

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 185 of 2020
With
CRAN 3 of 2022
Archana Roy
Vs.
State of West Bengal

With

CRA 121 of 2020
Amar Roy
Vs.
The State of West Bengal

With

CRA 127 of 2020
Ashok Roy @ Ashoke Roy
Vs.
The State of West Bengal

With

CRA (DB) 33 of 2022
With
CRAN 2 of 2022
Ashim Roy
Vs.
The State of West Bengal

For the Appellant : Mr. Dhananjay Nayak. Adv.
In CRA 185 of 2020

For the Appellant : Mr. Ayan Bhattacharjee, Adv.
In CRA 127 of 2020 : Mr. Sharequl Haque, Adv.
Mr. Aditya Ratan Tiwary, Adv.
Mr. Prattay Khan, Adv.

For the Appellant : Mr. Minoti Gomes, Adv.
In CRA 121 of 2020 & : Mr. Apurba Dutta, Adv.
CRA (DB) 33 of 2022

For the State : Mr. Pasun Kr. Dutta, Ld. App
Mr. Anasuya Sinha, Adv.
Mr. Pinak Kumar Mitra, Adv.
Mr. Subrato Roy, Adv.

Hearing Concluded on : September 20, 2022

Judgement on : September 28, 2022

DEBANGSU BASAK, J.:-

1. Four appeals have been heard analogously as they emanate out of one judgement of conviction and order of sentence.

2. The appellants have assailed the judgement of conviction dated January 22, 2020 and the order of sentence dated January 24, 2020 passed by the learned Additional Sessions Judge, Fast Track, First Court, Asansol in Sessions Trial No. 8 of 2007 arising out of Sessions Case No. 50/2006

convicting the appellant under Section 302/120B/201 of the Indian Penal Code, 1860.

3. The prosecution had approached the Trial Court claiming that the appellants on or about May 9, 2002 at about 7:00 hours at the house of Anil Kumar Roy situated at Saheb Bandh Para Police Station, Raniganj District, Burdwan entered into criminal conspiracy to assault Aparna Sarkar and her minor daughter Susmita Sarkar to murder Aparna Sarkar and Susmita Sarkar. The appellants had murdered Aparna Sarkar and Susmita Sarkar. The appellants had caused evidence of such offence to disappear.

4. Anil Kumar Roy since deceased had lodged a complaint with the police station on May 9, 2002 which was reduced in writing by a sub-Inspector of Police. The complaint of Anil Kumar Roy was registered as First Information Report being Raniganj Police Case No. 70/02 dated May 9, 2002. Anil Kumar Roy had stated in his complaint that his youngest daughter Aparna Sarkar and his grand daughter being the daughter born to Aparna Sarkar namely, Susmita Sarkar had been murdered. He had stated that out of his five sons, he was residing with three sons namely, Ashim Roy, Amit Roy, Amiya Roy and youngest daughter namely Aparna Sarkar and

her daughter Susmita Sarkar at his house. His two sons namely Ashok Roy and Amar Roy were residing separately. His eldest daughter Archana was residing at her matrimonial house.

5. Anil had stated that, his five sons and Archana had entered into a conspiracy with each other. They had raised strong objections to Aparna and her daughter residing with him. On May 1, 2002 at about 10 P.M they had assaulted and abused Aparna and told her that they would kill her. On May 8, 2002 at about 10 P.M, his eldest daughter Archana and her husband Ratan Roy came to Raniganj and entered into criminal conspiracy with Ashok, Amar, Ashim, Amit and Amiya attacked Aparna and brutally assaulted her and abused her. Aparna had informed about the incident to the police station when the police officer had come to their house and enquired about the incident. With the interference of local people the disputes have been said to be settled for the time being. On May 9, 2002 at about 7 A.M he had found Aparna and her daughter lying dead in the kitchen. Police of Raniganj Police Station had come to the house when they saw his daughter Aparna Sarkar and granddaughter Susmita Sarkar lying dead. He had stated in his police complaint that,

he apprehended that his sons, daughter and son-in-law in order to take possession of his house murdered his youngest daughter and granddaughter, caused disappearance of the evidence and fled away.

6. On the basis of the First Information Report, the police had commenced investigations. Police had submitted charge sheet on December 3, 2002 against six accused persons under Sections 302/201/120B of the Indian Penal Code, 1860. On February 12, 2003 the Court had taken cognizance of the offence against the accuseds under Sections 302/120B/201 of the Indian Penal Code, 1860. The case had thereafter been committed for trial. Charges had been framed against six accused persons under Sections 302/201/120B of the Indian Penal Code, 1860 on May 02, 2007. The contents of the charge had been read over and explained to the accused persons to which they pleaded not guilty of offence and claimed to be tried.

