# Ram Niwas Sonkar Alias Guddu Sonkar vs State Of U.P. on 29 March, 2018

## Bench: Amreshwar Pratap Sahi, Rajeev Misra

HIGH COURT OF JUDICATURE AT ALLAHABAD

A.F.R.

Court No. - 40

Case :- CRIMINAL APPEAL No. - 1882 of 2011

Appellant :- Ram Niwas Sonkar Alias Guddu Sonkar

Respondent :- State Of U.P.

Counsel for Appellant :- Alok Ranjan Mishra,Archna Hans,G.S.Chaturvedi

Counsel for Respondent :- Govt. Advocate,J.P.Singh

Hon'ble Amreshwar Pratap Sahi,J.

Hon'ble Rajeev Misra,J.

Heard Mrs. Pashali Solanki alongwith Archna Hans, learned counsel for the appellant and Sri Sagir Ahmad, learned AGA for the State.

This appeal arises out of the conviction of the appellant by the learned Sessions Judge Chandauli vide judgment dated 19.02.2011 for the offence under Section 302 IPC in Case Crime No. 230 of 2009 that gave rise to the Session Trial No. 69 of 2009. The appellant has been convicted of the alleged murder of one Km. Preeti who is stated to be a teacher of the same school of which the appellant is the Manager. The appellant has been sentenced to undergo imprisonment for life coupled with Rs. 10,000/- fine and in default of payment of fine to undergo further two years imprisonment. The judgment of the trial court concludes that apart from the oral and documentary evidence on record, the corroborating material as adduced by the prosecution has brought home the charges as a result whereof it is established that the appellant had committed the said offence and was therefore liable to be punished.

The case as set out in the FIR is that approximately at about 9:00 pm on 5th June 2009, the informant, Rajendra Sonker who has deposed as PW-1 along with one Dabloo Manjhi who has deposed as PW-2 were fishing on their boat in the river Ganges when a person was seen moving as a pedestrian along with his motor cycle side by side on the pontoon bridge from Varanasi towards Balua and a girl was also coming behind him. It was a moon lit night and there were some moving vehicles on the pontoon bridge which also threw light on the movement of the pedestrians and other traffic. When they witnessed the movement of the said motor cycle, they also saw that the accused-appellant was trying to start his motor cycle, and immediately thereafter there was some oral heated exchange between the appellant and the deceased. The said heated exchange is stated to have been audible enough where the oral exchanges indicated that there was some difference of opinion between the two expressing disgust at each other. The accused virtually threatened to finish her and assaulted her with a piece of iron. The FIR does not describe the nature of the instrument except for describing it as a piece of iron. After having assaulted her, the accused pushed the deceased into the river and immediately a hue and cry was raised by passersby as a result whereof the informant alongwith PW-2 arrived on the spot. They with the help of others tried to retrieve the body of the deceased who was recovered and was found dead.

They also allegedly caught hold of the appellant on the spot and apprehended his motor cycle bearing Registration No. UP 67 9820 of Make Kawasaki Boxer. They along with the accused went to the police station and handed him over to the police. A written report was dictated by PW-1 Rajendra Sonker and was scribed by one Pappu Mishra son of Indredev Mishra that was handed over to the concerned Clerk Constable at Police Station, Balua who then transcribed the FIR.

It appears that the accused is stated to have been taken into police custody and was sent inside the lock up at about 11:25 pm. It is also stated with the aid of the recovery memos that the motor cycle was taken into custody on the same day and one slipper was also taken into custody.

The inquest report was prepared the next day which is Exhibit Ka-6 and the same mentions the name of Shambhu Nath Singh, PW-3 along with four others as witnesses to the Panchayatnama.

It may be mentioned that Shambhu Nath Singh is the father of the deceased. The inquest report records the preparation of the Panchayatnama at about 7:00 am on 6th June, 2009. The description of the body was given, and while describing the injuries it was indicated that there was an injury on the right side of the head above the right eye-brow and blood along with foam was oozing out of the mouth and the nose of the deceased.

