



THE GAUHATI HIGH COURT
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)
PRINCIPAL SEAT AT GUWAHATI
Criminal Appeal (J) No. 20/2021

Arun Tanti,
S/O Late Bidya Tanti,
R/O No.2 Baliyan Village,
North Lakhimpur, Assam.

.....Appellant

-Versus-

The State of Assam,
Represented by P.P., Assam.

.....Respondent

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
HON'BLE MR. JUSTICE ROBIN PHUKAN

APPEARANCE:-

For the Appellant : Mr. B. Prasad, Amicus Curiae.

For the Respondent : Ms. B. Bhuyan, Sr. Counsel and
Addl. Public Prosecutor, Assam,
Ms. R. Das

Date of Hearing : 19.07.2024

Date of Judgment : 01.08.2024

JUDGMENT AND ORDER (CAV)

(R. Phukan, J)

Heard Mr. B. Prasad, learned Amicus Curiae for the accused/appellant and Ms. B. Bhuyan, learned Senior Counsel & Additional Public Prosecutor, assisted by Ms. R. Das, learned Counsel for the respondent, State of Assam.

2. This appeal is preferred by the accused/appellant, namely, Shri Arun Tanti, from the District Jail, North Lakhimpur, challenging the correctness or otherwise of the judgment, dated 12.03.2020, and order of sentence, dated 16.03.2020, passed by the learned Sessions Judge, Lakhimpur, North Lakhimpur in Sessions Case No. 62(NL)/2017.

3. It is to be noted here that vide impugned judgment dated 12.03.2020, the learned Sessions Judge, Lakhimpur, North Lakhimpur had convicted the appellant under Section 302 IPC and vide impugned order dated 16.03.2020, sentenced him to suffer imprisonment for life and to pay a fine of Rs. 1,000/-, and in default of payment of fine, to suffer rigorous imprisonment for another two months.

4. The background facts, leading to filing of the present appeal, are briefly stated as under:-

"The accused/appellant, namely, Shri Arun Tanti is an inhabitant of No. 2 Balijan Gaon, under North Lakhimpur P.S. in the district of Lakhimpur. He had a wife and two daughters and one son and his elder daughter was already married off and she lived with her husband in his house and his younger daughter lived with him and his son resides in the house of his father-in-law as '*Gharjamai*'. In the last Magh Bihu, the accused/appellant came to the house of his younger brother, namely, Shri Monohar Tanti, who is the informant of this case and was examined by the prosecution as P.W.1, and reported that his wife Sumoti Tanti had passed away. Thereafter, the informant (P.W.1), along with other villagers, rushed to the house of the accused Shri Arun Tanti and found the dead body of his wife Sumoti Tanti, lying on the ground and blood was oozing out from the body and also found one wooden lathi lying behind the dead body. He also found the accused/appellant in a drunken condition and he could not speak. On earlier occasion also the accused/appellant frequently had picked up quarrel with his deceased wife, and six months back, he had also set fire on her hand and the local people are also aware of the same, and therefore, he suspected that last night the accused/appellant had assaulted his wife to death with a stick. Then the informant had lodged one FIR (Ext.1) with the In-Charge, Lilabari Police Out Post.

On receipt of the FIR, (Ext.1), to this effect, from the informant Monohar Tanti (P.W.1), on 14.01.2017, the In-

Charge, Lilabari Police Out Post recorded a G.D. Entry, being Lilabari O.P. G.D. Entry No. 204, dated 14.01.2017, and forwarded the same to the Officer In-Charge, North Lakhimpur P.S. for registering a case, and he had taken up investigation of the case. Upon the said FIR, the Officer In-Charge, North Lakhimpur P.S. registered a case being North Lakhimpur P.S. Case No. 56/2017, under Section 302 IPC and endorsed S.I. Lintu Borah, I/C, Lilabari Police Out Post to investigate the case.

