GAHC010135382022

undefined

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/72/2022

ARUN TANTI
S/O. LT. DASARATH TANTI, VILL. SAKOMATO T.E PUCCA LINE, P.S. BISWANATH CHARIALI, DIST. BISWANATH, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

B E F O R E

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

HON'BLE MRS. JUSTICE YARENJUNGLA LONGKUMER

Advocate for the Appellant : Shri R. Sarma, Amicus Curiae

Advocates for the respondent : Ms. B. Bhuyan, Sr. Advocate & APP, Assam.

Date of hearing : 24.04.2025

Date of judgment : 29.04.2025

JUDGMENT & ORDER

(S.K. Medhi, J)

1. The instant appeal has been preferred from jail against a judgment and order dated 09.03.2022 passed by the Addl. Sessions Judge (FTC), Biswanath Chariali in Sessions Case No. 44/2019 registered under Section 302 of the IPC [corresponding to Section 103 of the BNS] with R.I. for life and a fine of Rs.5,000/-.

2. The incident is one of fratricide whereby the allegation is against the appellant of killing his own brother.

3. The criminal law was set into motion by lodging of an *Ejahar* on 30.10.2018 by one Bhabananda Tanti (PW-2), who is the brother of both the appellant and the deceased. He had narrated that on the previous day, i.e., 29.10.2018 at about 9 pm, there was a quarrel on some domestic matter which led to attack by the appellant on his brother in the quarters with an axe resulting in grievous injury whereby the deceased had died instantaneously. The said *Ejahar* was registered as Biswanath P.S. Case No. 266/2018 under Section 302 IPC [corresponding to Section 103 of the BNS] and investigation was done in which the statements of the relevant witnesses were recorded, the sketch map prepared, post-mortem done, and all other steps were taken leading to laying of the Charge Sheet. The charge was accordingly framed, which was explained to the appellant and on its denial, the trial had begun in which the

prosecution had adduced evidence through 10 Nos. of witnesses.

4. PW-1 is the mother of both the deceased and the appellant, who had deposed that the appellant and the deceased were staying in the Company's house while she was staying at the house of Bhabananda (PW-2) which was at a little distance. She got the information from her grandson, Biraj Tanti (PW-3), who had gone to the place of occurrence. She had deposed of the injury caused on the neck of the deceased by an axe. In her cross-examination, she had stated that the appellant and the deceased used to live together in a *pucca* house and had also clarified that she did not know who and how the deceased was killed and at that time, her grandson was not at the place of occurrence. Though he said that the appellant had killed the deceased, he did not witness the incident.

5. PW-2 is the informant, Bhabananda Tanti, who had deposed that he and his mother were residing in the *kutcha* house which was about 200 meters from the *pucca* house in which the appellant and the deceased were residing. He had stated that while going out to leave his sister to *Tangla*, he had received information through telephone regarding the incident and accordingly, had come to the place of occurrence. He had also deposed about an extrajudicial confession made by the appellant regarding his involvement. In his cross-examination, he had deposed that the son of the deceased used to stay with him and his mother and police had arrived before his arrival at the place of occurrence. With regard to the extrajudicial confession, a suggestion was given regarding contradiction of such statement made before I.O. which he had denied.

6. PW-3 is the son of the deceased, who was a minor at the time of the occurrence and even at the time of adducing evidence. He had deposed that he was not present at the time of the incident and when he had come in the morning, he learnt about the incident. In his cross-examination, he had clarified that he had gone to his grandmother's house in the previous evening and at that time there was no quarrel. However, when he had come back the next morning, he found the appellant brushing his teeth and thereafter, also found the body of the deceased inside the house.

7. PW-4 is the Chowkidar of the Line, who had also deposed about extrajudicial confession made by the appellant which was however made after the police had come. He also deposed that the appellant had produced an axe. In the cross-examination, he had stated that two families live in one quarter and Mohikanta Tanti (PW-5) lives in the adjacent part. The suggestion towards contradicting the deposition regarding extra-judicial confession as well as producing of the axe were however denied. He clarified that the extra-judicial confession was made before Bhabananda (PW-2), himself and other people.

