HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

…

i. CRA No. 9900005/2014
ii. CRA No. 07/2017 c/w
iii. Cr. Ref. No. 05/2014

Reserved on: 08.05.2025
Pronounced on: 05.06.2025

i) Shamim Ahmad Parray @ Koka Parray
S/O Ismail Parray R/o Jablipora presently
lodged in Cetnral Jail, Srinagar.

ii) Mst. Gulshana D/o Lassi Bhat widow of
Late Farooq Ahmad Parray R/o Babapora,. Badigam
Qazigund District Anantnag at present detained in
Central Jail, Srinagar.

……...Appellant(s)

Through:
Mr. S. T. Hussain, Advocate with Ms. Nida Nazir, Advocate.

Versus

i) State of J&K Through Police Station Bijbehara.

ii) State of Jammu and Kashmir through Principal Secretary to Government, Home Department, Jammu/ Srinagar.

……Respondent(s)

Through:
Mr. Illiyas Nazir Laway, GA with Mohammad Younis, Assisting Counsel.

***CORAM*:**
HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE SANJAY PARIHAR, JUDGE

JUDGMENT

Per Sanjay Parihar-J

1. These two criminal Appeals, one filed by appellant-accused (Shamim Ahmad Parry @ Koka Parry) and the other by appellant-accused (Mst. Gulshan) are directed against a common judgment of conviction dated 12-08-2014 and order of sentence dated 16-08-2014 passed by the learned

Additional Sessions Judge, Anantnag ('the trial Court') in Criminal Challan File No. 20/S titled State vs. Shamim Ahmad Parry and anr, whereby the appellants have been convicted for commission of offence under Section 302/34 RPC and have been sentenced to imprisonment for life with a fine of Rs. 5,000/- each.

2. Briefly stating, it was an incident that happened during the intervening night of 1st and 2nd April 2002 when PW-1 Gull Parray, who being brother-in-law of appellant Mst. Gulshana, while moving across her courtyard, found its main door locked from outside and also saw a pit having been dug in that courtyard. On enquiring from her as to where is Farooq (hereinafter referred to as deceased) she told him that he has been taken by Army people. When he entered in her house, he found body of deceased in a corner and on seeing that, (appellant) Mst. Gulshana started crying. He immediately called the Police party who seized the body. This led to the registration of case FIR No. 79/2002 by Police Station Bijbehara. It is alleged that during investigation appellants were apprehended on suspicion as there was a buzz in the area that Mst. Gulshana was having illicit relations with Shamim Ahmad Parray @ Kuka Parray (co-appellant) and in order to eliminate the deceased from their discourse, during intervening night of 1st and 2nd April 2002, she facilitated entry of co-appellant in her house without the knowledge of the deceased and when the later, entered in his house, the co-appellant who had already hid himself in the eastern corner, he hit the deceased on head by pestle (Chhota) and later on throttled him to death.

3. It is alleged that the pestle was recovered at the disclosure of Shamim Ahmad Parray and both the appellants narrated the sequence of events leading to the demise of the deceased. During investigation the post-mortem of deceased was got conducted and as per medico-legal opinion, the deceased had lacerated wound over occipital area (without fracture) besides broken hydra bone and there was trachea of lungs, which injuries over body of deceased were anti-mortem, that were capable of causing death that had taken place within 14/15 hours before the conduct of autopsy. The wooden pestle on being seized was shown to medical expert who confirmed that the injury caused over the back of the head of the deceased was possible with said wooden pestle. So the cause of death was most likely to be *asphyxia* (following throttling). During investigation an Identity Card of Shamim Ahmad Parray too was recovered from a pit that had been dug in the house of the deceased for alleged burying, but before it could happen PW-Gull Parray had informed the police. Both the appellants were therefore, accused of having killed deceased with common intention to eliminate him and in the intervening night of 1st and 2nd April 2002, they accomplished the killing of the deceased in the manner as disclosed above for which they were formally charged for offences under section 302/34 RPC on 19.08.2002 to which they pleaded not guilty and thus were put to trial.

4. Prosecution on its part examined the witnesses, namely, PW-Gull Parray, PW-Qadir Bhat, PW-3 Nazir Ahmad Bhat, PW-4 Abdul Hamid Dar, PW-5 Mst. Hafiza, PW-6, Aziz Parray (Kalan), PW-7 Abdul Aziz Parray (Khurd), PW-8 Hassan Parray, PW-9 Gh. Hassan Wagay, PW-10 Zahoor Ahmad Dar, PW-11 Gh. Mohi-ud-Din Dar, PW-12 Mansoor Ahmad Dar,

PW-13 Abdul Rehman Ms. Raheela Khan, Assisting Counsel vice Mr. Satinder Singh Kalla, AAG., PW-14 Gulzar Ahmad Mantoo, PW-15 Muma Parray, PW-16 Ghulam Mohi-ud-Din Parray PW-17 Ghulam Mohammad Malik, PW-18 Rubi Jan, PW-19 Mohammad Feroz No. 461, PW-20 Zahoor Ahmad Ganie, PW-21 Ali Mohammed Banday, PW-22 Abdul Khaliq Dar, PW-23 Bashir Ahmad, PW-24 Dr. Nisar Ahmad, PW-25, Dr. Abdul Hamid, PW-27 Shah-ul-Ahmad Kanth, PW-28 Farooq Ahmad, PW-29 Mst. Nayeema, PW-30 Mst. Shaheena, PW-31 Abdul Rashid, PW-32 Ghulam Qadir, PW-33 Bashir Ahmad Dar.

