

Form No. J(1)

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION

Present :

The Hon'ble Justice Rajasekhar Mantha
And

The Hon'ble Justice Ajay Kumar Gupta

CRA 559 of 2014

Uma Dey &Anr.
Vs.
The State of West Bengal

With

CRA 329 of 2014

Tapan Dey
Vs.
The State of West Bengal

With

CRA 354 of 2014

Baikuntha Nandi @ Sadhubaba @ Sadhu
Vs.
The State of West Bengal

For the Appellants in CRA 559 of 2014 : Mr. Partha Sarathi Bhattacharya
Ms. Sukla Das Chandra
Mr. Bhaskar Seth
Ms. Swarnali Saha

For the Appellants in CRA 329 of 2014
and CRA 354 of 2014 : Mr. Arndam Jana
Mr. Rajiv Lochan Chakraborty
Mr. Sumanta Ganguly
Mr. Debapratim Guha
Ms. A Sarkar
Mr. Yuvraj Chatterjee

For the State : Mr. Madhushudan Sur
Mr. Arani Bhattacharya

Heard on : 27th March, 2025

Judgment on : 2nd April, 2025

Rajasekhar Mantha, J.

1. The present appeals are directed against judgement and/or order of conviction dated 10th April 2014, 21st April, April 2014 and 22nd April 2014 passed by the Special Court, I.E. Act –cum- Additional Sessions Judge in Sessions Trial No.352 of 2009 convicting the appellants under Sections 498A, 302 and 201 of the Indian Penal Code.
2. Mr. Partha Sarathi Bhattacharyya, learned counsel for the appellant in CRA 559 of 2014 submits that there is no charge framed under Section 201 of the IPC. He further submits that the learned Sessions Court has convicted the appellants under Section 498A, 302 and 201 of the Indian Penal Code without mention of Section 34 of the IPC.
3. He further submits that the learned Sessions Court had acted illegally beyond its authority in sentencing the appellants to rigorous imprisonment till death under Section 302 of the IPC. The Sessions Judge has also not imposed any fine.

4. He has further pointed out that the Sessions Court had not fixed any date for the examination of the accused under Section 313 of the Cr.P.C. and has done it suo moto.
5. The signature of the Sessions Judge has not been available on the examination under Section 313 of the Cr.P.C. This according to the learned counsel for the appellant, Mr. Partha Sarathi Bhattacharyya, is ex facie illegal. His clients have been deprived of a fair opportunity to defend themselves in trial.
6. The records, however, indicate that by three several orders dated 27th June, 2012, 18th July, 2012 and 1st September, 2012 the learned Magistrate has fixed dates for examination of the accused under Section 313 of the Cr.P.C.
7. Another convicted appellant Pushpa Dey, mother-in-law of the victim Pratima, died during the pendency of these appeals. Her Appeal has abated.
8. The prosecution case in brief is that on 20th February, 2009 at about 11 pm the victims namely, Pratima Dey and her two daughters, Lakshmi Dey, and Saraswati Dey were dragged to the terrace of the house at Berhampore and were strangled first and then set on fire by each of the appellants. Pratima and her younger daughter Saraswati died of strangulation and burn injuries at the place of occurrence. The third victim Lakshmi died on the way to the

hospital. Lakshmi and Saraswati were 12 and 10 years old respectively, at the time of occurrence of the incident.

9. A complaint was lodged by the PW-1, Arati Pal, mother of the victim, indicating that her daughter was tortured and killed by her son-in-law, Tapan Dey, his mother Pushpa Dey and sister-in-law Uma Dey, and a third person Baikuntha Nandi.
10. The victim Pratima Dey was married to Tapan Dey (appellant in CRA 329 of 2014) 15 years prior to the date of the incident. It is alleged that the appellants used to pressurise the victim to bring money from her house and/or indulge in prostitution. On refusal of the victim, the appellants Tapan Dey, Puspa Dey and Uma Dey set the victims on fire.
11. An alternative case is also set up in the complaint that the daughter of the complainant committed suicide after killing her two daughters unable to bear torture from her in-laws.
12. The complaint was lodged at about 10.45 a.m., the succeeding day, i.e., 21st February, 2009. Formal FIR was registered being No. 76 of 2009 dated 21.02.2009 by the Berhampore Police Station under Sections 498A/302/34 of the Indian Penal Code.
13. The inquest was conducted on the body of the deceased, the next day at about 11.05 a.m. where the inquest officer, recorded the versions of the

witnesses that the victim was either burnt to death by her in-laws or died by suicide. The inquest witnesses are PW-4, Paritosh Paul, a relative of the victim, PW-15, Gobardhan Paul and PW-16, Gobinda Nandi, the brother of the deceased.