8. PW-5 is a cousin of the parties, who deposed that one morning, the boys of the village assaulted the appellant whereupon a commotion had taken place and he learnt that the appellant had killed his younger brother (deceased). In his cross-examination, he had deposed that the appellant and the deceased used to live in the same house and he did not hear them quarrelling in the night and did not know who killed Keshab (deceased).

9. PW-6 is a resident of the locality, who had deposed of witnessing some gathering near the house of the accused and on reaching the place of occurrence, he learnt that the accused had killed his elder brother. He however deposed of not remembering who had informed him. In his cross-examination, he had stated that PW-5 lives in the other part of the house where the appellant and the deceased used to reside and did not know how the deceased had died.

10. PW-7 is a permanent worker of the Tea Estate, who had deposed of coming to know of the incident from a boy in the Office and thereafter coming to the place of occurrence and finding the body of the deceased lying inside the house and blood was oozing out. He is also a seizure witness regarding the axe and the seizure list was proved as Ext. 2. In his cross- examination, he however had clarified that he did not see from where the axe was seized.

11. PW-8 is the Sarkari Gaonburah, who had deposed that at around 7.30 am, he came to know from the VDP Secretary regarding the incident and accordingly went to the place of occurrence and found the body of the deceased lying inside the house and blood was oozing out. He is also a seizure witness so far as the axe is concerned. In his cross-examination, he had stated that before he had arrived there were 100/150 people who had already gathered and that the appellant and the deceased lived in the Quarters of the T.E. He had however clarified that while signing the seizure list, nothing was written on it.

12. PW-9 is the Executive Magistrate, who had done the inquest. He had deposed of noticing two cut injuries on the body of the deceased.

13. PW-10 is the Doctor, who had conducted the post-mortem on the deceased who had noted two incised wounds. In his cross-examination, he had stated that such injuries can be caused by sharp cutting weapon. The findings and opinion rendered by PW-10 are extracted herein below:

> "*There was one incise wound of size 1x .5 inches over left supra auricular area and another 2x.5 inches on intra auricular area. Both were in the left side of the scalp. Depth was up to the scalp bone.*
>
> *Another incise wound of size – 3x.5x.5 inches over left temporal occipital area.*
>
> *Brain was haemorrhage.*
>
> *Stomach congested, contained food matters.*
>
> *All the injuries were of ante mortem in nature.*
>
> *The time since death was within 12 hours.*
>
> *The death was due to cerebrovascular accident as a result of the injuries sustained, i.e., head injuries.*
>
> *Ext.3 is the post mortem report and Ext.3 (1) is his signature."*

14. PW-11 is the I.O., who had done the investigation. He had deposed that on 30.10.2018, the *Ejahar* was received and before that, a telephonic information was received from the VDP Secretary regarding the incident and that the villagers had caught the appellant and kept him confined. GD Entry No. 891 was accordingly registered and he had gone to the place of occurrence and took the appellant into custody and also seized the axe which was shown by the

appellant. He had deposed about the inquest made and had proved the *Ejahar* recording of statements, interrogation of the accused and also regarding prayer made for recording the confessional statement. He also deposed that after completion of the preliminary investigation, the Case Diary was handed over to the O/C and another Officer had submitted the charge sheet. In his cross-examination, he had stated that the GD Entry was recorded at 8.30 am and no blood stained cloth was seized and that the seized axe was not sent to fingerprint expert or the articles to FSL. He also stated of not noticing any blood on the axe.

15. After the said investigation, the Charge Sheet was laid and the incriminating materials were put to the appellant in his examination under Section 313 of the Cr.P.C. [corresponding to Section 351 of the BNSS] where he had denied the truthfulness and veracity of the evidence against him. It may be mentioned that against Q No. 4, the appellant had suggested a defence of alibi. Further, in Q No. 1, the appellant in support of such defence had stated that he was elsewhere and had come to the place of occurrence only to take his bicycle.

16. Based on the aforesaid materials and after hearing the parties, the learned Trial Court has passed the impugned judgment and order dated 09.03.2022 which is the subject matter of challenge in the present appeal.

17. We have heard Shri R. Sarma, learned Amicus Curiae for the appellant. We have also heard Ms. B. Bhuyan, learned Senior Advocate and Addl. Public Prosecutor, Assam assisted by Ms. R. Das, the learned counsel.

