which shall be considered and gone into, uninfluenced by any observations made by us in this order."

26. Thus, we are of considered opinion that in the facts and circumstances of the present case as discussed above, and in view of observation made by Hon'ble Supreme Court in the aforesaid cases, the judgment and order dated 20.12.2023 passed by learned trial court is hereby set aside and matter is remanded back to the learned trial court to summon the witnesses as court witnesses to prove fard regarding taking of underwear from the dead body of the deceased and scientific experts associated with the preparation and issuance of the F.S.L./D.N.A. report with the entire supporting material and opportunity of cross-examination be also given to the accused, in the light of the observations made in the case of ***Irfan @ Bhayu Mewati (Supra)*** as noted above and then to decide the case afresh.

27. Accordingly, the appeal is ***allowed*** and reference is disposed of.

28. Copy of this judgment alongwith original record of Court below be transmitted to the Court concerned for necessary compliance.

(2025) 5 ILRA 77
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2025

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE JITENDRA KUMAR SINHA, J.

Criminal Appeal No. 328 of 1986

Sarvanarain Tewari & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Kritika Pandey, R.P. Singh, Rajesh Kumar Singh

Counsel for the Respondent:
A.G.A.

A. Criminal Law - Criminal Procedure Code,1973-Section 374(2)-Indian Penal Code,1860-Sections 302/34 & 201/34-Challenge to –Conviction-The incident occurred in1983 in District Azamgarh-The deceased was allegedly attacked by the appellants with lathis and other weapons over a land dispute-FIR was lodged promptly by the complainant/PW-1 naming all accused-The post mortem confirmed injuries consistent with blunt force trauma-The court found that eyewitnesses accounts were consistent and trustworthy, FIR was promptly lodged, no major contradictions in medical and ocular evidence-The presence of all accused at the scene with weapons was proven by all three eyewitnesses-Other eyewitnesses corroborated the version of PW-1,stated that all accused armed with lathis and sticks attacked the deceased-Medical report fully corroborated the eyewitnesses accounts regarding nature of assault and types of weapons used-postmortem report conducted by PW5(doctor) shows that deceased suffered multiple lacerated wounds and fractures on vital parts of the body-land dispute between the parties was cited as motive and defence failed to rebut or offer any plausible alternative motive-The common intention and participation of all accused was well-supported by all evidences-Thus, Conviction and life sentence u/s 302/149 IPC were upheld.(Para 1 to 34)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Jose @ Pappachan Vs S.I. Koyilandy & anr. (2016) 10 SCC 519

2. Krishna Mochi & ors. Vs St. of Bih. (2002) 6 SCC 81

3. Sharad Birdichand Sarada (1984) 4 SCC 116

4. Hari Prashad @ Kishan Sahu Vs St. of Chhatisgarh.(2024) 2 SCC 557

5. St. thru the Ins. of Police Vs Laly @ Manikandan (2022) SCC OnLine SC 1424

6. Trimukh Maroti Kirkan Vs St. of Mah. (2006) 10 SCC 681

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Both Criminal Appeals have been filed against the judgment and order dated 10.12.1985, passed by learned Additional Sessions Judge, Ballia in Sessions Trial No.249 of 1984, convicting and sentencing the appellants under section 302/34 and 201/34 IPC to undergo rigorous imprisonment for life and three years imprisonment respectively.

2. Vide order dated 12.01.2024 leading appeal stood abated in respect of appellant no.2-Subh Narayan Tewari and vide order dated 06.03.2017 connected appeal stood abated in respect of appellant no.1-Sita Ram. Now, the leading appeal is surviving only in respect of appellant no.1-Sarvanarain Tewari and connected appeal is surviving only in respect of appellant no.2-Saraswati Devi alias Sursatiya.

3. We have heard Shri Rajesh Kumar Singh, learned counsel for the surviving-appellant no.1-Sarvanarain Tewari in leading Criminal Appeal No.328 of 1986 and surviving appellant no.2-Smt. Saraswati Devi alias Sursatiya, in connected appeal no.3328 of 1985 as well as Ms. Mayuri Mehrotra, learned State Law Officer for the State of U.P. and perused the record.