5. After culmination of the trial, both the appellants were examined under Section 342 Cr.PC, in order to elicit any explanation with regard to the commission of crime to which they claimed that case lodged against them is false and has been orchestrated by PW-1 along with others who were all interested witnesses. That there is not any eye witness account and the case rests on circumstantial evidence. That the prosecution has miserably failed in connecting the chain of events. The trial court, in terms of impugned judgment, concluded that the prosecution case is based upon circumstantial evidence as there is no eye witness account of the incident and that prosecution has relied upon eight circumstances, that stood proved. The aforesaid circumstances are reproduced as under:

1. The deceased Farooq Ahmad Parray S/O Ghulam Qadir Parry R/O Jablipora Bijbehara died of homicidal violence.
2. Recovery of weapon of offence i.e., pestle (Chhota) used in the commission of alleged offence was recovered at the instance of accused No. 1 upon the disclosure statement made by the accused No. 1.

3. Blood stains detected on the pestle (Chhota) which was seized by the police in pursuance of disclosure statement made by accused No. 1.
4. Presence of accused No. 1 in the courtyard of house of deceased during the intervening night of 1st/2nd April, 2002 as seen by the PW-18.
5. Recovery of identity card of accused No. 1 at the scene of occurrence.
6. Presence of two pits, one in the courtyard and another in room of the house of the deceased in order to bury the deal body of the deceased.
7. Dead body of deceased found in the house of accused No. 2 and her non-explanation regarding the presence of dead body in the house.
8. Illicit relationship between accused No. 1 and accused No. 2 as a motive for the crime.

6. The trial court found that prosecution case stood proved beyond doubt on all said eight circumstances, therefore, proceeded to hold the appellants guilty for offences under section 302/34 RPC and sentenced them to imprisonment for life and fine of Rupees 5000/- each on the strength of judgment dated 12.08.2014 followed by the order of sentence.

7. The appellants have thrown challenge to the aforesaid finding of the trial court, and sentence so rendered on the following grounds:

i. That the learned trial Court has misread the entire evidence and the appellants have right to read out the evidence before this Court and upon entire re-appraisal of the evidence, it would become absolutely clear that there was no material before the trial court to have opined that there was throttling of deceased. So much so whether the weapon of offence alleged to have been recovered can, at, all be connected with the crime, this is because the said

recovery was clearly inadmissible having been recorded against the provisions of law.

ii. That the finding of the trial Court that appellant No. 1 was in the house of the deceased during the intervening night of 1st and 2nd April, 2002 has not sufficiently been proved. That there is no linking evidence. So far as the identity card of the appellant No. 1 having been traced from the place of occurrence is concerned, same had been planted by the complainant, because the witnesses have admitted that they were not present at the time of the recovery of identity card.

iii. That the recovery of body of deceased in the house of appellant No. 2 is not sufficient enough to connect the appellant No. 1 with the crime.

iv. That the learned trial Court has erroneously invoked Section 106 of the Evidence Act for which the prosecution had failed to lay cogent material. The appellants cannot be convicted on mere suspicion until the evidence is clear. Whereas in the given case the examination of the witnesses is contradictory to what was recorded u/s 161 Cr. PC. It is further urged that there is not any legally sustainable evidence to connect the

appellants with the commission of the offence under Section 302 RPC.

v. That the prosecution case is fabricated and even if the prosecution case is accepted to be correct in view of the statement of PW 22 Dr. Nasir Ahmad at the most offence under Section 304 Part II RPC, can be said to have been made out and in case the Court believes it a case of throttling to be proved. However, there is no sufficient evidence to connect the appellants with offence under Section 302.

8. The appellants, therefore, claim that they need to be acquitted and/or in the alternative may declare them guilty for offence under Section 326 RPC and keeping in view the judgments of the Hon'ble Apex Court and precedents, the appellants having already suffered punishment of more than ten years deserve to be given rest from the ordeal of trial and appeal.

9. On the other hand, respondent have claimed that the conviction and sentence recorded against the appellants is perfectly in accordance with law and the learned trial court has rightly appreciated the evidence and the grounds on which the appeal is laid are not legally sustainable. Learned counsel for the appellant vehemently contesting the case of the prosecution claimed that presence of appellant-Shamim Ahmad Parray in the courtyard of deceased during the intervening night of 1st /2nd April as seen by PW-18 is

completely without any evidence because the said witness is the daughter of appellant Gulshana Bano who, on one occasion, claims to have seen appellant in the corridor of her courtyard but in her court statement she has completely negated it.

10. We have heard both counsels and minutely gone through the record of the trial Court. At the outset in the light of finding returned by the trial court as well as the prosecution itself projecting its case, being based on circumstantial evidence only, it is apt to reiterate here as to what are the relevant principles that are to be kept in mind while appreciating the case of the prosecution when based on circumstantial evidence. Besides given the reliance on Section 106 of Evidence Act and the resistance laid by them to application of said provision, whether in the given facts the trial court was right in applying this provision is also an issue to be deliberated upon.

