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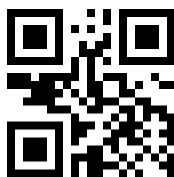

2026:GAU-AS:5035-DB

REPORTABLE

IN THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM: NAGALAND: MIZORAM & ARUNACHAL PRADESH)
PRINCIPAL SEAT

Crl. A. (J) 89/2022

Atowa Munda
S/O. Lt. Surkho Munda,
Vill. Orangajuli, P.S. Panery,
Dist. Udalguri.

----- Appellant

– ***VERSUS*** –

The State of Assam

-----Respondent

Advocate for the **appellant** :- Mr. A. Tewari.

Advocate for the **respondent** :- Ms. B. Bhuyan, Addl.P.P

B E F O R E

HON'BLE MR. JUSTICE NELSON SAILO
HON'BLE MR. JUSTICE PRANJAL DAS

Date on which judgment is reserved: 12.02.2026

Date of pronouncement of judgment: 06.04.2026

Whether the pronouncement is of the Operative part of the judgment : N/A

Whether the full judgment has been

Pronounced :Yes

JUDGMENT & ORDER (CAV)

(Mr. Pranjal Das, J.)

1. Heard Mr. A. Tewari, learned *Amicus Curiae* appearing for the appellant. Also heard Ms. B. Bhuyan, learned Addl. P.P. appearing for the State respondent.

2. The instant criminal appeal has been preferred from jail by the convict appellant **Atowa Munda** against the judgment and order dated 07.06.2022 passed by the learned Addl. Sessions Judge, Udalguri in Sessions Case No. 70 of 2019, whereby, the appellant has been convicted under Section 302/436 IPC and sentenced to undergo imprisonment for life and a fine of Rs. 5000/- (in default S.I for 3 months) for the conviction under Section 302 IPC; sentenced to imprisonment for 10 years and a fine of Rs. 5000/- (in default S.I for 3 months) for his conviction under Section 436 IPC. The sentences were directed to run concurrently.

3. The prosecution case in the trial in brief was that on 22.01.2019 ejahar was lodged by one Dominic Orang at the Panery police station stating that on the same day at around 3 am Atowa Munda committed murder of his wife Rejina Munda by stabbing her on her neck with a dao and thereafter, he set fire to the house and all the properties inside the house were destroyed by the fire.

4. On the basis of the FIR, Panery P.S. case No.09/2019 was registered under Sections 302/436 IPC and investigation started, upon completion of which charge-sheet were submitted against the appellant under Sections 302/436 IPC. After completion of other formalities such as committal etc., charges were framed against the appellant under Sections 302/436 IPC.

However, the appellant denied the charges upon the same being read over to him and claimed to be tried, whereupon the trial started.

5. During the trial, the prosecution examined 11(eleven) witnesses where after the appellant was examined under Section 313 Cr.P.C. No evidence was adduced from the defense side.

6. Mr. A. Tewary, the learned *Amicus Curiae* submits that there are infirmities in the prosecution case and that the same requires interference in this appeal. He submitted that the testimony of PW-3 states that dao was seized upon being found by the side of the dead body but the testimony of PW-11 states that dao was lying on the courtyard. It is submitted that when the alleged extrajudicial confession was made by the appellant, police was present and therefore, the same would not be admissible. It is submitted that in any case, any extrajudicial confession to be used for conviction requires corroboration, which is not there in the instant case.

7. In support of his contentions, the learned legal aid counsel cites the following decisions:-

(i) ***Annes Vs. The State of Govt. of NCT [2024] 6 S.C.R. 164.***

(ii) ***Aghnoo Nagesia Vs. State of Bihar, 1965 0 Supreme (SC) 151.***

(iii) ***Motilal Gorh @ Lity and Anr. Vs. State of Assam and Anr. 2019 0 Supreme (Gau) 697.***

(iv) ***Perumal Rana @ Perumal Vs. State, Rep. by Inspector of Police 2024 0 Supreme (SC) 6.***

(v) ***State of Andhra Pradesh Vs. Gangula Satya Murthy 1996 0 Supreme (SC) 1933.***

(vi) ***Pawan Kumar Chourasia Vs. State of Bihar [2023] 2 S.C.R. 875.***

8. On the other hand, Ms. B. Bhuyan, the learned Addl. P.P. supports the impugned judgment and order. It is submitted that there is no infirmity in the extrajudicial confession as revealed from the testimony of PW-4. It is submitted that the evidence of PW-4 and PW-5 lend sufficient strength to the prosecution case. It is submitted that the weapon of offence has been duly seized, lending support to the prosecution case regarding the guilt of the accused. The prosecution submits that the appeal is devoid of merit and should be dismissed.