4. Prosecution version as per written information is that on 06.09.1984 an information was given to police station by Shree Ram Tewari that the daughter-in-law of his neighbour- Sita Ram Tewari was lying burnt dead in her house. He further informed that today, noon she was beaten by her dever-Subh Narain Tewari, while beating he said that go and drown yourself somewhere and there is no place for you in our house. The people from neighborhood, on seeing smoke coming from the house of the deceased, reached there and by that time she appeared to have died. It appeared that either due to having been beaten or due to any other reason not known to him, daughter-in-law of Sita Ram died because of burning. Sita Ram and his sons were not there in the house. On the basis of the said written information, case was registered in case crime no. 133/84, under sections 306, 498A and 323 IPC. Thereafter Postmortem was conducted on the next day i.e. 07.09.1984. The following ante mortem injuries were found on the body of the deceased:

(1) Incised wound size 3 cm x 0.5 cm x muscle deep longitudinal direction on left side of face.

(2) Burn of 4th degree all over body except flue of right leg and dorsum of right foot. Body blackened all hair of head is burnt and charmed. Skin peeled off over body at many places.

5. Thereafter investigation was started by the Investigating Officer and after concluding the same a charge-sheet was submitted against the accused persons under section 302/34 and 201/34 IPC. The accused persons pleaded not guilty to the charge and denied to have murdered the deceased. They claim to have been falsely implicated due to enmity.

6. The prosecution has examined as many as 8 witnesses, namely, P.W.1-Shri Ram Tewari, P.W.2- Vyas Tewari, P.W.3-Shyam Lal Tewari P.W.4- Hridyanand Singh, P.W.5- Bhrigu Nath Singh, P.W.6-Nand Kumar Ray, P.W.7-Dr. G.P. Tripathi and P.W.8-Shiv Shankar Singh.

7. The prosecution has also submitted documentary evidence, which were marked as Exhibit Ka-1-FIR, Exhibit Ka-2-Chargesheet, Exhibit Ka-3-Panchayatnama, Exhibit Ka-4-Police Report No.13, Exhibit Ka-5-Photonash of deceased Sunaina, Exhibit Ka-6-Namoona Mohar, Exhibit Ka-8-G.D. Entry, Exhibit Ka-9-Post Mortem Report, Exhibit Ka-10-Site Plan with Index, Exhibit Ka-11-Recovery Memo of burnt soil and hair.

8. Submission of the learned counsel for the surviving appellants is that it is a case of circumstantial evidence in which link and chain of circumstances are not established. He submitted that in order to succeed on a criminal charge the case must fall within the grade of "must be true" and not "may be true". It is submitted that if two views are possible, one pointing to the guilt of accused and other to his innocence, the one favourable to the accused ought to be adopted. In support of his legal submission he has placed reliance upon the judgment of Hon'ble Apex Court in the case of **Jose Alias Pappachan vs. Sub Inspector of Police Koyilandy and Another, (2016) 10 SCC 519.**

9. On facts, learned counsel for the appellants submits that it is a case of circumstantial evidence. There are material inconsistency in the statements of P.W.1-Shri Ram Tewari, P.W.2- Vyas Tewari and P.W.3- Shyam Lal Tewari, who are stated to be the witnesses of fact. It is submitted that initially the first information report was lodged under section 306, 498A and 323 IPC, however, charge-sheet was submitted under Section 302/34 and 201/34 IPC. It was pointed out that the surviving appellants herein are Survanarain Tewari, husband of the deceased, and Saraswati Devi, married nanad of the deceased. By drawing attention to the first information report it was submitted that the same was lodged by Shri Ram Tewari- neighbour of the accused persons making allegations against Subh Narain Tewari- brother of Survanarain Tewari only and that there was no allegation against the surviving appellants in the first information report and that by improving the case they have been subsequently implicated with mala fide intention with only reason to implicate the entire family members whereas there is no evidence available against the appellants herein. It is submitted that there is material contradictions in the statements of P.W.1-Shri Ram Tewari, P.W.2- Vyas Tewari and P.W.3- Shyam Lal Tewari in respect of the presence of the accused persons on the spot and they have improved their version.