In '***Raj Kumar Singh Vs. State of Rajasthan' AIR 2013 SC 3150,*** dealing with case based on circumstantial evidence and after considering the law on this subject, it was held as under:

> *"In matter of direct testimony, if credence be given to the relators, the act of hearing and the act of belief, though really not so, seem to be contemporaneous. But the case is very different when we have to determine upon circumstantial evidence, the judgment in respect of which is essentially inferential. There is no apparent necessary connection between the facts and the inferences. The facts may be true, and the inference erroneous, and it is only by comparison with the result*

of observation in similar or analogous circumstances, that we acquire confidence in the accuracy of our conclusions…."

11. The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove, the mode of argument resembling the method of demonstration by the ***reductio-ad-absurdum***.

12. In para-23 of the judgment (supra) Hon'ble the Supreme Court further went on to hold as under:

"*Thus in view of the above, the Court must consider a case of circumstantial evidence in light of the aforesaid settled legal propositions. In a case of circumstantial evidence, the judgment remains essentially inferential. The inference is drawn from the established facts as the circumstances lead to particular inferences. The Court has to draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion, that the accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused."*

13. ***In 'MG Aggarwal Vs. State of Maharashtra' AIR 1963 SC 200,*** it was held, that if the circumstances proved in a case are consistent either with the innocence of the accused, or with his guilt, then the accused is entitled to the benefit of doubt. When it is held that a

certain fact has been proved, then the question that arises is whether such a fact leads to the inference of guilt on the part of the accused person or not, and in dealing with this aspect of the problem, the benefit of doubt must be given to the accused and a final inference of guilt against him must be drawn only if the proved fact is wholly inconsistent with the innocence of the accused and is entirely consistent with his guilt.

In 'Sharad Bardhi Chand Sarda vs. State of Maharashtra' AIR 1984 SC 1622, it was held there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability, the act must have been done by the accused.

14. Graver the crime, greater should be the standard of proof. An accused may appear to be guilty on the basis of suspicion but that cannot amount to legal proof. When on evidence two possibilities are available or open, one which goes in the favour of the prosecution and the other benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. This principle has special relevance where the guilt of the accused is sought to be established by the circumstantial evidence.

15. Keeping these principles in mind, we proceed to examine the merits of these appeals, also, whether the trial court was right in returning finding of guilty on the eight incriminating circumstances, which it claims, have been proved by the prosecution.

16. Insofar as the death of deceased Farooq Ahmad Parray is concerned, EXPW(24/2) is his autopsy report has stated that the deceased is stated to have been inflicted: lacerated wound on occipital area (no fracture) with residual haemorrhage; bluish congested with haemorrhage spongy spots send for forensic examination, broken Hyoid bone and Trachea lungs, Ecchymosis of strap muscles with surgical compression of neck and upon forensic examination there appear to be no evidence of poisoning and death was most likely due to Asphyxia (following throttling). In EXPW (24/4) the medical expert had further opined that the injuries seem to be sufficient to cause death and the fracture can be caused by severe pressure on Hyoid bone, so the death had taken place 14/15 hours before conduct of autopsy. The medico-legal opinion supported the case to be of a culpable homicide. The medical expert during trial claimed that the injury on the occipital region of the deceased could be caused by wooden pestle and upon cross-examination admitted that the pestle was not having any blood stains. The injury on the backside of the head of the deceased was a lacerated one where bleeding had ceased after death rather it had stopped by the time it was brought for the post-mortem.

17. The medico-legal opinion when tested in the light of statement given by Dr. Nisar Ahmad, Medical Officer, would show that the prosecution had laid thrust on use of wooden pestle only and at no point of time sought to prove its case as to how the injury in the

nature of strangulation were observed around the neck of the deceased.

18. Learned counsel for the respondent argued that there was not any clear evidence on record of the file of deceased having been put to throttling by the accused and in fact that part of investigation was neither enquired into nor has the prosecution proved as to how and in what manner the throttling marks were observed around the neck of the deceased. In-fact upon going through the evidence on record neither prosecution nor the trial court has dealt with the manner in which throttling of deceased took place. The word **throttle** as explained in Judicial Officer's Law Lexicon by Justice C.K. Thakker page 4717 is taken note of as under:

> *"Throttle in its ordinary parlance would mean compression of neck by means of finger. A slight compression is sufficient to cause complete closure of glottis as it forces the base of the tongue upwards and backwards against the posterior pharyngeal well causing complete occlusion of air passage. Evidence of violent compression of the neck during life is obtained from bruising due to thumb and fingers, nail marks, swelling and lividly of the fact. In addition, further evidence is provided by bruising and location of larynx, windpipe, and muscles and vessels on front and sides of neck, and fracture of the cornices of the laryngeal and occasionally the hyoid.*
>
> *Generally, haemorrhage in the subcutaneous tissues and in the muscles underlying nail marks is usually scanty as compared to the external injuries. Conversely, the absence of externally visible neck injury does not preclude fatal trauma. The signs of throttling are, the tongue may be bruised, may be bitten by teeth and protruded. Bleeding from the ears due to rupture of the blood vessels of the tympanum may be seen. There may be injuries on the*

face, chest, etc indicating a struggle. The throat or wind pipe, a valve controlling the supply of steam engine, lever which operates the throttle valve, to press or constrict the wind pipe, to strange, chock or suffocate, to shut or silence."