It may be mentioned here that according to the case diary, the appellant after having been taken into custody and sent to the lock up was also sent for medical examination to the Primary Health Center at Chahania, District-Chandauli before being sent to jail. The medical report of the said injury has not been made an exhibit. However, Exhibit Ka-11 which is the extract of the memo of the case diary indicating the lodging of the FIR and the alleged spot arrest of the appellant has been proved and is on record.

The post mortem was carried out by Dr. K.K. Singh, the Deputy Chief Medical Officer, District-Chandauli. The external examination of the body indicated two lacerated wounds one 8.6cm x 2.5cm bone deep on the right side of the head above the eye brow and a second injury being a lacerated wound of 3.8 cm x 2cm on the occipetal region of the head.

The internal examination indicates marks of ligature on both sides of the neck and the trachea is stated to be congested. Both lungs have also been indicated to be congested with full digested food in the small intestines and with faecal and gas matter in the larger intestine.

Clothes worn by the deceased were sent for forensic examination and the report of the laboratory dated 12th November, 2009 indicates that there were blood stains on the clothes that were worn by the deceased.

A charge-sheet was filed that named PW-1, Rajendra Sonker and Dabloo Manjhi, PW-2 as witnesses of fact apart from the other formal witnesses. PW-3, CW-1 and CW-2 are not named either in the FIR, the inquest or the chargesheet.

At this juncture, it may be noted that the father of the deceased Shambhu Nath Singh was not a witness of fact relating to the incident but he was examined as PW-3 on an application moved by the prosecution under Section 311 Cr.P.C. It is here that we may record that PW-1 and PW-2 both turned hostile, but neither PW-1 was declared as hostile nor PW-2 supported the story of the prosecution. PW-3, the father of the deceased, was therefore summoned by the Court on an application by the prosecution under Section 311 Cr.P.C.

During his deposition that was continuing on 22nd December, 2009 and the cross-examination was to proceed, the recording of his statement was deferred for another date. We have perused the order sheet of the Court below and we find that PW-3 had to appear on 2nd January, 2010 which date was fixed on account of the application moved by the defence seeking an adjournment. The case was then posted for 5th January, 2010 and again on 21st January, 2010. The matter was put up for the next day i.e. 22nd January, 2010 on which date PW-3 continued with his examination-in-chief as a prosecution witness.

A dispute was raised about PW-3 to be examined as a prosecution witness or as a Court witness. The trial court after assessing the arguments of both sides passed an order on 22nd January, 2010 that since PW-3 had been summoned at the instance of the prosecution, he would continue to be examined as a prosecution witness and not as a Court witness. We may also put on record that this order became final, and accordingly on the same day after lunch hours, the statement of PW-3 was continuing where for the first time PW-3 came up with the story that when he had reached the spot after having heard about the incident, he met one Sankatha Singh and one Sri Prakash Singh who stated that they had seen the incident and that they had caught hold of the accused and had taken him to the police station.

On 11th February 2010 on completion of cross-examination an application was moved by Shambhu Nath Singh requesting the Court to summon Sankatha Singh and Sri Prakash Singh for deposing

before the Court as Court witnesses. The said application was rejected by the trial court on 8th March, 2010 against which Shambhu Nath Singh filed Criminal Revision No. 1036 of 2010 before the High Court that was allowed on 15th March, 2010 with a direction to the trial court to summon both the above persons as Court witnesses, after noticing the fact that they were not even mentioned as witnesses in the charge-sheet. Sankatha Singh and Sri Prakash Singh appeared as court witnesses as CW-1 and CW-2 who were examined on 03.05.2010, 28.05.2010 and 17.06.2010.

PW-4, the Investigating Officer was examined on 2nd July 2010. The doctor who had carried out the autopsy was examined as PW-5 on 30th August, 2010 and the scribe of the FIR, Brij Bihari Paswan was examined as PW-6.

The statement of the accused under Section 313 Cr.P.C. was tendered on 16.11.2010, whereafter the trial court proceeded to convict the appellant on 19th February, 2011.