10. He pointed out that PW-1- Shri Ram Tewari, lodged the first information report
alleging that the deceased (Sunaina) was being beaten by Subh Narayan Tewari and she was also being abused and while beating, he said that go and drown yourself somewhere and that there is no place for you in our house. The people from neighborhood, on seeing smoke coming from the house of the deceased, reached there and by that time she appeared to have died. He stated that it appeared that either due to having been beaten or due to any other reason not known to him, the daughter-in-law of Sita Ram died because of burning. He stated that Sita Ram and his

sons were not there in the house. He submitted that whereas in the statement before the court recorded on 20.03.1985 he had stated that all the accused persons, namely, Subh Narain Tewari, Sita Ram Tewari, Sarvanarain Tewari and Saraswati were beating Sunaina (deceased) with kicks and fists and also said that ***"TUM DOOB JAAO, MAR JAO, TUMHARE JAISI AURAT KI MERE GHAR ME JAROORAT*** NAHI HAI" and that apart from that informant, Byas Tewari, Shyam Lal Tewari and other persons reached at the spot and tried to save the deceased, however, Sunaina (deceased) was taken inside the house by them, thereafter cry and shouting of the deceased were coming out from the house and then it was heard *"BAAP RE BAAP JAN GAEL"*. Thereafter, smoke and smell of burning was coming out from the house of accused persons and subsequently, accused persons came out from the house. He submits that a clear improvement has been made by PW.1 in his statement. It was further pointed out that PW.1 in his cross-examination had admitted that he only saw Subh Narain escaping from spot. He also admitted in his cross that no belongings kept inside the room were found burned.

12. Learned counsel for the appellants further pointed out that P.W.2-Byas Tewari in his cross examination had given the motive of murder that one Phulan Dev Tewari son of Sita Nath Tewari was having illicit relationship with the deceased-Sunaina wife of Sarvanarain Tewari and Saraswati, nanad of the deceased has seen Phulan Dev Tewari escaping from the room of Sunaina, who in turned informed her father Sita Ram and Sitaram told this to Subh Narayan Tewari and therefore, they were abusing her and said "HARAMJADI TUM DOOB MARO, TUMHARE LIYE ISS GHAR ME JAGAH NAHI HAI". He stated that after hearing hue and cry, he, Shri Ram Tewari (informant) and Buddhu reached the spot and tried to save the victim, however, all the accused persons have taken Sunaina inside the house and started beating her, after sometime it was heard "ARE BAAP RE JAAN GAEL" and after sometime, smoke started coming from the house and burning smell was felt in the surrounding. Thereafter, all the four accused persons left the place of incident. In paragraph 6 of his cross-examination he has given the motive that Saraswati had seen Phulan Dev escaping from the room of Sunaina from her window (Jangla). In his cross examination so far as the fact as to what he had seen Sarvnarayan Tewari running from the spot, he stated that he had not seen Sarvnarayan and has only heard his noise.

13. Attention was drawn to the statement of PW.3-Shyam Lal Tewari to contend that in his cross examination he had stated that he had not seen any of the accused beating Sunaina before noon and that he had not seen Sarvanarain Tewari in noon coming from anywhere. He found the door open and all the belongings in the house were not burned and there was no mark of smoke on the wall of the room and that no accused person came out from their house in front of him.

14. By highlighting the statement of PW-1, PW-2 and PW-3 it was submitted that there was improvement in the version of the incident as narrated in the first information report and therefore, no reliance can be placed on the said statements in the case of circumstantial evidence and reiterated that it is a case of circumstantial evidence, therefore, benefit of doubt must go in favour of the surviving accused appellants.

15. Learned counsel for the appellants next submitted that in any case the main allegation was against Shubhnarain Tewari (devar of the deceased) and no specific allegation of committing murder against surviving accused appellants. By highlighting the statement of PW.7-Dr G.P. Tripathi that injury no.1 was caused by some sharp edged weapon, however, there is no such recovery and as such the prosecution version becomes doubtful. He has further drawn the attention to the statement of D.W.1, Sunaina Devi, who claim herself to be the wife of Phulan Dev Tewari and states that she is Sunaina Devi and that wife of Sarvanarain Tewari is Jamvanti and not Sunaina Devi. She states that wife of Sarvanarain Tewari is the sister-in-law of her husband Phulan Dev Tewari and her husband Phulan Dev has never illicit relationship with any other lady. In paragraph 4 she stated that once wife of Sarvanarain came to the house but suddenly ran away and it is not known where she had gone. She further stated that as per her knowledge no lady was burned inside the house of Sita Ram Tewari within two years. She had denied the suggestion that the name of wife of Survanarain Tewari was Sunaina. On the strength of statements so highlighted, submission is that it is a case of circumstantial evidence and in the light of judgement of **Jose (supra)** the link and chain of circumstantial evidence is not established and the benefit of doubt to be extended to the accused appellants herein.