18. Shri Sarma, the learned Amicus Curie has submitted that admittedly the

present is a case where there is no eyewitness and the same hinges upon circumstantial evidence and therefore, it was incumbent upon the prosecution to have a continuous chain of circumstances leading to only one conclusion of the guilt of the appellant and none else. He has submitted that the circumstances in the instant case are not continuous and there is no credible evidence to connect the appellant with the offence in question.

19. By drawing the attention of this Court to the evidence on record, the learned Amicus Curiae has submitted that the PW-1, who is the mother of the parties had clearly stated that she got the information from her grandson who was examined as PW-3. She had also clarified that the appellant and the deceased used to live separately in the Company's house which is a *pucca* house and she does not know who and how the deceased was killed. She had also clarified that her grandson was not present at the place of occurrence at the relevant time. Regarding the PW-2, the informant, the learned Amicus Curiae has highlighted that he himself had got information about the incident through telephone and though he had talked about extrajudicial confession, such deposition is contradicted as no such statement was made by him before the police in his statement made under Section 161 of the Cr.P.C. [corresponding to Section 180 of the BNSS]

20. The learned Amicus Curiae has heavily criticized the manner in which the deposition of PW-3 was recorded. He has submitted that PW-3 was a minor and aged about 13/14 years at the time of occurrence and even at the time of deposition he was 14 years. There is nothing on record to suggest that any test was conducted to ascertain the ability of PW-3 to understand the implication of

the questions and the answers given by her. In any case he has submitted that PW-3 had clearly stated that he was not present at the place of occurrence during the relevant time and came to know about the same from other people. Regarding the aspect of his deposition in the cross-examination that when he had reached the place of occurrence in the morning he had found the appellant brushing his teeth and the deceased body inside the house, the learned Amicus Curiae has submitted that such version is wholly unbelievable in as much as the other materials on record would suggest that the matter was already reported to the police through a telephone call by the VDP Secretary namely Jatin Mahanand, as deposed by the I.O. as PW-11. Further, as per the PW-8 who is the Sarkari Gaonburah, at 7.30 am VDP Secretary Katiram Orang had informed him whereafter the police and other people had already reached the place of occurrence.

21. Regarding the evidence of PW-4, the learned Amicus Curiae has submitted that the aspect of extrajudicial confession appears to be made in front of the police and therefore hit by Sections 24 and 25 of the Indian Evidence Act [corresponding to Section 22 and 23 of the BSA] and would be inadmissible. As regards the production of the axe which has been stated by the PW-4, the learned Amicus Curiae has submitted that apart from contradiction, there are materials on record to show that no blood stain was found on the axe and the same was also not sent for any forensic examination regarding the fingerprints of the appellant.

22. With regard to the deposition of PW-5, who was a resident of the adjacent house, the learned Amicus Curiae had highlighted that in his cross-examination, they said PW-5 had deposed of not hearing any quarrel on the previous

evening. As regards the evidence of PW-6 and PW-7, the learned Amicus Curiae has submitted that they are simply hearsay witnesses and so far as PW-7 being a seizure witness is concerned he had clarified in his cross-examination that he did not see from where the axe was seized. As regards the deposition of the Sarkari Gaonburah as PW-8, the learned Amicus Curiae has submitted that it was at 7.30 am in the morning when he had stated to have learnt about the incident from the VDP Secretary Katiram Orang who however was not examined. Though the said PW-8 was a seizure witness he had clarified in his cross-examination that while signing, there was nothing written on the said paper. The other witnesses PW-9, PW-10, PW-11 are official witnesses.

23. As per PW-10, the Doctor who had conducted the post-mortem, the nature of the injuries matches with the use of a sharp cutting weapon and in the instant case the implication is the use of an axe. The learned Amicus Curiae has however submitted that it was incumbent upon the prosecution to prove beyond all reasonable doubt that it was the axe found in the residence of the appellant which was used and it was the appellant, who had used the said axe to cause the death of the deceased. The deposition of PW-11 has also been highlighted by the Amicus Curiae by pointing out that in the cross-examination the GD Entry was said to be recorded at 8.30 am which would bring a major inconsistency with the deposition of PW-8, the Sarkari Gaonburah, who had deposed that he came to know about the incident at 7.30 am from the VDP Secretary, namely, Katiram Orang. This also raises doubt regarding the version of PW-3, who had said of coming to the place of occurrence and found the appellant brushing his teeth and the body of the deceased inside the house. As regards the suggestion of a plea of alibi taken in the explanation given by the