14. PW-18, Brojogopal Das, the first Investigating Officer conducted the investigation for 7 days. He claimed to have recorded statements of some witnesses under Section 161 of the Cr. P.C. He left the investigation thereafter on being transferred from Berhampore Police Station.
15. PW-21, Tapan Kr. Chatterjee, was the second Investigating Officer who completed the investigation and submitted charge sheet. Charges were framed against the accused under Section 498A read with Section 34 and Section 302 read with Section 34 of the IPC.
16. The appellant Baikuntha Nandi @ Sadhu Baba in CRA 354 of 2014 was stated to be having an affair with the appellant Uma Dey in CRA 559 of 2014 and was charged.
17. PW-1, Arati Paul was the complainant who stated that her daughter was given in marriage 16 years before the trial. She deposed that the accused tortured her daughter 6 months after marriage and insisted she perform dirty work (indulge in prostitution). She specifically named Puspa Dey, the mother-in-law of the deceased for torturing and compelling her deceased

daughter into prostitution. She stated that she received information of the death of her daughter from a neighbour.

18. She then came to the house of her daughter with her elder son and found the door locked. On hearing her cries, neighbours came and told her that the victim and her two daughters were taken to the local Police Station. She then came to the Police Station and found one of her granddaughters, Saraswati Dey, lying dead covered in a wrapper. She found burnt injuries on her daughter and that her tongue was out.
19. Her elder brother PW-3, Kartick Chandra Dey was the scribe of the complaint. He was cross-examined at length. Several inconsistencies appeared from the evidence of the cross-examination.
20. PW-2, Khagen Paul was the brother of the victim, Pratima Dey. He deposed the same lines as that of the PW-1.
21. PW-4, Paritosh Paul, was a cousin uncle of the deceased and an inquest witness. He merely stated that the accused tortured and misbehaved with the deceased. He deposed in cross-examination that he came to know of the incident from PW-15, brother of the deceased. His evidence is in the same line as PW-1 and 2.
22. PW-5, Avishek Guhathakurata, a neighbour of the victim. He heard somebody shout "fire, fire" at the time of incident when he came out of his

house along with his two brothers and entered the house of the accused persons. They tried to douse the fire with buckets of water. He found one of the victims, Lakshmi Dey, asking for help to be saved. He took the surviving victim to the hospital along with others. He found the mother-in-law, Puspa Dey standing at the place of occurrence and did not see anybody else. He did not know Baikuntha Nandi, one of the appellants herein. He could not identify the mother-in-law, Puspa Dey in the trial Court.

23. PW-6, Hirak Mondal was another neighbour who was declared hostile. During cross-examination, he has completely denied the prosecution case.
24. PW-7, Totan Roy, was another neighbour and a seizure witness. He deposed that the appellant Baikuntha Nandi tried to settle the disputes between Pratima Dey and her in-laws. It is curious to note that Uma Dey was not present when several witnesses of the prosecution were examined. The case of the prosecution against Uma Dey could be tainted on this ground alone. PW-7 further deposed that he came to know of the incident from the local people. He, however, stated that the appellant tortured Pratima Dey. He was a witness to one of the seizures effected by the police.
25. PW-8, Rita Biswas is a neighbour. She was also examined in the absence of Uma Dey. She deposed that she heard hue and cry on the night of the incident and saw fire in the roof of the accused persons.

26. She along with her daughter came to the house when her daughter fainted. She stated that the fire brigade and local people had gathered at the place of occurrence. She claimed that one of the daughters of the victim shouted for help which she claimed to have heard. There was an altercation. Victim was tortured frequently by the appellants. She also found the mother-in-law of the victim viz. Pushpa assaulting Pratima on a particular day. She heard an altercation from the house of the victim on the date of the incident. She also heard the victim and her two daughters crying and shouting. She answered to the Court in course of trial that it is the victim who told her of the torture in the matrimonial house. She admitted that the appellant Tapan was not present in the house on the date of the incident. Her evidence regarding Baikuntha coming and going to the house is sketchy.
27. PW 10 held inquest on the victims. PW 10 in cross-examination stated that he was informed during the preliminary enquiry that the victim committed suicide along with her daughters Laksmi and Saraswati because they were unable to bear the torture by her husband, mother-in-law and sister-in-law. He also found the smell of kerosene from the bodies of the victims in course of inquest.
28. The story noted in the inquest report assumes significance when an alternate theory comes on record. An inquest report notes the surrounding circumstances and stories that are prevalent immediately after the

commission of the crime. To lie, humans require time. To narrate a false story, humans take more time. The inquest report being prepared earlier in time compared to the making of other statements, and being done just after the commission of the crime ensures that the story of the people noted in the report is generally not a lie. It may record a suspicion but always a legitimate one.

