

The State Vs. Gour Guha

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Court : Kolkata

Decided On : Oct-08-1993

Reported in : (1994)1CALLT84(HC)

Judge : Siba Prasad Rajkhowa and ;Rabin Bhattacharyya, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302, 306 and 307; ;[Evidence Act, 1872](#) - Sections 136, 138, 145 and 154; ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 211, 212 and 313

Appeal No. : Death Reference No. 3 of 1992 and Criminal Appeal No. 322 of 1992

Appellant : The State;gour Guha

Respondent : Gour Guha;The State

Advocate for Def. : Sobhan Lal Hazra, ;Sashanka Kumar Ghosh and ;A.R. Saha, Advs.

Advocate for Pet/Ap. : Balai Chandra Roy, ;Sekhar Kumar Basu and ;Lalit Mohan Dutta, Advs.

Judgement :

Siba Prasad Rajkhowa, J.

1. The Learned Additional Sessions Judge, Cooch Behar, by his Judgment and order dated 25.11.92 passed in sessions case No. 12 of 1987, has convicted accused Gour Guha under Section 302 of the Indian P.C. and has awarded death penalty. The Learned Trial Judge has made a reference to this Court under Section 366 of the Code of Criminal Procedure for confirmation of the death sentence.

2. The convict has also filed Crl. Appeal No. 322 of 1992 against the said order of conviction and sentence.

3. Both the reference and the appeal are heard together.

4. The first information report, Ext. 5, was lodged with the Officer-incharge, Toofanganj Police Station on 19.7.85 by an officer of Assam Police, i.e., Shyam Kumar Dutta, Sub-Inspector of Police and the same reads as follows :-

'I beg to state that on 18.7.85 at 3/3.30 hours my sister's husband, Gour Guha poured kerosene oil in the body of my sister Basanti and set fire for causing her death. Just after setting fire in the body Gour Guha gave water in her body. At that time maid-servant of the house shouted and neighbours of the area came and saw the incident. My sister was then taken to the Toofanganj Hospital by the Nibedita Matador in burnt condition and thereafter from there she was taken to M.J.N. Hospital, Cooch Behar in serious condition. My sister had been beaten by Gour Guha from some days. Gour Guha made conspiracy to cause the death of my sister by setting fire in the body and this is my ejahar and pray for enquiry into the matter.

5. Under the circumstances, I pray for acceptance of the written complaint and to investigate the matter and punish the culprits. It is mentioned here that delay caused because I am an employee of Assam Police, and reached here late.'

6. Records show that on the basis of this F.I.R. police registered a case under Section 307 of the Indian P.C. and started Toofanganj Police Station Case No. 10 dt. 19.7.85. Next day, on prayer of the Investigating Officer, the Court added Section 302 of the I.P.C. During investigation, Police found complicity of Smt.

Lakshmi Das in the commission of alleged murder of deceased Basanti. Police arrested both Gour Guha and Lakshmi Das and after completion of investigation submitted charge-sheet against both under Sections 302/34 I.P.C. The Learned Sub-Divisional Judicial Magistrate, Toofanganj committed the case to the Court of Sessions as per provisions of Section 209 of the Criminal P.C.

7. The Trial Court framed a charge under Section 302/34 Indian P.C. against both Gour Guha and Lakshmi Das. They pleaded not guilty. Prosecution has examined 25 witnesses. Defence has not adduced any evidence. From the evidence brought on record by the prosecution, the Learned Trial Judge has observed that 'the incriminating facts which have been exposed and discussed at length so far are incompatible with the innocence of the accused Gour Guha and incapable of explanation upon any other reasonable hypothesis than that of his guilt,' and held him guilty under Section 302 I.P.C. He did not find co-accused Lakshmi's involvement in the case and acquitted her. He heard accused Gour Guha on the point of sentence and thereafter passed the death sentence assigning special reason that 'the accused person in this case committed the murder with cruelty and for a sordid purpose without giving a chance to' the victim. The murder was in cool blood and the accused person has taken enough precaution. The murder was; committed with cruelty and accompanied by deliberate ferocity.'

8. Hence the reference and the Appeal.

9. The Learned Trial Judge has observed that no direct evidence as to the alleged murder is available and so prosecution has to rely solely on the circumstantial evidence as to the murder. The circumstances as found by the Learned Trial Judge establishing the guilt of the accused/appellant are :-

1. At the relevant time, at the place of occurrence only four persons were present including the deceased, the accused and his two sons. It is no body's case that the minor sons were responsible in any way for the fire. So, the burn injuries could be inflicted on the person of Basanti only by the accused Gour Guha, if they have not been inflicted or caused by an accident.