The trial court assessed the entire evidence and believed the spot arrest of the appellant and the ocular testimony of the court witnesses, CW-1 and CW-2 to establish the commission of the offence by the appellant, and apart from this came to the conclusion that the medical testimony does not in any way impede the ocular testimony, inasmuch as, the corroborating evidence in relation to the entire incident was sufficient to establish that the guilt had been proved beyond reasonable doubt. The trial court categorically observed, that the accused was well known to the deceased, she was a teacher in the same Institution where the appellant was the Manager, the motor cycle of the appellant had been recovered which was the vehicle on which the deceased had accompanied the appellant on the fatal day, the accused had been arrested on the spot which is evident from the general diary and its entry, the appellant had also sustained an injury which indicates that he had been caught on the spot as the injuries had also been recorded in the general diary. The trial court also recorded that the deceased had been last seen in the company of the appellant and one ladies slipper had been also recovered from the spot. Thus, all these attending circumstances were taken into account to conclude that the offence had been committed by the appellant and which was primarily based on the ocular testimony of CW-1 and CW-2.

Learned counsel for the appellant while advancing her submissions has urged, that no motive has been established and therefore there are no circumstances existing that may warrant a conclusion of the commission of the offence by the appellant without there being any direct testimony pertaining to the commission of the offence by him. The medical evidence includes the post mortem report and the statement of PW-5, the doctor who carried out the autopsy also does not corroborate the prosecution story, inasmuch as, apart from the two injuries on the head, the other injuries around the neck has been clearly explained by the doctor himself that the death was caused due to asphyxia and not on account of the injuries on the head. It was further submitted that the death was also not caused due to drowning as no water had been found in the abdomen of the deceased, and consequently in the absence of any evidence to establish that the appellant had caused any injury and in the absence of any case of the prosecution the strangulation, there was no material on record to conclude that the appellant had actually assaulted the deceased thereby committing an offence resulting in the murder of the deceased. The ocular testimony of CW-1 and CW-2 was a complete afterthought and is wholly unreliable. They were not eye witnesses and were set up after the original

story of the prosecution had failed. The fourth argument of the learned counsel is to the effect that both the named prosecution witnesses PW-1, Rajendra Sonker who is the first informant and Dabloo Manjhi, PW-2 have turned hostile.

In such circumstances, the entire ocular testimony cannot be made the basis for convicting and sentencing the appellant. It is further submitted that the document pertaining to the sending of the accused for medical examination has not been proved, and in such circumstances the inference drawn by the trial court on the said basis of an injury, and then shifting the burden on the accused under Section 106 of the Indian Evidence Act is a patent illegality for which there is no foundation. It is also urged that there is no recovery of any weapon or any iron object from the spot indicating the weapon of assault, and even otherwise, assuming for the sake of argument that the appellant had been apprehended from the spot immediately, no other material was recovered from him so as to establish an alleged assault of the nature as narrated in the FIR that has not been supported by CW-1 and CW-2 or even supported by the medical evidence.

The contention therefore is, that the conviction of the appellant is based on surmises and conjectures and not on the strength of any material evidence but only on suspicion and doubt which cannot take the place of proof. It is submitted that while getting his statement recorded under Section 313 Cr.P.C., the appellant had taken a clear stand that he had been dragged into the controversy merely because he was the Manager of the School where the deceased was a teacher and he had been picked up from his house along with his motor cycle which may have been for the purpose of identifying the body, and thereafter the appellant has been implicated in the case. He was never arrested from the spot. This, therefore, is a clear case where the appellant was roped into the controversy and was taken into custody without there being any evidence of assault by the appellant on the person of the deceased having been established by any trustworthy testimony.

Sri Sagir Ahmad, learned AGA submits that the date, time and place of occurrence could not be disputed on the basis of whatever evidence exists on record and this part of the testimony of the recovery of the body and that being of the deceased identified as such, together with the other corroborating material including the recovery of the motor cycle of the accused clearly establishes, that the offence had been committed on the fatal day i.e. 5th June, 2009 at the time indicated in the FIR. He submits that the medical evidence in no manner upturns the ocular testimony of the prosecution witnesses particularly, the Court witnesses CW-1 and CW-2 who were introduced after the orders were passed by the High Court and which order has become final. He submits that their testimony cannot be discarded on the ground that they have been brought into to fill up any lacuna, inasmuch as, they have also narrated the incident which corroborates the narration in the FIR and which is in conformity with the entire evidence which has been led on behalf of the prosecution. He submits that even if the post mortem report mentions the cause of death as asphyxia, and even if the Court comes to the conclusion that there is no direct evidence relating to strangulation, then in that event, the ocular testimony indicating the pushing of the deceased from the pontoon bridge into the river by the appellant has been established. He, therefore, contends that right from the departure of the deceased, which has been narrated by PW-3, the father of the deceased, up to the stage of the pushing of the deceased into the river has been clearly brought out by the prosecution, and therefore the burden stood shifted on the appellant to disprove the said suspicion which is valid and based on

evidence and which now takes the place of proof with the ocular testimony of CW-1 and CW-2.