The medical expert having not dealt with the issue of throttling as to how it had taken place even during investigation also this aspect has remained un-explored. This is because neither any evidence regarding injury marks over neck have been collected nor from medical expert any opinion has been sought as to what was the nature of compression, as well as existence of any type of injuries on account of struggle, while deceased was being applied pressure over neck. This goes on to mean that either this issue was deliberately left out or the prosecution knew that it might not be in a position to sustain its case in the Court of law on the issue of whether throttling of deceased had taken place or not. Having said so, since death has taken place, due to human intervention, so it is a case of culpable homicide whether that amounts to murder or otherwise is to be seen hereafter.

19. Prosecution relied on the testimony of PW-18 to convince the trial court that it was accused No. 1 (appellant-Shamim Ahmad Parray) who was lastly seen in the house of the deceased during the intervening night of 1st /2nd April 2002. This witness is daughter of deceased and appellant Mst. Gulshana. According to PW-33 Inspector-Bashir Ahmad, SHO, Uri the information regarding demise of deceased was received in the manner that some unidentified persons had killed deceased by subjecting him to

torture during the intervening night of 1st/2nd April 2002, which form the basis for registration of case. He categorically is admitting that when he enquired from PW-18 about what had happened at the time of incident, the witness did not tell him to have found accused No. 1 in the courtyard when she peeped from behind the door. Whereas, this witness in 161 Cr P C, statement recorded on 8th April 2002(after seven days of occurrence) is found narrating that after having meals while she was sleeping in her room she heard noises emanating from the courtyard. Thereafter she followed her mother and on reaching in the courtyard she saw Shamim Ahmad Parray in the courtyard which leads towards the big room, in which room electricity was on. Thereafter, the mother pushed her back towards her room, thereafter Shamim Ahmad Parray, went to the big room and destroyed the electric lamp. Whereas in her Court deposition she claims that though Mst.Gulshana Bano is her mother but now she is not related to her, she asked her mother about the whereabouts of her father who told her he had gone to provide fodder to animals in the nearby cowshed. Thereafter she went to bed around the mid-night she got awake after hearing some noise. Her door was closed from outside she tried to open it and also called her mother, maybe she was sleeping with the deceased. She did not allow her to come outside however, from the space of the door she could see accused Shamim Ahmad Parray who went in a room and switch off the lights. This witness has been subjected to lengthy cross-examination she admitted that the courtyard leads to the big

room, however, the witness is not sure whether deceased was sleeping in that big room or not. She further admits that there was no electricity in the Courtyard.

On close scrutiny of the testimony of witness it is clearly discernible that on one occasion she claims to have followed her mother in the courtyard where she saw accused no.1 whereas, in another statement she claims to have identified the accused after peeping from her room from a space line in between the doors. She herself admitted that the mother did not allow her to come out of room. Now there are two scenarios either the witness was allowed by her mother co-appellant to come out of the room or she remained inside. Whereas, PW-Gull Parray the informant as well as the brother of deceased who noticed the body in the morning when he was about to leave for "Fajr" prayers did not notice the presence of the accused.

20. On further examination of her testimony it is clearly discernable that she admits that after "Isha" prayers and having taken meals, she went outside her room at 9.00 PM for easing and till morning she was in the room and at 12.00 AM she tried to go outside. On another occasion she claims that she asked her mother as to what was happening outside but she did not listen, rather she pushed her back in the room. On another occasion she claims to have followed her mother in the courtyard there she saw accused No. 1 who was roaming here and there. The trial court was of the view that there is not much contradiction in her narration because whether she saw

accused No. 1 while following her mother or she saw him after peeping from the door would not be of much relevance because having been examined after four years of the incident such minor variations were bound to occur. Whereas, this witness at that time was nine years old, she has been examined for the first time after the incident on 08.04.2002. Trial court found that there is not much delay because the witness had categorically admitted that she was threatened by her mother not to speak about the presence of accused No. 1. The mother has been arrested on 05.04.2002, but even thereafter she did not make any statement rather is found narrating about the presence of accused No. 1 for the first time on 08.04.2002. From her narration there are two scenarios either she was not allowed by her mother to come out of the room so she had an occasion to see the accused from the space in between the doors that means she did not go outside, or that she had an occasion to go out and follow her mother because she wanted to come out of the room as there were some noises emanating, so she became curious hence came out of the room and followed her mother. On one occasion she claimed that there was no light in the courtyard rather light was in the adjoining room. The witness therefore, has blown hot and cold and given the case resting on circumstantial evidence, the contradictory narration of the witness should have put the learned trial court to caution before relying on her testimony. This is because she in her narration before the Court has categorically found narrating that though accused No. 2 is her mother but now she

is not her mother. It is very difficult to digest that a child would speak ill about her mother. On the contrary, it is also to be seen that the child would also not spare her mother in case she is found to be the killer of her father. It depends upon the human approach and the attending circumstances. In that background, the contradictory narration of the witness wherein she claims to have followed her mother and then found the accused whereas she contradicts herself by saying that she saw the accused after peeping from the room both these two versions are most relevant and cannot be brought within the purview of minor contradictions. That too in a case where the accused is charged with a heinous offence of one in above. PW-Gull Parray is her uncle and the child was with him she has admitted that their land is being ploughed by Gull Parray chances of she coming under the influence of her uncle cannot be understated, in that background the trial court ought to have been at loath in relying upon her testimony.