29. PW 13 was the fire brigade officer, who found 2 cans of inflammable substance. The cans were not produced in course of trial. Only the seizure lists were produced along with the labels.
30. PW 14 (Debnath Chakraborty) was the ASI of Police, who started the UD case. Upon visiting the place of occurrence, he found two dead bodies and one partially burnt body. He sent victim Laksmi who was still alive to the hospital along with local persons.
31. PW 15 is the star witness of the prosecution. He deposed that he had come to the house of the victim at about 3 p.m. on the date of occurrence. He was invited by his sister Pratima to come. He stayed with her when the victim informed him that her in-laws had been torturing her. He deposed that the appellant Baikuntha developed a relationship with the appellant Uma after her divorce. They used to meet at the matrimonial house of Pratima and often brought unknown men and women to the house. On the day prior the

incident he stated that unknown men and women had come to the house of the victim.

32. As the victim Pratima raised protest, she was subjected to torture. He restrained his sister and two daughters from attacking the others. He deposed that he spoke with the appellants Tapan, Uma and Puspa and requested them to restrain themselves against the victim. The presence of Tapan on the said day is doubtful. Absence is corroborated by the evidence of PW 8 and other evidence that has come on record and shall be discussed at a subsequent stage.
33. He had dinner in the house with the victim and went to sleep. He deposed that he woke up on hearing a quarrel in the house when he claimed to have found the victim and her two children being dragged to the roof of the house by Baikuntha and Uma. He further stated that Tapan and Puspa were dragging the victim and her daughters to the roof.
34. He stated as he had tried to resist the appellants, he was threatened and pushed out of the house and the main door was closed thereafter. He thereafter heard a hue and cry as well as shouting for help. He noticed huge smoke and fire emanating from the roof of the house. He became nervous and rushed to the main road. When he went back, he found few people had gathered around the house.

35. He entered the house and found two local persons with buckets of water trying to go to the roof, and accompanied them. He found the victim and her younger daughter Saraswati, lying dead. Saraswati was in the lap of the mother. The older daughter Lakshmi was still alive and was trying to say something. He deposed that the police and fire service personnel arrived at the place of occurrence immediately thereafter. They extinguished the fire and took the younger daughter Lakshmi to the hospital. He accompanied her to the hospital.
36. He thereafter deposed that he recorded his statement under Section 164 of the Cr. P. C. before the police. He stated that his signature on the inquest report was obtained in the hospital. He claimed to have informed the inquest personnel of the circumstances under which the victims have died. The same are however not reflected in the inquest report.
37. PW 18 was the first I.O., who seized the kerosene cans but could not produce the same except the seizure list and labels in the trial court. He investigated for seven days.
38. Thereafter PW 21 took over the investigation. PW 21 deposed that he recorded the confessional statement of PW 15 under Section 164 of the Cr. P. C. after two weeks of the incident.

39. PW 19 (Dr. Santosh Kumar Bhunia) was the doctor who conducted the post-mortem on the three victims. He found that the smell of kerosene oil was emanating from the bodies of the three victims. The dissection of the neck and other parts of the bodies of the three victims was conducted by a Dom (Handler of dead bodies). The name of the Dom is not mentioned. He opined that the death of the victim Saraswati De was due to asphyxia ante mortem and homicidal in nature. Death occurred due to strangulation.
40. He further opined that the victim was thereafter set on fire by pouring kerosene oil. Death was by asphyxia. Insofar as victim Pratima Dey is concerned, he opined that death was also due to asphyxia caused by strangulation and ante mortem and homicidal in nature. Burn injuries were inflicted all over the body by pouring kerosene oil and setting the deceased's body on fire.
41. Insofar as the elder daughter, Laxmi Dey, is concerned the post-mortem doctor opined that the death of due to shock as a result of burn injuries sustained after being incapacitated by attempted strangulation which is ante mortem and homicidal in nature. He also stated that the victim was in a sitting position when she was set on fire. The viscera of the victim were sent for FSL. The cross-examination of the post-mortem doctor has revealed more than the examination-in-chief.