appellant in his examination under Section 313 of the Cr.P.C. [corresponding to Section 351 of the BNSS] the learned Amicus Curiae has submitted that though defence witness has not been adduced, the said aspect cannot be ignored inasmuch as there is nothing on record to show that both the appellant and the deceased were together at the place of occurrence, namely, the Company's house where they used to normally reside. He has also submitted that in the response to Q No. 1 and Q No. 4, the appellant had stated that he was not present in the house on the fateful evening and was elsewhere and had only come in the morning to take his bicycle.

24. In support of his submission the learned Amicus Curiae has relied upon the following citations:

(i) Azgar Ali (MD.) & Ors. Vs. State of Assam [2016 (1) GLT 639];

(ii) Petlu Konwar & Anr. vs. State of Assam & Anr. [***2016 (3) GLT 358];***

(iii) Pradeep Kumar vs. State of Chhattisgarh [***(2023) 5 SCC 350***];

25. In the case of ***Azgar*** (supra), this Court had dealt with the aspect of circumstantial evidence in a criminal case wherein it has been reiterated that there has to be a complete chain of circumstances leading to the guilt of the accused.

26. The case of ***Petlu Konwar*** (supra) has been cited on three points,

namely, the testimony of a child witness, the relevancy of an examination under Section 313 of the Cr.P.C. [corresponding to Section 351 of the BNSS] and the requirement of the ingredients while a prosecution case rests on circumstantial evidence. For ready reference the relevant paragraphs are extracted herein below:

> *"25. It is established proposition of law that the evidence of a child witness cannot be rejected per se, but the evidence of child witness must be evaluated more carefully with closure scrutiny and circumspection because a child is susceptible to be influence and swayed by what others tell him and thus, he may fall prey to tutoring. On being convinced about the quality and reliability of the statements of a child witness, conviction can be based by accepting the statement of the child witness. Corroboration of a testimony of a child witness is not a rule but a measure of caution and prudence. In Suryanarayana vs. State of Karnataka, reported in (2001) 9 SCC 129, the Apex Court upheld the conviction on the basis of evidence of a sole eye witness, who was 4 (four) years at the time of incident and 6 (six) years at the time of her deposition as her evidence was found to be truthful and inspiring besides being corroborated in materials particulars."*

> *"50. The statement made by the accused under Section 313 Cr.P.C. can be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 Cr.P.C. cannot be made the sole basis of his conviction. Statement under Section 313 Cr.P.C. can either be relied on in whole or in part and it may be possible to rely on the inculpatory part of the statement of the accused if the exculpatory part is found to be false on the basis of the evidence laid by the prosecution. Though the statement of the accused under Section 313 Cr.P.C. is not a substantive piece of evidence, it can be used for appreciating evidence led by the prosecution to accept or reject it. However, it cannot be a substitute for the evidence of the prosecution. If the prosecution evidence does not inspire confidence to sustain the conviction of the accused, the inculpatory part of his statement under Section 313 Cr.P.C. cannot be made the sole basis for his conviction. It is*

obligatory on the part of the accused while being examined under Section 313 Cr.P.c., to furnish some explanation with regard to the incriminating circumstances associated with him, and the court must take not of such explanation even in a case of circumstantial evidence to decide whether or not the chain of circumstances is complete."

"*56. In every case based on circumstantial evidence, the question that needs to be determined is whether the circumstances relied upon by the prosecution are proved by reliable and cogent evidence and whether all the links in the chain of circumstances are complete so as to rule out the possibility of innocence of the accused. It has consistently been held that a conviction can be based solely on circumstantial evidence. The prosecution case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence put up by the accused. However, a false defence may be called into aid only to lend assurance to the court where various links in the chain of circumstantial evidence are complete in themselves. The fact so established should be consistent only with the hypothesis of the guilt of the accused. While appreciating the evidence of a witness, minor discrepancies on trivial matters which do not affect the core of the case of the prosecution must not prompt the court to reject the evidence in its entirety. Therefore, irrelevant details which do not in any way corrode the credibility of a witness should be ignored. The Court has to examine whether evidence read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence, more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether the earlier evaluation of the evidence is shaken, so as to render it unworthy of belief. Thus, the court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter, and shake the basic version of the prosecution witness. Where the case depends upon the conclusion drawn from circumstances, the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt."*