16. Learned counsel for the appellant next submitted that in any case the first information report has been lodged against Subh Narain Tewari and not against the surviving appellants Survanarain Tewari and Saraswati and therefore, they are entitled to be acquitted from all the charges.

17. Per contra, Ms. Mayuri Mehrotra, learned State law officer for the State of U.P. has submitted that it is a case of direct evidence; first, there was beating immediately there after murder was committed by strangulation and immediately thereafter dead body was burned to destroy the evidence. She further submitted that the incident had taken place inside the house of accused persons, therefore, as per section 106 of the Indian Evidence Act burden was on the accused persons to prove their innocence. She next submitted that the first information report was prompt. It was also submitted that there is strong motive to commit murder as the deceased having illicit relationship with one Phulan Dev Tewari.

18. Before proceeding further, it would be appropriate to take note of judgment of Krishna Mochi and Others vs. State of Bihar, reported in (2002) 6 SCC 81, wherein Hon'ble Apex Court in paragraph 32 has held as under:

"32. Thus, in a criminal trial a Prosecutor is faced with so many odds. The court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in an ivory tower. I find that in recent times the tendency to acquit an accused easily is galloping fast. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgment so as to achieve the yardstick of disposal. Some discrepancy is bound to be there in each and every case which should not weigh with the court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, the court should tread upon it, but if the same are boulders, the court should not make an

attempt to jump over the same. These days when crime is looming large and humanity is suffering and the society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing the world over and courts have been compelled to accept that "society suffers by wrong convictions and it equally suffers by wrong acquittals". I find that this Court in recent times has conscientiously taken notice of these facts from time to time. In the case Inder Singh v. State (Delhi Admn.) [(1978) 4 SCC 161 : 1978 SCC (Cri) 564 : AIR 1978 SC 1091] Krishna Iyer, J. laid down that : (SCC p. 162, para 2) "Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes." In the case of State of U.P. v. Anil Singh [1988 Supp SCC 686 : 1989 SCC (Cri) 48 : AIR 1988 SC 1998] it was held that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform. In the case of State of W.B. v. Orilal Jaiswal [(1994) 1 SCC 73 : 1994 SCC (Cri) 107] it was held that justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice, according to law. In the case of Mohan Singh v. State of M.P. [(1999) 2 SCC 428 : 1999 SCC (Cri) 261 : (1999) 1 SCR 276] it was held that the courts have been removing chaff from the grain. It has to disperse the suspicious cloud and dust out the smear of dust as all these things clog the very truth. So long chaff, cloud and dust remain, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, not to merely conclude and leave the case the moment suspicions are created. It is the onerous duty of the court, within permissible limit to find out the truth. It means, on one hand no innocent man should be punished but on the other hand to see no person committing an offence should get scot-free. If in spite of such effort suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused."

(Emphasis supplied)

19. It would also be appropriate to quote paragraphs 153, 154, 159, 163, 164 and 165 of landmark judgement of Hon'ble Apex Court rendered in ***Sharad Birdichand Sarada*** **, (1984) 4 SCC 116.** This judgment has been relied on in **Jose (supra):-**

"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.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

159. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier viz. before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,

(2) the said circumstance points to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

163. We then pass on to another important point which seems to have been completely missed by the High Court. It is well settled that where on the evidence two possibilities are available or open, one which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. In Kali Ram v. State of Himachal Pradesh [(1973) 2 SCC 808 : 1973 SCC (Cri) 1048 : AIR 1973 SC 2773 : (1974) 1 SCR 722 : 1974 Cri LJ 1] this Court made the following observations: [SCC para 25, p. 820: SCC (Cri) p. 1060]

"Another golden thread which runs through the web of the administration of justice in criminal cases, is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence."