2. PW-4, Narayan Chandra Nandy, is attached to the Land Reforms Dept., Govt. of West Bengal at Toofanganj. On 18.7.85, he attended his office as usual. Around the period from 3 P.m., to 4 p.m. on that day, he suddenly heard a sound outside his office and also heard a sound of stopping a moving van (Matador). He came out of his office and found Gour Guha inside the Matador who showed his abdomen and hands bearing burn injuries and asked him to save him. PW-4, also heard groaning sound from inside the van and he found Basanti inside the van groaning and completely in burnt condition. PW-4, did not get any opportunity to ask Basanti anything as the van sped off. PW-4, is a relation of Basanti. The Learned Trial Judge concludes that the accused wanted to procure a witness only to prove his innocence and took precaution so that Basanti could not disclose anything to PW-4.

3. Accused Gour Guha has presented the story in self-defence that he did try to extinguish the fire as a result of which he sustained burn injuries on his person. But there is no medical evidence as to the burn injury on his person. There is nothing to show that he received medical treatment for the alleged injuries. No attending physician has been examined. So the Learned Trial Judge concludes- Even if Gour Guha had received any burn injuries, they were not evidently serious enough and in absence of definite positive evidence it cannot be conclusively held that the so called injuries on the person of Gour Guha were sustained by him in his attempts to save his wife from the fire.

4. It is unlikely that accused Gour Guha would try to save his wife because of his strained relations with her and the ill-treatment meted out to her since before the occurrence resulting in her death. PW-4, stated that Basanti used to visit her paternal house and also visit his (PW-4's) residence occasionally and at that time Basanti used to narrate that Gour Guha used to torture her. PW-8, Bimal Dutta also found the accused assault Basanti on different occasions. Only two days before the fateful occurrence, Basanti was assaulted by Gour Guha and was sent away along with her two children to Gour Guha's original residence at Thana Para Chowpatty at Toofanganj. PW-15, Parbati Das was a maid-servant of Gour Guha. She has stated that Gour Guha physically assaulted his wife Basanti on many occasions, under the influence of liquor. On a Laxmi Puja night, Gour Guha had

intended to harm Basanti with a dagger holding out the threat that he would finish all. Bimal (PW. 8) intercepted him and in the process, Bimal got injured on his three fingers. On another occasion Gour Guha broke the chillies and pushed the same to the eyes of his younger son and Basanti. Bimal corroborated her. Moreover, Shyam Kumar Dutta de facto complaint-examined as PW-7 and Bimal Dutta (PW-8) had stated that the deceased requested them not to take up her cause with Gour Guha as it was likely that he would be more incensed to know that she had reported against him and so it would do more harm than good to her.

5. There was the Lakshmi Das factor, Lakshmi Das was the Private Tutor of the two sons of Gour Guha and Basanti. At that time Lakshmi Das was not married. Gour Guha was gradually drawn towards Lakshmi and a sort of liaison was established between them so much so that she sometimes used to stay and pass nights at Gour Guha's house. From the evidence of PW's-7, 8 and 15, the Learned Trial Judge comes to the conclusion that the conjugal relations between the accused and his wife Basanti got further soured because of Lakshmi's appearance on the scene.

6. Learned Trial Judge has discarded the theory of death of Basanti by accidental burning. The incident is said to have taken place because of burning of a stove. But no stove had been seized by the investigating Officer who had only seized a kerosene cooker (Material Ext. 1). The Learned Trial Judge found no pumping device affixed to the cooker and there was no question for the cooker burning out because of too much air pressure. The cooker was not sent to Forensic-Science Laboratory or to any other Expert. During inquest it was reported that the fire was caused due to burning of a stove and that the Sari worn by Basanti accidentally caught fire from the stove. But the Sari seized by the investigating Officer is the least damaged by fire among the seized materials. It appears to be very much fresh while the under garments worn by Basanti at that time had been reduced nearly to ashes. The upper garment, namely, the Sari, remains; more or less intact. So the story that the Sari worn by Basanti accidentally caught fire from the stove is not believed by the Learned Trial Judge. According to PW-19, Dr. Shikha Maity (Adhikary), the patient (Basanti) was found unconscious with 100 per cent burnt. Such extensive burn could not have taken place in any way and manner

had the fire been caused accidentally and there was honest attempt as claimed by Gour Guha to put out the fire. The only irresistible conclusion, according to the Learned Trial Judge, is that the fire took place only because of conscious human attempt and activities. Unless there was human agency playing an active role behind the burns, the damage could not have taken place within such a short time and so extensively to cover the whole body resulting in her almost immediate death.

7. PW-22, Dr. S.C. Pandit held autopsy on the dead body of deceased Basanti. He has no personal knowledge about the occurrence. In his opinion, death was due to complication of extensive burns which were accidental and ante-mortem in nature. In the opinion of the Learned Trial Judge, PW-22 has gone beyond his capacity as a Surgeon to give his opinion as to the accidental nature of the death of the victim.