7. During trial, the prosecution had examined 12 witnesses. The prosecution tendered documents being Exhibit 1 to 13. The accused persons have been examined under Section 313 of the Criminal Procedure Code where they

pleaded their innocence. They had, however, not adduced any evidence at the trial.

8. During the pendency of the trial Amit Roy had died and, therefore, by an order dated January 13, 2017 the learned Trial Court was pleased to file the case forever against the deceased accused Amit Roy. Anil Roy, the father and the de facto complainant had also died.

9. Learned advocate appearing for the appellant in CRA 121 of 2020 (Amar Roy) and CRA (DB) 33 of 2022 (Ashim Roy) has submitted that the de facto complainant had died before any evidence was recorded. De facto complainant did not claim to be the witness of the commission of the offence. She has pointed out to the evidence on record of the prosecution and submitted that, there was no dispute with regard to the property. The property had been transferred in the name of the five sons of the de facto complainant.

10. Learned advocate appearing for Amar and Ashim has referred to the First Information Report. She has also referred to the sketch map of the place of occurrence being Exhibit 10. She has submitted that, there are discrepancies with regard to the place of occurrence. Allegedly, the bodies were recovered from the bed room. It is the case of the prosecution that the

deceased had suffered burn injuries in the kitchen. Therefore, the case as against the appellants have not been established beyond reasonable doubt.

11. Learned advocate appearing for Ashim and Amar has submitted that, Amar was a resident of Ballavpur. Amar had no reason to be present at the time of commission of the offence or immediately thereafter at the place of occurrence.

12. Learned advocate appearing for Ashim and Amar has referred to the evidence of the various prosecution witnesses. She has submitted that, there are number of discrepancies in the evidence of the prosecution witnesses which does not establish the claim of the prosecution. She has referred to the evidence of the Medical Officer. According to her, the Medical Officer had stated in his deposition that Aparna had a fracture of vault of scalp while, in the Post Mortem Report of Aparna it is stated that there was, fracture vault of skull. She has submitted that there was no explanation as to how Aparna had suffered such injury or whether the same was fatal. She has submitted that, scalp is different from skull. She has contended that scalp could not be fractured as it is the part of the head where hair grows.

13. Learned advocate appearing for Ashim and Amar had submitted that, there was no evidence to link any of her clients with the offences. She has relied upon **1983 Volum 2 Supreme Court Cases 327 (Sonia Bahera vs. State of Orrisa).**

14. Learned Advocate appearing for Ashim and Amar has relied upon **2013 Volume 12 Supreme Court Cases 406 (Sujit Biswas vs. State of Assam)** and submitted that, suspicion however grave cannot take place of proof.

15. Learned advocate for Ashim and Amar has submitted that, none of her clients were absconding. In support of such contention, she has relied upon **2006 Volume 3 Supreme Court Cases 161 (P. Mani vs. State of T.N).**

16. Relying upon **2014 Volume 6 Supreme Court Cases 745 (Dhan Raj vs. State of Haryana)** learned advocate appearing for Ashim and Amar has submitted that, in case of circumstantial evidence, each circumstance must be proved beyond reasonable doubt by independent evidence. In the facts of the present case, the prosecution has not done so.

17. She has relied upon **2003 Volume 9 Supreme Court Cases 39 (State of UP vs. Dharmraj and Anr.)** and

contended that, the graver the crime the greater should be the standard of proof.

18. Learned advocate appearing for the appellant in CRA 127 of 2020 (Ashok @ Ashoke Roy) has submitted that, there is no substantive piece of evidence against the appellant. He has pointed out that all private witnesses including PW-1, PW-5 and PW-9 were declared hostile. No cross-examination of such witnesses had been conducted by the prosecution in terms of Section 145 of the Indian Evidence Act. He has relied upon **2016 Volume 3 Supreme Court Cases 108 (Krishan Chander vs. State of Delhi)**.

19. Learned advocate appearing for Ashok has submitted that, the learned Trial Judge relied on Section 106 of the Indian Evidence Act and placed the onus of proof in a reverse direction, erroneously. He has relied upon **2016 Volume 10 Supreme Court Cases 519 (Jose vs. Sub-Inspector of Police)** and **AIR 1936 Privy Council 289 (Stephen Seneviratne vs. The King)** in such context.