164. We now come to the mode and manner of proof of cases of murder by administration of poison. In Ramgopal case [(1972) 4 SCC 625 : AIR 1972 SC 656] this Court held thus: (SCC p. 629, para 15)

"Three questions arise in such cases, namely (firstly), did the deceased die of the poison in question? (secondly), had the accused the poison in question in his possession? and (thirdly), had the accused an opportunity to administer the poison in question to the deceased? It is only when the motive is there and these facts are all proved that the court may be able to draw the inference, that the poison was administered by the accused to the deceased resulting in his death."

165. So far as this matter is concerned, in such cases the court must carefully scan the evidence and determine the four important circumstances which alone can justify a conviction:

(1) there is a clear motive for an accused to administer poison to the deceased,

(2) that the deceased died of poison said to have been administered,

(3) that the accused had the poison in his possession,

(4) that he had an opportunity to administer the poison to the deceased."

20. Following the aforesaid proposition of law, the same view has been reiterated by Hon'ble Apex court in a recent judgement rendered in **Hari Prashad alias Kishan Sahu vs. State of Chhatisgarh, (2024) 2 SCC 557.**

21. There is no quarrel with the settled proposition of law in so far as a case is of circumstantial evidence. However, on appreciation of facts of the case and evidence on record, we find that the law in a case of circumstantial evidence is not applicable, though the evidence on record may require a close scrutiny.

22. A bare perusal of the injury report, which is quoted above, clearly reflects that injury no.1 was incised wound and as per opinion of the doctor the same could have been caused by any sharp edged weapon. He further opined that death was caused due to strangulation and there was fourth degree burnt on the upper part and behind part of right leg; all the hairs were almost burnt. This clearly reflects that it is not just a case of burning but in fact the deceased was not only attacked with sharp edged weapon on the vital part i.e. face but she was also strangulated and as per post mortem report she died because of strangulation she died and it is only thereafter she was burned to destroy the evidence. The investigating officer has recovered the burnt soil as well as burnt hairs of the deceased from the spot. This recovery was duly proved by the Investigating Officer-Shiv Shankar Singh, Deputy Superintendent of Police, who has appeared as PW.8 in the present case. No doubt, the walls of the room where the offence was committed, were not found burned, however, the site plan would clearly indicate **"x"** is the place outside the residence of the accused where the deceased were beaten by the accused person; **"A"** is the place where the dead body of the deceased was found**; "x** with dots" is the place of incident where the body of the deceased was lying in burned condition from where the burnt soil, burnt hairs and plain soil were recovered. This spot **"X" with dots"** was almost in the middle of the room and therefore, it was not necessary that any visible burning marked would have appeared on the wall. It is also not in dispute that all the prosecution witnesses i.e. P.W.1, P.W.2 and P.W.3 are independent witnesses and are neighbour of the accused persons and nothing came out in their cross-examinations in respect of their enmity with the accused persons as to why they would falsely implicate in the present case, as a matter of fact only faint suggestion of enmity was made but all the three witnesses remain intact through out their cross-examination. We also find that narration of the incident and involvement of the accused persons were specifically stated by all the three prosecution witnesses of fact in examination in chief and they remain intact through out their cross examinations on such facts.

23. At this stage, we may express our opinion that it is not a case of

circumstantial evidence rather it is a case of direct evidence even if the accused persons have not seen the entire incident. In fact three incidents one after another, that too, closely connected had taken place in the present case, one, beating the deceased outside the house of the accused persons shown as place **"X"** in the site plan, where the deceased Sunaina was being beaten by Subhnarain Tewari as per the first information report, two, from where Sunaina was taken inside the house by all the accused persons and it is when the prosecution witnesses reached at the spot and tried to save her from the accused persons, third event was the murder of the deceased inside the house. Spot of death was marked as **"X with dots"** in the site plan. This subsequent event committed by the accused persons was of causing incised wound on the face by sharp edged weapon and committing her murder by strangulation and thereafter, burning the body to destroy the evidence. All the witnesses of facts are intact on the fact that they had seen the smoke coming out from the house of the accused persons and thereafter they have seen the dead body inside the room in a burning state. It is pertinent to note that all the witnesses stated that the incident had taken place in the noon of 06.09.1984 at about 12.00; they have seen the accused persons beating the deceased outside their house and after about one and half hour, at about 2.00 o'clock smoke was seen coming out from the house of the accused persons. The first information report was lodge at 4.30 pm on the same day. There is no delay in lodging the FIR as one can understand that the same was lodged by the neighbour and not by any persons related to the deceased present on the spot. We, therefore find that the first information report is prompt in nature.