8. Immediately after the incident Gour Guha did not take any step to arrange for the treatment of Basanti or to inform the Police Station or to inform the near and dear relations who were within his reach at Toofanganj itself. Rather he preferred to hide himself and took shelter in his former residence. The Learned Trial Judge holds the view that, it is unusual for a human being and more so for a husband, to remain unmoved, unperturbed and unaffected after such an incident unless within the core of his heart he actually nourished some ill-feeling for Basanti and was himself responsible for the fire. The relationship between the couple and subsequent reactions of Gour Guha unmistakably point to the one conclusion-the inevitable conclusion-murder.

10. The main thrust of argument of Mr. Roy, Learned Counsel for the accused, is that there is absolutely no legal evidence to connect the accused with the commission of the crime. According to him, the conviction is based on no legal evidence but on surmises and suspicions, and the suspicions, however strong, cannot be the substitute for legal evidence and foundation for conviction. He has referred to AIR 1983 SC 907 (Bhugdomol v. State of Gujarat). This case does not relate to any murder charge. But while dealing with Section 3 of the Evidence Act, the Supreme Court has held that no amount of suspicion constitutes legal

evidence for sustaining a conviction. The Learned Counsel for the State has however placed utmost reliance on the circumstantial evidence as discussed by the Trial Court and has submitted that the conviction is well-founded. He has further referred to the broken bangles seized by the investigating Officer from the spot where Basanti was found lying in burnt condition. He has submitted that without some human agency applying physical violence to Basanti, the bangles could not have broken and the Learned Counsel points the accusing finger at the accused.

11. Keeping in mind the submissions made by the Learned Counsels of both sides we set ourselves to the grave task lying ahead of us. PW-7, Shyam Kumar Dutta, has stated that Basanti, was murdered by Gour Guha by setting fire to her body. PW-7 was not present at the place and at the time of occurrence. He was not an eye-witness. How did he came to know that Gour Guha had murdered Basanti by setting her fire On 18.7.85, he was, at Dhubri in Assam. On his return from duty to his residence he received the information from his wife about Basanti's death by burning. His wife was not a prosecution witness. He does not know wherefrom his wife got tht information. So, this statement is inadmissible in evidence. Assuming that this information is admissible, who told him that Gour Guha had burnt his wife to death He has not stated that Bimal Dutta (PW-8) had told him about this fact. He has stated that Parbati (PW-15) was working in the house of Gour Guha at the time of occurrence. This statement is not correct in view of the evidence given by Parbati herself. Let us assume that Parbati was present. But nowhere it is stated by PW-7 that Parbati had told him that Gour Guha had murdered his wife by burning. As we scrutinize the evidence of PW-7, we find that he has stated in his cross-examination that 'I heard from my uncle and others that they heard about killing of Basanti by setting fire to her body.' So his knowledge about murder of Basanti by setting fire by accused Gour Guha is nothing but hearsay. Let us see if we can get any definite proof of murder in the evidence of Bimal Dutta (PW-8). He says, 'Basanti was burnt dead by Gour Guha.' Did he see it himself 'No' will be the answer evident in his own statement, 'On the date of burning of my 'Didi' (sister), I had been to Siliguri with, a Mini Bus on duty and I was not at Toofanganj at the time of occurrence.' Then who told him that Gour Guha had murdered Basanti by burning We get the answer from him, 'I heard that Gour Guha set fire to my 'Didi'.'

He has also contradicted PW-7 when he makes a positive statement in his cross-examination that Parbati was not working in Gour Guha's house on the date of incident. PW-15, Parbati Das has stated that she worked at the house of Gour Guha as a maidservant for three years five months at a stretch and left the house of Gour Guha about one and a half-years prior to the occurrence of burning and death of Basanti. She heard from people that Basanti was burnt to death. PW-18 Astami Barman alias Shyamali is another maid-servant who worked at the house of Gour Guha. She was still working in his house around the time when the occurrence took place. But she has clarified herself by saying that on the date of occurrence when Basanti died by burning she was not present at Gour Guha's house. A few days prior to the incident of burning, she took permission from her 'Kakima,' meaning Basanti, and left Gour Guha's house for her own house. So we agree to the finding of the Learned Trial Judge that at the time of occurrence only four persons were present at the house of Gour Guha. They are Gour Guha himself, his wife Basanti and their two minor children. PW-7 added the presence of one more person, that is, the female private tutor-Lakshmi Das. But there is no corroboration and we do not know the source of his information and we do not accept this statement as correct. So, out of these four persons who knew the real state of affairs relating to the occurrence, Gour Guha is the accused himself. He had not confessed anything and the Court cannot compel him to depose against himself. Basanti is dead and gone without leaving any statement which might have been used as evidence. The two sons of the accused were there. They were examined by the investigating Officer also and were shown as witnesses in the charge-sheet. But they were not examined by prosecution. As such the trial had its full run without an eye-witness. That does not however mean that prosecution cannot succeed without an eye-witness. Circumstantial evidence is as good as ocular evidence if found reliable, and the oft quoted maxim that an eye-witness may lie but circumstances do not, may go haywire sometimes.