20. Learned advocate appearing for Ashoke has submitted that, the learned trial Judge had relied heavily on the Post Mortem Report being Exhibit 6 and the evidence of PW-7. According to him, in absence of additional circumstances

being brought on record corroborating the contents of the Post Mortem Report, the order of conviction against Ashok cannot be passed. He has contended that Post Mortem Report is only a corroborative piece of evidence. In support of such contention he has relied upon **2012 Volume 11 Supreme Court Cases 685 (Balaji Gunhu Dhule vs. State of Maharashtra).**

21. Learned advocate appearing for Ashok has submitted that, the First Information Report is a previous statement for the purpose of either corroborating or contradicting the maker of the same. It cannot be used for the purpose of corroborating or contradicting other witnesses. In support of such contention, he has relied upon **1997 Volume 11 Suipreme Court Cases 215 (Harkirat Singh vs. State of Punjab).**

22. Learned advocate appearing for Ashok has submitted that, absconsion by itself is not a circumstance which leads to a conviction. In support of such contention, he has relied upon **2013 Volume 12 Supreme Court Cases 406 (Sujit Biswas vs. State Assam).**

23. Learned advocate appearing for Ashok has contended that, Exhibit 11 has no evidentiary value. The document had

been tentatively marked as an exhibit with objection and that such objection was never removed by the prosecution in terms of law. He has relied upon **2001 Volume 3 Supreme Court Cases 1 (Bipin Shantilal Panchal vs. State of Gujarat)** in support of such contention.

24. Referring to Exhibit 11, learned advocate appearing for Ashok has contended that, Exhibit 11 was inadmissible as PW-8 being the author of the document did not speak about the same during his examination-in-chief. He has contended that a document has to be proved by examining the author. In support of such contention he has relied upon **2009 Volume 9 Supreme Court Cases 221 (Malay Kumar Ganguly vs. Dr. Sukumar Mukherjee & Ors)**. Relying upon **2013 Volume 3 Supreme Court Cases 801 (Joseph John Peter Sandy vs. Veronica Thomas Rajkumar & Anr.)** learned advocate appearing for Ashok has contended that, admission of the document is not the proof of its contents. Contents have to be proved by examining the author of the document.

25. Learned advocate appearing for Ashok has contended that, the testimony of PW-8 is unreliable. Moreover, circumstances alleged by the prosecution were not put to his client in Section 313 of Criminal Procedure Code examination.

He has relied upon **1984 Volume 4 Supreme Court Cases 116 (*Sharad Birdhichand Sarda vs. State of Maharashtra*)** and **2020 Volume 10 Supreme Court Cases 108 (*Maheshwar Tigga vs. State of Jharkhand*)** in support of his contention.

26. Relying upon **2019 Volume 13 Supreme Court Cases 289 (*Reena Hazarika vs. State of Assam*)** learned advocate appearing for Ashok has contended that, mere invocation of the last seen theory without the facts and evidence will not shift the onus upon the accused under Section 106 of the Indian Evidence Act, 1872.

27. Learned Advocate appearing for the appellant in CRA 185 of 2020 (Archana Roy) has contended that, the de facto complainant was not examined. He has referred to the inquest report of the dead body of Aparna Sarkar. He has also referred to the sketch map of the place of occurrence. He has contended that, his client is a resident of Ultodanga, Kolkata and that there was no cogent evidence that his client came at the place of occurrence at the time of the commission of the offence.

28. Learned advocate appearing for Archana has contended that, the complaint of the de facto complainant, the

inquest report and the evidence of PW-8 are at variance with each other and self-contradictory. He has pointed out the portions claiming to be contradictions.

29. Learned advocate appearing for Archana had submitted that, the learned Trial Judge erred in relying upon the deposition of the Medical Officer PW-7. He has pointed out that, the learned Trial Judge had acted erroneously and on the basis of conjecture that the crime could not be committed by any outsider. He has contended that, the learned Trial Judge had acted erroneously in accepting the evidence on behalf of the prosecution. The learned Trial Judge had acted erroneously in overlooking the contradiction in the deposition of the prosecution witnesses.

30. Learned advocate appearing for Archana has contended that, every circumstance was not put to his client under Section 313 of the Criminal Procedure Code. Relying upon **1983 Volum 2 Supreme Court Cases 327 (Sonia Bahera vs. State of Orrisa)** learned advocate appearing for Archana has contended that, there was no evidence before the Trial Court to link his client with the death of the deceased. Relying upon **2013 Volume 12 Supreme Court Cases 406 (Sujit Biswas vs. State of Assam)** learned advocate

appearing for Archana has submitted that, mere suspicion cannot take place of proof.

31. Learned advocate appearing for Archana has relied upon **2006 Volume 3 Supreme Court Cases 161 (P. Mani vs. State of Tamil Nadu)** and contended that absconsion by itself cannot result in a conviction.