24. No doubt, none of the prosecution witnesses have seen any of the accused persons actually causing incised wound by any sharp edged weapon and strangulating the deceased. Reason appears to be simple as the incident happened inside the close door house of accused persons and being neighbours they were natural witnesses of the smoke and burning smell coming out from the house of the accused persons after two hour from the time of beating Sunaina by all the accused persons. The narration of the incident by all the witnesses appears to be natural and there are no major discrepancies in the statements given by any of the witnesses. Evidence was fully corroborated with the post mortem report as well as medical evidence of P.W.7-Dr. G.P. Tripathi. Therefore, even if it is presumed to be a case of circumstantial evidence, the links of chain are complete.

25. In so far as the argument of learned counsel for the appellants that there was no recovery of weapon by which incised wound was caused is concerned, suffice to say that recovery of the weapon used in the commission of the offence is not a sine qua non to convict the accused. If there is a direct evidence in the form of eye witness, even in the absence of recovery of weapon, the accused can be convicted. The Hon'ble Apex Court in **State through the Inspector of Police vs. Laly @ Manikandan; 2022 SCC OnLine SC 1424, held that:**

"Similarly, assuming that the recovery of the weapon used is not established or proved also cannot be a ground to acquit the accused when there is a direct evidence of the eye witness. Recovery of the weapon used in the commission of the offence is not a sine qua non to convict the accused. If there is a

direct evidence in the form of eye witness, even in the absence of recovery of weapon, the accused can be convicted. Similarly, even in the case of some contradictions with respect to timing of lodging the FIR/complaint cannot be a ground to acquit the accused when the prosecution case is based upon the deposition of eye witness."

(Emphasis Supplied)

26. We also find that the statement of D.W.1 is not worth belief. She appears to be a witness produced before the court for the sake of creating evidence in favour of defence. There is nothing on record to proof her identification. In paragraph 7, however, she stated that in respect of death of Sunaina Devi wife of Survanarain Tewari police and Deputy S.P. gone to the village and that she does not live with her husband Phulan Dev all the time and do not go with him where ever he goes. However, in her cross examination she has denied the suggestion that she is wife of Sarvanarain Tewari and has stated that she is wife of Phulan Dev and that she is not aware about the murder of wife of Sarvanarain Tewari. On one hand, in her cross examination, she had stated that she does not have any knowledge about the wife of Survanarain Tewari and on the other hand, she had stated that in respect of murder of Sunaina wife of Survanarain Tewari police and Deputy S.P. had come to the village. We further find that in the statement recorded under section 313 Cr.P.C. all the accused persons have simply stated that Sunaina is the married wife of Phulan Dev Tewari and that they have not stated anything in their defence except by making bald statement that the prosecution witnesses have made statement against them because of enmity whereas not even a single word was stated as to why they bore enmity with them. The motive although may not have been stated in the first information report but it has come on record that the deceased was having illicit relationship with Phoolan Dev Tewari. Informant is the neighbour, however, to that extent he had stated that Subh Narain Tewari during noon hours was beating and abusing the deceased and told that "HARAMJADI TUM DOOB MARO, TUMHARE LIYE ISS GHAR ME JAGAH NAHI HAI" and people from neighborhood, on seeing smoke rising from the house of the deceased, reached there but by that time Sunaina appeared to have died and he had only expressed the view as a neighbour that it appeared that either due to having been beaten or due to any other reason not known to them, the daughter-in-law of Sita Ram died because of burning. This first information report from neighbor appears to be quite natural and clearly reflects that there was something wrong between the accused and the deceased.