Accordingly, the Investigating Officer (P.W.6) had visited the place of occurrence, examined the witnesses, drew a sketch map, (Ext.6), of the place of occurrence and held inquest on the dead body of the deceased and prepared the inquest report, (Ext.4), and arrested the accused, Shri Arun Tanti and forwarded him to the Court and sent the dead body for post-mortem examination at North Lakhimpur Civil Hospital and thereafter, collected the report, (Ext.2), and on completion of investigation, and having found a prima facie case well established against the accused/appellant, the I.O. (P.W.6) laid charge-sheet, being charge-sheet No. 115/2017, dated 31.03.2017, against the accused/appellant, before the learned Chief Judicial Magistrate, Lakhimpur, North Lakhimpur, to stand trial under Section 302 IPC. Thereafter, the learned Chief Judicial Magistrate, Lakhimpur, North Lakhimpur, complied with the provision of Section 207 IPC and thereafter, vide order dated 23.05.2017, committed the case to the Court of learned

Sessions Judge, Lakhimpur, North Lakhimpur, being the offence under Section 302 IPC is exclusively triable by the Court of Sessions.

On production of the accused/appellant before the learned Sessions Judge, Lakhimpur, North Lakhimpur, the learned Sessions Judge, vide order dated 10.07.2017, after hearing learned Advocates of both sides and also considering the materials on record, had framed charge against the accused/appellant, Shri Arun Tanti, under Section 302 IPC and on being read and explained over the charge to the accused/appellant, he pleaded not guilty and claimed to be tried.

The prosecution side had examined as many as six witnesses including the Doctor, who had conducted post-mortem examination and also the I.O. who had carried out the investigation of the case. The learned trial court had also examined the younger daughter of the deceased as well as of the accused/appellant, as court witness. After closing the prosecution evidence, the learned trial Court had examined the accused/appellant, under Section 313 Cr.P.C. Thereafter, hearing arguments of learned Advocates of both the parties, the learned trial Court found the charge under Section 302 IPC established against the accused and accordingly, convicted him under Section 302 IPC and sentenced him to suffer

imprisonment for life and also to pay a fine of Rs. 1,000/-, with default stipulation.”

5. Being highly aggrieved, the accused/appellant has approached this Court from District Jail, North Lakhimpur by filing an application stating that he is not satisfied with the judgment and order of sentence, so handed down by the learned trial Court. Then, admitting the appeal, this Court was pleased to appoint Mr. B. Prasad, learned counsel as Amicus Curiae to assist this Court in disposing of this appeal.

6. Mr. Prasad, learned Amicus Curiae for the accused/appellant submits that there is no direct evidence against the accused/appellant and that the entire prosecution case rests upon the circumstantial evidence. Referring to a decision of Hon'ble Supreme Court in **Sharad Birdhichand Sarda Vs. State of Maharashtra**, reported in **(1984) 4 SCC 116**, and also to another decision of Hon'ble Supreme Court in **Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra**, reported in **(1973) 2 SCC 793**, Mr. Prasad submits that the prosecution had failed to prove all the circumstances conclusively to establish the guilt of the accused, which the prosecution side had failed to establish. Further, Mr. Prasad, referring to the impugned judgment and order of sentence submits that the learned trial Court had mainly relied upon following circumstances to record conviction of the accused/appellant:-

- (i) that, the deceased and the accused/appellant were last seen together in his house, and
- (ii) that, the accused/appellant had failed to offer any explanation under Section 106, Indian Evidence Act, 1872;
- (iii) that, he had given evasive reply in his examination under Section 313(1)(b) Cr.P.C.,

