

**GAUHATI HIGH COURT****Bench: Justice Kalyan Rai Surana and Justice Mridul Kumar Kalita****Date of Decision: November 18, 2023**

Case No. : Crl.A./183/2022

**SIBU SARKAR****VERSUS**

- 1. THE STATE OF ASSAM AND ANR.**
- 2. HEMANTA BISWAS**

**Legislating:**

Section 161, 164, 313, 374(2) of the Code of Criminal Procedure, 1973

Section 302, 304B of the Indian Penal Code

Section 106, 118 of the Evidence Act

**Subject :**

Criminal Appeal regarding the conviction under Section 302 of IPC for the alleged murder of the appellant's wife. The appeal focuses on the scrutiny of witness testimonies, the delayed FIR, and the reliability of the dying declaration of the victim.

**Headnotes :**

Criminal Appeal – Acquittal in Murder Charge – Appeal against conviction under Section 302 of the Indian Penal Code – Appellant acquitted of charge for the murder of his wife – Inconsistencies and contradictions in the testimonies, especially of key witness (PW-6) – Delay in FIR lodging raises doubt on veracity of allegations – Dying declaration of the victim (Exhibit D1) indicating accidental cause of death not properly considered by the Trial Court – Testimony of neighbor (PW-5) stating victim claimed self-immolation,

and lack of implication by the victim against the appellant in her statements to others – Insufficient evidence to form a complete chain pointing to guilt of the appellant. [Para 34-42]

Evidence and Witnesses – Child Witness Testimony – Reliability of child witness (PW-6) under scrutiny – Material contradictions in her statements at different stages – Possibility of being tutored during the period between the incident and her court testimony – Her initial statement during investigation differed significantly from the trial testimony. [Para 35-37]

Delay in FIR Lodging – FIR lodged seven days after the incident – Delay unexplained and casts doubt on the allegations against the appellant – No immediate action despite awareness of the incident by the complainant. [Para 34]

Dying Declaration – Victim's Statement – Victim's statement to Resident Medical Officer (DW-3) indicating accidental fire during cooking – Victim did not implicate the appellant in her statements to her sister (PW-11) and to the medical officer – The Trial Court's dismissal of this testimony as non-voluntary not substantiated by evidence. [Para 40-41]

Decision – Conviction and sentence by the Trial Court set aside due to inconsistencies and insufficient evidence – Appellant acquitted of the murder charge under Section 302 IPC. [Para 42]

Referred Cases :

- Rajbir Vs. State of Haryana reported in “(2010) 15 SCC 116”
- Trimukh Maroti Kirkan v. State of Maharashtra reported in “(2006) 10 SCC 681”
- Collector of Customs v. D. Bhoormall reported in “(1974) 2 SCC 544 : 1974 SCC (Cri) 784 : AIR 1974 SC 859”
- Balram Prasad Agrawal v. State of Bihar reported in “(1997) 9 SCC 338 : 1997 SCC (Cri) 612 : AIR 1997 SC 1830”
- State of W.B. v. Mir Mohd. Omar reported in “(2000) 8 SCC 382 : 2000 SCC (Cri) 1516”
- State of T.N. v. Rajendran reported in “(1999) 8 SCC 679 : 2000 SCC (Cri) 40”
- State of U.P. v. Dr. Ravindra Prakash Mittal reported in “(1992) 3 SCC 300 : 1992 SCC (Cri) 642 : AIR 1992 SC 2045”

- State of Maharashtra v. Suresh reported in “(2000) 1 SCC 471 : 2000 SCC (Cri) 263”
- Ganesh Lal v. State of Rajasthan reported in “(2002) 1 SCC 731 : 2002 SCC (Cri) 247”
- Gulab Chand v. State of M.P. reported in “(1995) 3 SCC 574 : 1995 SCC (Cri) 552]”

### **Representing Advocates**

Advocate for the Petitioner: Mr. S.S.S. Rahman, Advocate

Advocate for the Respondent: Ms. B. Bhuyan, Additional Public Prosecutor (R-1); Ms. P. Bora, Advocate (R-2)

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### **JUDGMENT & ORDER (CAV)**

*(Mridul Kumar Kalita, J)*

- 1.** Heard Mr. S.S.S. Rahman, learned counsel for the appellant and also heard Ms. B. Bhuyan, learned Additional Public Prosecutor appearing for the State of Assam.
- 2.** This Appeal has been preferred by the appellant, Sri Sibul Sarkar under Section 374(2) of the Code of Criminal Procedure, 1973 impugning the Judgment and Order dated 28.07.2022 passed in Sessions Case No. 61/2017 by the Court of learned Sessions Judge, Udalguri, whereby the present appellant has been convicted under Section 302 of the Indian Penal Code and has been sentenced to undergo life imprisonment and to pay a fine of Rs. 10,000/(Rupees Ten Thousand only) and in default of payment of fine to undergo simple imprisonment for another 6(six) months.
- 3.** The facts relevant for consideration of the instant appeal, in brief, are as follows:-

i. That on 02.04.2017, one Sri Hemanta Biswas lodged an FIR(First Information Report) before the Officer-in-Charge of Rowta Police Station, inter-alia, alleging that his younger sister Smt. Mamani Sarkar

was married to the present appellant since eight years before filing of the FIR and it is alleged in the FIR that she was subjected to physical and mental torture by the present appellant for demand of dowry. It is also stated in the FIR that the family members of the wife of the present appellant also provided Rs. 70,000/- (Rupees Seventy Thousand) only to the appellant, but he was not satisfied with the same and continued to torture the sister of the first informant. It is further alleged that, on 25.03.2017, at about 9:30 PM, the present appellant confined his wife inside the house and set her on fire by pouring kerosene over her and when the neighbours arrived there seeing the fire from outside, they broke open the close door and recovered the sister of the first informant, namely, Mamani Sarkar, who had sustained 90% burn injuries and she was immediately taken to the hospital. However, on 30.03.2017, the sister of the first informant succumbed to her injuries.

ii. On receipt of the said FIR, Rowta P.S. Case No. 36/2017 was registered under Section 304B of the Indian Penal Code and investigation was initiated. After completion of the investigation, charge-sheet was laid against the present appellant under Section 304B of the Indian Penal Code, against the present appellant. Though the present appellant was arrested during the course of the investigation, however, on 22.08.2017, he was allowed to go on bail and thereafter, he faced the trial remaining on bail. Initially, on 22.08.2017, learned Sessions Judge, Udalguri, after considering the materials on records and after hearing both the sides, framed charge under Section 304B of the Indian Penal Code. When the said charge was read over and explained to him, he pleaded not guilty and claimed to be tried. However, on 06.07.2018, in compliance to the guidelines laid down by the Hon'ble Apex Court in "**Rajbir Vs. State of Haryana**" reported in "**(2010) 15 SCC 116,**" learned Sessions Judge, Udalguri framed alternative charge under Section 302 of the Indian Penal Code against the present appellant along with the charge which was already framed under Section 304B of the Indian Penal Code. The said charge was read over and explained to the present appellant and on being asked he pleaded not guilty to the said charge and claimed to be tried.