42. On cross-examination, he stated that there was nothing wrong with a dead body handler, Dom, performing dissection of the bodies of the victim. He admitted that he was not a qualified and/or forensic examiner. He could not indicate the time of death of the deceased when asked by the Trial Judge.
43. The credibility of the evidence of the post-mortem doctor was questioned seriously in the course of cross-examination.
44. The Doctor further deposed that the death of Pratima was due to as fixed here caused by strangulation, which was ante mortem and homicidal in nature. He further opined that the burn injuries were inflicted on the body by pouring kerosene oil and setting the body of the deceased on fire on all sides. The doctor opined as such that despite findings that the hyoid bone was ingested, the neck muscle around the middle of the neck skin features on strangulation, which was obliterated due to burn injuries.
45. Insofar as Lakshmi is concerned, the PW 19 opined that death was due to shock as a result of injuries sustained, after being incapacitated by attempted strangulation, which is homicidally and antemortem in nature. It is found that the victim might not have been standing at the time of death.
46. In cross-examination, he admitted that he did not take any instruments to the morgue for conducting post-mortem. He took down notes and prepared

the post-mortem report he did not obtain the final Viscera report. He also admitted that he did not have special knowledge and training for conducting a post-mortem.

47. The notes prepared by him on the observation of the body have been destroyed. The Dom who dissected the body of the victim was not trained to conduct the same nor had any academic qualification whatsoever. He admitted that the percentage of the burn injuries of the victim has not been noted. He admitted that he did not mention the type of asphyxia noted on the victims at the time of death. he could not indicate the time of death of the victims and admitted that he did not mention the same in the PM report. He could not explain why he used the expression asphyxia in his post-mortem report.
48. He admitted that he did not mention the presence of carbon and carbon dioxide within the lungs of the deceased. He also admitted that it was his own inference that prior to being burned, the victim was strangulated, his own visual inference.
49. The second investigating officer was PW 21, namely, Tapan Kumar Chatterjee. He stated that when he took over the investigation of the case on the 2nd of March, 2009. He did not indicate under what circumstances he applied before the CJM Murshidabad regarding the Statement of PW 15 under Section 164 of the CrPC.

50. He did not explain the delay of two weeks after the incident in recording the statement of PW 15. He only stated that he examined two fire service personnels under section 161 of the Cr.P.C. He forwarded the Viscera of the victims to the aforesaid through the Ld. CJM and submitted a charge sheet in cross-examination, he stated that he met PW 15 for the first and last time on the 5th of March, 2009, and there is no inducement in the case tariff as to why PW 15 was willing to have his statement recorded under 164 of the CrPC.
51. This Court has not found any statement of PW 15 under Section 161 of the Cr. P. C. recorded either before the first I.O. or the second I.O.
52. The delay of two weeks i.e. fourteen days by the first I.O. and seven days by the second I.O. in recording the statement of PW 15 under Section 164 of the Cr.P.C. has not been explained. The circumstances under which the second I.O. chose to record such statement, is also not available on record. After conclusion of the evidence of the prosecution, on behalf of the defence, Tapan Dey examined one witness, namely, Rajkumar Pal as DW 1. He tried to establish that the appellant Tapan Kumar Dey was not in the house on the day and time of the incident.
53. After the evidence was over the Trial Judge examined the appellants under Section 313 of the Cr. P. C. and thereafter convicted the appellants under Section 302 IPC.

54. This Court has carefully considered and analyzed the decision of the Trial Court. It appears that the Trial Court proceeded on inferences and quoted from jurisprudence and law without proper analysis of the evidence on record. The Trial Court judge, however, found serious omissions with the investigation as well as the prosecution.
55. What however stands out, as regards the torture of the victims and the charge of Section 498A is that there was no complaint of such torture prior to the date of occurrence i.e. 20th February 2009. As on the said date, Pratima was married to the appellant Tapan Kumar Dey for more than 15 years. The allegations of torture by the appellants on the victim Pratima, as deposed by both the family and independent witnesses, appear to be rather vague, and the allegations, omnibus in nature. Reference in this regard may be made to the decision of the Hon'ble Supreme Court in ***Digambar v. The State Of Maharashtra And Another*** reported in **2024 INSC 1019:-**

“19. A perusal of the FIR shows that the allegations made by the complainant are that in the year 2015, the appellants inflicted mental and physical cruelty upon her as she could not give birth to a male child. **Such allegations made by the complainant appear to be vague as no specific instances of harassment are mentioned. No specific role or allegation is levelled on either of the appellants and no specific incident of physical or mental cruelty has been mentioned. A mere omnibus statement has been made that the physical and mental cruelty was afflicted because the complainant could not provide a male child.** Furthermore, it is merely mentioned that the appellants would instigate the husband to harass the complainant, but again, no specific or precise instances are mentioned as to how the appellants instigated their son and what acts were committed by him as a direct result of such instigation.

22. In another recent judgment of this Court titled *JayadeepsinhPravinsinh Chavda and Others v. State of Gujarat*⁵, the

guilt of the appellant therein under Section 498- A of IPC was maintained, however, the ingredients of 498-A of IPC were discussed. It was observed thus:

“11. From the above understanding of the provision, it is evident that, ‘cruelty’ simpliciter is not enough to constitute the offence, rather it must be done either with the intention to cause grave injury or to drive her to commit suicide or with intention to coercing her or her relatives to meet unlawful demands.