32. With regard to circumstantial evidence, learned advocate appearing for Archana has relied **upon 2014 Volume 6 Supreme Court Cases 745 (Dhan Raj vs. vs. State of Haryana)** and contended that, in the facts of the present case, all circumstances have not been proved. The chain of circumstance is not complete.

33. Relying upon **2003 Volume 9 Supreme Court Cases 39 (State of U.P vs. Dharmraj and Anr.)** learned advocate appearing for Archana has contended that the graver the crime the greater should be the standard of proof.

34. Learned advocate appearing for Archana has relied upon **2009 Volume 4 Supreme Court Cases 200 (State of Punjab vs. Hari Singh and Another)** in support of the contention that questioning under Section 313 of Criminal Procedure Code is not a mere formality. He has relied upon

2003 Volume 12 Supreme Court Cases 528 (*Kuldip Singh and Others vs State of Delhi*) on the same issue.

35. All the learned advocates for the appellants have contended that the prosecution had failed to establish the charges beyond reasonable doubt and, therefore, the appellants should be acquitted.

36. Learned advocate appearing for the State has contended that, the State established the charges against each of the appellants beyond reasonable doubt. All the appellants had been present in the house of Anil Roy from where the dead bodies were recorded, in the evening prior to the murder, as will appear from Exhibit 11. Aparna had been first murdered by a fracture on the head and thereafter burnt. Susmita, the daughter of Aparna had been strangled first and thereafter burnt. She has submitted that, the impugned judgement of conviction and the order of sentence should be affirmed.

37. At the trial, prosecution had examined 12 witnesses. PW 1 in his evidence had stated that, he was the nephew of Anil Roy. Anil Roy had five sons and two daughters. He had stated that, Aparna used to stay with Anil Roy, her father at her father's residence. He had gone to the residence of Anil

Roy on receiving the news of the death of Aparna. He had tendered the inquest report of Aparna and her daughter as Exhibits 1 and 2. He had tendered the seizure list as Exhibit 3 at the trial. He had been declared hostile by the prosecution. He had been cross-examined by the prosecution. He had also been cross-examined by the defence. On cross examination by the defence, he had claimed that, he had signed three blank papers which he tendered in evidence as exhibits.

38. Another relative of Anil Roy had deposed as PW-2. He had identified his signatures on the inquest reports of the two deceased persons. He had stated that, he received both the dead bodies from the hospital. He had identified his signature on the seizure list which he claimed he signed on the blank paper. He had been declared hostile by the prosecution and was cross-examined. He had been cross-examined on behalf of the defence.

39. The wife of PW-2 had deposed as PW-3. She had been declared hostile by the prosecution. She had identified her signature on the inquest report. She had been cross-examined by the defence. She had stated that, Aparna had married for the second time and that there were litigations pending against her second husband.

40. A neighbour of Anil Roy had deposed as PW-4. He had been declared hostile by the prosecution and was cross-examined. He had also been cross-examined on behalf of the defence.

41. Another neighbour of Anil Roy had deposed as PW-5. She had been declared hostile by the prosecution and was cross-examined. She had been cross-examined on behalf of the defence also. In such cross examination by the defence, she had stated that she was not aware of any family dispute in the life of Aparna.

42. The police constable who had taken the two dead bodies from the place of occurrence being the house of Anil Roy to Asansol Sub Divisional Hospital on May 9, 2002 had deposed as PW 6. He had been cross-examined on behalf of the defence.

43. The doctor who had conducted the post-mortem on Aparna and Susmita had deposed as PW-7. He had stated that, he found extensive deep burn injury all over the body of Aparna. He had found fracture vault of skull. In his opinion, the death was due to the injury that he had described in the post mortem report. He had tendered the carbon copy of the post-mortem report of Aparna, prepared by him, in evidence

which was marked as Exhibit 5. In reference to Susmita he had stated that, he found extensive deep burn injury all over the body except the toes. He had found nail mark on either side of the neck with extravasation of blood and tissue. In his opinion, death was due to the injury that he had described in the post mortem report. He had tendered the carbon copy of the post-mortem report of Susmita which was marked as Exhibit 6. In reply to a question put by the Court, he had stated that, death was not because of burn. Burns on both the victims were post-mortem burn as there was no soot in larynges and trachea. He had been cross-examined on behalf of the defence. The defence could not elicit anything favourable to them from him.