Sri Sagir Ahmad therefore contends that the factum of the deceased having been travelling with the appellant and then being pushed into the river by him is established from the eye witness account and from the entire surrounding circumstances including the spot arrest of the appellant, and therefore, there is only one conclusion possible that has been rightly drawn by the trial court to convict the appellant. He submits that the two Court witnesses are being described as chance witnesses and near passers by and their evidence cannot be brushed aside in view of the law laid down by the Apex Court in the case of Rana Pratap & Others Vs. State of Haryana 1983 (3) SCC 327 paragraph 3. He further contends that the testimony of the eye witnesses which indicate the commission of the offence is not inconsistent with the medical evidence. He submits that the inconsistency as suggested on behalf of the appellant is a mere probability. The inference, therefore to be drawn by this Court should rest on the existing circumstances as has been explained by the Apex Court in the case of Maghar Singh Vs. State of Punjab 1987 (2) SCC 642, paragraph nos. 7 and 9 thereof.

He further contends that in view of what has been submitted on behalf of the prosecution and carefully discussed by the trial court, a second view is not possible on the facts of the present case and for minor discrepancies or some alleged omissions on the part of the investigation and prosecution cannot be the basis for upturning the conviction by the trial court. He therefore contends that no inference is called for with the judgment of the trial court which deserves to be affirmed.

We have considered the submissions raised and what we find on record is that the fact that the body of the deceased was recovered from the river on 05.06.2009 is not disputed. The inquest which was carried out on the next day has been proved as Exhibit Ka-6. The entry in the GD in relation to the lodging of the report and the sending of the appellant in the lock up has also been indicated in Exhibit Ka-11 and the formal proof of such documents has been dispensed with in terms of Section 293 Cr.P.C.

The document which has been made the basis of debate and which requires consideration is the post mortem report. The said report was proved by PW-5, Dr. K.K. Singh. The report which is Exhibit Ka-9 recites the injuries which are practically three in nature, two of them are lacerated wounds on the head and one is the ligature mark around the neck which was found on internal examination. This finding on internal examination has been impeached through arguments by the learned AGA contending that there is no indication of any ligature mark on an external examination. He submits that the inquest report also does not indicate any such external injuries around the neck.

The fact, however remains that the doctor who carried out the autopsy has proved this third injury to be existing as per his statement recorded on 30th August, 2010. A perusal of the statement of the doctor categorically indicates that death was caused due to asphyxia and not on account of any shock or haemorrhage arising out of the other two injuries. He has also explained the status of the body as having acquired rigor mortis and its duration. He has further stated that no water was found inside the stomach when normally if it is a case of drowning, water is to be found inside the

abdomen. The post mortem report has not indicated the duration of rigor mortis but the statement of PW-5 categorically states the duration of 24-30 hours each if calculated from the time of the incident does not match with the description of duration. This also, therefore, creates a doubt about the timing of the death of the deceased that has not been explained by the prosecution. It is quite possible that the body of the deceased may have been thrown into the river after having been done to death before hand about which there is no evidence nor is it the case of the prosecution. Thus, from the report and the statement of Dr. K.K. Singh, it is clear that death had not been caused due to drowning. It is also clear that the opinion of the doctor is that death had been caused due to asphyxia and not on account of ante mortem injuries caused on the head. We will come to discuss this aspect later on while taking into account the story of the prosecution of the deceased having been hit by an iron object which has not been corroborated by the Court witnesses CW-1 and CW-2.