9. In support of her contentions, the learned Additional P.P. cites the following decisions:-

(i) ***Sahedevan and Another Vs. State of Tamil Nadu (2012) 6 SCC 403.***

(ii) ***Panneerselvam Vs. State of Tamil Nadu (2008) 17 Supreme Court Cases 190.***

(iii) ***Paniben (SMT) Vs. State of Gujarat (1992) 2 Supreme Court Cases 474.***

10. We have perused the impugned judgment, the grounds of appeal, the depositions of the witnesses adduced at the trial, the exhibited documents and other relevant materials. We have considered the submissions of the learned counsel for the appellant and the learned Additional Public Prosecutor.

11. As already stated above, the appellant was charged during the trial for offences under sections 302 and 436 IPC. He was alleged to have committed murder of his wife Rejina Munda and set fire to the dwelling

house of the accused. There are no eyewitnesses to the occurrence and the case is based on circumstantial evidence.

12. The law on proof in a criminal trial based on circumstantial evidence are well settled starting from the cardinal principles laid down in the foundational judgment of ***Sharad Birdichand Sharda v. State of Maharashtra, (1984), 4 SCC 116***. The learned trial court referred to the principles enunciated in the said judgment. Para 153 of the said judgment may be reproduced, which have encapsulated the five golden principles :-

> "***153.*** *A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*
>
> *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
>
> *It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]*
>
> "*Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."*
>
> *(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
>
> *(3) the circumstances should be of a conclusive nature and tendency,*

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

13. During the trial, in the impugned judgment, the learned trial court in paragraph 30 of the judgment has held that the prosecution was able to prove the following incriminating circumstances against the accused. (ii) The death of the accused Rejina Munda due to ante-mortem cut injury on her neck. (ii) Burning of the house of the accused immediately after the death of his wife. (iii) Disappearance of the accused from his house for some time soon after the alleged occurrence. (iv) Recovery of the weapon used by the accused while causing death of his wife. (v) The accused confessing his guilt before the villagers who gathered at his house soon after the occurrence. (vi) Failure of the accused to provide any reasonable explanation for the occurrence.

14. In this context, the learned trial court also invoked the provisions of section 106 of the Indian Evidence Act regarding the failure of the accused to offer an explanation and also referred to the decision in this regard rendered in ***State of Rajasthan v. Kashi Ram reported in (2006) 12 SCC 254.***

15. Now, in this appeal again, it remains to be determined as to whether the aforesaid finding of the learned trial court about proof of the above mentioned circumstances is correct or otherwise. The autopsy doctor who conducted post-mortem on the dead body of the deceased has adduced evidence during the trial as PW-1. He is Dr. Arup Kumar Kalita who

testified that on 22-01-2019, he was working in Udalguri Civil Hospital and on that day, he conducted post-mortem examination on the dead body of Rejina Munda, 40-year-old female, in connection with Paneri P.S. Case No. 9 of 2019. The dead body was brought by UBC/338 Rinku Das. It may be mentioned herein that the incident is stated to have taken place on 22-01-2019 around 3 A.M. in the wee hours of the morning. PW-1 stated that upon examination of the dead body during the autopsy, he found one cut injury over the right side of neck, 7cm x 6cm x 2cm. He also found right-sided carotid vessel cut and haemorrhage seen over the cut surface. In his opinion regarding death, he stated that death was due to haemorrhagic shock following ante-mortem cut injury and time since that was 9-12 hours. He proved the post-mortem report as Exhibit-1 and his signature thereon as Exhibit 1(1). Cross-examination was declined.

16. Thus, the medical evidence clearly indicates that the death of the deceased was a homicidal death due to ante-mortem cut injury and the time of 9-12 hours indicated by the medical evidence is compatible with the approximate time of the incident at 3 a.m. in the morning on 22-01-2019. Therefore, the learned trial court did not err in holding that the death of the appellant's wife was due to ante-mortem cut injury and haemorrhage.

17. The incident is stated to have taken place in the house of PW-2 Dominic Orang in which the appellant and his wife were stated to have been staying at the time of the incident. In his testimony, PW-2 who is also the informant of the case stated that the appellant is his relative and the incident took place on 22-01-2019 and that at the time of the incident, he was staying at another place looking after his cultivation and had asked

the appellant to stay in his original residence in Line No. 20, House No. 55 at Orangjuli, TE. On the day of the incident, at 4 P.M., he received a phone call from his next-door neighbour Rajen at the place where he was staying at that time that there was a murder in his residence and his house was burning. Upon hearing this, he immediately rushed to his original house on his scooty along with Rajen and upon reaching the spot saw his entire house gutted with fire and the dead body of Rejina Munda, wife of the appellant, was found lying on the courtyard of the house with a cut injury on the neck. Therefore, PW-2 has also stated about witnessing a cut injury on the neck of the victim as revealed by the medical evidence. PW-2 proved the FIR as Exhibit-2 and his signature as Exhibit 2(1). He admitted in cross-examination that he did not see the incident and he denied the suggestion that the appellant was not responsible for committing the offence.