6.1. But, the aforesaid circumstances, according to Mr. Prasad, had failed to complete the chain of circumstances, which are required to be established beyond all reasonable doubt, by the prosecution side to base a conviction. Mr. Prasad also submits that there is no direct evidence to show that the deceased and the accused/appellant were living in his house on the fateful night of occurrence, and that though one stick was recovered and seized by the I.O., yet the same was not sent for forensic examination at the Forensic Science laboratory (FSL), so as to establish usage of the same in committing the crime. Mr. Prasad further submits that the Doctor, who had conducted autopsy on the dead body of the deceased, had found no mark of burn injury on her person as alleged in the FIR (Ext.1) by the informant and on such count the same cannot be relied upon, and as the prosecution side had failed to establish the circumstances so relied upon by the learned trial court beyond reasonable doubt, the accused/appellant, according to Mr. Prasad, is entitled to the benefit of the same and therefore, Mr. Prasad has contended to extend the benefit of doubt to the accused/appellant.

7. Per contra, Ms. B. Bhuyan, learned Senior Counsel & Additional Public Prosecutor for the state respondent, has supported the impugned judgment and order of sentence, so passed by the learned trial Court. According to Ms. Bhuyan, the occurrence took place within the four corners of the house, where the accused/appellant and the deceased were living, and since the occurrence took place within the four corners of the house, the prosecution is to establish only those circumstances which it can. And as in the instant case, living in the four corners of the house by the accused/appellant and his deceased wife, at the time of occurrence has been established by the prosecution side by adducing cogent evidence, the accused/appellant had owed an explanation in view of Section 106 of the Evidence Act. In support of her contention Ms. Bhuyan has referred two decision of Hon'ble Supreme Court in **Trimukh Maroti Kirkan Vs. State of Maharashtra**, reported in **2007 Criminal Law Journal, page 20**, and also in **Wazir Khan Vs. State of Uttarakhand**, reported in **(2023) 8 SCC 597**. Taking this Court through the examination of the accused/appellant under Section 313, Cr.P.C., Ms. Bhuyan submits that the accused/appellant had given an evasive reply and failed to explain under what circumstances his wife suffered the injuries, which were homicidal in nature, in view of the medical evidence. Ms. Bhuyan further submits that the accused/appellant had also taken the plea of alibi but he had failed to establish the same by adducing any evidence. Under such circumstances, Ms. Bhuyan submits that the learned trial Court had rightly arrived at the finding of guilt of the accused/appellant and

that he is responsible for the death of his wife and as such the impugned judgment and order warrants no interference of this court and therefore, it is contended to dismiss the appeal.

8. We have given a thoughtful consideration to the submissions of learned Advocates of both the parties and also gone through the impugned judgment and order of conviction and sentence and also gone through the record of the learned trial Court and also gone through the decisions referred by learned Advocates of both the parties.

9. It appears from the record of the learned trial court that the prosecution side had examined as many as six witnesses and also exhibited as many as six documents, the FIR as Ext.1, the post-mortem examination report as Ext.2, the seizure list as Ext.3, the inquest report as Ext.4, the charge-sheet as Ext.5 and the sketch map of the place of occurrence as Ext.6. The prosecution side had also examined the informant, Shri Monohar Tanti as P.W.1, Shri Jadav Tanti as P.W.2, Shri Rajesh Telenga as P.W.3, Shri Nabin Horo as P.W.4, Dr. Ram Prasad Pawe, Medical Officer of North Lakhimpur Civil Hospital as P.W. 5 and the I.O. Inspector Lintu Borah as P.W.6. It also appears that the learned trial Court had examined one Smt. Roma Tanti, daughter of the deceased as well as of the accused/appellant, as C.W.1.