We now come to the statement of the witness of fact namely PW-1, Rajendra Sonker. The said witness is the first informant who is stated to have lodged the FIR which was transcribed by one Pappu Misra. The written report that was in the hand writing of Pappu Misra was tendered and the FIR was registered. Pappu Misra has not been examined as a witness. PW-1 while proceeding after the examination-in-chief turned hostile. He denied having dictated the contents of the written report and stated that he had put signatures on some plain papers. This testimony of PW-1, therefore has to be assessed upon the veracity of the statement in the examination-in-chief. Even though the said witness in the examination-in-chief proceeded with the story of the deceased having been hit by an iron object, and then pushed into the river, the same was totally denied in the later part of the statement and he virtually did turn hostile, even though, the prosecution did not declare him as such. In such a situation and in the absence of any material coming out of the said testimony to corroborate the medical evidence, the testimony of PW-1 has to be discarded being materially inconsistent in particulars with regard to the fact of the alleged commission of the offence by the appellant. The same is the position of the other witness of fact Dabloo Manjhi who was examined as PW-2. It may be stated that both PW-1 and PW-2 have described themselves to be fisherman who were carrying out some fishing activity at the time of the alleged incident when they heard a body splash into the water. Their credit worthiness about the commission of the offence by the appellant becomes unacceptable on account of their hostility but at the same time it deserves to be noted that their testimony nowhere negates the recovery of the dead body of the deceased. In such a situation, the occurrence has been partially established even by these witnesses except for them having seen the appellant committing the said offence.

The next witness that entered the dock was Shambhu Nath Singh, father of the deceased. He is not the witness of fact nor did he witness the actual commission of the offence. He however stated that his daughter had informed him that she was to accompany the appellant to Varanasi for the purpose of pursuing a matter relating to the recognition of the Institution. He further states that she had informed him that she would be returning back and therefore the said witness had every reason to believe that the deceased and the appellant were together in company and while returning, the incident took place. Since, he was not a witness of the fact of the commission of the offence, he came to be re-examined and his examination-in-chief was continued on 22nd January, 2010.

It is clear that the story of the prosecution takes a different turn with the introduction of the two Court witnesses CW-1 and CW-2 through the deposition of PW-1 for the first time in court.

As noted above these two court witnesses came to be examined after a direction was issued by the High Court in the criminal revision preferred by Sri Shambhu Nath Singh. Nonetheless the High Court took notice of this fact that these two witnesses are not named in the charge sheet.

We have perused the record and we find that these two witnesses CW-1 and 2 are neither mentioned in the first information report nor in the inquest report, nor in any of the statements recorded either under Section 161 Cr.P.C. or any reference having been made about them in the entire case diary. They have not been even mentioned in the statements of PW-1 and 2 in their examination-in-chief who are also witnesses of fact, and who are also stated by these court witnesses to have accompanied them, both at the time of the occurrence of the incident and while apprehending the appellant on the spot. They have been described by PW-1 Shambhu Nath Singh to be present when he arrived on the spot after receiving information of the recovery of the dead-body.

Thus there was a complete abscence of the names of either of these two persons through out the investigation and even thereafter in the court during trial upto the re-examination of Shambhu Nath Singh. We do not find any plausible explanation coming-forth for this and on cross-examination Shambhu Nath Singh in his statement on 11.02.2010 has categorically stated that he had not stated the names of these two persons having witnessed the incident or the arrest earlier when he gave the statement, as his mental balance then was disturbed when he saw the accused in the docks before the Court. This explanation given by PW-3 nowhere appeals to reason nor it has been considered by the trial court while placing reliance on the testimony of PW-3 and CW-1 and CW-2. This witness namely Shambhu Nath Singh was in perfect sound state of mind right from his examination-in-chief on 22.12.2009 upto the ultimate cross-examination on 11.02.2010. There is no indication in his application dated 11.02.2010 that earlier when he gave the statement he was not in sound state of mind. We do not find any such corroboration from either the statement or the order sheet of the case or even any explanation coming-forth from the prosecution as to when did he loose his mental balance so as to forget the names of these two prime witnesses who have now been made the basis of actual conviction. We therefore do not find ourselves in agreement with the conclusion drawn by the trial court where there is no consideration of this relevant material relating to the knowledge of these witnesses being present on the spot not being disclosed earlier.