27. In the case of ***Pradeep Kumar*** (supra), the Hon'ble Supreme Court has

laid down that in a criminal case where two views are possible, the one which is in favour of the accused is to be adopted, the relevant observation being extracted herein below:

> "*It is important to note that the cardinal principles in the administration of criminal justice in cases where heavy reliance is placed on circumstantial evidence, is that where two views are possible, one pointing to the guilt of the accused and the other towards his innocence, the one which is favourable to the accused must be adopted. [Kali Ram v. State of H.P. (1973) 2 SCC 808].*"

28. The learned Amicus Curiae has accordingly submitted that the appeal is liable to be allowed by giving benefit of doubt to the appellant and he be released forthwith.

29. Strenuously opposing the appeal, Ms. B. Bhuyan, the learned Addl. Public Prosecutor, Assam has submitted that the judgment of conviction and sentence has been passed by taking into consideration all the relevant materials and the same does not require any interference. She has submitted that the evidence on record are sufficient to prove beyond all reasonable doubt the involvement of the appellant in the commission of the offence and accordingly the conviction and sentence has been rightly given by the learned Trial Court.

30. By referring to the evidence of PW-1, the learned Addl. Public Prosecutor has submitted that the said PW-1 had categorically stated that the appellant and the deceased used to live together in the Company's house while they had stayed separately in a *kutcha* house. She, accordingly submits that there is no dispute with the fact that both the appellant and the deceased were together on

the fateful evening. She has also drawn the attention of this Court to the deposition of PW-2, who is the informant and another son of PW-1, who is also the brother of both the appellant and the deceased. The PW-2 according to the learned Addl. Public Prosecutor supports the prosecution case and his evidence is consistent with the PW-1.

31. So far as PW-3 is concerned, the learned Addl. Public Prosecutor has submitted that the said PW-3, though had stated that he was not present at the place of occurrence during the relevant time, he had gone there in the morning when he had found the appellant brushing his teeth and the dead body of the deceased was inside the house. She had accordingly submitted that it was a clear case where the provisions of Section 106 of the Evidence Act [corresponding to Section 109 of the BSA] would come into play as the onus had shifted on the accused to explain the circumstances which he had failed to do. As regards the plea taken by the defence regarding the minority of the said PW-3, the learned Addl. Public Prosecutor has submitted that at the time of deposition, the PW-3 was sufficiently mature and could respond to the questions put to him in the dock.

32. The learned Addl. Public Prosecutor has also submitted that the official witnesses, more particularly, the evidence of PW-10, Doctor, who had conducted the post-mortem would show that the use of the murder weapon, i.e., an axe appears to have been proved as the nature of the injuries matches with use of such a weapon. She has submitted that when the weapon was itself produced by the appellant, the requirement of serological test may not arise. She has also highlighted that PW-2 and PW-4 had also deposed regarding confession made

before them by the appellant regarding his involvement.

33. In support of her submission, the learned Addl. Public Prosecutor has relied upon the following decisions.

(i) Trimukh Maroti Kirkan vs. State of Maharashtra [***(2006) 10 SCC 681];***

(ii) Shaikh Sattar vs. State of Maharashtra [***(2010) 8 SCC 430]***

34. The case of ***Trimukh Maroti*** (supra) has been relied for bringing home the aspect as to how circumstantial evidence is to be appreciated. In the said case, the aspect of the explanation to be given by an accused when there is allegation about an offence being committed inside a house wherein the deceased and the accused were together has also been dealt with. For ready reference, the relevant observations made by the Hon'ble Supreme Court are extracted herein below:

> *12. In the case in hand there is no eye-witness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence.*

14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecution 1944 AC 315 _ quoted with approval by Arijit Pasayat, J. in State of Punjab vs. Karnail Singh (2003) 11 SCC 271). 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. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

> *(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him."*

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

18. The question of burden of proof where some facts are within the personal knowledge of the accused was examined in State of West Bengal v. Mir Mohammad Omar & Ors. (2000) 8 SCC 382. …This Court took note of the provisions of Section 106 of the Evidence Act and laid down the

following principle in paras 31 to 34 of the reports :

> *"31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.*
>
> *32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.*
>
> *33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.*
>
> *34…*

21. In a case based on circumstantial evidence where no eye-witness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decisions of this Court...