44. A Sub-inspector of Police posted at Raniganj Police Station had been examined as PW-8. He had stated that, on May 8, 2002 he was engaged on night Mobile duty. He had seen smoke in the house of Anil Roy. He had knocked on the door of the house of Anil Roy and woke him up. The door of the house was not locked from inside. It was closed. When the police had asked Anil Roy about the smoke, he was surprised and said that he had to enquire about the cause of smoke. He and other police personnel had helped Anil Roy to move the

bodies of Aparna and Susmita to the Verandah. He had stated that he recorded the oral statement of Anil Roy in writing and forwarded the same to the Officer in Charge of the Police Station to start a case. He had tendered the complaint of Anil Roy and the consequent First Information Report as Exhibits 7 and 8 respectively.

45. In his deposition, PW-8 had stated that, on May 9, 2002 in the morning he visited the house of Anil with two other police personnel. He had gone on to say that, on May 9, 2002 when he visited the house of Anil, then Anil and his sons were present which he immediately corrected. He had immediately corrected himself and said that, on May 8, 2002 when he visited the house of Anil, then Anil and his sons were present. On May 9, 2002, only Anil was present. On May 8, 2002, the daughter of Anil had come to the police station. It is then that the Court had asked him that, how after claiming that he cannot recollect anything he could recollect all the things of May 8, 2002. In answer to such query of the Court PW-8 had stated that, he was shown the case diary by the learned public prosecutor in charge. The learned judge had immediately closed the examination in chief of PW-8.

46. PW-8 had been cross-examined on behalf of the defence. He had been asked about his visit to the house of Anil in cross examination on May 8, 2002 and May 9, 2002. He had reiterated what he said about his visits on May 8, 2002 and May 9, 2002 in his examination-in-chief. His testimony in examination-in-chief about the presence of the sons of Anil Roy at the house of Anil Roy on May 8, 2002 and their absence on May 9, 2002 had withstood the cross-examination by the defence on such score.

47. The matchmaker for the second marriage of Aparna had deposed as PW-9. His deposition has not rendered any assistance either to the prosecution or to the defence. So also is the deposition of PW-10 whose deposition has neither assisted the prosecution nor the defence.

48. The police personnel registering the formal first information report on the basis of the complaint of Anil had deposed as PW-11. He had identified and tendered the formal first information report. He had identified the signature of the witness in the seizure dated May 15, 2002 which was marked as Exhibit 9. Cross examination of PW 11 had been declined on behalf of the defence.

49. The investigating officer had deposed as PW-12. In his testimony, PW-12 had stated that, on getting charge of the investigation, he visited the place of occurrence. He had prepared a rough sketch map with index of the place of occurrence which was tendered in evidence and marked as Exhibit 10. He had prepared the inquest report. He had tendered the inquest report of the two deceased as Exhibits 1 and 2. He had stated that he sent the two dead bodies for post-mortem examination after preparing dead body Chalan. The dead body Chalans of the two deceased had been tendered in evidence and marked as Exhibit 4. He had seized some burnt pieces of wearing apparels and other articles by preparing a seizure list on May 9, 2002 which was marked as Exhibit 3. He had also prepared another seizure list on May 15, 2002 which was marked as Exhibit 9.

50. PW-12 had stated that, on reaching the place of occurrence he had come to know that on May 8, 2002, in course of his Mobile duty, PW-8 had visited the place of occurrence. He had also come to know during investigation that, on the last day of the incident, the two deceased went to the police station and PW-8, as sub- inspector of the police station accompanied those two ladies up to their house. He

had examined PW-8 in connection with the case. He had stated that, during investigation, he collected the GD entry from the police station to show that PW 8 visited the place of occurrence on May 8, 2002. He had tendered such GD entry in evidence which was marked as Exhibit 11 subject to objection. He had stated that, on conclusion of investigation he submitted charge sheet bearing charge sheet number 204/02 dated December 31, 2002.

51. PW-12 had been cross-examined at length on behalf of the defence. The first question in cross examination that the defence had put to PW-12 was on Exhibit 11 after showing Exhibit 11 to PW-12. He had answered by saying that, it is not mentioned in Exhibit 11 that PW-8 had lodged the general diary. He had stated that there was no official seal on Exhibit 11.

52. All the appellants had been examined under Section 313 of the Criminal Procedure Code. In particular, attention of all the appellants had been drawn to Exhibit 11 during their examination under Section 313 of the Criminal Procedure Code. They had also been asked whether they want to say anything more during their examination under Section 313 of

the Criminal Procedure Code. In answer thereto, the appellants had stated that they were innocent.