18. PW-3, Robin Gowala, is a co-villager of the appellant and he testified that at the time of the incident he was in his residence, whereupon he heard from neighbours that the appellant after killing his wife set the house on fire and upon hearing this he immediately rushed to the house of the appellant and saw dead body of the deceased lying on the bed with cut injury on her neck with bleeding and also saw fire on the roof of the house. PW-3 stated that he along with others put off the fire and informed the police. He stated about the incident having taken place around 2.30 to 3.00 A.M. From the testimony of PW-3 also, it emerges that he saw cut injury on the neck of the victim with bleeding, thereby lending corroboration to the testimony of PW-2 in this regard and also the medical evidence. He has also testified about the incident having taken place

around 2.30 to 3.00 A.M. From the testimony of PW-3 also, it emerges that he saw fire on the roof of the house, thereby lending corroboration to the testimony of PW-2.

19. The testimony of PW-4, Paresh Ram Munda, is also important as he is a next-door neighbour of the appellant. He has also stated about the incident having taken place on 22-01-2019 around 3.00 A.M. He stated that at that time he was sleeping, whereupon he heard one Atowa Kaucha shouting fire-fire, and whereupon he got up and ran towards the house of the appellant and saw fire in his house, which was gradually progressing towards the house of the witness as well. He testified that he climbed on the roof of the house and put off the fire by throwing water and in the meantime, some other persons also came and helped in extinguishing the fire. Later, a fire brigade also came. PW-4 further testified that upon entering the house of the appellant along with neighbours, wife of the appellant was brought out from inside the house with cut injury on her neck and she was dead by this time.

In cross-examination, he admitted that he had personally not seen who set fire to the house or cut the throat of the wife. Thus, from the testimony of PW-4 also, it emerges that he saw fire on the house of the appellant, the cut injury on the neck of the deceased wife of the appellant. And he also testified about the incident having taken place around 3.00 A.M. The person named Atowa Kaucha, referred to in the testimony of PW-4, has also deposed in the trial as PW-5. He stated that he knew the appellant as well as the deceased.

20. From his testimony also, it emerges that the incident took place at around 3.00 A.M. on 22-01-2019. He is also an eyewitness to the fire on

the house of the appellant – in as much as he testified that at around 3.00 A.M. while he came out of the house to answer the call of nature, he saw fire engulfing the house of the appellant and shouted fire-fire, thereby lending corroboration to the testimony of PW-4 in this regard about PW-5 shouting fire-fire. He testified that subsequently the neighbors came and thereafter, the dead body of Rejina Munda, wife of the appellant was brought out from the inside the house with a cut injury on her throat. PW-5 also assisted in putting out the fire. Thus, PW-5 has also corroborated the prosecution evidence regarding the incident having taken place around 3.00 A.M. and the house of the appellant being on fire at that time. And he has also stated about the cut injury on the throat of the deceased.

21. One Bashil Champia testified as PW-6. He has stated the time of the incident as 7.00/7.30 P.M. testifying that he was informed that the house of the appellant was burnt. Thereupon, he immediately rushed to the house and found the residential house of the appellant engulfed by fire, which was subsequently controlled by pouring water. He testified that subsequently the house was searched, whereupon the wife of the appellant was found lying with cut injury on her neck. This part of the testimony of PW-6 has remained unshaken in his cross-examination also.

22. One important aspect that has emerged from the testimony of PW-6 in his cross-examination is that one part of the house of the appellant was occupied by one person named Shanti. But unfortunately, the said person named Shanti was not examined during the investigation, nor adduced as a prosecution witness. From the testimony of PW-6 also, the fire on the house of the appellant and the cut injury on the neck of the victim emerges.

23. However, PW-6 has stated the time of the incident as 7.00/7:30 P.M. in the evening, unlike the other witnesses discussed above, who have consistently stated about the time of the incident to be around 3 A.M. on 22-01-2009.

24. PW-7 Goga Munda stated about the incident taking place on 22-01-2019. He has also testified about the fire in the house of the appellant being controlled with the help of water tanker of the tea garden. He has stated about the dead body of the wife of the appellant lying inside the burnt house and it was taken out. However, PW-7 has not stated about the cut injury on the neck of the victim.

25. Atanu Seal, who was a senior welfare officer of the Orangajuli Tea Estate at the relevant time, adduced evidence as PW-9, during which he testified that he was informed by Chowkidar about fire in one house in line No. 2, whereupon he went there. He stated that the actual owner of the house was Dominic Orang, but his relative Atowa Munda was staying there, thereby lending corroboration to the testimony of PW-2 Dominic Orang in this regard. He stated about seeing the burnt house where the fire was subsequently put off and also about seeing the dead body inside the burnt house. He stated about going to the place of occurrence around 9 P.M. In cross-examination, he stated that the house was burning from the backside and half of the house was burnt.

26. PW-11 SI Ibrahim Khalil Ullah, the investigating officer of the case in his testimony, has also stated about receiving information about the murder of Rejina Munda by her husband Atowa Munda and he is setting the house on fire. He also testified about seizing half-burnt materials from the place of occurrence by the seizure list which he has exhibited.