> *22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes placed in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In Nika Ram v. State of Himachal Pradesh AIR 1972 SC 2077 it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with 'khokhri' and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In Ganeshlal v. State of Maharashtra (1992) 3 SCC 106 the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 Cr.P.C. The mere denial of the prosecution case coupled with absence of any explanation were held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. ...*

35. The case of ***Shaikh Sattar*** (supra) has been relied upon to oppose the submission made on behalf of the appellant regarding the plea of alibi. She has submitted that if such a plea is taken, it is the duty of the accused to duly prove the same by giving positive evidence and mere denial in his examination under Section 313 of the Cr.P.C. [corresponding to Section 351 of the BNS] will not be enough. She has submitted that no defence evidence was opted to be adduced by the appellant. For ready reference, the relevant observations are extracted herein below:

> *35. Undoubtedly, the burden of establishing the plea of alibi lay upon the appellant. The appellant herein has miserably failed to bring on record any facts or circumstances which would make the plea of his absence even*

probable, let alone, being proved beyond reasonable doubt. The plea of alibi had to be proved with absolute certainty so as to completely exclude the possibility of the presence of the appellant in the rented premises at the relevant time. When a plea of alibi is raised by an accused it is for the accused to establish the said plea by positive evidence which has not been led in the present case. We may also notice here at this stage the proposition of law laid down in the case of Gurpreet Singh Vs. State of Haryana, (2002) 8 SCC 18 as follows:

> *"This plea of alibi stands disbelieved by both the courts and since the plea of alibi is a question of fact and since both the courts concurrently found that fact against the appellant, the accused, this Court in our view, cannot on an appeal by special leave go behind the abovenoted concurrent finding of fact".*

36. The rival submissions have been duly considered and the materials, including the LCRs placed before this Court have been carefully examined.

37. Admittedly, in the instant case, there is no eyewitness and the same hinges upon circumstantial evidence and therefore, it would be necessary for us to look into the materials on record as to whether those would constitute a complete chain leading to the guilt of the appellant and none else. In this connection, it would be beneficial to the reiteration of the law by the Hon'ble Supreme Court in the case of ***Ramanand @ Nandlal Bharti vs. State of Uttar Pradesh*** reported in ***AIR 2022 SC 5273.*** In the said judgment, the aforesaid aspect has been beautifully explained in the opening paragraph which reads as follows:

"*Mark Twain, the great American writer and philosopher, once said:*

> *It is like this, take a word, split it up into letters, the letters, may individually mean nothing but when they are combined they will form a word pregnant with meaning. That is the way how you have to consider the circumstantial evidence. You have to take all the*

circumstances together and judge for yourself whether the prosecution have established their case."

Regarding the appreciation of circumstantial evidence and the principles of law governing the field, the following has been laid down.

"*46. Although there can be no straight jacket formula for appreciation of circumstantial evidence, yet to convict an accused on the basis of circumstantial evidence, the Court must follow certain tests which are broadly as follows:*

1. Circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

2. Those circumstances must be of a definite tendency unerringly pointing towards guilt of the accused and must be conclusive in nature;

3. The circumstances, if taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused but should be inconsistent with his innocence. In other words, the circumstances should exclude every possible hypothesis except the one to be proved.

47. There cannot be any dispute to the fact that the case on hand is one of the circumstantial evidence as there was no eye witness of the occurrence. It is settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt the complete chain of events and circumstances which definitely points towards the involvement and guilty of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eye witness in the case. It is also equally true that an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of the expected principles in that regard.

50. 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."

38. PW-1, who is the mother of the deceased as well as the appellant had clearly stated that she got the information from PW-3. In her cross-examination she had clarified that she did not know who had killed her son and how he was killed and she had also stated that her grandson from whom the information was received was not at the place of occurrence during the crucial time.