In as much as the spot map of the scene of crime prepared by PW-23 does not disclose there being light in the corridor which is an additional ground to make her testimony unreliable when there was not light how she has been able to identify accused No. 1.

21. Having said so, the prosecution has squarely relied upon the fact that both accused made disclosure statements implicating themselves in the incident of first hitting the deceased with pestle (Chhota) and then throttling him to death. In this regard, the trial

court has relied upon the recovery of pestle (Chhota) and identity card of accused No.1 which is found to have been recovered from a pit that had been dug in the courtyard. Before examining as to why the pits were dug, it is necessary to appreciate as to whether there was clinching evidence, sufficient enough to fasten liability on accused No. 1 having given recovery of pestle. EXPW (8/1) is stated to be recovery of pestle (Chhota) which is claimed to have been recovered at the instance of accused No. 1 in pursuance to a disclosure statement made on 05.04.2002. PW-33 who is Investigating Officer has deposed that on 05.04.2002, both accused have made disclosure statements which were separately recorded. PW-28, PW-29, PW-30, PW-31 and PW-32 are the witnesses before whom the disclosure statement has been made. EXTPW (31/1) and EXTPW-31 are the two disclosure statements which are in the nature of confession whereby both the accused are alleged to have resorted to self-incrimination, which on the face of it are hit by Section 25, 26 of Evidence Act and trial court was also right in holding so. However, it has relied upon the recovery of pestle (Chhota) at the behest of accused No. 1. In this regard, the recovery has been affected from the house of the accused No. 2 and not from accused No. 1.

22. PW-Ghulam-u-din Parray who is a witness to the seizure of pestle (Chhota) is categorically found narrating that the said weapon was kept inside the room which was visible to one and all. PW-33, Investigating Officer too is found narrating that weapon of offence

is a common household item. Rest of the witnesses also have stated that the wooden pestle (Chhota) was recovered from the room of the deceased, they too have admitted that the same was not hidden thus was easily accessible. It was argued on behalf of the prosecution that the place wherefrom weapon of offence was recovered that was to the specific knowledge of accused No. 1. Such argument is totally contrary to the "evidence on record" . Because almost every witness is found narrating that the pestle was recovered from kitchen which was lying over the shelf and was easily accessible. Once that is the case, then it cannot be said that the spot where the weapon of offence was lying was to the specific knowledge of the accused No. 1. Much stress had been laid that since the wooden pestle bore blood stains and the same matched with the blood group of the deceased thus rendering the said recovery admissible and co-related with the incident. In this regard PW-Dr. Nasir Ahmad Ganie, Medical Officer, has categorically admitted that the pestle was not bearing any blood stains at the time it was brought to him, as he has only given the certificate that the injury could have been caused by use of such pestle. Needless to mention here that in terms of medico-legal opinion the injury over the back of the head of deceased was in the nature of lacerated wound which generally is caused by blunt object or force that causes skin to tear. On some occasions it can extend into deeper tissue layers potentially damaging the underlying structures. Perusal of the medical opinion would disclose that it nowhere is found disclosing that the injury at

the back of the head resulted into oozing of blood nor there was any damage to the underlying structure, rather it is fairly conceded that there was no fracture by the impact and use of wooden pestle. So the chances of wooden pestle bearing blood stains are remote that is why the medical expert has admitted that when it was brought for expert opinion he could not find any blood stains over it.

23. Whereas, PW-27 the Assistant Scientific Officer, Serology FSL, Srinagar, had been sent with EXK-24/2002, K-25/2002, K-26/2002, K-27/2002, K-28/2002, which were in the nature of apparels of deceased, cushion, pillow, pheran as well as wooden pestle (Chhota) and the blood stains, on examination, were detected over wooden pestle (Chhota) as well. If we go by the testimony of PW-27 then the wooden pestle also bore blood stains and since according to prosecution, it related to blood group-A with that of the deceased so there was comparison to disclose that blood stains on wooden pestle were that of deceased. This runs contrary to the narration of medical expert as well as the fact that there was no underlying fracture. The prosecution in the given circumstance had not been able to explain this contradiction as to how come the weapon of offence had blood stains when it was sent to the forensic expert but did not have same when it was shown to the medical expert. It appears from the record that the wooden pestle (Chhota) was produced before the medical expert on 05.04.2002 whereas, the items have been forwarded to FSL much thereafter. Investigating Officer has in his testimony categorically narrated that until the accused were arrested on

05.04.2002, there was no incriminating evidence against them to warrant their involvement in the incident of killing of the deceased rather he claims that it was after their arrest, when they made disclosure statement, their involvement surfaced.