27. Thus, we find that from the testimony of the above witnesses, it is proved that at the time of the incident, the house of the appellant was set on fire and it was burning which was subsequently put off by the people. All the witnesses have consistently stated about fire in the house of the appellant. Except for PW-8, PW-9 Atanu Seal and PW-11 Ibrahim Khalil Ullah who came subsequently and saw the burnt house.

28. The other witnesses in this regard being PW-2, PW-3, PW-4, PW-5, PW-6 and PW-7 all have testified regarding seeing the house burning and that it was subsequently put off with the help of people and fire brigade of the garden. PW-2, PW-3, PW-4, PW-5, PW-6 have all consistently testified about seeing cut injury on the neck of the deceased wife of the appellant. This testimony of these witnesses does corroborate the medical findings about a significant cut injury on the neck of the victim as testified to by the autopsy doctor being PW-1 Dr. Arup Kr. Kalita.

29. Amongst these witnesses while PW-2, PW-3, PW-4, PW-5 have stated about the incident having taken place around 3 A.M. But PW-2 has stated about going with his neighbour Rajen to the place of occurrence at 4 P.M. and noticing the fire. PW-6 has stated about the time of the incident to be around 7/7.30 P.M. While PW-7 has stated about the incident having taken place in the evening of 22.01.2019. Thus, some discrepancy has emerged with regard to the time of the incident from the testimony of these witnesses with one set testifying about having taken place, in the wee hours around 3 A.M.; while two other witnesses have stated about or indicated about the incident having taken place in the evening. It may be mentioned that in the FIR dated 22.01.2019 by PW-2 the time of the incident has been mentioned as around 3 A.M. and PW-2

the informant has also stated the same in his testimony during the trial.

30. On the basis of this evidence, we find that the finding of the learned trial court that the burning of the house of the appellant, around the time of the death of his wife has been by and large proved from the testimony of the witnesses.

31. The learned trial court in the impugned judgment has relied on the purported extrajudicial confessions made by the appellant before PW-2, PW-4, PW-5, PW-6. With regard to the aspect of such confession being made in the presence of the police, the learned Trial court has tried to differentiate the issue and held that, it has been proved by the evidence that the appellant also made such confession before the arrival of the police and that he again made confession on those lines in the presence of the police. Therefore, this aspect of the determination by the learned trial court has to be adjudicated.

32. For this purpose, we go to the testimony of PW-2 Dominic Orang, who is also the informant of the case and in whose house the incident took place and where the appellant and his wife were stated to be staying at the time of the incident. In examination-in-chief, PW-2 stated that the appellant confessed before police and public that he committed the crime. Therefore, the aforesaid extrajudicial confession revealed from the testimony of PW-2 would be hit by section 26 of the Indian Evidence Act, which bars the admissibility of a confession made, while the accused is in custody of the police, unless it is made in the immediate presence of a Magistrate.

33. From what emerges from the testimony of PW-2, though it is not

explicitly stated at that time the appellant was in the custody of the police, but nevertheless, the presence of the police along with the public when the appellant made the purported extrajudicial confession, would still make such confession remaining under the cloud of section 26 and it will be difficult to accept such extrajudicial confession revealed from the testimony of PW-2.

34. PW-4, Paresh Ram Munda, has also stated about an extrajudicial confession of the appellant in his testimony. He stated that after committing the incident, the appellant fled away. But around 5 AM in the morning, when people started gathering in his house, he came and confessed in presence of PW-4 as well as in the presence of other villagers like Sankar driver, Birsingh Sangha, Junaas Tirki, Raju Munda, Jakariya, Jogyan and Robin Gwala – that he cut the throat of his wife with Kalam Kothari and thereafter, he fled away by setting the house on fire.

In cross-examination, on one hand, he says that police reached the spot after 25 minutes of the accused coming back to his house and on the other hand, he also states in cross-examination that when the accused made the confession before the public, police personnel was also present, thereby bringing in a contradiction in his testimony regarding the said extrajudicial confession. PW-4 does not state that the appellant made two confessions, one before the public when police was not present and another when police was present. Rather, when he stated about such extrajudicial confession in his examination-in-chief, he has not mentioned the presence of police and in cross-examination, he states about police coming to the place 25 minutes later. However, in cross-examination, he makes the unqualified statement that when the appellant made the

confession before the public, police personnel was also present. Therefore, the extrajudicial confession revealed from the testimony of PW-4 is also hit by section 26 of the Evidence Act.

35. Similarly, PW-5 Atowa Kaswa, who was also an eyewitness to the fire in the house of the appellant, testified that accused confessed before the public about killing his wife. However, in cross-examination, he negates that testimony by saying that when the accused made the confession of killing his wife and setting his house on fire, police was also present, thereby inviting the restriction under section 26 of the Indian Evidence Act.

36. PW-6 Bashil Champia also stated in his examination-in-chief that the accused confessed his guilt before the public and thereafter, police was called and he was handed over to the police.

However, in cross-examination, he states that when accused confessed his guilt, the police personnel were also present. PW-5 and PW-6 have not stated in their deposition that the appellant made two confessions regarding his guilt, one before the public when police was not present and another before the public when police was also present.