10. The evidence of P.W.1 (the informant) reveals that the occurrence took place on the last Magh Bihu. Though, he had not stated about the date and time of occurrence, yet the FIR (Ext.1),

lodged by him reveals that it took place on 13.01.2017, the day before lodging of the FIR on 14.01.2017, and it also appears that it took place during night hours. The evidence of P.W.3, Shri Rajesh Telenga reveals that the occurrence took place on the night of Magh Bihu and that he heard hue and cry towards the house of the accused/appellant, at about 10/11 p.m. It is to be noted here that P.W.3 is the neighbor of the deceased as well as of the accused/appellant. The evidence of P.W.4 Shri Nabin Horo also indicates that the occurrence took place about a year back, on one night, in the house of the accused/appellant, Shri Arun Tanti. The evidence of P.W.5, the Medical Officer, who had conducted autopsy on the dead body of the deceased, also reveals that he had conducted the autopsy on 14.01.2017, at about 10 a.m. However, he had not indicated in his report (Ext.2) the time since death of the deceased till the time of conducting the autopsy on the dead body. But, on examination of the abdomen, he found undigested food materials in the stomach and semi-digested food materials in the small intestine and digested food materials in the large intestine. So, what can be derived from the above mentioned piece of evidence is that the deceased suffered demise after sometime of taking dinner as un-digested food particles were found in the intestine. The evidence of C.W.1, the daughter of the deceased also indicates that the occurrence took place at night in her house. However, she was not present in her house on that night. Thus, it appears from the evidence of the prosecution witnesses, especially from the FIR (Ext.1) that the occurrence took place on the night of 13.01.2017, in the

house of the accused/appellant. It is to be noted here that the accused/appellant had not disputed the date, time and place of occurrence.

11. Further, it appears from the evidence on record that in the occurrence, that took place on 13.01.2017, at night, Sumoti Tanti suffered demise. Now, let it be seen, how Sumoti Tanti, the wife of the accused/appellant suffered demise and whether it was accidental, or suicidal or homicidal in nature. In this regard, evidence of the P.W.5, the Medical Officer, who had conducted autopsy on the dead body of the deceased, is material and relevant.

12. The prosecution side had examined Dr. Ram Prasad Pawe, Medical and Health Officer-1, North Lakhimpur Civil Hospital, who had conducted autopsy on the dead body of the deceased, as P.W.5. His evidence reveals that on 14.01.2017, at about 10 a.m., he conducted autopsy on the dead body of Sumoti Tanti, aged about 40 years, wife of Shri Arun Tanti of No. 2 Baliyan village, under North Lakhimpur P.S., on being produced and identified by UBC 603, Shri Ashok Kumar Shah, and in presence of Shri Nobin Horo, Shri Monohar Tanti, relatives of the deceased, and he found as under:

I. EXTERNAL APPEARANCE:

1. Condition of subject stout emaciated, decomposed etc. An average built female non decomposed dead body with rigor mortise present in limbs.

2. Wounds-position and character: Lacerated wound in right molar region 5 x 4 x 3 cm². Lacerated wound in forehead left side 8 x 5 x 4 cm².

3. Bruise-position, size and nature: Nil.

4. Mark of ligature on neck dissection etc.: Nil.

II. CRANIUM AND SPINAL CANAL:

1. Scalp, skull and vertebrae: Fractured skull left forehead.

2. Membrane: Ruptured.

3. Brain and spinal cord: Brain ruptured.

III. THORAX:

1. Wallis ribs and cartilages: Present interior wall of thorax at mid portion.

2. Pleurae: Ruptured.

3. Larynx and tracheae: Healthy.

4. Right and Left Lung: Ruptured.

5. Pericardium: Healthy.

6. Heart: Healthy.

7. Vessels: Healthy.

IV. ABDOMEN:

1. Walls: Healthy.

2. Peritoneum: Healthy.

3. Mouth, pharynx and oesophagus: Healthy.

4. Stomach and its contents: Healthy with undigested food materials.
5. Small intestine and its contents: Healthy with semi-digested food materials.
6. Large intestine and its contents: Healthy with digested food materials.
7. Liver: Healthy.
8. Spleen: Healthy.
9. Kidneys: Healthy.
10. Bladder: Healthy.
11. Organs of generation, external and internal: Healthy.