53. The prosecution had established the following at the trial :-

- i. Aparna Sarkar had died due to fractured vault of skull. Susmita Sarkar had died due to injury on either side of the neck with extravasation of blood in tissue. Both of them had died prior to both of them being set on fire. Aparna Sarkar had suffered extensive deep burn injury all over the body. Susmita Sarkar had suffered extensive deep burn injury all over the body except the toes. These have been established by the Post Mortem Report being Exhibit 5 and the evidence of the post mortem Doctor being PW-7.
- ii. PW-7 had stated that burn was not the cause of the death. In both the victims, there were no soot in Larynges and Trachea. He had opined that the burn were post mortem burn.
- iii. Aparna Sarkar and Susmita Sarkar used to live with Anil Roy, since deceased, in the

house of Anil Roy. Ashim Roy, Amit Roy and Amiya Roy had been residing with Anil Roy at his residence.

- iv. Aparna Roy had gone to the police station on May 8, 2002 where she lodged a General Diary being Exhibit 11, stating that, Ashok Roy, Ashim Roy, Amit Roy, Amar Roy, Archana Roy and the wives of Ashok Roy and Amar Roy had been disturbing and torturing her mercilessly over the issue of paternal property.
- v. PW-8 had been directed to take up the matter of the General Diary of Aparna Sarkar as will appear from Exhibit 11. PW-8 had stated that Aparna Sarkar had come to the police station on May 8, 2002 in his examination-in-chief. In his cross-examination, PW-8 had stated that, he had gone to the house of Anil Roy on May 8, 2002 and May 9, 2002.
- vi. The sons of Anil Roy were present in the house of Anil Roy when PW-8 had visited such house on May 8, 2002.

vii. Visit by PW-8 to the house of Anil Roy on May 8, 2002 and May 9, 2002 had been corroborated by the Investigating Officer being PW-12. On May 9, 2002, when PW-8 had visited the house of Anil Roy seeing the smoke coming out of his house, the door of the house of Anil Roy was open. Sons of Anil Roy were not present.

54. No eye witness had been examined by the prosecution at the trial. The prosecution had relied on circumstantial evidence to bring home the charges as against the appellants. The impugned judgement of conviction has proceeded on circumstantial evidence in convicting the appellants.

55. *Malay Kumar Ganguly (supra)* and *Joseph John Peter Sandy (supra)* have held that, even though a document may be admissible in evidence, still its contents have to be proved.

56. *Bipin Shantilal Panchal (supra)* has held that, when an objection is raised during evidence taking stage regarding admissibility of any material or item of oral evidence, the Trial Court can make a note on such objection and mark the objective document tentatively as an exhibit subject to such

objection being decided at the last stage of the final judgement. If the Court finds at the final stage that the objection so raised is sustainable, the Court can keep such evidence excluded from consideration.

57. In the facts of the present case, Exhibit 11 had been marked as an exhibit subject to objection at the time of the deposition of PW-8. Significantly, the first question that the appellants as part of the defence had, put to PW-12 in cross-examination is to show Exhibit 11 to PW-12 and ask questions on such document. The relevant portion of the cross-examination of PW-12 as has been recorded by the learned Trial Court is follows :-

“Cross Examination:

[(Ext. 11) is shown to the witness]

It is fact that in the said report it is not mentioned that S.I, Panchanan Saha lodged the G.D.E. There is no official seal in this copy of the G.D

58. The defence at the trial, that is the appellants herein, having relied upon Exhibit 11 in cross-examining PW-12, cannot be heard to contend that, they had any valid objection

to Exhibit 11 being marked as an exhibit. Since they had relied upon Exhibit 11 in cross-examination of PW-12, not only was the document admitted by the appellants but the appellants had also admitted the contents thereof. Both the document as well as its contents of Exhibit 11 had been admitted by the appellants at the trial and, therefore, they cannot be heard to have a valid objection of such document being marked as an Exhibit at the stage of the appeal.

59. The ratio of ***Malay Kumar Ganguly (supra)*** and ***Joseph John Peter Sandy (supra)*** has no manner of application in the facts of the present case, since, the appellants had questioned PW-12 after showing Exhibit 11, at the trial. The appellants had acknowledged the existence and contents of Exhibit 11 to be true and correct. They had acknowledged that Exhibit 11 was a substantive piece of evidence requiring consideration by the Court in evaluating the charges as against them.

60. In ***Sonia Bahera (supra)***, the Supreme Court, after evaluating the facts of that case, did not find any evidence leading to the only conclusion of commission of offence of the accused. Facts and circumstances of the present case are different.

61. *Dhajraj @ Dhant (supra)* has held that, for establishing the guilt on the basis of circumstantial evidence, the chain of circumstantial evidence must be completed. If it appears from the facts that the chain of circumstantial evidence cannot be concluded in the manner sought to be done by the prosecution, then, the benefit of the doubt should go to the accused.