27. Learned counsel for the appellants has placed reliance on **Jose (supra)** not only in support of his argument of this case being a case of circumstantial evidence and that as links of chain are not complete or established, but also to contend that section 106 Indian Evidence Act, 1872 has no application in the present case and no burden of proof can be placed on the accused persons, as their presence in the house is neither admitted nor proved. He further submitted that in any case, as held in **Jose (supra)** suspicion, however, grave cannot take place of proof and prosecution must canvas a story that must be true and not merely 'may be true', therefore, in any case, benefit of doubt must be extended to the appellant. Paragraph no.52 of the **Jose (supra)** is quoted as under:-

"52. The evidence of the eyewitnesses when considered in conjunction with the testimony of the

doctor does not link the appellant directly or indirectly with the actual act leading to the unnatural death of the deceased. In the absence of any persuasive evidence to hold that at the relevant time the appellant was present in the house, it would also be impermissible to cast any burden on him as contemplated under Section 106 of the Evidence Act. The consistent testimony of the appellant and his son to the effect that after alighting from the bus on their return from Potta, the deceased was made to accompany DW 1 back home while the appellant did go in search of labourers for works in his compound on the next day and that thereafter till the time DW 1 had departed for his ancestral house, the appellant did not return home, consolidates the defence plea of innocence of the appellant."

28. At this stage, it would be appropriate to take note of section 106 of the Indian Evidence Act, 1872 which is quoted as under:-

*"**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."*

29. We are of the opinion that the argument so raised is not sustainable in the eyes of law.

30. In **Trimukh Maroti Kirkan vs. State of Maharashtra, (2006) 10 SCC 681,** Hon'ble Apex Court held that in case a crime is committed in secrecy inside a house, in view of section 106 of Indian Evidence Act, there is also a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed and that they cannot get away by keeping quite on the premise that prosecution must discharge its burden of proving the case. It was further held that if the accused fails to offer any cogent explanation or offers an explanation which is untrue then it can be treated as an additional link in chain of circumstances against the accused to make it complete. Paragraphs no.14 to 22 are quoted as under:-

"14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecutions [1944 AC 315 : (1944) 2 All ER 13 (HL)] — quoted with approval by Arijit Pasayat, J. in State of Punjab v. Karnail Singh [(2003) 11 SCC 271 : 2004 SCC (Cri) 135] .) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the

content and scope of this provision and it reads:

"(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him."

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

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

"30. It cannot be disputed that in proceedings for imposing penalties under clause (8) of Section 167, to which Section 178-A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But, in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and — as Prof. Brett felicitously puts it—'all exactness is a fake'. El Dorado of absolute proof being unattainable, the law accepts for it probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case.

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

32. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the persons concerned in it.

On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of fact may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result, prove him guilty. As pointed out by Best (in Law of Evidence, 12th Edn., Article 320, p. 291), the 'presumption of innocence is, no doubt, presumptio juris; but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property', though the latter is only a presumption of fact. Thus the burden on the prosecution or the Department may be considerably lightened even by such presumptions of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden, to discharge which, very slight evidence may suffice."

(emphasis supplied)

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

18. The question of burden of proof where some facts are within the personal knowledge of the accused was examined in State of W.B. v. Mir Mohd. Omar [(2000) 8 SCC 382 : 2000 SCC (Cri) 1516] . In this case the assailants forcibly dragged the deceased, Mahesh from the house where he was taking shelter on account of the fear of the accused and took him away at about 2.30 in the night. Next day in the morning his mangled body was found lying in the hospital. The trial court convicted the accused under Section 364 read with Section 34 IPC and sentenced them to 10 years' RI. The accused preferred an appeal against their conviction before the High Court and the State also filed an appeal challenging the acquittal of the accused for murder charge. The accused had not given any explanation as to what happened to Mahesh after he was abducted by them. The learned Sessions Judge after referring to the law on circumstantial evidence had observed that there was a missing link in the chain of evidence after the deceased was last seen together with the accused persons and the discovery of the dead body in the hospital and had concluded that the prosecution had failed to establish the charge of murder against the accused persons beyond any reasonable doubt. This Court took note of the provisions of Section 106 of the Evidence Act and laid down the following principle in paras 31 to 34 of the reports: (SCC p. 392)

"31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof on the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the

major beneficiaries and the society would be the casualty.

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

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

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

19. Applying the aforesaid principle, this Court while maintaining the conviction under Section 364 read with Section 34 IPC reversed the order of acquittal under Section 302 read with Section 34 IPC and convicted the accused under the said provision and sentenced them to imprisonment for life.

20. In Ram Gulam Chaudhary v. State of Bihar [(2001) 8 SCC 311 : 2001 SCC (Cri) 1546] the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for the absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they had murdered the boy. It was further observed that even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The accused by virtue of their special knowledge must offer an explanation which might lead the court to draw a different inference.