23. Hence, it was clear that ‘cruelty’ is not enough to constitute the offence. It must be done with the intention to cause grave injury or drive the victim to commit suicide or inflict grave injury to herself. In the present case, the allegations levelled in the FIR do not reveal the existence of any such allegations. The only allegation that referred to an injury being inflicted against the complainant is a vague statement that the son of the appellants herein used to beat her, but there is no specific allegation of any such injury being caused by the appellants herein.”

Emphasis applied

56. The evidence of PW 7 and 8, neighbors of the victims as also the evidence of PW 5, 6, and family members PW 1, 2, and 3 do not indicate any specific incidents of torture or particulars thereof. As to what steps the family of Pratima took against torture is also not mentioned by them. There are no prior complaints of any alleged torture, with the police.
57. There are no eyewitnesses to the actual participation of the appellants in the act of killing the victims. The evidence of PW 5, 6, and 7 is that there was an altercation in the house of the deceased with regard to the illicit relation between appellants Baikuntha and Uma. The frequenting of strangers, both men and women, into the marital house of the victim was one more piece of evidence indicating the objection of Pratima towards Uma and Baikuntha.

58. The same would essentially imply that Pratima often protested and had altercations with Appellant Uma and her mother-in-law in connection with the presence of Baikuntha and the entry of strangers inside the house. The same is therefore inconsistent with torture within the meaning of Section 498A of the IPC. The inferences drawn by the Learned Trial Court in this regard are based on the conjectures and surmises.
59. The next error committed by the trial Court is applying Section 106 of the Evidence Act to conclude that the appellants murdered the victim clearly because they have not been able to explain the circumstances which were within the special knowledge they possessed. Section 106 of the Evidence Act would not have any manner of application in the facts of the case since PW 15 was also present in this house along with the appellants from the very evening of the date of occurrence.
60. There is yet another reason to disbelieve the prosecution's case against the appellant. If the appellants were desirous of killing the victims by strangulation and setting them on fire, they would not have chosen the roof of the house to commit the act in question. The roof is open to the sky and visible to one and all. The appellants would have easily known that the victim being set on fire by them would have invariably alerted the neighbours and people residing in adjoining areas. They would have committed such an act within the house itself and not outside thereof.

61. Further, would the appellants have chosen a day when PW-15 was present in the house to eliminate the victims? This is highly unlikely. There is also no evidence on record to indicate that the appellants have tried to kill the victims previously.
62. At this stage, it would be apposite to consider the evidence of the star witness of the prosecution, namely, PW 15 Gobordhan Nandi. He is the brother of the deceased Pratima. He was present at the place of occurrence from 3.00 pm. He agreed to stay the night at the request of Pratima. Upon hearing of the altercation, between deceased victim and the appellants, he got up in the middle of the night. He claims to have seen that the victims were being dragged by the appellants to the terrace of the house. He claims that when he resisted he was thrown out of the house by the appellants.
63. Strangely, he did not raise any hue or cry from outside the house to alert the neighbours. On the contrary, the neighbours PW 6, 7, and 8 have deposed that they were alerted only by the cries of Lakshmi and Saraswati from the rooftop of the house while they were burning.
64. What is most startling to this Court is that PW 15, though present in the house and also in the PS, the very next morning did not mention this fact to his mother, the complainant, nor chose to lodge any complaint of his own. Had PW 15 seen the incident as deposed in course of trial, he would have

informed his mother of the same, and it would have been a part of the complaint.

65. The complaint, on the contrary, filed by PW 1, states that the appellant victims were either murdered or committed suicide. The evidence of PW 15 becomes doubtful firstly on this ground.
66. Secondly, there is no explanation whatsoever from the investigating officer as regards when and how he came to know that PW 15 was willing to record his statement under Section 164 of the CrPC. While a delay in recording statements under Sections 161 and 164 of the CrPC would not *ipso facto* negate the veracity of the same the prosecution is required to explain the delay.
67. A statement under Sec. 164 is normally preceded by a statement under section 161. The police on assessing the nature and quality of the statement, reduce it in writing under Sec 161. The Police thereafter take a conscious decision as to whether the statement so made will ensure a conviction during the trial. It is only upon such assessment that the maker of the statement is produced before the Magistrate to once again record the same under section 164 of the Cr.P.C. This ensures that the maker of the statement does not resile therefrom.