12. Mr. Roy, Learned Counsel for the accused/appellant has however criticised the prosecution for not examining the two sons, of the accused as prosecution witnesses. He has drawn our attention to the Order No. 22 dated 19.12.91 passed by the Trial Court. It is seen that on that day one of the two sons of the accused, namely, Prasenjit Guha, was present in Court. But the Learned Public Prosecutor

filed a petition stating that Prasenjit would not be examined on the ground that he was gained over by defence. Trial Court accepted this petition and discharged him. In this regard, Mr. Roy has cited : 1971 CriLJ1173 , (State of U.P. v. Jagga), in which a similar question arose. The Supreme Court has observed that all the witnesses of the prosecution need not be called but the witness whose evidence is essential to the unfolding of the narrative must be called. His absence seriously, affects the truth of the prosecution case. Further dealing with Section 154 of the Evidence Act, the Supreme Court has said, 'the mere presentation of an application to the effect that a witness had been won over was not conclusive of the question that the witness has been won over.' In the case in hand, it was the duty of the prosecution produce the son of the accused for cross-examination which would have elicited the correct facts. How many PW's will be examined, who will be examined, who will be left out as unnecessary and redundant, are some of the decisions to be taken by the Public Prosecutor. The choice is definitely his. But witnesses are examined to unfold the prosecution case and so any lesser mortal may be the most material witness. As already referred, the two sons must have seen the occurrence and they would have been the best witnesses, and whether they would have revealed the truth, nothing but the truth and the whole truth or whether they would have shown hostility to prosecution to save their father is beside the point. We agree with Mr. Roy that prosecution has withheld two most vital witnesses from examination and this it is an infirmity in the trial. By being choosy, prosecution need not earn the dubious distinction of being prejudicial to defence.

13. There are hostile witnesses galore, to be precise, PW's 3, 5, 9, 11, 12, 14, 16 and 18 turned hostile to the prosecution and the Court permitted the prosecution to cross-examine them and to confront them with their previous statements allegedly made before the investigating Officer who recorded them. As per provision of Section 162, Criminal P.C, such statements may be used by prosecution to contradict a witness in the manner provided by Section 145 of the Evidence Act. We are not happy with the manner in which these PWs were confronted with their previous statements in this case. The manner in which witnesses are to be confronted with their previous statements was brilliantly discussed by the Mysore High Court in *In re Saibanna Tippanna*, reported in AIR 1966 Mysore 248. We

quote here the passage relevant for our purpose :

'When a prosecution witness tells a different story in his examination-in-chief in the Court of Session, than what he told before the police, the Public Prosecutor can ask for permission to cross-examine him to establish the truth. It is permissible for the Public Prosecutor to get in the course of such cross-examination the principal purpose of which is to put leading questions to the witness and also to confront the witness with his previous statements to get if possible, answers favourable to the prosecution. It is to be observed that Section 154 of the Evidence Act which does not speak of a 'Hostile' witness as sometimes a witness who is permitted to be cross-examined by the party who calls him is described, confers power on the Court to permit the cross-examination of a witness by the party who calls him. The fact that such cross-examination is permitted does not mean that the witness who is cross-examined is for all purposes an untrust-worthy witness and that his evidence and no part of it can be regarded as representing the truth. A witness who is unwilling to speak the whole truth when he is called by the prosecution to support its case, but gave an inaccurate or incomplete version of what he is supposed to have seen may in the course of his cross-examination, either feel persuaded or compelled to complete the story and to state facts about which he gave no evidence in examination in-chief. It may also happen that a prosecution witness contradicts himself completely in the course of his cross-examination, and having stated nothing about the incident about which he was expected to speak, says all about it in his cross-examination. The question before the Court in either event would be to decide which part of his testimony is false and which part of his evidence is true. Provided there is the required degree of conviction in the mind of the Court that a particular part of the testimony of a witness whether it forms part of the examination-in-chief or cross-examination is true, there is nothing which can constitute an impediment to the Court acting upon such evidence in support of its conclusions.'

14. In this reported case, Mysore High Court further speaks of three possibilities when a witness is confronted with his previous statements : The first possibility is that the witness may deny that he made the previous statement; the second possibility is that he admits that he made them; and the third possibility is that he