37. PW-9 Atanu Seal, the Welfare Officer of the Tae Garden, testified that upon being asked by the police, the appellant admitted before him and others that he had killed his wife. PW-9 further testifies that on being asked by the SDPO Bhergaon, who was a police official, the appellant admitted that he had killed his wife by giving a blow by dao and left the dao in the place. Therefore, the testimony of PW-9 regarding the extrajudicial confession is also hit by section 26.

38. The main investigating officer of the case is PW-11 S.I. Ibrahim Khalil Ullah. Interestingly, he has not stated in his deposition about the appellant making any extrajudicial confession. In support of his contentions, the learned counsel for the appellant has relied on the decision of **Agnoo Nagesia** (supra) with regard to the restrictions imposed by section 26 of the Indian Evidence Act regarding admissibility of a confession made before police, made in the presence of police or in the custody of the police, unless it is made in the immediate presence of the Magistrate.

39. Similarly, he has also relied upon the decision in **Perumal Raja @ Perumal** (supra) on the same subject. In **Gangula Satyamurthy**, the Hon'ble Apex Court with regard to section 26 of the Indian Evidence Act has stated that the term 'custody' within the meaning of section 26 does not necessarily mean arrest custody. It has to be understood in a pragmatic sense. The relevant para 20 of the decision may be reproduced herein below –

> "***20.*** *In Pulukuri Kottaya v. King Emperor, AIR 1947 PC 67, the Privy Council held that the fact discovered embraces the place from which the physical object is produced and the knowledge of the accused as to this, and the information given, must distinctly relate to this fact."*

40. It is well settled that an extrajudicial confession is an admissible evidence and can be used for a conviction, though it is inherently a weak kind of evidence and corroboration would be a rule of prudence. In this regard, para 5 of **Pawan Kumar Chaurasia** (supra) relied upon by the appellant side may be reproduced herein below –

> "***5.*** *As far as extra-judicial confession is concerned, the law is well settled.*

Generally, it is a weak piece of evidence. However, a conviction can be sustained on the basis of extra-judicial confession provided that the confession is proved to be voluntary and truthful. It should be free of any inducement. The evidentiary value of such confession also depends on the person to whom it is made. Going by the natural course of human conduct, normally, a person would confide about a crime committed by him only with such a person in whom he has implicit faith. Normally, a person would not make a confession to someone who is totally a stranger to him. Moreover, the Court has to be satisfied with the reliability of the confession keeping in view the circumstances in which it is made. As a matter of rule, corroboration is not required. However, if an extra-judicial confession is corroborated by other evidence on record, it acquires more credibility."

41. There is no quarrel with the proposition that the extrajudicial confession if found trustworthy can be used for conviction, though corroboration is a rule of prudence. However, in the instant case, we find that all the extrajudicial confessions revealed from the testimony of PW-2, PW-4, PW-5, PW-6 and PW-9 were found to be made in the presence of the police and therefore, hit by the restriction imposed under section 26 of the Indian Evidence Act. The learned trial court perhaps erred that in accepting the extrajudicial confessions on the ground that the appellant had made confession before the public when police had not yet come and he again made a confession when police was present.

42. Such a determination in our considered do not emerge from an appreciation of the testimony pertaining to the extrajudicial confessions. Therefore, though several witnesses have stated about an extrajudicial confession made by the appellant, but in view of the infirmities thereon

vis-a-vis section 26 of the Evidence Act, the said extrajudicial confessions have to be discarded.

43. The learned trial court has held that one of the circumstances proved against the appellant was the recovery of the weapon of offence. In this regard, PW-2, Dominic Orang, the informant, stated in his examination-in-chief that the appellant handed over the dao to the police with which he committed the murder of his wife and police seized the dao, though PW-2 did not sign on the seizure list as a witness.

In cross-examination, he further clarified the same, stating that the accused led the police where he kept the offending dao hiding and shown the same to the police, which seized the dao. However, from his testimony, we find that PW-2 has not thrown light on the place from where such dao was shown by the accused to the police and thereafter seized by the police.

44. PW-3, Robin Gowala, has also stated about seizure of the dao by the police and he has stated in his deposition that police seized a dao by the side of the dead body, but again PW-3 also is not a seizure witness.

In his examination-in-chief where he stated the aforesaid, PW-3 has not thrown light as to whether the seizure by the police of the dao from the side of the dead body or upon showing by the accused.

45. PW-6, Bashil Champia, has also stated about showing of the dao by the appellant. He testified that after the incident, they searched for the accused and thereafter, the accused arrived at the place and on being questioned by villagers, he brought out the dao by which he had given stab injury on the neck of his wife. He has not elaborated further

regarding the place from where the said dao was produced by the accused, nor did he throw light on whether the dao was seized by the police. Though PW-8, an employee of the TE, namely Kanak Chandra Sarma, has stated about recovery of the dao, but he has indicated a different place of recovery. He stated that the police came and recovered one dao left on the roadside in front of his quarter of the Tea Estate and that police seized the dao in his presence and obtained his signature as a witness.