- iii. The prosecution side examined 13 witnesses to bring home the charges against the present appellant. The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973, during which he pleaded his innocence and denied the incriminating evidence adduced by the prosecution witnesses against him. The appellant also adduced evidence of three defence witnesses in his defence.
  
- iv. However, after completion of the trial, learned Sessions Judge, Udalguri, by Judgment, which is impugned in his appeal has convicted and sentence the present appellant in the manner as already described in paragraph No. 2 of this judgment hereinbefore.

**4.** Before considering the rival submissions made by learned counsel for both sides, let us go through the evidence which is available in record.

**5.** PW-1, Sri Hemanta Biswas, who is the first informant in this case has deposed that the appellant is his brother-in-law and the deceased Smt. Mamani Sarkar was his sister and his sister was married to the appellant about seven years prior to his deposing before the Court as PW-1. He has deposed that the appellant used to torture his sister for demand of dowry and they also paid Rs. 70,000/- (Rupees Seventy Thousand) only to the appellant, but even after that the appellant continued to demand for more money from her sister. PW-1 has stated that his sister informed him about the torture meted out on her by the appellant. He has stated that on 25.03.2017, at about 9:30 PM village people informed his another sister namely, Namita Biswas from whom he came to know that his sister Mamani Biswas had been burned and the appellant had taken her to the hospital. Thereafter, the PW-1 went to the rented house of the appellant, however, he could not find them and from there he went to the Nemcare Hospital, where he found his sister admitted in I.C.U. with 90% burn injuries. PW-1 has further stated that on 30.03.2018, his sister succumbed to injuries and thereafter, the PW-1 lodged the FIR, which is exhibited as Exhibit-1. He has further deposed that during investigation police seized one burnt mosquito net, one burnt shirt and towel which were exhibited as Materials Exhibit Nos. 1, 2 and 3 respectively. He also exhibited the seizure list as Exhibit-2 and his statement which was recorded by the Magistrate as Exhibit-3.

**5.1** During cross-examination PW-1 has stated that his brother-in-law (the present appellant) and his deceased sister were staying at a rented house at Kopati, which is about half a kilometer away from his house. He also stated that in the year 2012, his mother paid Rs. 70,000/- (Rupees Seventy Thousandonly) to the appellant. He has also stated that he does not know as to how his sister got burned. He has also stated that he has not seen any torture meted out on her sister, however, sometime, he saw swelling on her face. He was asked certain suggestive questions by the defence side to which he answered in negative.

**6.** PW-2, Tapash Mazumdar, whose house is situated in front of the house of the present appellant, has deposed that on 25.03.2017, at the time of the occurrence he was in his house and he was informed by his sister that smoke was coming out from the house of the appellant. PW-2 has deposed that he immediately rushed to the house of the present appellant, where other local people also came and they opened the two front gates made of iron and bamboo and entered into the house of the appellant and saw that the wife of the appellant was sitting on the floor with burn injuries on her body and her child was crying near her. Thereafter, PW-2 came out and made arrangements for taking her to the hospital. He has also deposed that the wife of the present appellant was admitted in the Nemcare Hospital and thereafter, the present appellant returned to his house for taking ATM and cash. He thereafter, again came to the hospital. PW-2 has further deposed that his statement was also recorded by the Magistrate, which he exhibited as Exhibit-4.

**6.1** During cross-examination, PW-2 has stated that he saw the appellant staying in the rented house for last two years and he did not saw any quarrel between the appellant and his deceased wife. He has also stated that he does not know how the deceased caught fire.

**7.** PW-3, Sri Shyamal Shill, whose house is also adjacent to the house of the present appellant, has deposed that on the day of the incident, he was in his house at about 9:30 PM and he heard hue and cry raised by the neighbouring people that the house of the appellant caught fire. On hearing hue and cry, PW-3 came out of his house and saw some other villagers, who told him that the wife of the appellant has been burned by fire and she should be immediately taken to the hospital in his car. PW-3 has further deposed

that on hearing this he immediately brought out his car and some other people carried burnt Marami Biswas in to his car and then they went to the hospital. PW-3 has also deposed that the appellant also accompanied them in the car to the hospital and after five days of the incident, the wife of the appellant died in the hospital due to burn injuries. PW-3 has also deposed that his statement was recorded under Section 164 of the Code of Criminal Procedure, 1973, which he exhibited as Exhibit-5.

**7.1** During cross-examination, PW-3 has deposed that the deceased was an Anganwadi worker and the appellant was staying with the deceased at Kopati Bagicha under Rowta Police Station and he never heard any quarrel between them.

**8.** PW-4, Susila Mazumdar, who is a co-villager of the appellant, has deposed that on the day of incident at about 9:30 PM, when she came out of her house to wash her hands near the tube well, she saw flames coming out from the house of the appellant and she raised alarm and told her family members about the fire. Thereafter, she along with her brother rushed to the house of the appellant and found that the front gates of the house were closed and inside gate was also under lock. PW-4 has deposed that thereafter they called the appellant, by name, from there and raised alarm about the fire. PW-4 has also deposed that after calling 3-4 times the name of the appellant, he came out from his house and open the lock of the inside gate and told that a small incident had happened and asked them to leave. However, PW-4 went inside the house of the appellant and saw the wife of the appellant was burning. She has deposed that she thereafter returned back to her home and later on came to know that the wife of the appellant was taken to hospital where after four days she succumbed to injuries. She has also deposed that her statement under Section 164 of the Code of Criminal Procedure, 1973 was recorded which is exhibited as Exhibit-6.