may not only admit the previous statement but he may also state what he stated before the police was the truth. But even if the third possibility happens, it will not be evidence as the previous statement was one made to the police during investigation. There must be successful endeavour to bring on record what could become evidence before the Court had the witness proceeded to state, without reference to his statement before the police, that it was indeed true that he had witnessed the occurrence and seen the assailants. In the case in hand, PW-3, Madhu Sudan Dey has stated that he was informed by his friend Haranu Dey (not a witness) that Basanti committed suicide in her house. PW-5, Swapan Paul has stated that he cannot say the circumstances in which Basanti expired. PW-9, Madan Mohan Sana has stated that he enquired from the persons at the house of Gour Guha as to what had happened and those persons told him that there was a fire and that fire was set to the body of Gour Guha's wife. PW-11, Parimal Paul has stated that a burning incident took place in the house of Gour Guha about six years back (from the date of his deposition which was 9.1.92). He came and found Basanti lying on the ground in burnt condition. He also found burn injuries on the person of Gour Guha at his hands and abdomen. PW-12, Narayan Guha has stated that he got information from somebody that there had been a fire in the house of Gour Guha. So he came there and was told by certain Manager Madan of Bhavani Bidi Factory, that Basanti in burnt condition had been removed to hospital. PW-14, Dhruba Dey has stated that he went to the house of Gour Guha with his Matador Van and found Basanti in burnt condition. He also saw burn injuries on Gour Guha. He carried both to Toofanganj hospital and then to Cooch Behar hospital. PW-16, Kanchan Dev is the driver of that Matador Van and has stated that he drove the van carrying the burnt body of Basanti, and Gour Guha who also had burn injuries, to Toofanganj hospital and then to Cooch Behar hospital. PW-18 is Astami Barman alias Shyamali, maidservant of Gour Guha. She has stated that she was not present at the house of Gour Guha when the occurrence of Basanti's death by burning took place. Her statement was recorded under Section 164 Criminal P.C. by N.K. Panja (PW-1), Sub-Divisional Judicial; Magistrate, Toofanganj vide Order sheet dated 25.7.85. Her statement was proved by PW-1 and marked Ext. 1. The statement of PW-15, Parbati Das was also recorded under Section 164, Criminal P.C. by PW-20, P. Bhattacharya on 22.7.85.

On that day he was Judicial Magistrate First Class at Toofanganj. That statement was proved and marked Ext. 7. However, PW-15 did not turn hostile to the prosecution. The purpose of making a brief but pointed reference to the evidence of these hostile witnesses is that they have not thrown any light on the guilt of the accused, so far as it relates to the occurrence of 18.7.85.

15. As regards the examination of the accused under Section 313 of the Criminal P.C., we must say that this has been done in a perfunctory manner. The purpose of such examination is to enable the accused personally to explain any circumstances appearing in the evidence against him. We are particularly surprised at putting the following question to the accused : 'On the date of occurrence you in consultation with-('in collusion with' would be appropriate) Lakshmi, poured kerosene oil on Basanti and set her on fire. What have you to say 'We have perused the entire evidence on record. Perhaps nothing has escaped our notice. Where is this most vital piece of evidence We would indeed be very much, anxious to come across such evidence. Yes, we have found it. It is in the opening sentence of the F.I.R. Ext. 5, '.....my sister's husband Gour Guha poured kerosene oil in the body of my sister Basanti and set fire for causing her death.' (Of course, there is no reference to Lakshmi). None of the prosecution witnesses has deposed to that effect. F.I.R. is not a substantive piece of evidence. Mr. Roy has referred to : 1955 CriLJ1644 , Machander v. State of Hyderabad, While dealing with Section 342 of the Criminal P.C. (1898), which now corresponds to Section 313 of the Criminal P.C. (1973), the Supreme Court has struck a note of caution that the Judges and Magistrates must realize the importance of the examination under Section 342. It is their duty to question the accused properly and fairly; bringing home to his mind in clear and simple language the exact case he has; to meet and each material point that is sought to be made against him and of affording him a chance to explain them if he can and so desires. In our opinion, the Learned Trial Judge has failed in his duty.

16. Despite the infirmities in the prosecution as pointed out above, is there anything that can be retrieved from the circumstantial evidence to connect the accused with the crime Some semblence of the motive is shown to exist in the sense that Lakshmi, the Private Tutor appears to have made some in-road in the

mind of the accused. But prosecution is not bound to establish any motive for the crime. The accused is also not bound to disclose anything. The burden of proving a case beyond reasonable doubt rests always with the prosecution. So even if existence of motive is shown, prosecution must prove its case to the hilt and that because of such a motive, the crime has been committed. Leaving aside the hostile witnesses, let us come to the other material witnesses. Witnesses generally come under three categories; (1) wholly reliable, (2) wholly unreliable and (3) partly reliable and partly unreliable. Again, even if some speaks the truth, Court may not find his evidence to be of much help. So is the case with PW-7, Shyam Kumar Dutta, His information as to the occurrence of murder and as to various incidents prior to the murder, is mostly derived from others and therefore, hearsay evidence. PW-4, Narayan Ch. Nandy is found to be wholly reliable and therefore, his evidence will carry much weight. He has stated that in the matador van, he saw both the accused and the deceased Basanti. Basanti was groaning in pain and her body was completely burnt. Accused showed him his hands and abdomen which were in burnt condition and he cried for help to save him. After taking permission from his: employer, he proceeded to Cooch Behar hospital and found Basanti lying on a bed and saline being administered to her. She was tossing feverishly on the bed, saying 'mother' 'mother'; 'save me', 'save me'; and sometimes uttering the name of her son 'Joy' and also asking for water. This shows that she did not utter the name of her husband or anything like 'murder'. This witness did not ask her anything as to how it happened. He has not stated that he had put such questions to her but that she was not in a state of mind to speak out. He has stated that the deceased used to tell them that Gour Guha used to torture her. In his cross-examination he has stated that Bimal Dutta (PW-8) narrated to him the incidents in which Bimal Dutta sustained injuries with sharp cutting weapon inflicted by accused Gour Guha. PW-8 is not wholly reliable. We can rely on him so far as his evidence relates to the incidents prior to the occurrence of 18.7.85. We cannot rely on his evidence when he says, Basanti was burnt dead by Gour Guha. Minor discrepancies apart, PW-15, Parbati corroborates the evidence of PW-8 as to the incidents prior to the occurrence of 18.7.85. She can be relied upon to that extent. PW-21, P.K. Sengupta, was a senior Officer-cum-Assistant Chemical Examiner, State Forensic Science Laboratory, Calcutta. He received five paper packets;