39. PW-2, who is the brother of the parties had also clarified that their residence was at a distance of 200 metres and they were staying in a *kutcha* house whereas the appellant and the deceased were staying in the Company's house and he had himself got information of the incident through telephone while he was proceeding to *Tangla*. The PW-2 had however deposed of an extrajudicial confession. It is however noted that in his cross-examination there was a contradiction inasmuch as he did not state about such extrajudicial confession before the police in his statement under Section 161 of the Cr.P.C [corresponding to Section 180 of the BNSS]. Further, it is clear from his evidence that when he had reached the place about 100 people had assembled there and the police had also arrived before his arrival. It becomes apparent that extrajudicial confession, if any, was done in front of the police and

therefore, hit by Section 25 r/w Section 24 of Indian Evidence Act [corresponding to Section 23 and 22 of the BSA].

40. PW-3 is the son of the deceased who was a minor boy of 13/14 years at the time of occurrence and even at the time of deposition he was aged about 14 years. The deposition recorded does not indicate that any procedure was undertaken to assess his ability to answer the questions and the implications of his response. Be that as it may, he had deposed that he was not present at the place of occurrence during the time of the incident and had come to know of the same from other people. In his cross-examination he had clearly stated that he had gone to his grandmother's house in the evening and at that time there was no quarrel. He had come to the place of occurrence on the next morning when he had allegedly seen the appellant brushing his teeth and the body of his father was lying inside the house. From the same deposition, it is however not certain as to the presence of the appellant and the deceased in the house together after PW-3 had left the house for his grandmother's house in the previous evening. The version of PW-3 is also required to be tested with the deposition of the other witnesses inasmuch as while the PW-3 had deposed in his cross-examination of coming to the house of the appellant and the deceased in the morning, it is on record from the deposition of PW-8, who is the Sarkari Gaonburah that at 7.30 am he had come to know about the incident from the VDP Secretary, Katiram Orang. We have also noted that the I.O. of the case who had deposed that PW-11 had also proved the GD Entry regarding the case which was recorded at 8.30 am. It therefore appears that before the PW-3 had reached the place of occurrence, there were other people who had already gathered inasmuch as at 7.30 am itself, the information was made known to the

Sarkari Gaonburah, who would be the person who would normally reach the place of occurrence in case of such an incident.

41. PW-5, Mohikanta Tanti is a crucial witness in this case as he lived in another part of the same quarter which is not disputed. In this regard, apart from his deposition, PW-6 has also stated the same and the said fact is also supported by the sketch map which was proved as Ext.4. The said PW-5 had disclosed in his cross examination that he did not hear any quarrel between the appellant and the deceased on the previous evening.

42. As regards the aspect of extrajudicial confession, we have noticed that so far as the PW-4, who is the other witness who had deposed regarding extrajudicial confession, it clearly appears that such extrajudicial confession was made in the presence of the police. In this regard it would be relevant to refer to the provisions of the Indian Evidence Act, namely, Section 24 and 25 [corresponding to Section 22 and 23 of the BSA] regarding such confession. While under Section 25 [corresponding to Section 23 of the BSA] such confession made before the police is not admissible or relevant even under Section 24 [corresponding to Section 22 of the BSA], a caveat is laid down that confession would not be relevant if it is made under threat, promise or inducement. In the instant case, the evidence on record including the evidence of the PW-11, who is the I.O. would show that the appellant was assaulted by the public and after his arrest he was produced before the Doctor who had reported of injuries sustained by him. Therefore, irrespective of the presence of the police in making the extrajudicial confession, the same would otherwise be irrelevant as it would be hit by Section 24 of the Indian Evidence Act

[corresponding to Section 22 of the BSA].

43. As regards the aspect of producing the alleged murder weapon which is the axe by the appellant, we have noticed that there is no separate memo recorded regarding the discovery of the axe by the police on being shown by the accused. Even if such memo is held to be not mandatory, there is nothing to show that it was the axe which was found in the house of the appellant which was used as there was no forensic test done. The I.O. who was examined as PW-11 admitted that the axe which was seized did not contain any bloodstains and in any case, neither any serological test nor any test was done to match the fingerprints on the axe which could have led to some credence to the prosecution case.