**8.1** During cross-examination, PW-4 has deposed that the deceased was leaving in the house adjacent to their house for about one year and during this period she had never heard any quarrel between the deceased and the appellant. She has also deposed that she does not know how the deceased got fire. She has also deposed that the appellant had accompanied the deceased.

**9.** PW-5, Smt. Susma Biswas, who is the neighbour of the deceased, has stated that on the day of the incident at about 9:30 PM, when she was inside her house she heard hue and cry coming out from the house of the appellant and thereafter, she came out and went to the house of the appellant. She saw other people of the neighbourhood also came there. They called the appellant to open the lock of the iron gate and thereafter the appellant came and open the lock of the iron gate. PW-5 has also deposed that thereafter they entered into the house of the appellant and saw his wife was sitting on the floor in a burnt condition. Her face and entire body was burnt. Later on, she was taken to the hospital, wherein, she died after 4-5 days. PW-5 also deposed that her statement was recorded under Section 164 of the Code of Criminal Procedure, 1973, which she exhibited as Exhibit-7.

**9.1** During cross-examination PW-5 has deposed that when she reached the house of the appellant, Sri Tapash Mazumdar and Smt. Susila Mazumdar were already present in front of the house of the appellant. She has also deposed that on being asked the wife of the appellant told her that she set herself on fire on her own and when the PW-5 asked the present appellant he had told to them that he does not know how the incident has happened. Later on, the victim expired in the hospital.

**10.** PW-6, Ms. Sriya Sarkar, who is the daughter of the appellant and who was 8 years of age when she deposed before the Trial Court as PW-6, has deposed that on the day of incident at about 9:00 PM, when she was with her mother the appellant started assaulting her without any reason and asked her to bring money from her parents house and after assaulting her mother the appellant pushed her inside the bathroom. Thereafter, he again pulled her out of the bathroom and brought one matchbox and set her mother on fire. PW-6 has also stated that after setting her mother on fire, the appellant was playing with his mobile phone and when PW-5 asked her father to save her mother, he threatened her not to raise any alarm otherwise he would kill her also like her mother. PW-6 has further deposed that her mother was moaning in pain and in the meanwhile, on hearing the shouts neighbours came to their house and knocked at the door of their house, however, the appellant told them nothing had happened and they should leave the house. She has further deposed that one Tapash came inside the house and saw



her mother burning in flame and thereafter, she was taken to hospital. PW-6 has also deposed that as she was

crying and then she was taken by her neighbour, Sunu Didi, to their house and later on, her uncle brought her to their home from the house of Sunu Didi. PW-6 has further deposed that as a result of burn injury her mother died in the hospital. She has also stated that the appellant used to assault her mother regularly demanding dowry from her. She has also stated that the police brought her to the Magistrate and got her statement recorded under Section 164 of the Code of Criminal Procedure, 1973, which is exhibited as Exhibit-7.

**10.1** During cross-examination PW-6 has deposed that there were three rooms in the house where they stayed till the incident. She has also stated that the appellant set her mother on fire in the bedroom and the bathroom is situated next to the bedroom. She has also stated that at the time of the occurrence of the incident she was sitting in the bedroom and at that time the appellant was assaulting her mother and brought a match-box which was kept in front of image of Goddess for lighting incense stick for prayer. She has also stated that she has not noticed whether kerosene oil was poured on her mother before lighting her with a match-stick. PW-6 has also stated that the appellant had assaulted her mother when she was coming out from kitchen and also asked her to bring money from her parents. She has also stated that when the neighbour Tapash came inside the bedroom only at that time the appellant poured water on her mother to douse the fire and thereafter, her mother was taken to the hospital for treatment. She has denied the suggestion given to her that on the day of occurrence at the time of incident she was sleeping. She has also denied the fact that she has stated before police that on the day of occurrence when she woke up from sleep and suddenly, she saw her mother shouting in flame and her father was sitting on the bed witnessing her burning mother and after a while her father got up from the bed and poured water from a bucket to extinguish the fire. She has denied the suggestion that she has deposed before the Court falsely and she has given her statement under Section 164 of the Code of Criminal Procedure, 1973 as tutored by her family members.

**11.** PW-7, Sri Swapan Roy, has deposed that on the day of incident, at about 9:20 PM, he was in his residence watching television and at that time he heard hue and cry from the house of the appellant and thereafter, he immediately rushed to the house of the appellant and saw some neighbouring people have already gathered therein front of the gate, but the

appellant was preventing them from entering into his house. PW-7 has deposed that he asked the appellant as to what had happened to which the appellant answered that nothing has happened, but PW-7 opened the gate by pushing away the appellant and entered into his house from where smoke was coming out. PW-7 has further stated that inside the room he saw the wife of the appellant was engulfed with flame all over the body and smell of kerosene was coming out and water was spilled out in the room and in one corner of the room the daughter of appellant was standing in fear. PW-7 has further deposed that he saw the wife of the appellant was wearing new clothes and her burnt clothes were lying there and her entire body was burned and she was in pain. PW-7 has further deposed that seeing the situation he immediately called a vehicle to shift the wife of the appellant to the hospital. However, the wife of the appellant eventually died in the hospital out of burn injuries. PW-7 has also deposed that he did not see any quarrel between the deceased and the appellant before the incident and he does not know how the deceased caught fire.

**12.** PW-8, Smt. Parbati Guha, has also deposed that on the day of incident at about 9:30-10:00 PM, she was watching television in her residence and at that time one Susila Mazumdar, who is her neighbour, came to her house and informed her that a fire has broken out at the house of the appellant. Thereafter, PW-8, along with Susila and Suchama Mazumdar came to the house of the appellant and saw that some neighbours have already gathered there in front of the house of the appellant. However, they were not allowed by the appellant to enter into the house saying that nothing had happened inside. PW-8 has further deposed that however as they were not convinced they forcefully entered into the house and saw that the wife of the appellant was engulfed in flames and her entire body was burned and she was in a sitting position wearing new clothes. At that time the appellant also sprinkled some water on her body and PW-8 has further stated that they saw the only daughter of the appellant was trembling due to fear. Thereafter, PW-8 took the daughter of the appellant to her own home for safety and other people who had gathered there took the victim to hospital. However, the wife of the appellant died of burn injuries. She has also stated that her statement was recorded under Section 164 of the Code of Criminal Procedure, 1973 which is exhibited as Exhibit-9.

