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THE STATE OF ODISHA

v.

BANABIHARI MOHAPATRA AND ANR.

(Special Leave Petition (Crl.) No. 1156 of 2021)

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FEBRUARY 12, 2021

[INDIRA BANERJEE AND HEMANT GUPTA, JJ.]

Penal Code, 1860: ss.302/201 r/w s.34 – Prosecution case was that the victim-deceased was found dead in shop of accused with a swollen belly and deep burn injury on right foot and blood was oozing out of his mouth and nostrils – In the FIR lodged by complainant-wife of the deceased, she had stated that on the fateful day, the first accused-respondent had come to her house and told her that the deceased was lying motionless and not responding to calls and thereafter younger son of first accused also came and gave similar information – Complainant alleged that first accused and his son committed murder of her husband by applying electric shock after administering poisonous substances to him – As per post mortem report, cause of death was electric shock, suffered by the deceased within 24 hours from the time of examination – The post mortem doctor opined that the deceased was intoxicated with alcohol and the death was either accidental, or homicidal, but not suicidal – Acquittal by trial court – High Court dismissed state’s application for leave to appeal on the ground of delay of 41 days but after considering the merits of application for leave to appeal – State’s appeal against acquittal – Held: The mere fact that the deceased was lying dead at a room held by accused respondent No.1 and that the accused had informed the complainant that the deceased had been lying motionless and still, and not responding to shouts and calls, would not establish that the respondents murdered the deceased – The post mortem report suggests that the death could have been accidental – Of the nine prosecution witnesses, three witnesses were declared hostile by the prosecution – There were apparent inconsistencies, inaccuracies and inherent improbabilities in the statements of witnesses – Prosecution miserably failed to establish the guilt of the accused Respondents – The impugned judgment of the High Court dismissing the appeal on the

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ground of delay did not call for interference under Art.136 of the Constitution of India. A

Appeal against acquittal: An appeal against acquittal has always been on an altogether different pedestal from an appeal against conviction – In an appeal against acquittal, where the presumption of innocence in favour of the accused is reinforced, the appellate court would interfere with the order of acquittal only when there is perversity – In this case, it cannot be said that the reasons given by the High Court to reverse the conviction of the accused were flimsy, untenable or bordering on perverse appreciation of evidence. B C

Criminal law: Case based on circumstantial evidence – Before a case against an accused can be said to be fully established on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn must fully be established and the facts so established should be consistent only with the hypothesis of guilt of the accused – There has to be a chain of evidence so complete, as not to leave any reasonable doubt for any 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. D

Dismissing the special leave petition, the Court

HELD: 1.1 The prosecution appears to have examined 9 witnesses. There are no eye witnesses to the incident. The deceased had apparently died in a room held by the Accused Respondent No.1. The Accused Respondents did not abscond. The Accused Respondents themselves informed the complainant that the deceased was lying still and motionless, not responding to calls. [Para 14][618-E-F] E F

1.2 The post mortem Report of the deceased reveals that the cause of death was electric shock, suffered by the deceased within 24 hours from the time of examination. On post mortem examination, the Doctor found food particles including meat in the stomach of the deceased, and also detected smell of alcohol. The post mortem doctor opined that the deceased was intoxicated with alcohol and the death was either accidental, or homicidal, G

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A but not suicidal. There is no conclusive evidence that the death was homicidal. [Para 15][618-F-H]

1.3 The complaint lodged by the complainant is apparently based on suspicion. Since the Accused Respondents had informed the complainant that the deceased was lying still and motionless,
B not responding to calls and the body of the deceased was found at the premises of the Accused Respondent No.1, the complainant has assumed that the Accused Respondents killed the deceased. [Para 16][619-A-B]

1.4 In evidence, the complainant said that the Accused
C Respondent No.1, Banabihari, had taken a loan of Rs.20,000/- from the deceased which he had not repaid even though the deceased had asked him to repay the amount. Significantly, there is no whisper in the FIR, of any loan taken by the Accused Respondent No.1 from the deceased. The reference to the alleged loan appears to be an afterthought, in an attempt to insinuate a
D motive for killing the deceased. [Para 17][619-B-C]

1.5 The mere fact that the deceased was lying dead at a room held by the the Accused Respondent No.1 and that the Accused Respondents had informed the complainant that the deceased had been lying motionless and still and not responding
E to shouts and calls, does not establish that the Accused Respondents murdered the deceased. The post mortem report suggests that the death could have been accidental. [Para 18] [619-C-E]