24. Scanning of the recorded evidence, led by the prosecution, would disclose that the place wherefrom wooden pestle (Chhota) was recovered, as per photographs captured during the course of investigation, would show that the wooden pestle (Chhota) has been recovered from a place which could be easily noticed when a person enters the room (kitchen) rather it was not a place to the special knowledge of accused No. 1. PW-1 has informed the Police agency about the incident, who swung into action and as per PW-33, he seized the dead body and also examined the whole of the house including kitchen, corridor etc. but could not find anything incriminating. So had there been blood ridden wooden pestle in the kitchen of deceased, then such item could have been easily noticed by the Investigating Officer, which is not the case herein.Whereas the existence of the wooden pestle (Chhota) has surfaced after the arrest of the accused on 05.04.2002. The recovery is not made from a place where the existence of the pestle is known to the accused only but it was accessible to one and all and the chances of it being a planted recovery cannot be ruled out. At the cost of repetition given the testimony of the medical expert when the weapon was brought to him it had no blood stains then how come the blood stains were later on noticed by forensic examiner this all would lead

to the probability that prosecution has resorted to padding of the evidence.

25. Another circumstance which is sought to be attributed against accused is the recovery of his identity card from a pit that was dug in the courtyard. The photographs appended to the charge-sheet which have been recorded during the investigation would show that the Identity Card is alleged to have been recovered from one of the pit that was dug and it is said that PW-Gulzar Ahmad Mantoo had found Identity Card of the accused and the same was handed over to the Police. This fact of Identity Card being recovered from the pit is stated to have been witnessed by PW-6, PW-8, PW-14. PW-15, PW-16, PW-17 and PW-31. Prosecution claims that this Identity Card the accused lost while he was digging pit, which he was to use for burial of deceased after having been killed by both of them. This Identity Card has not been recovered at the behest of accused No. 1 rather it is fairly admitted that it was noticed by PW-18 who handed it over to the Police. In-fact the photographs appended on the record also go on to show that the said witness is found noticing the Identity Card and then handing it over to the Police. PW-33 the Investigating Officer has fairly admitted that after examining crime scene on 02.04.2002 thoroughly,he did not come across any incriminating material against the accused. It is only after 05.04.2002 that the evidence started surfacing regarding the involvement of the accused. He admits that during the search of whole of the house including the household items also, he saw the

pit that had been dug, however, could not find any Identity Card. Whereas, in the photographs, the Identity Card is quite visible from a naked eye. If the PW-18 is to be believed that the Identity Card was noticed by him then the Investigating Officer is contradicting this aspect because if he had been to scene of the crime on 02.04.2002, and thoroughly searched the premises to look for the evidence regarding killing then the Identity Card would most likely have surfaced on the 02.04.2002 itselfand not waited for the arrival of the witnesses so that they can recover it and hand it over to the Police. Defence is right in contending that there are chances of the Identity Card having been planted after the accused were arrested on 05.04.2002.

26. Prosecution claims that there were two pits one in the courtyard and one in room of the house of the deceased that were dug for the purpose of burying the deceased. Assuming that argument to be true, nowhere in the charge-sheet or in the site plan the width of those pits is shown because according to PW-1 as well as PW-15, when accused no. 1 was brought to the Police Station the accused no. 1told them that he had dug the pit in order to bury the body of the deceased. So much so that accused had also shown two pits which he claims to have dug so as to bury the deceased. PW-17 is found narrating that the pit dug at the courtyard was 4X4 feet in length/breadth whereas, the one in the room was small one. A question would thus arise whether on the mere statement of accused, that he has dug two pits for burying the deceased, could such

circumstance have been used to fasten liability on the accused of killing of the deceased, that too when, assuming for the sake of argument, that deceased had died because of the omission and commission of the accused, then could have it been possible for the accused to bury the deceased, who was a full grown adult in a 4 x 4 pit.

27. Learned counsel for the appellant had vehemently contended that the two pits, which are sought to be drawn as an incriminating material against the appellants, reliance thereto is also uncalled for because there is overwhelming evidence on the record of the file not only from the cross-examination of the prosecution witnesses but even from the testimony of defence witnesses, that goes on to show that the deceased belonged to a family whose many members had turned to militancy and prior to the incident army had raided their house on information that weapons are stored there and for that purpose the two places were dug out, however, nothing incriminating was recovered. So merely because the prosecution found existence of two pits would not lead to the presumption that said two pits were dug by the appellants for the purposes of burying deceased when the evidence of their culpability on the very face of it is weak and infirm. There appears to be substance in the arguments so advanced because during trial the defence had elicited from certain witnesses information about the background of the deceased and his family members and it was revealed that some of his family members were involved in providing shelter to the

militants and the defence has also examined some witnesses, who too are admitting that few days prior to the incident Army had searched the house of the deceased under reliable information that weapons or like material might be lying in the house of the deceased and in that period the places were dug out, however nothing incriminating was found. Such an explanation assumes importance and given the fact that one of the pit was 4x4 in dimension and even if it is assumed that such a pit was dug in by the appellants for burying deceased who was an adult member it would have been very difficult for the accused to bury him in that pit unless they resorted to breaking of his limbs. So, the hypotheses, on which the Court has relied that the two pits were dug for the purposes of burying of deceased is highly improbable