**12.1** During cross-examination, she has stated that when the deceased was taken to hospital, the present appellant also accompanied her. She has also stated that she had not noticed any quarrel between the deceased and the present appellant before her death.

**13.** PW-9, Dr. Taritshika Deka has deposed that on 31.03.2017, she was posted as resident doctor at Nemcare Hospital, Guwahati and she examined the deceased and found that the immediate cause of death was due to septicemia, which was due to 85% of burn injuries.

**14.** PW-10, Dr. Kanbapu Choudhury, who conducted the post-mortem examination of the deceased, has deposed that on 31.03.2017, he was posted as Assistant Professor in the Department of Forensic Medicine, Gauhati Medical College and Hospital, Guwahati and on that day he conducted the post-mortem examination of Mamoni Biswas Sarkar in reference to Bhangagarh GDE No. 671 dated 31.03.2017. On an examination he found the following.

“EXTERNAL APPEARANCE:-

Condition: A female dead body of average built, brown complexion. Cotton bandage present on head, chest abdomen, both upper and lower limbs. Eyes closed, cotton pack on mouth. Rigor mortis present all over the body.

Wounds, Bruise-position and character: Injury-Ante mortem burn injury present on forehead, front of neck, both upper limbs, front of the chest and abdomen except the genital area, both lower limbs except the feet, back of the neck, back of the chest and abdomen, both buttocks. Burn injuries are epidermal and dermo epidermal in nature. Zone of hypercarbia and redness present between healthy and burn area. Foul smelling pus and unhealthy granulation tissue present at burn area at places.

Mark of ligature on neck dissection, etc: Not detected externally and on dissection.

CRANIUM AND SPINAL CANAL:-

Scalp, Skull, vertebrae-All healthy, Membrane-healthy, Brain-healthy, spinal cord-Not examined.

THORAX:-

Walls ribs and cartilages- Wall as described ribs and cartilages healthy, pleurae-healthy, Larynx and trachea-mucosa congested, lungs-both congested, Pericardium-healthy, Heart-healthy, Vessels-Healthy.

### ABDOMEN:-

Walls-As described, Peritonoum-healthy, Mouth, pharynx, oesophagushealthy, Stomach and its contents healthy empty, Small intestine and its contents healthy contains liquid food and matters, Large intestine and its contents-healthy contains gases and fecal matter, Liver healthy, Spleenhealthy, Kidneys-congested pus present at renal pelvis, Bladder-healthy, Organs of generation-healthy, Uterus-empty.

### MUSCLES, BONES AND JOINTS

Injury as described, Disease or deformity, Fracture and Dislocation not detected.

### Opinion:-

Death was due to septicemia as result of ante mortem burn injury as described. The burn injury covers approx 85 % of total body surface area.”

He has exhibited the post-mortem examination report as Exhibit-11.

**14.1** During cross-examination PW-10 has deposed that he did not find any external injuries on the dead body except the burn injuries.

**15.** PW-11, Smt. Gautami Biswas, has deposed that the informant is her brother and the appellant is her brother-in-law and the deceased was her younger sister. She has deposed that her sister was married to the appellant out of love affair between them and at the beginning for about 1 year the relationship between her sister and the appellant was cordial. However, thereafter, the relationship became strained and the appellant started demanding dowry from her frequently. PW-11 has deposed that just before death of her sister, she called her to her house during holi festival. She has deposed that her sister was having some problems and she wanted to tell her about the same, however, PW-11 told her that after completion of the examination of her daughter, she would visit her. However on, 25.03.2017, PW11 received a phone call from her house that her sister had suffered burn injuries and she had been shifted to the Nemcare Hospital. PW-11 has further stated that on 26.03.2017, when she went to the Nemcare Hospital to see her sister in the hospital she did not find the appellant, however, she met his brother Sanjay Sarkar, who told her that the appellant has returned back to Kopati in the same vehicle in which her sister brought to the Nemcare Hospital. PW-11 has further deposed that at about 4:30 PM she was allowed to meet her sister in the hospital, where she saw that her whole body was

burned and she was still able to speak. When PW-11 asked the deceased as to how she had sustained the burn injuries, she replied that when she was talking over phone with her husband's brother namely, Sanjay Sarkar, her husband Sibu Sarkar became furious and snatched away the phone from her hand and also assaulted on her neck causing her injury and thereafter, as PW-11 was asked to leave the room of her sister by the hospital authorities, as she was suffering from smallpox, she could not go to meet her sister later on. PW-11 has deposed that she suspects that her sister was killed by the appellant by pouring kerosene over her and putting her on fire. She has also deposed that her statement under Section 164 of the Code of Criminal Procedure, 1973 was also recorded and same has been exhibited as Exhibit-12 by him.

**15.1** During her cross-examination she has stated that the appellant took money from her on three occasions and out of love for her sister she paid the money to the appellant. She has also deposed that daughter of the deceased had told her that the appellant took a match-box and set her mother on fire. She has denied and answered in negative to certain suggestive questions which were put to her by the defence side.

**16.** PW-12, Sanjib Sarkar, has deposed that on the day of the incident he was informed by one Tapash Mazumdar that fire broke out in the residence of the appellant. Thereafter, he rushed to the house of the appellant and saw many other people had already gathered there. He saw that the appellant had burn injuries on her face and other parts of the body.

**16.1** During cross-examination PW-12 has stated that the appellant also accompanied the deceased to Nemcare Hospital and he did not asked the appellant about the incident.

**17.** PW-13, Sri Dimbeswar Deka ASI of Police, who is also the Investigating Officer of the case, has deposed that he was entrusted as the Investigating Officer of Rowta P.S. Case No. 36/2017 under Section 304B of the Indian Penal Code and after taking charge of the investigation, he went to the place of occurrence, recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1973, seized some half burnt clothes including one mosquito net and got the statement of some of the witnesses recorded under Section 164 of the Code of Criminal Procedure, 1973. He has also

stated that after about 3 months the appellant himself surrendered before him and thereafter he was forwarded to the Court.