V. MUSCLES, BONES AND JOINTS:

1. Injury: Nil.
2. Disease or deformity: Nil.
3. Fracture: Fractured left wrist joint, fractured right tibia and fibula mid 3rd and fractured femur left side upper 3rd.
4. Dislocation: Fractured sternum upper 3rd, Fractured right side rib 3rd, 4th, 5th, 6th and 7th rib and fractured left side rib 3rd, 4th and 5th.

MORE DETAILED DESCRIPTION OF INJURY OR DISEASE:

An average built female non decomposed dead body with rigor mortis present in limbs. Lacerated wound in right molar region and forehead as described. Fractured left wrist joint, fractured right tibia and fibula mid 3rd, fractured left femur upper 3rd, fractured sternum

upper 3rd, fractured right side rib 3rd, 4th, 5th, 6th and 7th rib and fractured left side rib 3rd, 4th and 5th rib. Fractured skull at forehead left side with ruptured meninges and brain.

OPINION:

Upon the aforementioned finding, P.W.5 had opined that the cause of death was due to cardio respiratory failure, due to head and chest injury, due to trauma which was homicidal in nature.

13. Ext.2 is the post mortem examination report; Ext.2 (1) is also consistent with his evidence. It is elicited in his cross-examination that in his report he did not mention about the nature of weapon used in committing the assault. Except this nothing tangible could be elicited in his cross-examination. Thus, we find that the cause of death of the deceased Sumoti Tanti was due to cardio respiratory failure, due to head and chest injury, due to trauma, which was homicidal in nature. Notably, the factum of homicidal death of the deceased was not disputed by the accused/appellant.

14. It also appears that the I.O., before sending the dead body of the deceased for autopsy, had conducted inquest on the dead body of the deceased and prepared a report, which the prosecution side had exhibited as Ext.4. A perusal of the Ext.4 indicates that the I.O. had found injury mark over her mouth, neck, hand, chest and to some extent, this inquest report also lent credence to the evidence of the P.W.5. It is to be noted here that the cause of death of the deceased had not been disputed by the accused/appellant and Ext.2 and the evidence of the doctor (P.W.5) clearly indicate that the death

of the deceased Sumoti Tanti was homicidal in nature. Now, what is left to be seen is who caused the aforesaid injuries.

15. It is to be noted here that there is no direct evidence to show as to who had caused the injuries sustained by the deceased on her person. But, it appears from the evidence of the prosecution witnesses and also from the evidence of the court witness, (C.W.1), that the deceased and the accused/appellant were husband and wife and at the relevant point of time, they were living in the house of the accused/appellant, where the occurrence took place.

16. The evidence of P.W.1 reveals that the accused appellant is his elder brother and he lived separately at a distance of one km from his house and that the family of the accused/appellant, Shri Arun Tanti, comprises of his wife Sumoti Tanti and he has two daughters, the elder one is already married off and living in the house of her husband and the younger one was with him and he had a son who used to live as 'Gharjamai' in the house of his father-in-law. His evidence also reveals that he lived separately, at a distance of about one km from that of the house of the accused. And in the morning of last Magh Bihu, Arun Tanti, who happened to be his elder brother, came to his house and informed him that his wife Sumoti Tanti had died. Thereafter, he (P.W.1), along with neighbours rushed to the house of the accused/appellant and found the deceased lying on the ground and blood was oozing out of her body and he noticed injuries over the whole body of the deceased and he also found one '*lathi*', being stained with blood, lying nearby and he also found the

accused/appellant in drunken condition and was not in a position to speak and thereafter, he had lodged the FIR, (Ext.1), with the police station and according to him, as there was no other person in the house, so the accused/appellant, might have committed the offence. Admittedly, this witness had not seen the actual occurrence. And nothing tangible could also be elicited in his cross-examination to discredit his evidence.