46. PW-8 proved the seizure list as Exhibit 3 and his signature thereon as Exhibit 3(1). He also proved as Material Exhibit 1, the dao.

47. One clarification emerges from his cross-examination as much as he stated that the police showed him the dao after recovery. From the testimony of PW-8, it does not emerge that the dao was seized upon being shown by the accused and the place of recovery of the dao is stated to be a roadside in front of his quarter. Though in cross-examination, it has emerged that the dao was shown to him after the recovery.

48. In this context, the learned trial court has held that the testimony of PW-8 cannot be taken to constitute evidence regarding the place from where the dao was seized because the said weapon was shown to him after his recovery.

49. Similarly, Atanu Seal, the Welfare Officer who testified as PW-9 during the trial stated that the accused led the police to the place where the dao was kept and that the dao was left kept on the roadside in front of the quarter of Kanak Sharma, PW-8. PW-9 also signed on the seizure list Exhibit-3 and proved his signature there on as Exhibit-3(1) and the dao

as Material Exhibit-1.

In cross-examination, he stated that he is not sure whether the dao shown to him during deposition was the dao which was recovered on that day.

50. Interestingly, the main Investigating Officer as PW-11 in his deposition has stated about seizure of the dao and also he has proved it as Material Exhibit-1 during his deposition. But in his entire testimony, he is silent about whether the dao was seized upon being shown by the appellant.

51. With regard to the testimony of PW-9, he stated that he went to the place of occurrence at 9 PM and the dao was recovered around after 1 AM of midnight. In his cross-examination, it is also stated that when he went to the place of occurrence at about 9 PM, the house was burned.

52. Thus, with regard to the recovery of the dao also, we find that while PW-2 stated about accused handing over the dao to the police by leading to the place where he had kept the dao in hiding, but did not throw light on what that place was.

53. PW-3 stated about the police seizing the dao from the side of the dead body but not throwing light as to whether it was so recovered upon being shown by the accused.

54. PW-6 stated about the accused bringing out the dao upon being questioned by villagers. But his testimony is silent as to whether he led the police regarding recovery of the dao and also silent about the place from where the dao was seized. PW-8 stated about seizure of the dao from roadside near his quarter, in front of his quarter and is silent about

whether the same was shown by the appellant. PW-9 on the other hand, though, stated about seizure of the dao from the roadside as stated by PW-8, but he stated that it was seized upon the accused leading the police to that place where the dao was left. Moreover, as already stated, it is surprising that the PW-11, the I/O has not mentioned about seizure of the dao upon being shown by the accused though he has mentioned about only seizure of the dao.

55. Thus, with regard to the seizure of the dao, the testimony of the witnesses is not very consistent regarding the place from where it was actually seized. There are also differences between the testimony of the witnesses as to whether the dao was simply seized by police from the side of dead body or whether it was shown by the appellant upon being asked by the villagers or it was recovered upon the appellant leading the police to the said place.

In cross-examination of the I/O, PW-11, it is admitted that the seized dao was not sent for forensic examination even though there was a blood stain on the dao. This is a significant infirmity in the investigation of the case. In this context, the decision of ***Motilal Gorh @ Lity and Anr. (supra)*** a Division Bench judgment of this Court cited by the appellant side may be noted. In that decision, in Para 15, it was held that in the absence of chemical and serological test of the so-called weapon of offence, mere recovery of the weapon which was dao in that case may be of no use to the prosecution as there was no evidence to connect the dao with the commission of the offence. Similar is the situation in the instant case, as there is inadequate evidence to connect the seized dao as the weapon of offence. Though the seizure of the dao has been proved by the

prosecution, but there is discrepancy regarding the place from where it was seized and also whether it was indeed seized upon being shown by the accused as the said aspect is completely missing in the testimony of the I/O, which is a significant omission.

56. Upon perusal the aforesaid evidence on record, we find that from the testimony of PW-2, it emerges that he went to the place of occurrence around 4 PM and soon thereafter, the appellant reached there. It has emerged from the testimony of PW-3 that after the incident of assaulting his wife, the appellant set fire to his house and fled away. But when police came, he emerged on his own. And then police took him under custody.

57. From the testimony of PW-4 also, it emerges that after the incident, the appellant fled away but around 5 AM when people started gathering, he came back. In cross-examination, he reiterated that the accused came back to the house around 5 AM.

58. PW-6 has also stated that upon reaching the place of occurrence, they searched for the accused and the accused arrived at that place. From the testimony of these witnesses, it is proved that after the incident, the accused had gone missing and thereafter, he came back to the house on his own, whereupon he was apprehended by the police. On the basis of the aforesaid evidence as discussed and appreciated above, we are of the view that the following points emerge :-

(i) The death of the appellant's wife in the house in which she and the appellant were living, though it was the house of PW-2. However, it is convincingly proved that at that time, PW-2 had allowed the appellant and his wife to stay there. It has also emerged

that the house had two parts.