**17.1** During cross-examination, he has denied the suggestion that PW-6, Sriya Sarkar had not stated before him that on the day of occurrence in the night she was sleeping and she woke up from sleep suddenly saw that her mother was shouting under flame and her father was sitting on the bed witnessing her burning mother and after a while her father got up from the bed and poured water from a bucket to extinguish the fire and thereafter, she was taken to hospital. He has also stated that PW-11 Gautami Biswas had not stated before him that now and then she used to give money to the appellant. He has also stated that he seized half burnt clothes and one mosquito net from the place of occurrence.

**18.** During his examination under Section 313 of the Code of Criminal Procedure, 1973, the appellant pleaded his innocence. However, apart from pleading his innocence, he did not give any explanation regarding the incriminating evidence deposed against him by the prosecution witnesses. He adduced the evidence of 3(three) witnesses in his defence.

**19.** DW-1, Sri Deepak Nag, has deposed that on 25.03.2018, while he was in his shop, he heard that fire engulfed the house of the appellant. Thereafter, he went there, however at that time the victim was already taken away to the hospital and when he asked about the incident, he was told that fire broke out from the kitchen while the victim was preparing meal.

**19.1** During his cross-examination DW-1 stated that he has no personal knowledge about the occurrence. He also denied the suggestion that he has deposed falsely for the appellant.

**20.** DW-2, Sri Ripu Thakur, has deposed that at the time of incident he was in his shop and he heard that fire engulfed the residence of the appellant. Thereafter, he went to the place of occurrence, however, by that time the wife of the appellant was already taken to the hospital. He has also deposed that the family relationship between the appellant and his wife was good.

**20.1** During his cross-examination, DW-2 has stated that at the time of incident he was not present at the place of occurrence. He has denied the

suggestion he has deposed falsely as he had good relationship with the appellant.

**21.** DW-3, Dr. Dipak Sarma has deposed that on 26.03.2017, he was working as Resident Medical Officer at the Nemcare Hospital, Guwahati. He has stated that on that date at night, the victim Mamoni Biswas was admitted in the hospital with 85% burn injuries and her registration number was MRD No.1661/17. DW-3 has deposed during recording of dying declaration the patient gave declaration, as “on 25.03.2017, while I was preparing meal on hearth, somehow fire engulfed on me. Then I have been brought to Nemcare hospital Guwahati.” DW-3 has further deposed that in case of admission of patient with burn injuries, the declaration of every such patient is recorded by the hospital, therefore, declaration of Mamoni Biswas was also recorded. DW-3 exhibited the said declaration as Exhibit-D1. He also exhibited signature of one Mridul Deka, technician, who had written the declaration as Exhibit-D1 (2).

**21.1** During cross-examination, DW-3 has deposed that declaration of the victim was recorded as asked by hospital authority during the time of her admission in the hospital. He has also deposed that the patient did not give the statement voluntarily, it was recorded only as stated by her after putting of questions to her as a doctor by him.

**22.** Mr. S.S.S. Rahman, learned counsel for the appellant has submitted that the appellant is innocent and he only tried to save his wife by pouring water on her after he noticed that his wife caught fire. It is also submitted by the learned counsel for the appellant that the appellant does not know as to how his wife caught fire and it was the appellant who took his injured wife to the hospital. He has also submitted that though the incident occurred on 25.03.2017 and the wife of the appellant died on 30.03.2017, the FIR was lodged on 02.04.2017, i.e. about 7(seven) days after the occurrence of the incident with concocted allegations against the appellant. He has further submitted that the allegation levelled against the appellant in the FIR is a result of an after thought by the first informant, who is the brother-in-law of the appellant. It is also submitted that by the learned counsel for the appellant that the learned Trial Court has arrived at a finding of conviction of the appellant mainly on the basis of testimony of PW-6, who is the daughter of the appellant, who was aged about 7 years only at the time of the incident



and she has deposed before the Court after 1(one) year of the incident and she may easily be tutored during this period.

**23.** Learned counsel for the appellant has also submitted that there are embellishment and contradiction in the testimony of PW-6. It is submitted by learned counsel for the appellant that PW-6 had stated before the Investigating Officer, in her statement recorded under Section 161 of the Code of Criminal

Procedure, 1973, on 02/04/2017, that at the time of the incident she was sleeping and when she woke up she saw her mother shouting in flames and the appellant sitting on the bed and after a while the appellant got up from the bed and poured water on his wife from a bucket, whereas, while deposing before the Court as PW-6 she gave a different version of the incident implicating the appellant. Learned counsel for the appellant has submitted that the omission to state the facts, in her statement recorded under Section 161 of the Code of Criminal Procedure, 1973, which PW-6 has stated before the Court during trial, amount to material contradiction and hence her testimony is unworthy of any credence and should not be relied upon.

**24.** Learned counsel for the appellant has submitted that PW-6 has given a different version of the incident at different stages i.e. while giving statement before Investigating Officer which was recorded under Section 161 of the Code of Criminal Procedure, 1973 and thereafter, during her statement under Section 164 of the Code of Criminal Procedure, 1973 and finally while deposing as PW-6 during the trial, which itself makes her testimony unreliable and unworthy of any credence. He further submitted that in view of the fact that PW-6 is a child witness who may easily be tutored, learned Sessions Judge, Udalguri, erred in relying upon her testimony to arrive at a finding of guilt of the appellant.

**25.** Learned counsel for the appellant has also submitted that the learned Trial Court also failed to take into consideration the dying declaration of the deceased which was exhibited by Dr. Dipak Sarma as Exhibit-D1, wherein the deceased had stated that while she was preparing meal on hearth, somehow fire engulfed her and thereafter, she was brought to the hospital. Learned counsel for the appellant has submitted that the Exhibit-D1 clearly shows that the fire which engulfed the deceased was accidental, while she was cooking food and the present appellant was nowhere involved in the

alleged incident, rather he only poured water on the deceased in order to save her life.