28. That apart, the trial court has relied on Section 106 of the Evidence Act to draw inference that since the dead body was found from the house of the deceased and appellants were the two occupants of the house so they owe an explanation. In this regard case law reported in case titled ***'Anees Vs. State Government of NCT' 2024 SCC Online SC 757,*** as appearing in paragraphs 55 and 56 being relevant is beneficial to be taken note of:

> *"55. If an offence takes place inside the four walls of a house and in such circumstances where the accused has all the opportunity to plan and commit the offence at a time and in the circumstances of his choice, it will be extremely difficult for the prosecution to lead directevidence to establish the guilt of the accused. It is to resolve such a situation that Section 106 of the Evidence Act exists in the statute book. In the case of Trimukh maroti Kirkan (Supra), this*

Court observed that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. The Court proceeded to observe that a Judge also presides to see that a guilty man does not escape. Both are public duties. The law does not enjoin a duty on the prosecution to lead evidence of such character, which is almost impossible to be led, or at any rate, extremely difficult to be led. ***The duty on the prosecution is to lead such evidence, which it is capable of leading, having regard to the facts and circumstances of the case.***

56. We are of the view that the following foundational facts, which were duly proved, justified the Courts below in invoking the principles enshrined under Section 106 of the Evidence Act:

a. *The offence took place inside the four walls of the house in which the appellant, deceased and their 5-year-old daughter were living. The incident occurred in the early morning hours between 3.30 am and 4.00 am.*

b. *When the Investigating Officer reached the house of the appellant, he found the deceased lying in a pool of blood. The appellant was also present at his house.*

c. *The defence put forward by the appellant that two unidentified persons entered the house and inflicted injuries on the deceased and also on his body is found to be false.*

d. *The clothes worn by the appellant at the time of the incident were collected by the Investigating officer. The clothes had blood stains. According to the Forensic Science Laboratory report, the blood stains on the clothes of the appellant matched with the blood group of the deceased ie., AB+.*

e. *The conduct of the appellant in leading the investigating officer and others to a drain nearby his house and the discovery of the knife from the drain is a relevant fact under Section 8 of the Evidence Act. In other words, the evidence of the circumstance simpliciter that the appellant pointed out to the Investigating Officer the place where he threw away the weapon of offence i.e, knife would be admissible as 'conduct'*

under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act."

In case titled *"**Vasant alias Girish Akbarsab Sanavale and Another Vs. State of Karnataka," 2025 SCC Online SC 337*** the relevant portion of Paragraph 91 is extracted as under:

*"91. Section 106 of the Evidence Act was also pressed into service by Mr. Singhvi appearing for the State. We are of the view that it has no application in the present case. It is true that when crime is alleged to have been committed inside the four walls of the house and that too in secrecy then the family members residing in the house are the best persons to know and explain as to what had actuall0y happened. Let us for the time being proceed on the footing that the husband was very much present at the time of the incident however, there is nothing to indicate that he shared common intention with his mother. When the mother-in-law poured kerosene on the deceased and set her on fire, it is possible that the husband out of sheer fright might have run away from his house after trying to extinguish fire by pouring water on the burning body of his wife**. **For applicability of Section 106 so as to implicate the husband also in the alleged crime the prosecution has to as a condition precedent lay the foundational facts prima facie indicating his involvement or participation in the alleged crime. His sudden disappearance after the incident is not sufficient to infer common intention**."*

So given the aforesaid legal preposition before taking aid of Section 106 of the Evidence Act for fastening liability on the accused, the prosecution is required to lead foundational facts so as to enable the accused to tender an explanation as against such foundational facts however that does not mean that the prosecution

is required to lead evidence of such a character, which is almost impossible to be led or at any rate extremely difficult to be led.

29. Admittedly the body of the deceased has been found in one of the rooms. Insofar as the presence of appellant Shamim Ahmad Parray is concerned, as already discussed above, evidence led by the prosecution linking his presence at the scene of the crime has been found to be weak and infirm. Inasmuch as recovery of weapon of offence attributable towards him too is shrouded with suspicion because the place from where the weapon was recovered was accessible to one and all. Even the recovery of his Identity Card from one of the pits, that too as discussed above, has been found to be suspicious because the evidence led in this regard is not clinching one. Having said so, once the foundational fact regarding presence of accused No. 1 is found to be lacking then could it be said that the co-accused (appellant) Mst. Gulshana, was the main culprit who wanted to eliminate her husband. The prosecution case has all along been that it is Shameem Ahmad Parray who was the main culprit and that Gulshana had only helped him in making entry in her house before the deceased could come. The so called confession also proceeds on said assumption that accused No. 1 was the person who first hit the deceased with wooden pestle from behind and then later on throttled him to death. Nowhere there is allegation of the other co-accused having facilitated the former towards commission of offence. In that background, even foundational facts against

Gulshana Bano to the effect that she had helped the accused in affecting killing of deceased are found lacking.