The summoning of these two witnesses was not justified keeping in view the law laid down by the Apex Court in the case of State of Haryana Vs. Ram Mehar & Others 2016 (8) SCC 762 paragraph nos. 34 and 35. The application moved did not frame the exact questions that are required to satisfy the Court for summoning a witness.

There is a second dimension to this namely a legal aspect on the issue of pre-disclosure. Had the name of two witnesses been previously disclosed, which is the obligation of any person including a witness to do so during investigation or even thereafter before the Court in terms of Section 39 Cr.P.C., the appellant would have had an opportunity to confront the witnesses during examination before the court. We do not find any explanation coming-forth at all as to what had prevented PW-3

from bringing this fact to the notice of the police or even describing them having witnessed the incident earlier.

Learned A.G.A. contends that this was probable because these two witnesses have stated that they went to the police station but since the first information report had already been lodged, no attention was paid by the investigation in recording their presence which ought to have been done, and any such lapse on the part of the investigation cannot come to the aid of the accused.

We are unable to believe this proposition inasmuch as the evidence through these two court witnesses that has been introduced later-on was a vital and material information relating to the occurrence of the incident as also the apprehending of the appellant. Non-disclosure of such an important material fact therefore denies the appellant of a fair opportunity of trial, inasmuch as, had this disclosure been made and been recorded by the investigation in the case diary, then such material would have been utilized in terms of section 145 of the Indian Evidence Act, 1872 by the defence. In our opinion this was not a minor piece of evidence but now as the entire prosecution story has been unfolded, the conviction by the trial court virtually rests on the disclosure made by these two court witnesses.

The statement of PW-4 of the Investigating Officer recites that he had no information about the presence of CW-1 and CW-2 nor did he find them or meet them when he was at the spot on the date of occurrence. Their statements were not recorded nor was he informed about their presence. Their reference does not find place even in the charge-sheet. Thus the total negation about the presence of these two witnesses by the Investigating Officer clearly contradicts the testimony of CW-1 and CW-2 who allege to be present and having gone to the police station with PW-1 and PW-2 along with the accused.

We may on the issue of a fair trial refer to the decision of the House of Lords in the case of Regina Vs. H 2004 U.K. House of Lords Reports, 3 where the English Law with regard to the disclosure of facts to the accused has been discussed in detail and non-disclosure which results in prejudice has been dealt with in the aforesaid judgment. However the position of English Law vis-a-viz Indian Law has been explained by the Apex Court in the case of Manu Sharma Vs. State of (NCT) Delhi 2010 (6) SCC, 1 paragraph nos.190 to 222, 270 to 273 and 303. We are referring to these judgments to indicate that the ratio thereof stands attracted in the present case when the prosecution story began with the theory of the deceased having been hit by an iron object on the head, where two injuries are reported in the medical report without there being any discovery of the weapon of assault, when the appellant is alleged to have been apprehended on the spot and also, when the medical report nowhere indicates the cause of death on account of such assault.

It is here that we now turn to the comparative statements of the two prosecution witnesses who have turned hostile coupled with the story in the first information report to the effect where they had categorically stated that the accused had been clearly seen assaulting the deceased with an iron object whereafter she was pushed into the river. This ocular testimony has to be compared now with the statements of CW-1 and 2 where both these witnesses have entirely given up this description of assault and have only stated about the pushing of the deceased into the river. This material

contradiction in the initial story of the prosecution as brought forward coupled with the medical evidence of assault on the head without indicating the same being a cause of death, clearly indicates that the statement of the court witnesses giving up this story ends up in a clear conclusion that the prosecution has not been able to remove this doubt pertaining to the actual assault on the deceased as set-up by it. We therefore find that these two court witnesses having not supported the theory of assault the prosecution story of the accused having been see assaulting the deceased does not appear to be correct.

The aforesaid circumstances have nowhere been discussed by the trial court and this perversity in the impugned judgment therefore calls for a reversal inasmuch as any material evidence that has prejudiced the cause of the accused as indicated above and has not been able to prove the prosecution case to the hilt, has to be read in favour of the accused.