68. The mandate of section 164 obliges the Magistrate to elicit all information from the maker of the statement to assess the volition of the statement maker before him. The statement under 161 will also be a relevant piece of information for the magistrate to ask the maker as to whether the statement made by him under Sec 161 has been obtained by coercion. The magistrate may also enquire and record why the maker of the statement has not made any statement under Sec 161. Reference in this regard may be made to the decision of the Supreme Court in ***R. Shaji v. State of Kerala*** reported in **(2013) 14 SCC 266 :**

“26. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 CrPC can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction. In a case where the Magistrate has to perform the duty of recording a statement under Section 164 CrPC, he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 CrPC. Hence, the Magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case.

29. During the investigation, the police officer may sometimes feel that it is expedient to record the statement of a witness under Section 164 CrPC. This usually happens when the witnesses to a crime are clearly connected to the accused, or where the accused is very influential, owing to which the witnesses may be influenced.

27. So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted.”

69. So it may be mandatory for the police to first record a statement under section 161 and thereafter proceed to take the accused before the Magistrate to record a statement under Sec 164. However, the normal and customary practice of recording a statement under Sec 161 and thereafter a statement under Sec 164 has rendered this practice as an executive /administrative interpretation of Sections 161 and 164. However, the delay in making the statement must be either explained by the prosecution in the Trial or should be ascertained by the Magistrate himself.
70. Useful reference may also be made to paragraph 27 of the decision of the Supreme Court in ***B. N. John v. State Of U.P.*** reported in **2025 INSC 4**, where the Supreme Court noted the non-mentioning of the crucial facts in the FIR and the subsequent mentioning of the same in other proceedings relatable to criminal proceedings would mean that such facts are belated formulation. The fact that PW 15 did not record his version in the inquest report nor in the FIR and also not by a statement under section 161 indicates that the statement which has found its place under section 164 is the outcome of an afterthought. **Paragraph 27** thereof is set out below:-

“What is to be noted in the present case is that if the appellant had actually used criminal force or had assaulted the public servants, which would bring the said acts within the scope of Section 353 of the IPC, **nothing prevented the complainant from mentioning the same in the FIR being the first information. If such vital and crucial facts are missing from the FIR of which the complainant was fully aware of and was already cognizant of, which he could have mentioned at the first instance, it would indicate that any subsequent mentioning of these facts in the case by the complainant would be an afterthought as has happened in the**

present case. The alleged fact of assault, or use of criminal force by the appellant could not be said to have been discovered at a later point of time, as these offensive acts, if really had happened, would have happened before the filing of the FIR/complaint and thus should have found mention in the FIR. These acts were not something that had happened at a later point of time, but would have been known to the complainant had these happened when the complainant and official party were raiding the hostel managed by the appellant. Thus, the absence of mentioning these alleged acts which would constitute ingredients of the offence under Section 353 of the IPC, renders the FIR legally untenable as far as the offence under Section 353 of the IPC is concerned. We do not see any reason why the complainant failed to mention in the FIR the alleged use of criminal force or assault of the public servants to prevent them from discharging their official duties when they were raiding the premises.

Emphasis Applied

71. In the instant case, admittedly PW 15's statement under Section 161 of the CrPC was not recorded either by the first IO-PW 18 or the second IO-PW 21. PW 21 after taking over the investigation on 5th March, 2009 stated that he had met PW 15 for the first and last time on the said date. He also admitted that he did not record the statement of PW 16 under Section 161 of the CrPC. There is no explanation whatsoever as to when and how PW 15 offered to record a statement for the Magistrate and/or what basis PW 21 decided to record the statement of PW 16 before the Magistrate under 164 of the Cr.P.C. remains completely unexplained.
72. Thirdly, PWs 5, 6, and 7 have clearly stated that they entered the house of the victims after hearing the cries and seeing fire or smoke emanating from the roof. They tried to douse the fire with the help of buckets of water. PW 15 remained completely inactive; he did not participate in dousing the fire on the deceased.

73. PW 15 stated that he saw the appellants Tapan Kumar Dey, Baikuntha, Uma, and Puspa present in the house and participating in the act of setting the victims on fire. PWs 5, 6, 7, and 8 do not mention the presence of any appellant other than appellant Pushpa in the house of the victims on the said date.
74. In the backdrop of the above, this Court is unable to accept at all, the veracity of the evidence of PW 15 or his Statement under 164 of the CrPC. The above also clearly suggests that PW-15's evidence is an afterthought and concocted by the prosecution.
75. Therefore there is no clear evidence as to who amongst the appellants were present in the matrimonial house of the victim Pratima on the date and time of occurrence. While it is true that Uma and Pushpa must be deemed to have been present in their house. The presence of appellant Tapan Kumar Dey and Baikuntha Nandi is wholly doubtful.
76. The prosecution has therefore not been able to prove beyond reasonable doubt the presence of appellant Tapan Kumar Dey and Baikuntha Nandi in the house of the deceased. The question of shifting the burden of proof under Section 106 of the evidence act on them therefore does not and cannot arise.
77. Insofar as appellant Uma Dey is concerned, it appears that several witnesses have been examined by the prosecution when she was not even present

before the Trial Court. None of the evidence of the witnesses examined in the absence of Uma could have been entertained by the Trial Court.