**26.** It is submitted by the learned counsel for the appellant that had the appellant had committed the offence as alleged in the FIR, he would have certainly been implicated by the deceased while she was giving her dying declaration before DW-3, which was not done in this case. It is also submitted by learned counsel for the appellant that the deceased, while having interaction with PW-11(sister of the deceased) in the hospital, when PW-11 came to the Nemcare Hospital to see her, did not say anything regarding the appellant setting her on fire, as alleged in the FIR, and if the offence alleged had actually happened, it would have been the first thing that the deceased would have told to her sister (PW-11) when she came to meet her.

**27.** It is also submitted by the learned counsel for the appellant that the prosecution witnesses, namely, PW-2 (Tapash Mazumdar), PW-3 (Shyamal Shill), PW-4(Susila Mazumdar), PW-7(Swapan Roy), PW-8 (Parbati Guha), all of whom were neighbours of the appellant, have deposed that they never witnessed any quarrel between the appellant and his wife and therefore, the allegation levelled against in the FIR is not believable. Learned counsel for the appellant has also submitted that PW-5 Smt. Susma Biswas, who is the neighbour of the appellant, has deposed that when she reached the house of the appellant, the wife of the appellant told her that she set herself on fire on her own. Learned counsel for the appellant has also submitted that the appellant was living happily with his wife and as he is a medical representative and he had good earnings, there was no occasion for him to demand any dowry or to subject his wife to cruelty for dowry and the allegations levelled against him by his brother-in-law (PW-1) and his sister-in-law (PW-11) are concocted and they had tutored PW-6 to testify against him. It is, thus submitted by the learned counsel for the appellant that the learned Trial Court failed to take into consideration the evidence on record in its proper perspective and came to the conclusion of guilt of the present appellant without their being sufficient materials on record to come to such a conclusion, therefore, the conviction of the present appellant is liable to be set aside.

**28.** On the other hand, Ms. B. Bhuyan, learned Additional Public Prosecutor submitted that the incident occurred inside the house of the

appellant in which he and his daughter, i.e., PW-6 were present at the time of alleged incident. It is submitted by learned Additional Public Prosecutor that the child witness (PW-6), who is a competent witness, and who is the daughter of the appellant has categorically implicated the present appellant by stating that it is the appellant who brought one matchbox from the prayer place (thakur thali) and set her mother on fire. Learned Additional Public Prosecutor has submitted that the conduct of the present appellant after the incident is itself an implicating circumstance which points towards the guilt of the present appellant. It is further submitted by the learned Additional Public Prosecutor that the testimony of PW-6 shows that the appellant was playing with his mobile, when the victim was moaning in pain after getting burnt by fire, and he did nothing to stop the fire even when he was requested to do so by his own daughter. It is only when the neighbours came inside his house, he poured water on his wife. Such conduct, as per learned Additional Public Prosecutor, only shows that it was the appellant who set the victim on fire and wanted her to die.

**29.** It is submitted by the Learned Additional Public Prosecutor that it is from the testimony of prosecution witnesses that after the incident, the appellant had prevented the neighbours and other people who gathered outside his house from entering into his house which only shows that the appellant was trying to conceal the real facts from other people and was not keen in providing medical treatment to the victim.

Learned Additional Public Prosecutor has further submitted that though the incident occurred inside the house of the appellant, where she was present at the time of alleged incident, however, when the appellant was examined under Section 313 of the Code of Criminal Procedure, 1973, he offered no explanation as to how the incident occurred. Learned Additional Public Prosecutor has submitted that the appellant, who was present in the house when the incident occurred, 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. Learned Additional Public Prosecutor has further submitted that 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. In

support of her submission, the learned Additional Public Prosecutor has cited a ruling of hon'ble Apex Court in

**"Trimukh Maroti Kirkan v. State of Maharashtra,"** reported in **(2006) 10 SCC 681** wherein it was observed as follows :-

**"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.**

**16. A somewhat similar question was examined by this Court in connection with Sections 167 and 178-A of the Sea Customs Act in *Collector of Customs v. D. Bhoormall* [(1974) 2 SCC 544 : 1974 SCC (Cri) 784 : AIR 1974 SC 859] and it will be apt to reproduce paras 30 to 32 of the reports which are as under: (SCC pp. 553-54)**

**"30. It cannot be disputed that in proceedings for imposing penalties under clause (8) of Section 167, to which Section 178-A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But, in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and — as Prof.**

Brett felicitously puts it—‘all exactness is a fake’. El Dorado of absolute proof being unattainable, the law accepts for it probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case.

31. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered—to use the words of Lord Mansfield in *Blatch v. Archer* [(1774) 1 Cowp 63 : 98 ER 969] , Cowp at p. 65—‘according to the proof which it was in the power of one side to prove, and in the power of the other to have contradicted’. Since it is exceedingly difficult, if not absolutely impossible, for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

32. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the persons concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of fact may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result, prove him guilty. As pointed out by Best (in *Law of Evidence*, 12th Edn., Article 320, p. 291), the ‘presumption of innocence is, no doubt, *presumptio juris*; but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property’, though the latter is only a presumption of fact. Thus the burden on the prosecution or the Department may be considerably lightened even by such presumptions of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden, to discharge which, very slight evidence may suffice.” **(emphasis supplied)**

**17. The aforesaid principle has been approved and followed in *Balram Prasad Agrawal v. State of Bihar* [(1997) 9 SCC 338 : 1997 SCC (Cri) 612 : AIR 1997 SC 1830] where a married woman had committed suicide on account of ill-treatment meted out to her by her husband and in-laws on account of demand of dowry and being issueless.**

**18. The question of burden of proof where some facts are within the personal knowledge of the accused was examined in *State of W.B. v. Mir Mohd. Omar* [(2000) 8 SCC 382 : 2000 SCC (Cri) 1516] . In this case the assailants forcibly dragged the deceased, Mahesh from the house where he was taking shelter on account of the fear of the accused and took him away at about 2.30 in the night. Next day in the morning his mangled body was found lying in the hospital. The trial court convicted the accused under Section 364 read with Section 34 IPC and sentenced them to 10 years' RI. The accused preferred an appeal against their conviction before the High Court and the State also filed an appeal**

**challenging the acquittal of the accused for murder charge. The accused had not given any explanation as to what happened to Mahesh after he was abducted by them. The learned Sessions Judge after referring to the law on circumstantial evidence had observed that there was a missing link in the chain of evidence after the deceased was last seen together with the accused persons and the discovery of the dead body in the hospital and had concluded that the prosecution had failed to establish the charge of murder against the accused persons beyond any reasonable doubt. This Court took note of the provisions of Section 106 of the Evidence Act and laid down the following principle in paras 31 to 34 of the reports: (SCC p. 392)**

“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 on the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the aforementioned circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct, etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the Court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to Mahesh at least until he was in their custody.”