17. P.W.2, Shri Jadav Tanti is the son of P.W.1. Close on the heels with P.W.1, this witness also testified that on the previous day of Magh Bihu, Arun Tanti came to his house and stated that his wife Sumoti Tanti passed away, and then he, along with his father, and some other persons, rushed to the house of Arun Tanti, and saw the dead body of the deceased lying in the room and he came to know that on the previous night, the occurrence took place. This witness was not cross-examined by the accused/appellant. And it appears that he also lent corroboration to the version of the P.W.1. In re-examination by the prosecution side, he stated that the accused/appellant Arun Tanti and his wife Sumoti Tanti were living in the house alone and except him; no other person was there in his house.

18. P.W.3 is Shri Rajesh Telenga, is a neighbor of the accused /appellant. His evidence reveals that the accused/appellant is a habitual drunkard. His evidence also reveals that wife of the accused/appellant, Sumoti Tanti, had passed away and that the occurrence took place one year back, on the night of Magh Bihu. His

evidence also reveals that on the night of occurrence, at about 10/11 p.m., he heard hue and cry in the house of the accused/appellant, and on the following morning, one Nabin Horo, whose house is situated near the house of the accused/appellant, informed him over phone that some untoward incident had happened in the house of Arun Tanti and called him to his house. Then with some other persons, he went to the house of the accused/appellant and found the dead body of the deceased Sumoti Tanti lying in the house and then the incident was reported at Lilabari Police Out Post. In re-examination, he stated that he had not gone to see the injuries on the person of the deceased Sumoti Tanti as he becomes nervous seeing injuries. The accused/appellant had cross-examined this witness, but, probative value of his evidence could not be demolished.

19. P.W.4 is Shri Nabin Horo and he also dittoed the same fact like P.W.3. However, P.W.4 had noticed some injuries over the neck and legs of the deceased. It is elicited in his cross-examination that he had not stated before police about the injuries he had seen on the person of the deceased. However, in re-examination, he stated that on the night of the occurrence, the accused/appellant and his wife Sumoti Tanti were the only persons in their house. It is also elicited that he had noticed bleeding injuries over the legs and stomach of the deceased and also had seen one lathi, lying by the side of the dead body, being smeared with blood.

20. C.W.1, Smt. Roma Tanti, is the younger daughter of the deceased and of the accused/appellant. Her evidence reveals that on the night of the occurrence, her father Arun Tanti and her mother Sumoti Tanti were the only persons living in the house of her father Arun Tanti. Her evidence also reveals that on that night, she was living in the house of her grandfather, Shri Ramesh Tanti, whose house is situated about one kilometer away from the house of her father Arun Tanti. On the following morning of the night of occurrence, she and her grandfather came to know that her mother had passed away. Then, she proceeded to the house of her father and found the dead body of her mother Sumoti Tanti, lying on the ground and also found bleeding injuries over the head, face and left hand of her deceased mother. She had also noticed one stick lying near the fencing of the house with blood stain over the same. It is elicited in her cross-examination that Sumoti Tanti used to take alcohol often and under the influence of alcohol, her father Arun Tanti and mother Sumoti Tanti used to pick up quarrel and due to drunkenness of her father, the occurrence might have taken place on the fateful night.

21. Thus, from the evidence of P.W.1, P.W.2, and P.W.4 and also from the evidence of C.W.1, it becomes apparent that on the night of the occurrence, the accused/appellant Arun Tanti and the deceased Sumoti Tanti were in the house and no other family members were present, as they were living in different places. The factum of death of the deceased was first reported by the accused/appellant himself to the informant (P.W.1) and also to P.W.4, who, thereafter, went to

the house of the accused/appellant Arun Tanti and found his wife lying dead on the ground with injuries on her person and also found one stick, being smeared with blood, lying nearby the dead body of the deceased.

22. Another circumstance, which also stands established from the evidence of P.W.3, is that on the night of Magh Bihu, at about 10/11 p.m., he heard hue and cry towards the house of the accused/appellant and in the following morning, he came to know about the death of the deceased. It also becomes apparent that the accused/appellant is a habitual drunkard and P.W.1 had found him in drunken condition and he was not in a position to speak, while the accused/appellant had reported to him about the death of his wife. The evidence of C.W.1 also indicates that her mother Sumoti Tanti and her father Arun Tanti used to pick up quarrel under the influence of liquor and due to drunkenness of her father Arun Tanti, the occurrence might have taken place.

