to a number of pieces of evidence, such as a boil on the finger of Jamuna, multiple irregular areas of suspected burns, varying from 1 to 1/3" in length and-half inch to 3/4" in width, on the lower third of right fore-arm, ulnar side, of the appellant, when he was examined by Dr. J. Nath on 2-6- 1965, the statement by a witness that he saw some smoke coming out of the house at the time of the alleged murder, the rumour of her death by burning mentioned by several witnesses, which found a place in the information sent to the Police on 30-5-1965 by Lallu Prasad, P.W. 28, a relation of the murdered wife, and into another written information given by Hawaldar Gorakhnath Singh, P.W.3, at the Police Station, on 28-5-1965, and other similar bits of information and belief deposed to by witnesses.

So far as the information dated 30-5-1965 (Ex. 17) treated as F.I.R. by the Police, or the information given by Gorakhnath Singh on 28-5-1965, which, according to the appellant, ought to be treated .as a First Information Report, and other pieces of information and belief given by the witnesses are concerned, it is clear that these are based on hear-say which was rightly excluded. The Trial Court pointed out that the appellant and other members of his family were the sources of these false rumour`s circulated by them so as to protect themselves against an accusation for murder. We, therefore, attach no importance whatsoever either to the document which the prosecution or the one which the appellant placed before us as the First Information Report. These contain nothing more than rumour and hearsay because those who could have reported the commission of an ,offence were actually the offenders interested- in concealing its commission and misdirecting investigation.

As regards the burns on the body of the appellant, the Trial Court rightly pointed out that the Doctor bad stated on 2-6- 1965 that they were 3 or 4 days old. They were not shown to be connected with .any attempt to extinguish a fire which could have burnt Smt. Chanda Devi. The best evidence in such a case could have been that of a Doctor who, as the High Court pointed out, should have been called but was not called despite the fact that there was a telephone in the house.

We think that the burden of proving the plea that Smt. Chanda Devi died in the manner alleged by the appellant lay upon the appellant. This is clear from the provisions of Sections 103 and 106 of the Indian Evidence Act. Both the Trial Court and the High Court had rightly pointed out that the appellant had miserably failed to give credible or substantial evidence of any facts or circumstances which 'Could support the plea that Smt. Chanda Devi met her death because her Nylon Saree had accidentally caught fire from a kerosene stove. The Trial Court had rightly observed that the mere fact that some witnesses had seen some smoke emerging from the room, with a kitchen nearby at a time when food was likely to be cooked, could not indicate that Smt. Chanda Devi's saree bad caught fire. Neither the murdered woman nor the appellant nor any member of his family was shown to have run about or called for help against a fire.

Learned Counsel for the appellant contended that Section 106 of the Evidence Act could not be called in aid by the prosecution because that section applies only where a fact relating to the actual commission of the offence is within the special knowledge of the accused, such as the circumstances in which or the intention with which an accused did a particular act alleged to constitute an offence. The language of Section 106 Evidence Act does not, in our opinion, warrant putting such a narrow construction upon it. This Court held in Gurcharan Singh v. State of Punjab(1), that the burden of

proving a plea specifically set up by an accused, which may absolve him from criminal liability, certainly lies upon him. It is a different matter that the quantum of evidence by which he may succeed in discharging his burden of creating a reasonable belief, that circumstance absolving him from criminal liability may have existed, is lower than the burden resting upon the prosecution to establish the guilt of an accused beyond reasonable doubt.

Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused. The crucial question in the case before us is : as the prosecution discharged its initial or general and primary burden of proving the guilt of the appellant beyond reasonable doubt?

Perhaps the Trial Court had adopted a more logical course upon facts and circumstances indicating that the appellant was one of the three persons whose conjoint actions had, on the morning of 28-5-1965, resulted in the death of Smt. Chanda Devi. It may be that the appellant was the primary or the main actor in the actual commission of the murder after his step-mother had sought his aid in what appeared to be an appeal to him by her to teach his wife a lesson so that she may not be troubled by her any more. But, the effect of the finding that the appellant went into the room from which the cries of the murdered woman, to save her from being killed, came immediately afterwards, is diluted by the evidence that Jamuna Prasad and Smt. Kalawati had followed him. The High Court's view could perhaps find some support from the fact that Jamuna Prasad was seen pacifying and rebuking the children outside while the appellant may have been dealing with his wife in a manner which brought about her death. But ' all this is a matter of conjecture. Lurking but not unreasonable doubts and suspicions seem to, us to envelope and assail the prosecution case atleast after Jamuna Prasad and Smt. Kalawati have been acquitted. As the learned counsel for the appellant has rightly pointed out, after the acquittal of Kalawati and Jamuna Prasad for murder, by the use of Section 34 Indian Penal Code, the individual and not the conjoint liability of the appellant has to be established by the prosecution before the appellant could be convicted under (1) A.I.R. 1956 S.C. 460.