44. We have also noticed that there are inconsistencies in the prosecution case and vital witnesses have not been examined. As noted above, the Sarkari Gaonburah who was examined as PW-8 had stated that he got to know about the incident from the VDP Secretary, one Katiram Orang at 7.30 am. On the other hand, the I.O. as PW-11 had stated that it was VDP Secretary, Jatin Mahanand, who had informed the police station over phone regarding the incident for which GD Entry 891 was recorded on 30.10.2018. Apart from the aforesaid inconsistency, neither Katiram Orang nor Jatin Mahanand were examined. Further, the GD Entry was also not proved and even in the deposition there is no mention regarding the time of recording such GDE.

45. With regard to the defence taken on the plea of alibi, we are of the view that mere indication in the examination under Section 313 Cr.P.C.

[corresponding to Section 351 of the BNSS] of a defence of alibi would not be enough and such a plea if taken has to be substantiated by positive evidence to be adduced either by the accused himself or through other defence witnesses which was not done. However having said that it has to be seen as to whether the prosecution was successful in making out a case beyond all reasonable doubt regarding the presence of the appellant with the deceased in the house on the fateful evening. In this connection, it would be apposite to refer to the observation made in this regard by the Hon'ble Supreme Court in the case of ***Shaikh Sattar*** (supra) which is as follows:

> "*36. But it is also correct that, even though, the plea of alibi of the appellant is not established, it was for the prosecution to prove the case against the appellant. To this extent, the submission of the learned counsel for the appellant was correct. The failure of the plea of alibi would not necessarily lead to the success of the prosecution case which has to be independently proved by the prosecution beyond reasonable doubt. Being aware of the aforesaid principle of law, trial court as also the High Court examined the circumstantial evidence to exclude the possibility of the innocence of the appellant.*"

46. To examine the said aspect, the evidence of the relevant witness, namely, the PW-3 and PW-5 are to be noted. While PW-3, who is the son of the deceased had stated that while he had come to the grandmother's house in the evening, there was no quarrel between the parties and thereafter, he had alleged to have gone back to the place of occurrence in the next morning, at the same time PW-5, who is the nearest person having his house in one part of the house of the appellant and the deceased had stated that he did not hear any quarrel. There is no positive evidence that on the said evening the appellant and the deceased were there together when the occurrence had taken place. In

view of such evidence it would not be prudent to assume that the appellant was with the deceased at the time of occurrence. The aspect that PW-3 found the appellant brushing his teeth while the dead body of his father was found inside the house itself appears to be contradictory with the other evidence which has been discussed above in details.

47. The cases relied upon regarding circumstantial evidence has clearly laid down that the chain of circumstances has to be complete and in the instant case the said chain does not appear

to be complete. Further in the case of ***Pradeep*** (Supra), it is laid down that when two views are possible, the view which is in favour of the accused-appellant is to be adopted.

48. While we are in agreement with the proposition advanced by the learned Addl. Public Prosecutor while relying upon the case of ***Trimukh Maroti*** (supra) as well as the case of ***Shaikh Sattar*** (supra) with regard to the plea of alibi we are of the view that the principles of those cases would not be applicable in the facts and circumstances of the present case.

49. It appears that the impugned conviction is based more on suspicion than on strict legal proof. In the case of ***Sujit Biswas Vs. State of Assam*** reported *in* ***(2013) 12 SCC 406,*** it has been laid down that suspicion cannot take the place of legal proof. For ready reference, the relevant observation of the Hon'ble Supreme Court is extracted herein below.

> *"13. 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 something that `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 sure 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 mere 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 a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense."

50. In view of the aforesaid facts and circumstances, we are of the considered opinion that the materials in this case would not be sufficient to come to a conclusion of guilt and that the same has been proved beyond all reasonable doubt. We are of the opinion that the benefit of doubt is to be given to the appellant.

51. Accordingly, we set-aside the impugned judgment and order dated

09.03.2022 passed by the Addl. Sessions Judge (FTC), Biswanath Chariali in Sessions Case No. 44/2019 convicting the appellant under Section 302 of the Indian Penal Code [corresponding to Section 103 of the BNS] and acquit the appellant. The appellant is accordingly directed to be released forthwith unless he is wanted in any other case.

52. Send back the LCRs.

53. For the valuable assistance rendered by Shri R. Sarma, the learned Amicus Curiae, we record our appreciation and he would be entitled to the prescribed fee.

JUDGE **JUDGE**

Comparing Assistant