23. Thus, from the evidence discussed herein above, it becomes apparent that there is no direct evidence against the accused/appellant. But, the prosecution side had succeeded in establishing by leading clear and cogent evidence that on the fateful night, deceased Sumoti Tanti and accused/appellant Arun Tanti were in their house where the dead body of the deceased found lying with injuries on her persons and the same were homicidal in nature. Also we find that one lathi, being smeared with blood, was found lying near the dead body. The I.O. had seized the same preparing seizure

list, Ext. 3. But, the I.O. had not sent the said lathi to the Forensic Science Laboratory (FSL) for examination. Mr. Prasad, the learned Amicus Curiae has rightly pointed this out. But, this omission on the part of the I.O. to send the lathi for examination in FSL, would not render the prosecution case untrustworthy and on that consideration otherwise trustworthy and reliable evidence ought not to be cast aside. In holding so, we are supported by a decision of Hon'ble Supreme Court in **State of Punjab vs. Gurmit Singh & Others**, reported in **AIR 1996 SC 1393**.

24. Thus, we find that though there is no direct evidence as to who caused the injuries to the deceased that lead to her death, yet, in view of the facts and circumstances discussed in the foregoing para, and also in view of principle laid down by Hon'ble Supreme Court in the case of **State of W.B. v. Mir Mohammad Omar**, reported in **(2000) 8 SCC 382**, **Trimukh Maroti Kirkon** (supra) and in the case of **Wazir Khan** (supra), the accused/appellant owes an explanation in view of Section 106 of the Evidence Act.

25. It is to be noted here that Section 106 of the Evidence read as under:-

"106. Burden of proving fact especially within knowledge.—

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustration:-

- (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.
- (b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

26. While dealing with Section 106 of the Evidence Act, Hon'ble Supreme Court in the case of **Mir Mohammad Omar (supra)**, has held as under:-

“**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.”

XXXXXX

“**37.** The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special

knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.”

27. In **Trimukh Maroti Kirkan** (*supra*), Hon’ble Supreme Court had occasion to consider a similar case of homicidal death in the confines of the house and observed as under:-

“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 Prosecutions* [1944 AC 315 : (1944) 2 All ER 13 (HL)]—quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh* [(2003) 11 SCC 271 : 2004 SCC (Cri) 135].) 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 travelling 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.

xxx xxx xxx

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 place 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. ...”

28. In the case of **Wazir Khan** (supra), the Hon'ble Supreme Court in para No. 24, has enunciated the principle as under:

“In a case based on circumstantial evidence where no eyewitness 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, namely, *Nika Ram v. State of Himachal Pradesh*, AIR 1972 SC 2077, *Ganesh Lal v. State of Rajasthan*, (2002) 1 SCC 73, and *State of U.P. v. Dr. Ravindra Prakash Mittal*, AIR 1992 SC 2045.”

XXXXXXXX

“Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show, like in the present case that shortly before commission of the crime they were seen together or the offence took place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not dispute his presence at home at the relevant time and 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 that crime.”

29. Here in this case, while the incriminating circumstances were put to the accused/appellant in his examination under Section 313 Cr.P.C. and his response was sought for, the accused/appellant had given an evasive reply that he was not present in his house and he is not responsible for the death of his wife.

30. It appears that by virtue of his reply in to the question in examination under Section 313 Cr.P.C., he had taken the plea of alibi. The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed. (See **Dudh Nath Pandey v. State of U.P.**, reported in (1981) 2 SCC 166).

31. But, we find from the record that the accused/appellant had made no effort to establish the plea of alibi by adducing any evidence. On the other hand, the evidence of prosecution side is clear and cogent to establish his presence at the place of occurrence, i.e. in his house, on the relevant night. Thus, the plea of alibi failed.