78. Reference in this regard may be made to Section 299 of Cr.P.C. which provides for two situations where the prosecution can examine its witnesses in the absence of the accused. The first situation is when the accused is absconding and the second situation is when the accused person is unknown. Neither of the said situations occurred in the present case. It is no argument that the defense counsel for the appellant/accused may have been present when the prosecution witnesses were examined, and they had the opportunity to see and note the witness. The accused is also as a matter of right entitled to observe the witness to be able to instruct his advocate accordingly.
79. There being no clear evidence of the presence of Uma, Tapan Kumar Dey and Baikuntha in the house at the time of occurrence, the burden of proof does not shift on them to explain the circumstances under which the victims died. Section 106 of the Evidence Act therefore could not have been invoked by the Trial Court, in the facts of the case, given that the evidence of PW 15 cannot be accepted at all.
80. PW 8 is the only person who stated that Puspa was present in the Courtyard of the house when she came to the place of occurrence after seeing smoke and fire on the roof of the house. At the time when PW 8 saw Puspa in the

courtyard of the house, several other people had already gathered in the house to douse the flames on the victims.

81. The evidence of PW 8 as regards the presence of Pushpa alone would therefore not attract the last seen theory or even be fact that Puspa was present inside the house and special knowledge of the circumstances under which the victims died. The prosecution has failed to prove the presence of any of the appellants in the house of the victims.
82. It is now well settled, *inter alia*, in the decision of the Supreme Court in the case of **Arvind Singh v. State of Maharashtra** reported in **2021 (11) SCC 1** particularly paragraphs 82 and 83 thereof that the provisions of Section 106 are applied rarely and do not absolve the prosecution from proving its case against accused. Reference in this regard may be made to paragraphs 82 and 83 of **Arvind (supra)**:-

“82. This Court in *Rajender* [*Rajender v. State (NCT of Delhi)*, (2019) 10 SCC 623 : (2020) 1 SCC (Cri) 63] was examining the applicability of Section 106 of the Evidence Act when the place of the murder of the deceased was a secluded area. The deceased was last seen with the accused. The explanation in her statement under Section 313 CrPC was that she parted company with the deceased, when the deceased got down from her car at the inter-State bus terminus (“ISBT”). This explanation has been disbelieved by the trial court and the High Court. This Court held that the time-gap between the last seen and the time of the death of the deceased is so small so as to make it impossible for the deceased to come in the contact of any other person. It was held as under : (*Rajender case* [*Rajender v. State (NCT of Delhi)*, (2019) 10 SCC 623 : (2020) 1 SCC (Cri) 63] , SCC p. 632, para 12)

“12.2.4. Having observed so, it is crucial to note that the reasonableness of the explanation offered by the accused as to how and when he/she parted company with the deceased has a bearing on the effect of the last seen in a case. Section 106 of the Evidence Act, 1872 provides that the burden of proof for any fact that is especially within the knowledge of a

person lies upon such person. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company with the deceased. In other words, he must furnish an explanation that appears to the court to be probable and satisfactory, and if he fails to offer such an explanation on the basis of facts within his special knowledge, the burden cast upon him under Section 106 is not discharged. Particularly in cases resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, such failure by itself can provide an additional link in the chain of circumstances proved against him. This, however, does not mean that Section 106 shifts the burden of proof of a criminal trial on the accused. Such burden always rests on the prosecution. Section 106 only lays down the rule that when the accused does not throw any light upon facts which are *specially within his/her knowledge* and which cannot support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce an explanation as an additional link which completes the chain of incriminating circumstances.”

(emphasis in original)

83. The judgments referred to by Mr Chaudhary, *Sawal Das v. State of Bihar* [*Sawal Das v. State of Bihar*, (1974) 4 SCC 193 : 1974 SCC (Cri) 362] , *Gargi v. State of Haryana* [*Gargi v. State of Haryana*, (2019) 9 SCC 738 : (2019) 3 SCC (Cri) 785] , were to argue that the last seen evidence will not absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of consideration of facts of which the burden of proof may lie upon the accused. However, the principles laid down in the aforesaid judgment are not applicable to the facts of the present case, when the prosecution has proved the act of kidnapping and the last seen evidence soon before the approximate time of death of victim. Therefore, the prosecution has discharged the onus of proof beyond reasonable doubt. It was then for the accused to rebut the presumption of any other intervening fact before the death of the victim. In fact, none of the prosecution witnesses have been cross-examined on that possibility at all.”