(ii) The death of the appellant's wife was a homicidal death due to a cut injury on her neck, which was an injury of a significant nature as revealed by the medical evidence.

(iii) Though, several witnesses have stated about the appellant making extrajudicial confessions, about his involvement in the incident, but all these extrajudicial confessions are hit by Section 26 Indian Evidence Act having been made in the presence of the police.

(iv) The seizure of the dao has been proved by the prosecution evidence, but there is no evidence, including forensic evidence to prove that the same dao was indeed the weapon of offence.

(v) For the discrepancies in the evidence, it is not convincingly proved as to the place from where the dao was seized and as to whether the dao was shown by the accused to the appellant or whether he led the police to the place where the dao was hidden and it was seized from there. As per the evidence of PW-8 and PW-9, it was seized from the roadside and if that is the case, then it would not be a case of leading to discovery as roadside is a public place where such a dao could be visible to others.

(vi) The evidence does prove that after the incident, the accused went missing and thereafter, emerged when people and police started gathering.

(vii) With regard to the timing of the incident, while some of the witnesses have stated about the incident taking place around 3 AM in the wee hours of 22-01-2019, but two of the witnesses, about

including the informant have indicated about the incident having taken place in the evening. From the testimony of PW-9, it emerges that whom he went to the place of occurrence at around 9 PM, he saw the house burning and that the dao was seized around 1 AM, which does not really tally with the narration regarding the time of incident and the gathering of people followed by the other events starting from around 3 AM.

59. From the evidence on record, the main incriminating materials which have been proved against the appellant are as follows – *(i) Death of the appellant's wife in the house where she was staying with the appellant, (ii) homicidal cut injury on the neck of the wife, deceased, (iii) recovery of a dao from in and around the place of occurrence, (iv) the house of the appellant being found burning after the incident, (v) appellant going missing soon after the incident and then emerging.*

60. In the context of these proved circumstances, now we are confronted with the question, as contended by the prosecution, as to whether the provisions of section 106 of the Indian Evidence Act can be invoked to attribute guilt to the appellant.

61. Before proceeding further, section 106 of the Indian Evidence Act may be reproduced herein below –

> 106. Burden of proving fact especially within knowledge. – When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

62. The appellant's side has also referred to a decision in this regard rendered in the case of **Anees** (supra) and drawn attention to para 38

thereof. The same relevant para 38 as well as 39 which are relevant on the subject matter may be reproduced herein below –

38. The aforesaid decision of Shambhu Nath (supra) has been referred to and relied upon in Nagendra Sah v. State of Bihar, (2021) 10 SCC 725, wherein this Court observed as under:

"22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the court can always draw an appropriate inference.

23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused.

39. In Tulshiram Sahadu Suryawanshi and Anr. v. State of Maharashtra, (2012) 10 SCC 373, this Court observed as under:

"23. It is settled law that 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 position is strengthened in view of Section 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilised. We make it clear that this section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. It is useful to quote the following observation in State of W.B. v. Mir Mohammad Omar and Ors. [(2000) 8 SCC 382: 2000 SCC (Cri) 1516] : (SCC p. 393, para 38)

> *"38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In Shambhu Nath Mehra v. The State of Ajmer [AIR 1956 SC 404: 1956 Cri LJ 794] the learned Judge has stated the legal principle thus :*
>
> > *11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106*

is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience.

The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge.'"

63. In his examination, under Section 313 CrPC, the appellant has not given any explanation as to how his wife expired in the house where they were living. In fact, as an answer to question No. 12, which was a generic question regarding the occurrence, he stated that he works as a labour and on the day of the incident he had gone out for work at 8 AM and came back from work at 6 PM in the evening and he was apprehended by the police at 8 PM and that he does not know who killed his wife, Rejina Munda.

64. This explanation does not appear to be very convincing in view of what has emerged from the prosecution evidence because from the testimony of PW-3, PW-4, PW-5, it emerges that the incident took place around 3 AM in the wee hours and going by the statement of the appellant, he was present in the house at the time. From the testimony of PW-4, it has also emerged that initially the appellant fled away but when people started gathering, he emerged at around 5 AM. This has been reiterated by PW-4 in his cross-examination.

65. This also conflicts with the statement of the accused that he went

out at 8 AM and came back at 6 PM and trying to indicate that he does not know how the incident took place and also trying to indicate that the incident took place when he was absent from the house. But the testimony of PW-3, PW-4 and PW-5 indicates that he was present in the area when the incident took place.

66. However, it is true that from the testimony of PW-2, it is indicative of the incident having taken place in the evening because he stated about going to the place of occurrence after 4 PM and finding the house burning. Similarly, PW-6 has stated about going to the place of occurrence after 7.30 PM and finding the house engulfed by fire. PW-9 has also stated about going to the place at 9 PM and finding the house burning and recovery of the dao after 1 AM in the night. Therefore, if we go by the testimony of PW-3, 4 and 5, the accused was present when the incident took place. And if we go by the testimony of PW-2, PW-6 and PW-9, indicating about the incident having taken place in the evening, the same may be more compatible with the explanation of the accused that he was absent during the day and came back at 6 PM and that he does not know who killed his wife.