21. In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decisions of this Court. [See State of T.N. v. Rajendran [(1999) 8 SCC 679 : 2000 SCC

(Cri) 40] (SCC para 6); State of U.P. v. Dr. Ravindra Prakash Mittal [(1992) 3 SCC 300 : 1992 SCC (Cri) 642 : AIR 1992 SC 2045] (SCC para 39 : AIR para 40); State of Maharashtra v. Suresh [(2000) 1 SCC 471 : 2000 SCC (Cri) 263] (SCC para 27); Ganesh Lal v. State of Rajasthan [(2002) 1 SCC 731 : 2002 SCC (Cri) 247] (SCC para 15) and Gulab Chand v. State of M.P. [(1995) 3 SCC 574 : 1995 SCC (Cri) 552] (SCC para 4).]

22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In Nika Ram v. State of H.P. [(1972) 2 SCC 80 : 1972 SCC (Cri) 635 : AIR 1972 SC 2077] it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with "khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In Ganeshlal v. State of Maharashtra [(1992) 3 SCC 106 : 1993 SCC (Cri) 435] the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 CrPC. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. In State of U.P. v. Dr. Ravindra Prakash Mittal [(1992) 3 SCC 300 : 1992 SCC (Cri) 642 : AIR 1992 SC 2045] the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that the wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC. In State of T.N. v. Rajendran [(1999) 8 SCC 679 : 2000 SCC (Cri) 40] the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime."

31. In these circumstances, we find that the judgment of **Jose (supra)** is of no

help to the appellants in the present case. The incident had taken place inside the house of the accused persons and burden was on the accused persons to prove their innocence as per Section 106 of the Indian Evidence Act.

32. To corroborate the view taken by us on the argument of material improvement in testimony of P.W.1-Shri Ram Tewari, the informant and the FIR, we have seen the case diary dated 07.09.1984. We find that after recording the first information report it contains the panchayatnama and immediately thereafter, in continuation, recorded statement of the informant wherein he had clearly stated that Subh Narain Tewari, Survnarain Tewari, Sitaram Tewari and Sarswati were beating the deceased with kicks and fists and she shouted and cried. The statement before the court is also to the same effect. Statement of witnesses under section 161 Cr.P.C. was recorded immediately after investigation on 07.09.1984, therefore, it cannot be said that there was improvement in the statement of PW.1- Shri Ram Tewari and other two witnesses namely, PW.2-Vyas Tewari and PW.3-Shyam Lal Tewari have also made statements to the same effect and remain intact even in their cross examination.

33. Therefore, even if this case is taken to be a case of circumstantial evidence only, for the discussion made herein above, we find no merit in both the appeals. Direct involvement of both the surviving accused appellants namely Sarvanarain Tewari and Smt. Saraswati Devi in committing the offence is proved beyond any shadow of doubt.

34. At this stage, we have also perused the trial court judgment and find that the reasoning given by the trial court is perfectly just and proper and we, on our own appreciation of evidence on record, find no merit in both the appeals and the same are accordingly **dismissed.** The conviction of surviving-appellant no.1-Sarvanarain Tewari in leading Criminal Appeal No.328 of 1986 and surviving appellant no.2-Smt. Saraswati Devi alias Sursatiya, in connected Criminal Appeal no.3328 of 1985 is confirmed.

35. Since both the appeals have been dismissed and conviction and sentence awarded by the trial court has been confirmed by us, their bail bonds are cancelled and sureties are discharged. The Chief Judicial Magistrate, Ballia is directed to take the surviving-appellant no.1-Sarvanarain Tewari in leading Criminal Appeal No.328 of 1986 and surviving appellant no.2-Smt. Saraswati Devi alias Sursatiya, in connected appeal no.3328 of 1985 into custody and send them to jail to serve out the sentence awarded by the trial court and confirmed by us.

36. Let a copy of this order be communicated by the Registrar (Compliance) to the Chief Judicial Magistrate concerned for compliance within a week.

37. The Chief Judicial Magistrate, Ballia is also directed to send his compliance report within one month to this Court.

38. Lower court record be sent to the concerned Court forthwith.