2.1 All the three witnesses related to the deceased, that is
F the second Prosecution Witness, being the wife of the deceased, the first Prosecution Witness, being the younger brother of the deceased and the fourth Prosecution Witness, being the sister of the deceased have more or less reiterated what has been stated in the FIR with embellishments. There are, however, apparent
G inconsistencies, inaccuracies and inherent improbabilities in the statements of these witnesses. These three witnesses deposed that they suspected that the accused Respondents had killed the deceased as the deceased was asking the Accused Respondents to repay Rs.20,000/- which the deceased had advanced to the Accused Respondents by way of loan. However, there is no
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whisper of the alleged loan in the FIR lodged by the complainant wife being the second Prosecution Witness. [Paras 25, 26] [620-G-H; 621-A-B]

2.2 The Medical Officer found electrical wounds in the leg which were sufficient to cause death. He opined that the injuries sustained by the deceased might have been due to contact with live electric wire. He opined that the contact was prolonged. The injuries were ante mortem. This witness was of the opinion that the death may have been accidental or homicidal, but not suicidal. Nothing significant has emerged from the oral evidence of the Investigating Officer, to establish the guilt of the Accused Respondents. In her deposition, the Investigating Officer also said that some local persons had stated that the first Accused Respondent, out of animosity, killed the deceased by applying electric current. The oral evidence of the Investigating Officer in this regard is totally vague and devoid of particulars. The Investigating Officer had neither named the local persons nor enquired into the source of their information if any. The local persons have not been examined as witnesses. The Prosecution miserably failed to establish the guilt of the Accused Respondents. The Trial Court rightly acquitted the Accused Respondents. [Paras 30, 32, 33][622-D-E; 623-A-C]

3. An appeal against acquittal has always been on an altogether different pedestal from an appeal against conviction. In an appeal against acquittal, where the presumption of innocence in favour of the accused is reinforced, the appellate court would interfere with the order of acquittal only when there is perversity. In this case, it cannot be said that the reasons given by the High Court to reverse the conviction of the accused are flimsy, untenable or bordering on perverse appreciation of evidence. [Para 34][623-C-E]

4. Before a case against an accused can be said to be fully established on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn must fully be established and the facts so established should be consistent only with the hypothesis of guilt of the accused. There has to be a chain of evidence so complete, as not to leave any reasonable

- A **doubt for any 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. [Para 35][623-E-F]**

- B *Sadhu Saran Singh v. State of U.P.* **2016 (4) SCC 357 : [2016] 1 SCR 913; Shanti Devi v. State of Rajasthan (2012) 12 SCC 158 : [2012] 9 SCR 226; Sujit Biswas v. State of Assam AIR 2013 SC 3817 : [2013] 3 SCR 830; Kali Ram v. State of Himachal Pradesh AIR 1973 SC 2773 : [1974] 1 SCR 722 –relied on.**

Case Law Reference

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|---|-------------------------|------------------|----------------|
| C | [2016] 1 SCR 913 | relied on | Para 34 |
| | [2012] 9 SCR 226 | relied on | Para 36 |
| | [2013] 3 SCR 830 | relied on | Para 38 |
| | [1974] 1 SCR 722 | relied on | Para 39 |

- D **CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Crl.) No.1156 of 2021.**

From the Judgment and Order dated 02.11.2020 of the High Court of Orissa at Cuttack in CRLLP No. 14 of 2020.

- E **Ravi Prakash Mehrotra, Ankit Agarwal, Advs. for the petitioner.**
The Judgment of the Court was delivered by

INDIRA BANERJEE, J.

- F 1. This Special Leave Petition filed by the State of Odisha is against a final judgment and order dated 2nd November, 2020 passed by the High Court of Orissa at Cuttack dismissing an application for leave to appeal being CRLLP No.14 of 2020 filed by the Petitioner State, against a judgment dated 14th January, 2020 passed by the Sessions Judge, Bhadrak in S.T. Case No.182/392 of 2014, acquitting the Respondents from charges under Sections 302/201 read with Section 34 of the Indian Penal Code (IPC).

- G 2. Learned Counsel appearing on behalf of the Petitioner State forcefully contended that the High Court committed gross error in dismissing the application for leave to appeal filed by the Petitioner State

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on the ground of delay of 41 days, even though, there were serious charges against the Accused Respondents, including charges of murder under Section 302 of the IPC. A

3. It is true that the appeal has, by the impugned judgment and order dated 2nd November 2020, been dismissed on the ground of delay of only 41 days in filing the CRLLP. B

4. In a criminal case involving the serious offence of murder, the Courts do not ordinarily dismiss an appeal against a judgment and order of the Trial Court, whether of conviction or of acquittal, on the sole ground of some delay. This is to prevent miscarriage of justice.