containing some portions of burnt Silk Sari, Petticoat, etc. in connection with Toofanganj Police Station, Case No. 10 dated 19.7.85 for analysis. On analysis he detected 'Mineral Oil too small for identification.' PW-22, Dr. S/C. Pandit is the Autopsy Surgeon who held the post-mortem examination on the dead body of Basanti with reference to Kotwali Police Station, U.D. (Unnatural death) Case No. 125/85 dated 19.7.85 He found extensive burns which were ante-mortem and accidental. He then corrects himself to say that the burn injuries may be homicidal or suicidal. But in his cross-examination by defence he says that his definite opinion is that the burn injuries were accidental in nature. This accidental burning theory did not find favour with the Learned Trial Judge. We are also not very keen to accept this theory. PW-25 is B.K. Chanda, Sub-Inspector of Police and he is the Investigating Officer. On 19.7.85, he was the Officer-in-charge of Toofanganj Police Station. On the basis of the written complaint of Shyam Kumar Dutta, he started Toofanganj P.S. Case No. 10 dated 19.7.85, under Section 307 I.P.C. On that day he arrested Gour Guha and found burn injuries on his body and so he sent him for treatment to Cooch Behar hospital and was kept in the Police Cell of the hospital. On 22.9.85 he received accused Gour Guha from the Police Cell of the hospital after his recovery and forwarded him to the Court of the Sub-Divisional Judicial Magistrate, Toofanganj. From the evidence thus discussed, we find some corroborative evidence to come to a definite finding that the conjugal happiness had eluded the accused and the deceased since few months prior to the occurrence of 18.7.85 and that the deceased had been ill-treated by the accused. But the circumstantial evidence has led us to believe thus far and no further. In the chain of circumstances, the last link and the vital link is missing. We cannot make that big leap to come to the inevitable conclusion and cannot, laying the accusing finger at the accused say, 'you are hooked'. Here we quote a passage from : 1974 CriLJ1249 , Dharm Das Wadhvani v. State of U.P. 'Every evidentiary circumstance is a probative link, strong or weak, and must be made out with certainty. Link after link forged firmly by credible testimony may form a strong chain of sure guilt binding the accused. Each link taken separately may just suggest but when hooked on to the next and on again may manacle the accused inescapably. Only then can a concatenation of incriminating facts suffice to convict a man. Short of that is insufficient.' The Learned Trial Judge has made a casual

approach to the burn injuries on the person of the accused mainly because he did not produce any medical evidence. But it is a fact that he had sustained burn injuries. PW-4 has testified to it. The hostile witnesses-PW's 11, 14 and 16 also saw burn injuries on the person of Gour Guha. The Investigating Officer had also seen the burn injuries on him and he arranged for his treatment in the Cboch Behar hospital and kept him in the Police Cell. He was in hospital undergoing treatment from 19.7.85 to 22.9.85, that is, for about two months. True, no injury report was placed on record before the Trial Court. It was the duty of the Investigating Officer to collect the same. In Section 313 examination the Learned Trial Judge did not ask the accused to explain as to how he sustained burn injuries. The Learned Trial Judge has observed that PW-4 could not speak to Basanti in the Matador Van as it sped off and concluded that the accused wanted to hide something. But there is no evidence that the accused directed the driver to speed past PW-4 so that he would not be able to speak to Basanti. The Learned Trial Judge has suspected the conduct of the accused in that he did not inform the occurrence to the Police immediately. But we find that both the accused and the deceased had been removed to the hospital and the burn injuries on the person of the accused were also serious in nature. We can very well visualize the situation. We should not read too much in the inaction of the accused in not reporting the matter to the police in the situation. It was a traumatic experience of the accused and he may be stunned and dazed. The Learned Trial- Judge has referred to the almost unburnt Sari on the wearing of the burnt body of Basanti and has commented adversely against the accused. But it may so happen that the sight of the charred body was so much appalling and appealing to the accused that he might have covered it with another Sari. Of course, such presumption is hypothetical. The Learned Counsel for the State has referred to the presence of broken bangles (vide seizure Memo Ext. 4) at the spot and submitted that this could be attributed to the physical violence to the deceased by the accused. But the alternative possibility is that the deceased, writhing in agony, must have struggled for life and the bangles broke. Under the circumstances, it is difficult to just brush aside the defence version that the deceased herself set fire to her person to commit suicide and the accused tried to save her and in the process got his hands and abdomen burnt. This is no doubt a theory but nevertheless a