Section 302 Indian Penal Code Simpliciter. Beyond the fact that the appellant is the husband of the murdered wife, who might be ordinarily expected to take the initiative in teaching her a lesson, especially when Smt. Kalawati had invoked his aid, and a possibly natural reluctance of a normal father-in-law to take the initiative or a leading role in such a matter, both of which could be matters of conjecture or presumption only, there is nothing which could fasten or conclusively fix the liability for any particular or separate act of the appellant which may be aid to have caused his wife's death.

We find that the High Court had not dealt with the question whether a distinction could be made between the case of the appellant on the one hand and his father Jamuna Prasad and his step-mother Kalawati on the other quite satisfactorily, so far as the offence of murder is concerned. Nevertheless, we may have agreed with its conclusion, on the evidence on record, that the appellant

alone was liable for the murder of his wife Smt. Chanda Devi and we may not have disturbed its finding of fact but for another feature of the case which stares one in the face. We proceed now to deal with this feature.

Even if, as the Trial Court and the High Court had correctly held, there is admissible and credible evidence of five witnesses, Ganesh Prasad, P.W. 1, Nand Kishore, P.W. 2, Radhey Shyam Sharma, P.W.9, Laxmi Narain, PW. 16, and Basdeo Prasad, P.W. 27, who are said to have heard or watched from outside, from varying distances, Of what was going on in the Verandah, no eye witness was produced who could prove what actually took place inside the room where the murder was committed. The only evidence given of what could have taken place inside the room was the cry of "Bachao Bachao" although there is some understandable variation between accounts of witnesses as to whether the murdered woman also uttered some more words showing that she was being actually killed. We also agree with the view that the evidence of witnesses about what the children said or did at that time is admissible under Section 6 of the Evidence Act. In view of some evidence in the case that the appellant's children had refrained from revealing any facts against the appellant or his father or his stepmother, when they were questioned by relations or by the Police, it could be urged that there was no point in producing the children. The Court could also have rightly decided, in such circumstances not to examine them under Section 540 Criminal Procedure Code' But, there is no explanation even attempted to show why the Maid servant , Geeta Kurmini, who, according to the prosecution case, was also in the Verandah at the time of the occurrence, was not produced at the Trial although her statement was recorded under Section 164 Criminal Procedure Code and was brought on the record (Ex. 12). This statement could only be used as evidence to corroborate or contradict Geeta Kurmini if she had appeared as a witness at the trial. The appellant could, therefore, quite reasonably ask the Court to give him the benefit of the optional presumption under Section 114 illustration (g) of the Evidence Act and to infer that, if she had been produced, it would have damaged the prosecution case against the appellant. Her statement, if it had been there as evidence in the case, may ,very well have shown that it was Jamuna who was taking the leading part in bringing about the death of Smt. Chanda Devi. There is some evidence in the case as to the kind of man Jamuna was. It shows. that he was not a naturally kind or gentle or amiable individual liked by people. The normal inhibitions of a father-in-law with regard to his daughter- in-law , which learned Counsel for the State emphasized so much, may not really be there at all in this case. Indeed, we think that, in the circumstances of the case, Geeta Kurmini, the maid servant, was a witness essential to the unfolding of the prosecution case. Her evidence could not be withheld by the-prosecution whatever may be its effect upon the case. We think that the principle laid down by Privy Counellin Stephen Sneviratne v. the king (1), with regard to such a witnes, is applicable here. It was observed there (at page 300) "Their Lordships do not desire to lay do" any rules to, fetter discretion on a matter such as this was is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part. of those conducting prosecutions- but, at the same time they cannot speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so, confusion is very apt to result. and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination.

Witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution".