**21. In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decisions of this Court. [See State of T.N. v. Rajendran [(1999) 8 SCC 679 : 2000 SCC (Cri) 40] (SCC para 6); State of U.P. v. Dr. Ravindra Prakash Mittal [(1992) 3 SCC 300 : 1992 SCC (Cri) 642 : AIR 1992 SC 2045] (SCC para 39 : AIR para 40); State of**

Maharashtra v. Suresh [(2000) 1 SCC 471 : 2000 SCC (Cri) 263] (SCC para 27); Ganesh Lal v. State of Rajasthan [(2002) 1 SCC 731 : 2002 SCC (Cri) 247] (SCC para 15) and Gulab Chand v. State of M.P. [(1995) 3 SCC 574 : 1995 SCC (Cri) 552] (SCC para 4).]

**30.** Learned Additional Public Prosecutor has submitted that in the instant case also the appellant has failed to offer any explanation as to what had happened inside the house in which the incident had occurred, where the appellant was himself present at that time. Learned Additional Public Prosecutor has submitted that coupled with failure on the part of the appellant give an explanation as to what had happened inside the house, where he was present, when the alleged incident occurred, the testimony of PW-6 also has categorically implicated the present appellant for the death of her mother, leaving no room for doubt regarding the involvement of the present appellant in the alleged offence. Learned Additional Public Prosecutor has, therefore, submitted that the conviction of the appellant under Section 302 of the Indian Penal Code and the sentence imposed there for does not warrant any interference by this Court.

**31.** Ms. P. Bora, learned counsel for the respondent No.2 made submissions similar to that of learned Additional Public Prosecutor and on the same grounds has objected to any interference with the impugned judgement and sentence of the appellant in this appeal.

**32.** We have considered the submissions made by learned counsel for both the sides and hand all through all the materials on record meticulously.

**33.** On perusal of the impugned judgement, it appears that learned Sessions Judge, Udalguri has convicted the present appellant under Section 302 of the Indian Penal Code for committing murder of his wife, mainly on the basis of the testimony of PW-6 as well as failure on the part of the appellant to give proper explanation regarding the incident, during his examination under Section 313 of the Code of Criminal Procedure, 1973. Learned Sessions Judge also discarded the testimony of DW-3 on the ground that statement given to the doctor by the wife of the present appellant, when she was brought to the Nemcare Hospital, was not given voluntarily as it was recorded only after the doctor had put question to her.

**34.** The evidence on record shows that though the incident of deceased Mamoni Sarkar sustaining 85% of burn injuries occurred on 25/03/2017 and she succumbed to the said injuries on 30/03/2017, however, the FIR was lodged, against the present appellant, only on 02/04/2017. The evidence of PW-1 shows that he came to know, on 25/03/2017 itself, about the incident in which his sister sustained burn injuries, however, no reason has been shown in the FIR for the delay of seven days in lodging of the FIR against the appellant. This delay in lodging of the FIR, in itself, raises a doubt regarding the veracity of the allegations levelled against the present appellant in the FIR, which is exhibited as Exhibit 1.

**35.** As already stated hereinbefore, learned Trial Court has relied mainly upon the testimony of the PW-6 to come to the finding of guilt of the present appellant. Let us now examine as to whether the testimony of PW-6 may be considered trustworthy and safe for reliance for the purpose of coming to the finding of guilt of the present appellant. It appears that when the PW-6 had deposed before the Trial Court, she was of eight years of age. Her testimony was recorded in the trial court, on 29/11/2018, whereas the incident occurred on 25/03/2017, that is about 01 year 08 months 04 days prior to her deposing before the Court as PW-6. Thus, it appears that at the time of the alleged incident, the PW-6 was a child of 06 years 04 months of age.

**36.** It is true that merely because of the fact that the PW-6 was a child witness, when she witnessed the incident and when she deposed before the Trial Court, in itself, may not be a reason to discard her testimony, as under Section 118 of the Indian Evidence Act. She was found by the learned Trial Court to be a competent witness as she was able to understand the questions put to her, while she was deposing as PW-6, and was able to give a rational answers to the said questions. However, mere competency of a witness is not a guarantee of his or her trustworthiness as well as truthfulness of the testimony of such a witness. The truthfulness of the testimony of a witness, irrespective of the fact whether he or she may be a child witness or otherwise, depends upon the facts and circumstances of a particular case. Verifying the consistency in the version of facts narrated by a witness at different stages of investigation, enquiry and trial is a well-accepted test to find out the reliability of a witness. If the facts narrated by a witness has remained consistent throughout the various stages of the investigation, enquiry and trial, there may not be any ground to disbelieve such a witness. However, if



there are material contradictions in the version of facts narrated by a witness at different stages of investigation, enquiry and trial, such a witness may not be safe for reliance.