probability. And once a doubt arises, not the doubt of a vacillating mind, it will be unsafe to convict a man merely on suspicion, however strong it might be. Perhaps it was a case in which ill-treatment meted out by the husband to his wife left her without any choice but to take her own life thereby attracting Section 306 I.P.C. But there was no such alternative charge and it is far from our mind to substitute a new case where there is none.

17. When Mr. Roy opened his argument, the Bachan Case-(Bachan Singh v. State of Punjab, : 1980 CriLJ636) was staring in our face and we were wondering if it was a 'rarest of the rare cases' attracting extreme penalty. But at the journey's end we find that it no longer stares. It is not for nothing that the maxim, let hundred guilty persons escape punishment than an innocent person to suffer conviction, has been well-received in our country.

18. The result is that the death reference is rejected. The appeal by the convict is allowed. The impugned order of conviction and sentence is set aside. The accused is acquitted on benefit of doubt and he is directed to be freed from his incarceration forthwith.

R. Bhattacharyya, J.

19. I have had the privilege of going through the judgment of my learned brother and I do not find any patent reason to disagree with him. However, I want to add a few points of law for the guidance of the learned subordinate courts, although such laws have been well interpreted and explained by the courts of our country including the apex court which are numerical in strength. To begin with, it is glaring that materials have come to the surface in regard to commission of crime after setting out particulars of date, time and place when such offences were perpetrated by the accused persons.

20. Strangely enough, the charge framed by the court is devoid of particulars. It is manifest from the charge that the venue and time are strikingly absent.

21. In my view, it is preposterous. But, it is never insisted on by any courts of our country that in framing charge evidence has to be disclosed. According to the

salutary provision of law, the framing of charge should not offend the provisions of Section 211 of the Cr P.C. Charge serves the purpose of notice or intimation to the accused, drawn up according to the specific language of law giving clear and unambiguous or precise notice of the nature of accusation that the accused is called upon to meet in the course of trial in *V.C. Sukla v. C.B.I.*, 1980 Supp SCC 1992. The same view has been expressed in *Major G.S. Sodhi v. Union of India*, 1991 SCC (Cri) 357. If I turn to the case for a moment to appreciate the points raised, it is significant that the victim suffered burn injury in the premises of the accused which according to the case of the prosecution that both the accused were the authors of the crime. It has been well described when and at what time such offence took place. The charge, as framed, is absolutely void as it suffers from material particulars. Besides, it is a rolled up charge which the learned court below overlooked at the time of framing or at any time subsequent thereto. It is curious to find that the principal charge under Section 302 was clubbed with Section 34 of the I.P.C. which is not permissible as the principal charge is to be set out first and, thereafter, the charge under Section 34 of the I.P.C. ought to have been filed. The charge in my view has been framed in a casual manner which should not have been done in a case of this nature. It should not sleep away from memory that fouler the crime higher the proof. In framing charge, the mode and manner resorted to by the learned trial court strikes at the root of the case of the prosecution. In my view, Section 215 cannot be read in aid of framing of charge which would be evident while I will discuss Section 313 of the Code of Criminal Procedure.

22. Returning to examine the ambit and scope of Section 313 of the Cr.P.C; it embodies principle of fairness based on the salutary principle, '*audi alteram partem*'. It is not an idle formality. The purpose of the examination of the accused under Section 313 is to afford him an opportunity to explain the incriminating materials which has surfaced on record. The stage of examination of the accused under Clause (b) of Sub-section 1 of Section 313 is reached only after the witnesses for the prosecution have been examined and before the accused is called upon to enter on his defence. It is notorious that the trial Judge is not expected before examining the accused under Section 313 of the Code to sift the evidence and pronounce on whether or not he would accept the evidence in

connection with any incriminating material for the purpose of determining as to whether or not to examine the accused on that material. To do so would be to prejudge the evidence without hearing the prosecution under Section 314 of the Code. The invaluable and precious expression, 'shall question him' clearly bring out the mandatory character of the Clause and imposes a duty on the court, the object being to confer a corresponding right on the accused to an opportunity to offer his explanation for such incriminating material against him. Therefore, no matter how weak or scanty the prosecution evidence is in regard to a certain incriminating material, it is the obligation of the Court to examine him and seek the explanation of the accused thereto. Unless that stage is reached the oral arguments by any of the parties cannot be advanced. However, the Court has no obligation to examine any accused when the incriminating material has not surfaced on record. But once the incriminating material appearing against the accused persons is in evidence, the Court is not wriggled out of its obligation to examine the accused.