5. However, in this case the application of the Petitioner State, for leave to appeal against the judgment and order of acquittal of the Respondent Accused, has been rejected on the ground of delay, but after considering the merits of application for leave to appeal. C

6. We have considered the contentions of the State of Odisha being the petitioner before us. As per an FIR lodged with the police by one Gitanjali Tadu, hereinafter referred to as the “Complainant”, her husband Bijay Kumar Tadu, hereinafter referred to as the “deceased”, had been working in the Home Guard, Chandabali and deputed at Chandabali Police Station. D

7. According to the Complainant, the deceased used to move around with the first accused, Banabihari Mohapatra, who had an electric sales and repairing shop styled “Raja Electricals” at the Ferry Ghat area near the Chandabali bus stand. E

8. In the FIR, it is alleged that the first accused came to the residence of the deceased at around 7.30 a.m. on 23rd June, 2014 and told the Complainant that the deceased had been lying motionless and still, not responding to calls. Later his younger son Luja alias Smruti Ranjan Mohapatra being the second Respondent also came and informed the complainant that the deceased was lying motionless. F

9. On hearing this, the Complainant along with her family members went to the Ferry Ghat near the Chandabali Bus Stand and found her husband lying dead inside a room which was locked, with a swollen belly and a deep burn injury on his right foot which was apparently caused by electric shock. The body of the deceased appeared black and blood was oozing out from the mouth and nostril of the deceased. G

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- A 10. In the FIR, the complainant has alleged that on 22nd June, 2016, the deceased had left the house to go to the house of a relative. He had been wearing a gold chain on his neck and two gold rings on his fingers, and had been carrying Rs.800 for purchase of a new pair of pants and shirt and Rs.5,000/- for purchase of articles for a marriage.
- B 11. On making enquiries the complainant learnt that the deceased had not visited the house of the relative on that day. The complainant has alleged that the Accused No.1 Banabihari Mohapatra, his son Luja alias Smruti Ranjan Mohapatra, being the Accused No.2, and other accomplices committed murder of her husband by applying electric shock to him after administering some poisonous substances to him.
- C 12. The Sessions Judge Bhadrak framed charges against the Accused Respondents Banabihari Mohapatra and Luja @ Smruti Ranjan Mohapatra alleging that, together they had intentionally caused the death of the deceased, thereby committing murder and had caused disappearance of evidence and thus been guilty of offences under Sections 302/201 read with Section 34 of the IPC.
- D 13. We have carefully gone through the judgment of the Sessions Judge, Bhadrak, holding that the prosecution had failed to prove the charges against the Accused Respondents or either of them under Section 302, or Section 201 read with Section 34 of the IPC, and acquitting them under Section 235(1) of the Cr.P.C.
- E 14. The prosecution appears to have examined 9 witnesses. There are no eye witnesses to the incident. The deceased had apparently died in a room held by the Accused Respondent No.1. The Accused Respondents did not abscond. The Accused Respondents themselves informed the complainant that the deceased was lying still and motionless, not responding to calls.
- F 15. The post mortem Report of the deceased reveals that the cause of death was electric shock, suffered by the deceased within 24 hours from the time of examination. On post mortem examination, the Doctor found food particles including meat in the stomach of the deceased, and also detected smell of alcohol. The post mortem doctor opined that the deceased was intoxicated with alcohol and the death was either accidental, or homicidal, but not suicidal. There is no conclusive evidence that the death was homicidal.

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16. The complaint lodged by the complainant is apparently based on suspicion. Since the Accused Respondents had informed the complainant that the deceased was lying still and motionless, not responding to calls and the body of the deceased was found at the premises of the Accused Respondent No.1, the complainant has assumed that the Accused Respondents killed the deceased.

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17. In evidence, the complainant said that the Accused Respondent No.1, Banabihari, had taken a loan of Rs.20,000/- from the deceased which he had not repaid even though the deceased had asked him to repay the amount. Significantly, there is no whisper in the FIR, of any loan taken by the Accused Respondent No.1 from the deceased. The reference to the alleged loan appears to be an afterthought, in an attempt to insinuate a motive for killing the deceased.

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18. The mere fact that the deceased was lying dead at a room held by the the Accused Respondent No.1 and that the Accused Respondents had informed the complainant that the deceased had been lying motionless and still and not responding to shouts and calls, does not establish that the Accused Respondents murdered the deceased. At the cost of repetition it is reiterated that the post mortem report suggests that the death could have been accidental.