30. Before we take the discussion on Section 106 of the Evidence Act to logical conclusion, since the prosecution case rests on the strength of circumstantial evidence, in that background motive of commission of offence also assumes importance. Prosecution claims that since there was intimacy between the two appellants who wanted to eliminate the deceased because he was an eye sore before them, so they both with common intention got him killed in the manner as disclosed aforesaid. PW-33 has fairly conceded that until the accused were arrested on 05.04.2002, there was no connecting evidence before him to have shown that there was any illicit relationship between the two. Meaning thereby the story of the two accused having illicit relations too, has all come to fore after they were arrested. PW-18 the minor child of the deceased during the course of her statement is found narrating that accused Shamim Ahmad Parray used to come to their house, now this part of the statement she is stating for the first time when examined in the Court. Whereas, in her statement recorded under Section 161 Cr.P.C there is not any whisper of it, that goes on to show that the prosecution in order to foresee, a case against the accused most probably have resorted to building a theory of the two accused having illicit relation in order to carve-out motive for commission of offence thereby rendering its whole case not only suspicious but suffering from grave infirmities.

31. In '***Raj Kumar Singh Vs. State of Rajasthan' AIR 2013 SC 3155***, the issue of suspicion and its appreciation came up for consideration before Hon'ble the supreme Court and it was held as under:

> *"17. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that 'may be' proved and 'will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason, that the mental distance between 'may be' and 'must be' is quite large and divides vague conjectures from sue conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between 'may be' true and 'must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between 'may be' true and 'must be' true, the court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that the reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense."*

32. So, once the evidence regarding complicity of accused No. 1 is found lacking then merely because the accused No. 2 was present in the house when the body of the deceased was first noticed by PW-1 would not lead to the presumption that she killed the deceased. This

is because the foundational facts linking her to the commission of offence stood not proved and suspicion howsoever grave cannot take place of proof in absence of legal evidence. It was urged that when PW-1 enquired from her as to where the deceased is, she is stated to have told him that the deceased was taken by Army personnel. Whereas, the fact remained that the body of the deceased; was inside the room. Assuming that accused-Gulshana Bano lied to the PW-1 regarding presence of deceased, the question would arise that whether on the strength of evidence available on record could she be held liable for killing of the deceased merely because she choose to lie before PW-1 regarding presence of deceased.

33. To this, answer has got to be in negative, because even if she chooses not to tender any explanation in her statement under Section 342 Cr.PC. Since, any explanation rendered by her is not a substantive piece of evidence rather it can be used only for appreciating the evidence led by prosecution to accept or reject it. When the prosecution case itself does not inspire confidence and suffers from grave infirmities then merely because accused Gulshana Bano has not chosen to offer any explanation about the manner in which the deceased died would not attract Section 106 of the Evidence Act. Her non- explanation if any cannot be used to fill up the gaps left by the prosecution witnesses in their depositions. Once the case of the prosecution is found in-sufficient to sustain charge against the accused, any inculpatory part of her statement cannot be made sole basis of her conviction, because the same does

not come within the purview of evidence in terms of section 3 of the Evidence Act. An adverse inference can be drawn against her only and only if the incriminating material stood fully established and to that any false explanation would act as additional material against her. She however, has a right to remain silent and she cannot be forced to become witness against herself. Hence the circumstances upon which the prosecution have been relying and had persuaded the court below to hold them guilty, those circumstances have not been proved beyond doubt.

34. Insofar as the existence of the two pits, one in the courtyard and another in the room is concerned, in this regard, there is not only the admission of the prosecution witnesses but even the version of defence witnesses. DW Mohammad Ibrahim Bhat, DW Mohammad Amin Parray and DW Nisar Ahmed Parray have been found stating that certain relatives of deceased were involved in militant activities and prior to the incident Army had raided his house so as to search for weapons and there the two pits were dug, however, nothing could be recovered. In this regard, the appellant Gulshana Bano though has not offered any explanation, however, she had stated to PW-1 that deceased had been taken by Army for questioning, such facts lend certain degree of probability that the two pits that have surfaced in the house of the deceased might have occurred because of search operation. In case the two accused wanted to bury the deceased, nothing prevented them from digging a pit which was fit

enough to accommodate the body of the deceased and it was not necessary for them to dug in two separate pits.

35. There is one more issue that requires consideration which is, though the deceased had met with the homicidal death and given the evidence against appellant Shamim Ahmed Parray being untrustworthy then could it be inferred that the co-accused had subjected the deceased to the assault and then to throttle him to death. Such inference is highly improbable given the nature of oral evidence on record. The injury on the back of the head of the deceased was lacerated wound however, medical expert nowhere has stated that this injury was the cause of death rather according to post-mortem report the death has happened due to throttling for which not an *iota* of evidence has been collected say finger impression, bruise marks over the back of the hand, toes or for that matter even marks of struggle if any. In absence of any such material on record it would be quite hazardous to hold both the appellants guilty of offence U/S 302/34 RPC with aid of Sec.106 Evidence Act on strength of available material and evidence.

36. For the foregoing reasons we regret our inability to uphold the judgment of the trial Court. Accordingly, while allowing both these appeals, the judgment of conviction and sentence passed by the trial Court is set aside. The appellants are acquitted of all the charges, since they are on bail, shall stand discharged of bail bonds.

37. For the reasons, the appeals filed by the appellants have been ***allowed,*** the reference for confirmation of the sentence is declined and Cr. Ref. No. 05/2014 is ***rejected.***

38. The record of the trial Court be returned.

(**Sanjay Parihar**)
Judge

(Sanjeev Kumar)
Judge

SRINAGAR:
05.06.2025
Shaista, PS

Whether the judgment is reportable: Yes/No.