**37.** In the instant case though, PW-6 has denied that fact that she had stated before the Investigating Officer that on the day of occurrence of alleged incident, she was sleeping and when she woke up, she saw her mother engulfed in flames and was shouting and her father was sitting on the bed witnessing her burning mother and thereafter he got up from the bed and poured a bucket of water on her mother which extinguished the fire, however, the Investigating Officer, while deposing as PW-13, has confirmed that PW-6 made such a statement during the investigation stage. It appears from the records, available before the Court, that the statement of PW-6 was recorded under Section 161 of the Code of Criminal Procedure, 1973, on 02/04/17, i.e., on the date of lodging of the FIR, where as her statement under Section 164 Cr.P.C was recorded on 08/04/2017. It also appears from evidence on record that during that period she was staying with her maternal uncle. It also appears from the record that on the date of incident itself, i.e., on 25/03/2017 itself, after the alleged incident, the PW-6 was taken to the house of one of the neighbours of the appellant and from there she was taken to the house of her maternal uncle. It also appears from record that when the statement of PW-6 was recorded under Section 161 and 164 of the Code of Criminal Procedure, 1973, and when her deposition was recorded in the trial, she was staying with her maternal uncle/maternal grandparents. It is pertinent to note that though the PW-6 has deposed that she had seen the appellant setting her mother on fire on the date of alleged incident, however, though she was taken to be house of her maternal uncle on the date of alleged incident itself, her maternal uncle took 7 days for lodging the FIR against the present appellant. It was quite natural for PW-6 to narrate the real facts which she had actually witnessed immediately to her maternal grandparents/maternal uncle when she was taken to their house on the date of incident and had she had done so, there does not appear to be any plausible reason for delayed lodging of the FIR against the appellant. Thus, the delayed lodging of the FIR against the present appellant, in the instant case, raises a cloud of doubt regarding the veracity of the allegation that it is he who set his wife on fire. Moreover, though the PW-6 has stated in her statement under Section 161 of the Code of Criminal Procedure, 1973, that she was sleeping at the time of incident and when she woke she saw her

mother engulfed in fire and her father (present appellant) was sitting on the bed, who thereafter poured a bucket of water on her to douse the fire, however, while deposing before the court as PW-6, during trial, she made embellishments in her testimony and had stated that she had seen the present appellant setting her mother on fire. It is to be taken note of that when PW-6 came to depose before the court during trial, she was staying with her maternal grandparents/maternal uncle (she was taken to the house of her maternal uncle

on the date of incident itself after the incident), hence, considering the tender age of PW-6 and the circumstances of this case it cannot be ruled out that she might have been tutored, during her stay in her maternal uncle's house, which has resulted into an improved version in testimony by her during trial, implicating the present appellant, which she had not done when she was examined during investigation on 02/04/2017.

**38.** As regards the observation of learned Trial Court as well as submissions made by learned Additional Public Prosecutor and learned counsel for the informant that as the appellant, during his examination under Section 313 of the Code of Criminal Procedure, 1973, Cr.P.C, had failed to give proper explanation as to what had actually happened inside the house where the incident had occurred, where he was present at that time, therefore, same may be regarded as an additional incriminating circumstance against the present appellant, we are of the considered opinion that, in the instant case the appellant had pleaded his innocence, during his examination under Section 313 of the Code of Criminal Procedure, 1973, and also had adduced defence evidence in trying to prove his innocence. Facts of this case, in our considered opinion, does not fall within the category of cases to which the ruling of "**Trimukh Maroti Kirkan v. State of Maharashtra**,"(supra) would be applicable as in the instant case at the time of incident the appellant was not alone along with the deceased as the PW-6 was also present there. Moreover, we have seen herein above that the PW-5 Smt. Susma Biswas, who is a neighbour of the appellant as well as the deceased, in her testimony, has deposed that the deceased Mamoni Biswas, on being asked by her, told her (PW-5) that she had set herself on fire. PW-5 has also deposed that the appellant had also told her that though he was there inside the said room, he does not know anything as to how incident occurred as he was sleeping in the same room. This testimony of PW-5 has not been considered by the learned Trial Court in the impugned judgment.

We see no justification in discarding the aforesaid testimony of PW-5 as we find no material on record to suggest that she had deposed falsely before the learned Trial Court.

**39.** Further, it is also to be noted that Mamoni Biswas succumbed to her injuries only after five days of the incident and during this period she had spoken to PW-11 (who is the sister of the deceased) in the Hospital. We are of the considered opinion that if the appellant had set her on fire, it would have been the first thing which the victim would have told to her sister i.e., PW- 11, however, the victim never implicated the present appellant for setting her on fire. She had only stated to PW- 11 that the appellant had snatched away the phone from his wife (deceased) when she was talking to his younger brother over mobile phone and he assaulted her over neck.

**40.** If we consider the testimony of PW-11, it also appears that when she met the deceased in the hospital, when she was admitted there, she had specifically asked her as to how she sustained such burn injuries, however, the victim never implicated the appellant for setting her on fire. Coupled with this, the testimony of DW- 3, who was the Resident Medical Officer working at Nemcare Hospital, Guwahati on the night when the victim, namely, Mamoni Biswas was admitted there with 85% of burn injuries, wherein he has deposed that at the time of recording the statement of the victim, she had stated that on 25.03.2017, while she was preparing meal on hearth somehow the fire engulfed her. Learned Trial Court discarded this testimony on the ground that the statement of the victim recorded in the Nemcare Hospital at the time of her admission was not voluntarily given. However, we do not find any justification or any supporting material to show that the statement of the victim given before the DW- 3, which is exhibited as Exhibit No. D-1, was not voluntary or that it was obtained after subjecting her to any kind of pressure or inducement.

**41.** It is further to be noted that this case is not a case where the victim died instantly, rather, in this case, after sustaining burn injuries, the victim survived for five days and during this period she had spoken to at least two different persons, namely, (1) with DW-3 in the hospital while giving her statement and (2) with her own sister i.e., PW- 11, in the hospital. It is most unlikely that when she could speak to PW-11 and DW-13, she could not speak to her attending doctors and nursing staff as to what actually happened

at the fateful time. However, before nobody the victim implicated the present appellant for setting her on fire. We have already indicated in paragraph Nos. 35, 36 and 37 as to why the testimony of PW-6 is not safe for reliance for arriving at the finding of guilt of the present appellant. The other evidence on record, which are circumstantial in nature, for the reasons stated herein before, in our considered opinion does not form a complete chain of evidence pointing only towards the guilt of the present appellant, rather, as discussed herein before there are materials on record, to show that the victim did not implicate the present appellant for setting her on fire. We are, therefore, of the considered opinion that learned Trial Court had erred in arriving at a finding of guilt of the present appellant in the impugned judgment.

**42.** In view of above discussions, this appeal is allowed and the impugned judgment as well as conviction and sentence imposed on the present appellant is hereby set aside and the appellant is acquitted of charge under Section 302 of the Indian Penal Code. The appellant be set at liberty forthwith unless required in connection with any other case.

**43.** Send back the case record of Sessions Case No. 61/2017 along with connected files and a copy of this judgment to the Court of learned Sessions Judge, Udalguri.

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