We may now proceed to examine the statement of the court witnesses keeping in view the argument of learned counsel for the State that they have categorically supported the story of pushing the deceased into the river. As discussed above the ocular testimony of any heated debate or any precursor of any scuffle between the two namely the deceased and the accused have not been established by the prosecution beyond a reasonable doubt. The question now is that if there was no such scuffle, and even if the deceased had been pushed by the appellant as testified by CW-1 and CW-2, then had she been pushed alive or dead. The reason is that the post-mortem report clearly records death due to asphyxia. It is not by way of a drowning. The oozing of foam and blood from the mouth of the deceased also does not match the fact that it was recovered from the river. This leads to the conclusion that she may have been alive when she had been pushed but at the same time there is no explanation by the prosecution about the two injuries on the head which does not support the ocular testimony of assault. It is quite possible that when the body of the deceased landed in the river, her head may have been hit by some hard object of the pontoon bridge or any other material. The question of creditworthiness of the two court witnesses having given up the story of assault and adopting the theory of pushing the deceased therefore creates a serious doubt about the presence of these two witnesses who have been introduced in the manner as described hereinabove. We therefore find the creditworthiness of these two witnesses to be highly doubtful on the facts and circumstances of the present case. No doubt, as urged by the learned AGA, that these two court witnesses were passersby and therefore they should not be readily disbelieved but the manner in which they were introduced creates a high degree of suspicion about their presence and reliability. Their version of lodging the accused after spot arrest at the police station in their presence alongwith PW-1 and PW-2 is clearly contradicted by the Investigating Officer's statement coupled with the hostility of PW-1 and PW-2.

As to what is a reasonable doubt has been dealt by us after quoting Hon'ble Mr. Justice Humphreys in our earlier decision in the case of Krishna Pal & Another Vs. State of U.P. in Criminal Appeal No. 950 of 2013 decided on 07.02.2018 that may be referred to.

The prosecution took up three hypothesis to establish the cause of death in the present case as indicated above so as to involve the appellant but none of them have been proved beyond a reasonable doubt. We further find ample support to confirm our conclusions from the ratio of the

decision of the Apex Court in the case of Dev Kanya Tiwari Vs. State of U.P. in Criminal Appeal No. 720 of 2016 decided on 12.03.2018.

Coming to the last part of the argument pertaining to the shifting of the burden under Section 106 of the Indian Evidence Act, 1872 we find that so far as the issue of the entire material being put to the accused is concerned there is a clear deficiency in terms of 207 Cr.P.C. Apart from this there is another story of the prosecution about the deceased having been heard departing with the accused as per the statement of PW-3. This in our opinion as per the statement of Shambhu Nath Singh is a hear say evidence and which deserves to be discarded keeping in view the provisions of Section 60 of the Indian Evidence Act, 1872.

The prosecution sought to buttress this with the aid of the injury of the accused as recorded in the case diary. Learned AGA submits that the accused has not been able to dispute the same. On this we may put on record that the injury report of the accused was neither exhibited nor proved before the trial court. There was no occasion for describing any injury in the case diary, but even otherwise if the prosecution wanted to rely on the same then some substantive evidence ought to have been led about the accused having sustained an injury. No such disclosure is there in the statement of the prosecution witnesses. Thus the burden on the accused under Section 106 was not shifted as no such question was even posed to the accused during the recording of the statement under Section 313 Cr.P.C.. The conclusion of the trial court therefore on this count is erroneous.

Thus given an overall view of the entire evidence on record we find that the prosecution has not been able to discharge its initial burden under Section 106 so as to impose the liability on the appellant to prove something which the defence was not required to do by way of any bad cross-examination. The eye witness account of CW-1 and CW-2 being wholly unreliable to the extent of having witnessed the accused in the company of the deceased on the fatal day and pushed her into the river, the prosecution has utterly failed to establish it's case beyond reasonable doubt.

Consequently for all the reasons hereinabove we find that the guilt of the accused has not been proved beyond a reasonable doubt and he is entitled to the benefit thereof. The appeal therefore deserves to be allowed. It is accordingly allowed, the impugned judgment dated 19.02.2011 of the trial court convicting the appellant and sentencing him is set aside. We are informed that the accused is still serving out the sentence. He shall be set at liberty forthwith, if not wanted in any other case.

Order Date :- 29.3.2018 S.Chaurasia