62. It is trite law that, evidence must be so conclusive that all reasonable doubts are removed from the minds of ordinary person. Proof beyond reasonable doubt does not mean that proof must be so clear that there is no possibility of error it has been recognized that, there is no absolute standard in respect of proof of reasonable doubt. Doubts can be said to be reasonable when it is not imaginary or trivial. It has to be a fair doubt based upon the evidence of the case.

63. *Malay Kumar Ganguly (supra)* has noted that, ordinarily, if a party to an action does not object to a document being taken on record, and the same is marked as an Exhibit, he is estopped and precluded from questioning the admissibility thereof at a later stage. However, a document becomes inadmissible in evidence unless the author thereof is examined with regard to the contents thereof. Contents of

such documents cannot be held to be proved unless the author is subjected to cross-examination in a Court of law.

64. In the facts of the present case, all the appellants were present at the house of Anil Roy on May 8, 2002 when PW-8 had visited the house of Anil Roy in the evening. Aparna Sarkar had lodged a complaint with the police on May 8, 2002 pursuant to which, PW-8 had visited the house of Anil Roy where he had found the sons of Anil Roy to be present. Exhibit 11 has established that, all the appellants were present on May 8, 2002. Deposition of PW-8 and corroborated by PW-12 has established the presence of the appellants. Exhibit 11 contains an allegation of torture on Aparna Sarkar inter alia by the appellants. Since the appellants had shown Exhibit 11 to PW-12 in cross-examination, the question of the maker thereof being examined or cross-examined does not arise. The appellants admitted the contents of Exhibit 11, at the trial. Therefore, the factum of the appellants of torturing Aparna Sarkar, as contained in Exhibit 11 stands established as against the appellants.

65. *Sujit Biswas (supra)* has dwelt on the purpose of examining the accused person under 313 of Criminal Procedure Code. It has held that, in a criminal trial, the

purpose of examining the accused person under Section 313 of the Criminal Procedure Code is to meet the requirements of the principles of natural justice. The accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him and the Court has to take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is broken.

66. *Kuldip Singh and Others (supra)* has held that, important incriminating circumstance is required to be put to an accused in his examination under Section 313 of the Criminal Procedure Code and in absence of the same, the prosecution would be disentled from placing reliance on such piece of evidence. ***Hari Singh (supra)*** has held that, questioning of accused under Section 313 of the Criminal Procedure Code is not a mere formality. Essence of accusation has to be brought to the notice of the accused while examining him under Section 313 of the Criminal Procedure Code. ***Maheshwar Tigga (supra)*** has held that circumstance not put to an accused under Section 313 of the Criminal Procedure Code cannot be used against him and must be

excluded from consideration. Similar view has been expressed in ***Sharad Birdhichand Sarda (supra)***.

67. In the facts of the present case, all the appellants had been put questions with regard to all incriminating circumstances as against them including Exhibit 11 in their examination under Section 313 of the Criminal Procedure Code. In particular, reference can be made to question No. 11 which had been put to the appellants in their examination under Section 313 of the Criminal Procedure Code.

68. *Dharmraj and Anr. (supra)* did not interfere with an order of acquittal as the same was one of the two possible views. Possible views have to emanate from the facts established at the trial. In the present case, the appellants have not drawn the attention of the Court to any other possible view that can be taken other than an order of conviction, on the basis of the factual matrix established at the trial.

69. *Jose (supra)* has held that, in the absence of any persuasive evidence to hold that at the relevant time, the accused was present in the house it would be impermissible to cast any burden on the accused under Section 106 of the Evidence Act. Applicability of the provisions of the 106 has

been spoken of in **Stephen Seneviratne (*supra*)** and **P. Mani (*supra*)**. In the facts of the present case, PW-8 and Exhibit 11 and the evidence of PW-8 being corroborated by PW-12, have established conclusively that, all the appellants were present in the house at the relevant point of time.

70. At the trial, the prosecution had, by virtue of Exhibit 11, the veracity, contents and truthfulness of which the appellants had acknowledged, and by virtue of the testimonies of PW-8 and PW-12, established conclusively that the appellants were present along with the two victims at the residence of the victims at the time of the murder. The appellants had failed to discharge their onus under Section 106 of the Evidence Act.