23. In the background of the law set down by the apex court of our country in *State of Maharashtra v. Sukh Dev Singh*, : 1992 CriLJ3454 , I have had the opportunity, while participating in the bench with hon'ble Mr. Justice L.M. Ghosh in *Sambhu Adhikari and Ors. v. State*, 1992 CCrLr 1, to deliver the judgment. I thoroughly discussed about the scope and object of Section 313 of the Cr.P.C. There, I indicated, the object of Section 313 of the Code of Criminal Procedure is to establish a direct dialogue between the court and the accused. If a point in the evidence is important against the accused and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and given an opportunity of explaining it. But where, as here, this Court finds that the questions put to the accused are not at all evidence in the eye of law or the evidence recorded is absolutely inadmissible having its root in hearsay, there was therefore, no material circumstance which could be put to the accused and the examination of the accused became a vain show which could never be taken into account and formed the basis of conviction.

24. Moreover, the accused persons while examined under Section 313 of the Cr.P.C. were not duly warned. The questions have been asked to each of the

accused persons in regard to which there was no material evidence. The learned court below had asked Smt. Laxmi Basak :

'GHATANER DIN APNI O GOUR PARAMARSHA KARE BASANTIR GAYE AGUN LAGIYAE DEN. FALE SE MARA JAYE'

The learned court below also asked Gour Saha :

'APNAR CHELEDER GRIHASIKSHIKA LAXMI DASHER SANGE APNAR ABAIDHA SAMPARKA CHILO. ER JANYA APNAR STREER SAHIT APNAR JHAGRA HAITA.

GHATANER DUDIN AGE APNI, BASANTI O TAR DU CHELEKE BARI THEKE TARIYE, DEN.

GHATANER DIN APNI LAXMIR SAHIT PARAMARSHA KARE KEROSENE DHELE AGUN LAGAN. FALE SE MARA JAY'.

25. I have meticulously examined the evidence with abundant caution and the questions put to the accused persons are incompatible with the evidence on record. It does not come to the surface of the record that both the accused poured kerosene on the body of Basanti and, thereafter, they had set fire to her body. The framing of charge in the background of the materials disclosed before the evidence did not point out such fact. Even, none of the witnesses testified to the pouring of kerosene on the body of Basanti by both the accused followed by setting fire 'to her body. Therefore, the pouring of kerosene oil sprang up from conspiracy as asked by the court while the accused persons were examined is beside the charge and the evidence. The examination of the accused under Section 313 of the Cr.P.C. does not stand to have been pivoted on incriminating circumstances.

26. On the other hand, the accused persons have been practically crossexamined by the Court.

27. In the context, the case of Jaideb v. State of Punjab, : [1963]3SCR489 , may be of great importance where the Court held that the examination of the accused

persons under Section 342 is intended to give him an opportunity to explain any circumstances appearing in the evidence against him. In exercising its power under Section 342, the- Court must take care to put all relevant circumstances appearing in the evidence to the accused persons. It would not be enough to put a few general and broad questions to the accused, for by adopting such a course the accused may not get opportunity of explaining all the relevant circumstances. While concluding on this aspect the Supreme Court also held, 'It is obvious that no general rule can be laid-down in regard to the manner in which the accused persons should be examined under Section 342. Broadly stated, however, the true position appears to be that passion for brevity which may be content with asking a few omnibus general questions is much inconsistent with the requirements of Section 342 as anxiety for thoroughness which may dictate and unduly detailed and large number of questions which may amount to the cross-examination of the accused persons.' Therefore, taking into account the charge, evidence and the examination of the accused under Section 313, I cannot help holding that the approach of the learned trial court is wrong, his treatment to the case is wrong who made an undue assumption of fact. I cannot but observe that the case proceeded on the basis of eye witnesses, but suddenly what prevailed upon the court to come to the conclusion :- 'The incriminating facts which has been exposed and discussed at length so far are incomparable with the innocence of the accused Gour Guha and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The circumstances have been fully established and they are inconsistent only with hypothesis guilt of the accused and they are of a conclusive nature and tendency and they exclude any other hypothesis excepting the guilt of the accused'.

28. These observations of the learned court below could only be made where the case is based upon circumstantial evidence. It is not a case of circumstantial evidence where such observations could be made by the learned court below regarding the chain of circumstances being complete.

29. There is no direct evidence to prove that the accused was the perpetrator of the crime. Thus, taking into consideration the factual and legal aspect of the case, the death reference cannot be accepted.

30. Accordingly, it stands rejected and the accused shall be set at liberty at once unless wanted in connection with the any other case.

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