67. It is clear from the decision in **Anees** (supra) that section 106 Indian Evidence Act does not relieve the prosecution of the primary burden of proving the case beyond reasonable doubt. Only in the event of the prosecution, proving the basic facts against the accused that the burden could shift to the accused to offer a cogent and plausible explanation about something which could be within his exclusive knowledge. Section 106 only relieves the prosecution of proving something which should be extremely difficult or almost impossible for the

prosecution to prove as it is something which is within the exclusive knowledge of the accused.

68. Section 106 Indian Evidence Act is not meant to relieve the basic burden of prosecution. In the instant case, it is true that the appellant has not offered a proper explanation regarding the death of his wife in the house in which both of them were staying. At the same time, his explanation or at least a part of it has also been found to be unconvincing or perhaps false. Therefore, it remains to be determined as to whether the same can be taken as a failure of the appellant to discharge the burden under section 106 Evidence Act – so as to attribute guilt to him. To do so, we have to see as to whether the prosecution has been able to prove the basic incriminating circumstances pointing towards the guilt of the appellant as the instant case is based on circumstantial evidence.

69. In terms of the principles laid down in **Anees** (Supra), it is clear that before the provisions of Section 106 of the Evidence Act are invoked against the accused, the basic chain of circumstances against the accused has to be proved in such a manner that they lead to a reasonably definite inference regarding his guilt - unless the same is rebutted by him by an explanation within his special knowledge. Thus, only in such a situation, his failure to provide a cogent explanation can be held against him and the provisions under Section 106 can be invoked to attribute guilt to him. The provisions of Section 106 are not meant to relieve the prosecution from proving the chain of circumstances and discharge its basic burden with regard to proof by circumstantial evidence. It is only meant to give some relief to the prosecution with regard to matters which are within the exclusive knowledge of the accused and may be impossible or extremely

difficult for the prosecution to prove.

70. Coming back to the facts of the instant case, it is true that the incident took place in the house of the deceased and accused by a homicidal significant cut injury on her neck, which as per the medical opinion is compatible with assault by a sharp weapon like a dao. A dao was also recovered from in and around the place of occurrence though the investigation or the prosecution could not link the dao as the weapon of offence or that it was seized as a weapon of offence.

71. It is also not proved convincingly that it was seized upon being shown by the accused as some of the witnesses including the I/O has not stated about the dao being seized upon showing by the accused. The fire on the house, as also the disappearance of the accused for some time has been proved by the testimony of some of the witnesses.

72. However, some of the witnesses as discussed above have also stated about finding the burning house upon going there in the evening and going by their testimony the incident may not have taken place in the wee hours around 3.00 a.m. when the accused was likely present in the house. If the incident had indeed taken place in the evening, it could indicate some relevance of his explanation that he went out in the morning around 8.00 a.m. and came back in the evening around 6 pm and thereafter he was apprehended by the police. If the testimony of some of the witnesses about going to the place of occurrence around 7.00-7.30 pm and finding the house burning is accepted as correct, then it cannot altogether rule out the hypothesis of the incident having taken place during the day or during the time when the accused was purportedly not present in the house as stated by his explanation under Section 313 Cr.P.C.

73. Therefore, we are constrained to hold that an alternative hypothesis do emerge and the chain of circumstances on the basis of the aforesaid proved circumstances cannot be taken to be a complete chain leading to a reasonably definitive inference of guilt of the accused.

74. Further, the explanation of the accused under 313 Cr.P.C. could be taken to be a plausible explanation as well, with regard to facts and circumstances, especially within his knowledge. If that be so, then the test of Section 106 Evidence Act would have to be taken to be passed in favour of the accused, rather than that of the prosecution.

75. There is no doubt that there is very strong suspicion upon the appellant, but there is a well-settled principle of criminal jurisprudence that suspicion, howsoever strong, is not a substitute for proof.

76. Consequently, in the entire facts and circumstances on the basis of the evidence on record and in backdrop of the above discussion, we come to the considered finding that the guilt of the convict appellant has not been proved beyond reasonable doubt as required in a criminal trial.

77. Accordingly, the appellant is required to be given benefit of doubt and acquitted. Resultantly, this appeal succeeds and the impugned judgment dated 07.06.2022 passed by the learned Addl. Sessions Judge, Udalguri in Sessions Case No. 70 of 2019 is hereby set aside.

78. The convict appellant shall be set at liberty forthwith, if not wanted in any other case.

79. The criminal appeal stands allowed and disposed of.

80. Mr. A. Tewari, learned Amicus Curiae for his valuable assistance shall be paid the fixed amount of remuneration in this regard by the Assam

State Legal Services Authority.

81. Original TCR, if any, be send back forthwith.

JUDGE **JUDGE**

Comparing Assistant