71. It has been contended on behalf of the appellants that, the actual place of occurrence has not been established at the trial. According to the appellants the victims had been found in the bed room in one version and in the kitchen in the other version. In the facts of the present case, the prosecution had established that the dead body of the victims had been recovered from the house of Anil Roy. The prosecution had also established that, the appellants were present in the house of Anil Roy at the relevant point of time. The place of

occurrence is the house of Anil Roy where the appellants had been last seen with the victims. The appellants have not discharged their burden of proof to establish so as to show how the victims came to be murdered and thereafter burnt in the house of Anil Roy where they were present at the relevant point of time.

72. *Rina Hazarika (supra)* has held that in a case of circumstantial evidence the prosecution is required to establish the continuity in the links of the chain of circumstances so as to lead to the only and unshakeable conclusion of the accused being the assailant, inconsistent or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused. It has also observed that, mere invocation of the last seen theory sans the facts and evidence in a case, will not suffice to shift the burden to the accused under Section 106 of the Evidence Act unless the prosecution first establishes a prima facie case.

73. *Balaji Gunhu Dhule (supra)* has held that, the Court cannot merely rely upon Post Mortem Report to convict an accused for an offence. Post Mortem Report should serve as corroborative evidence, corroborating the evidence of eye

witnesses and cannot be evidence sufficient by itself to reach conclusion for convicting an accused.

74. *Harkirat Singh (supra)* has held that, statement made by a witness during inquest proceedings cannot be used as substantive evidence in view of the embargo of Section 162 of the Criminal Procedure Code. It has also held that, First Information Report cannot be used as a substantive piece of evidence. Contents of the First Information could have been used for the purpose of corroborating or contradiction of the maker, if he had been examined.

75. *Krishan Chander (supra)* has held that, when a witness is cross-examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed of. It has considered Section 161 of the Criminal Procedure Code and held that, the record of the statement of witnesses under Section 161 of the Criminal Procedure Code, cannot be admitted in evidence straightaway nor can be looked into. They must be duly proved.

76. In the facts of the present case, Exhibit 11 had been duly proved by the appellants at the trial when they put questions in it in cross-examination of PW-12. Moreover,

Exhibit 11 is not a statement recorded under Section 161 of the Criminal Procedure Code.

77. The post mortem doctor being PW-7 had in his report being Exhibit 5 stated that there was a fracture of the skull on the body of Aparna Sarkar while in his deposition before the Trial Court he had stated that there was a fracture of the vault of the scalp. The recording of the deposition of PW-7 has an obvious typographical error with skull being recorded as scalp. In any event the contents of Exhibit 5 which is a written document speaks for itself and the PW-7 who is the author of such document did not make any statement in his deposition to be construed as being contradictory with the contents of Exhibit 5.

78. The prosecution has been able to establish beyond reasonable doubt that, Aparna Sarkar and Susmita Sarkar had been murdered prior to them being set on fire. Five sons of Anil Roy along with Archana Roy had been present at the house of Anil Roy on May 8, 2002 at the time of the death of Aparna Sarkar and Susmita Sarkar. The sons of Anil Roy along with their respective wives and Archana Roy have been torturing and disturbing Aparna Sarkar over the issue of paternal property. Archana Sarkar and Susmita Sarkar had

been living in the house of Anil Roy at the time of their death. Setting Aparna Sarkar and Susmita Sarkar on fire after they had been murdered leads to the conclusion that, it was so done in order to destroy the evidence of the murder.

79. We have found no ground to interfere with the impugned judgement of conviction and the order of sentence. CRA 185 of 2020 with CRAN 3 of 2022, CRA 121 of 2020, CRA 127 of 2020, CRA (DB) 33 of 2022 with CRAN 2 of 2022 are dismissed. All connected applications are disposed of accordingly.

80. By an order dated September 8, 2021 Amar Roy, the appellant in CRA 121 of 2020 had been granted bail pending the hearing of the appeal. On parity Ashok Roy @ Ashoke Roy, the appellant in CRA No. 127 of 2020 had been granted the same privilege by the order dated December 3, 2021.

81. In view of the dismissal of the appeals, the bail granted on September 8, 2021 in CRA 121 of 2020 and December 3, 2021 in CRA 127 of 2020 stands cancelled. Such appellants are directed to surrender forthwith to serve the remainder of the period of their sentences. In default of the appellant in CRA 121 of 2020 and CRA No. 127 of 2020 surrendering, the

jurisdictional Court is at liberty to proceed as against them or any of them as the case may be.

82. Trial Court records and a copy of this judgement and order be transmitted to the jurisdictional Court forthwith.

83. Urgent Photostat certified copy of this judgement and order, if applied for, be given to the parties on compliance of all formalities.

[DEBANGSU BASAK, J.]

84. I agree.

[MD. SHABBAR RASHIDI, J]