83. The evidence of the PM doctor PW 19 leaves much to be desired. The incision on the body of the victim, as per the evidence of the PM doctor himself, was performed by a Dom who was not even authorized or trained to perform such in sessions. He at best had the skills of a daily labourer. The rest of the evidence of the PM doctor, who admittedly has not even trained in forensic science, cannot therefore be accepted by this Court. The conclusion of the

PM doctor that the death of the victims occurred by strangulation first and that they set on fire later is a theory that cannot be accepted by this Court. The PM report of the victims, is not acceptable to this Court. Reference in this regard may be made to the decision of the Supreme Court in ***Jacob Mathew v. State of Punjab***, reported in (2005) 6 SCC 1 :

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“From these general statements it follows that a professional man should command the corpus of knowledge **which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in the knowledge of new advances, discoveries and developments in his field.** He should have such an awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. **He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more.** The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet.” (Charlesworth & Percy, *ibid.*, para 8.04)

21. The degree of skill and care required by a medical practitioner is so stated in Halsbury's Laws of England (4th Edn., Vol. 30, para 35):

“35. The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; **nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.**”

84. There are two facets of a post-mortem report. First, the direct evidence of injuries found on the body of the victim. These are facts. Second, the opinion is formed based on the injuries found on the body. The court is not bound by

the opinion of the doctor. The court is however bound by the factum of the presence of injuries found on the person of the victim to assess the injuries referring to oral testimony on record.

85. In the present case, the postmortem doctor did not have the requisite expertise to conduct the postmortem. He got the body dissected by an unqualified person. As a consequence thereof, he has been unable to render any definitive finding as to whether the victims were indeed subjected to strangulation. There arises a doubt as to why Laxmi will be attempted to be strangled but she will ultimately die due to burn injuries, whereas the other two victims will die by strangulation and then will be burnt, as stated by the unqualified post-mortem doctor. Reference in this regard may be made to the decision of the Supreme Court in ***Gastrade International v. Commissioner Of Customs, Kandla*** reported in **2025 INSC 411:-**

“57. The opinion of the experts, however weighty they may be, are not binding on the court and is only relevant for the court to consider it to come to a final decision on any fact in issue. However, since courts are not experts in the discipline of science, they ordinarily accept the scientific report and act upon it. But where the expert opinion suffers from certain shortcomings or ambiguities, lack of clarity, or inadequacy it would be subject to judicial scrutiny and it would not be safe to rely wholly on the same under such circumstances.”

86. The unprofessional and disgraceful post-mortem report fails to support the case of the prosecution given the alternate theory that has come on record which is that the victim, Pratima, killed her two daughters and then committed suicide herself. An injury report prepared by a qualified person

would, therefore, have definitively cleared out the doubts on whether it is a case of homicide or suicide by recording the injuries of the victim.

87. This Court has noted that the Trial Judge has also clearly found that the investigation in the instant case was extremely poor and the prosecution grossly lacking. It is true that a poor investigation, would not by itself acquit an accused. One cannot ignore the fundamental requirement that the prosecution is required to prove the charges against the accused beyond all reasonable doubt. In the instant case, the prosecution has failed to do so.
88. The Trial Judge appears to have relied upon, general theories and principles of law and has based the impugned judgment and order wholly on conjecture and surmise. The Trial Judge has failed to apply the basic principles of criminal jurisprudence that the State is required to prove the charges beyond any reasonable doubt against the appellants.
89. The chain of circumstances, against the appellants is neither complete nor any link beyond the altercation between the victim Pratima and her sister-in-law Uma and mother-in-law, have been established. That is only one link in the chain of circumstances, the rest have not been proven to establish that these appellants only and it is only these appellants who could have caused the death of the victims.
90. For the reasons stated hereinabove, this Court is of the view that the prosecution has failed to establish, beyond a reasonable doubt, the charges

under Section 302 or 498A or 201 against any of the appellants. The conviction of the appellants by the Trial Court is therefore not sustainable in law and therefore, liable to be set aside.

91. The accused Uma Dey is set at liberty forthwith, subject to her not being required to be detained in other cases. The bail bonds of the appellants Baikuntha and Tapan Dey are discharged. All accused shall be bound by the result of any appeal that the State may carry from this judgement.
92. The appeals are allowed and disposed of.
93. Urgent photostat certified copy of this order, if applied for, be supplied to the parties as early as possible.

(Rajasekhar Mantha, J.)

I agree.

(Ajay Kumar Gupta, J.)