32. This being the factual and legal position, we are of the considered opinion that the proposition of law, so laid down in the case of **Mir Mohammad Omar** (supra), **Trimukh Maroti Kirkan** (supra) and **Wazir Khan** (supra) are squarely applicable to the facts and circumstances here in this case. Ms. B. Bhuyan, learned Senior Counsel & Additional Public Prosecution has rightly pointed this out during argument and we record our concurrence to the same.

33. We have considered the submission of Mr. B. Prasad, learned Amicus Curiae for the accused/appellant in the light of facts and circumstances on the record as discussed herein above, but, for the reason discussed in the foregoing para, we are in respectful disagreement with the same. Also we have gone through the decisions of Hon'ble Supreme Court in the cases of **Sharad Birdhichand Sarda** (supra) referring to its earlier decision in **Hanumant vs. State of Madhya Pradesh** reported in (1952) 2 SCC 71, has held as under:-

“**153.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

“Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say,

they should not be explainable on any other hypothesis except that the accused is guilty,

- (3) the circumstances should be of a conclusive nature and tendency,
- (4) they should exclude every possible hypothesis except the one to be proved, and
- (5) 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.

34. There is no quarrel at the bar in respect of the proposition of law laid down in the aforesaid cases. It is well settled that in a case based on circumstantial evidence, the circumstances must be proved beyond all reasonable doubt and the same must be complete so as to point out unerringly the guilt of the accused.

35. In the case in hand, in view of the given facts and circumstances, as discussed herein above, and also in view of the principle of law, enunciated in the case of **Mir Mohammad Omar** (supra), **Trimukh Maroti Kirkan** (supra) and **Wazir Khan** (supra), and also in view of the failing to owe an explanation of the cause of death of his wife by the accused/appellant, let alone a plausible one, this Court is of the considered opinion that it was none other than the accused/appellant, who was the author of the crime. And that in view of the matter, the decisions, so referred by Mr. Prasad, would not come into the assistance of the accused/appellant.

36. The learned trial Court also, in the impugned judgment and order of conviction and sentence, had held that in view of Section 106 of the Evidence Act, the accused/appellant had owed an explanation as on the night of occurrence, he was living with his wife in his house and as he had given an evasive reply in his examination under Section 313 Cr.P.C., the learned trial Court has held that the accused/appellant is responsible for the crime and that there was no possibility to any other person getting access to his house, and the chain of circumstances led the Court to believe that he is guilty of the offence under Section 302 IPC. The finding of guilt so recorded by the learned trial Court appears to be based on the sound principle of law and proper appreciation of the facts and circumstances on the record and this Court is unable to take a view, different from that of the learned trial Court.

37. The learned trial Court, while convicting the accused/appellant under Section 302 IPC, sentenced him to suffer imprisonment for life and to pay a fine of Rs. 1,000/-, and in default of payment of fine, to suffer rigorous imprisonment for another two months. Having drawn up a balance sheet of the incriminating as well as mitigating factors, this Court is of the view that the learned trial Court has rightly handed down the sentence and the same warrants no interference of this court.

38. The learned trial Court has also recommended the District Legal Services Authority, Lakhimpur, North Lakhimpur for assessment of compensation which the legal heirs of the victim are entitled to as per

Assam Victim Compensation Scheme, 2012. We endorse the recommendation so made by the learned trial Court.

39. In the result, we find no merit in this appeal and accordingly, the same stands dismissed. Send down the learned trial Court record with a copy of this judgment and order. The parties have to bear their own cost.

40. Before parting with the record, we wish to place our appreciation on record as regards the services rendered by Mr. B. Prasad, learned Amicus Curiae appearing for the accused/appellant and direct the Registry to make available to him just remuneration as per the notified fee structure applicable to the Amicus Curiae.

JUDGE

JUDGE

Comparing Assistant