Mr. Mulla, appearing for the appellant, has also drawn our attention to K.G. Patil V. State of Maharashtra (2). This Court held there that, when two out of three accused persons, each having been charged under Section 302 read with Section 34 Indian Panel Code, were acquitted, it must be assumed that the two acquitted persons did not parti- cipate in the commission of the offence at all. it is contented that the natural result of this view is that the particular act of the individual accused which brought about the death of the murdered person must be established beyond doubt before he is singly and separately convicted under Section 302 Indian Penal Code simpiiciter. Our attention was also invited to Sohan Lal v. State of U.P.,(3) where it was held by this Court that in the absence of evidence to show which act of the accused caused the death of the murdered man, it would neither be proper to convict the accused person under Section 302 Indian Penal Code simpliciter nor under Section 302 read with Section 34 Indian Penal Code, when the High Court had acquitted the co- accused of charges under Section 302 read with Section 34 Indian Penal Code, and the State had not appealed against the acquittal.

(1) AIR 1936 P. C. 289 @ 300.

(2) [1964] (1) SCR 678.

(3) [1971] (1), S. C. C. 498., In the case before us, the High court had actually altered the conviction of the appellant from one under Sections 302/34 I.P.C. to one under Section 302 I.P.C. thereby implying that he was not guilty of :any offence under Section 302/34 I.P.C. It is true that this Court explained, in Yashwant & Ors. V. State of Maharashtra, (1) that the applicability of Section 34 I.P.C. to a case depends upon the particular fact 8 and circumstances of the case. Therefore, we have to scrutinize and pronounce upon the particular facts of the case before us.

We think that, upon the facts of this case, there could be a reasonable doubt as to whether Section 34 I.P.C. could be applied to convict any of the three accused persons of murder. After excluding the application of Section 34 I.P.C. to the case, the evidence does not also appear to us to prove conclusively that the appellant must have either throttled the deceased or done some other act, quite apart ,from the acts of his father and step-mother, which brought about the death. This result follows from the totality of evidence and the presumption from the non-production of Geeta Kurmini which destroys the value of the evidence which weighed so much with the High Court, that the appellant was doing something like pushing or taking the murdered woman inside her room at the time when she was last :seen alive. The Trial Court and the High Court relying on the evidence of 'some bleeding of the body of the deceased, admitted by the appellant. to have been carried in the car to the burning ghat, and the absence of evidence of death caused by burning, came to the conclusion that the appellant must have throttled the deceased. This was pure conjecture after eliminating the defence case of burning by accident. if it had been a case of throttling only, it would be difficult to explain the cries of murdered woman for help which were heard by witnesses on the road unless we assume that the murdered woman cried out, as she may have done, before the hands

which choked her were placed on her throat. Therefore, although we may hold, as we do, that this must be a case of murder, it is not possible for us to find con- clusively that it was a case of throttling and of nothing else or that the person who could have throttled or done some other act which actually killed the deceased was the appellant and not his father or step-mother. So far as the case of quick disposal of the body by the appellant is concerned, the circumstancial evidence was rightly believed and held to be conclusive by both the Courts below. This evidence was too damaging to admit of any doubt that the appellant took the leading part in doing away with the remains of the body of his wife after she had been murdered. The Trial Court and the High Court, while maintaining the appellants conviction under Section 201 Indian Penal Code, had not fixed his sentence. It was urged by Mr. Mulla before us that the appellant should not be given more than three years rigorous imprisonment just as his father Jamuna had been sentenced to three years rigorous imprisonment only under Section 201 Indian Penal Code. It may be mentioned here that, while special leave to appeal was granted to the appellant against the judgment of the High Court, this Court (1) [1973] 1 SCR 291.

had refused to grant any leave to his father Jamuna to appeal against his conviction under Section 201 Indian Penal Code. We, however, think that a distinction between the case of the appellant and his father is justified on two grounds mainly; firstly, it was the duty of the appellant, as the husband, to have done something to protect his wife, even if we assume, for the sake of argument, that the actual death may have been brought about by the acts of others ; and secondly the applicant had taken a leading part in disposing of the murdered woman. We think that the maximum sentence which can be passed under Section 201 Indian Penal Code is deserved by the appellant upon facts and circumstances of this case. Accordingly, we allow this appeal to the extent that we set aside the conviction of the appellant under Section 302 I. P. C., but we maintain his conviction under Section 201 1. P. C. and sentence him to undergo seven years rigorous imprisonment and to pay a fine of Rs. 1,000/- and, in default of payment of fine, to undergo further rigorous imprisonment for a term of six months.

V.P.S.

Appeal allowed.