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19. We have perused the evidence of the nine Prosecution Witnesses, namely, the first Prosecution Witness Dhanjaya Tadu, younger brother of the deceased, the second Prosecution Witness Gitanjali Tadu, wife of the deceased, the third Prosecution Witness, Ajay Sahoo, a Shop Keeper at the locality where dead body of the deceased was found, the fourth Prosecution Witness, Smt. Bijayalaxmi Tadu, sister of the deceased, the fifth Prosecution Witness, Bailochan Bej, a Barber by profession who knew the complainant and the deceased as also the accused persons who resided in the Chandabali Police Station area, the sixth Prosecution Witness, Manmohan Sutar, an auto driver, the seventh Prosecution Witness, Aswini Kumar Nayak, a cultivator residing at Nayahat in the Chandabali Police Station area of Bhadrak, the 8th Prosecution Witness, Dr. Bhisma Parida, being the Doctor who conducted the autopsy/ post mortem examination of the deceased and the ninth Prosecution Witness Smt. Kumari Behera, Sub Inspector of Police, who was the Investigating Officer.

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A 20. Of the nine Prosecution Witnesses, three witnesses namely, the third Prosecution Witness, Ajay Sahoo, the fifth Prosecution Witness, Bailochan Bej and the seventh Prosecution Witness, Durga Charan Nayak were declared hostile by the Prosecution.

B 21. The third Prosecution Witness said that he had only seen the police shifting the dead body of the deceased and knew nothing more about the case. Nothing has emerged from his cross-examination by the Public Prosecutor. In his cross-examination by the defence, he said there was no electric connection in the house from which the body of the deceased was brought out. He even said that the Accused Respondents did not own any shop dealing with electric appliances. No credence can
C be given to this witness.

D 22. The fifth Prosecution Witness, Bailochan Bej, denied knowledge of the case. He said that the police had not examined him, nor recorded any statement made by him. In cross-examination by the prosecution, he only said that he had a saloon at Chandabali Police Station, Bhadrak. He categorically denied having made the statements attributed to him by the police.

E 23. The seventh Prosecution Witness, Durga Charan Nayak only said that he had seen the body of the deceased in the rented place near the Chandabali bus stand with bleeding injury on his right leg and blood
F oozing from his mouth and nostrils. He said he did not know how the deceased suffered the injury or died. Nothing significant has emerged from his cross-examination by the Public Prosecutor.

F 24. The sixth Prosecution Witness, Manmohan Sutar deposed that he knew the informant, the deceased as also the Accused Respondents. In a nutshell, he only confirmed that the dead body was in the shop of the Accused Respondents in Home Guard uniform. Inquest of the body was conducted in his presence. He identified his signature in the Inquest Report. He also said he had noticed a bleeding injury in the right foot of the deceased and blood oozing from the mouth and nostrils.

G 25. All the three witnesses related to the deceased, that is the second Prosecution Witness, being the wife of the deceased, the first Prosecution Witness, being the younger brother of the deceased and the fourth Prosecution Witness, being the sister of the deceased have more or less reiterated what has been stated in the FIR with embellishments.

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There are, however, apparent inconsistencies, inaccuracies and inherent A
improbabilities in the statements of these witnesses.

26. These three witnesses deposed that they suspected that the
accused Respondents had killed the deceased as the deceased was asking
the Accused Respondents to repay Rs.20,000/- which the deceased had B
advanced to the Accused Respondents by way of loan. However, as
observed above, there is no whisper of the alleged loan in the FIR lodged
by the complainant wife being the second Prosecution Witness.

27. That apart, the first and fourth Prosecution Witnesses have
admitted in cross-examination that they did not have first hand knowledge
of the loan alleged to be advanced by the deceased to the Accused C
Respondent No.1. The first Prosecution Witness said that the complainant
(PW2) had told him that the Accused Respondent No.1 had not repaid
loan of Rs.20,000/- to the deceased. The fourth Respondent said she
had heard about the loan from her deceased brother. Though she said
that the loan was given to the Accused Respondent No.1 at the time of D
his daughter's marriage she could not say how long ago the loan was
given. She could not even tell the approximate date or year of marriage
of the Accused Respondent No.1's daughter.

28. From the evidence of the first and the second Prosecution
Witnesses it transpires that the deceased had left his house at around
10.00 a.m. on 22nd June 2014, to go to his Aunt's house in connection E
with his Aunt's daughter's marriage. He was wearing a gold chain and
two gold rings and carried Rs.800/- with him for buying a pair of trousers
and shirt and Rs.5000/- for articles for the marriage. Enquiries, however,
revealed that he had not gone to his Aunt's house. It is, however, difficult
to understand why the deceased should have been wearing his home F
guard uniform if he were going to visit his Aunt in connection with the
marriage of his Aunt's daughter. There is evidence to show that the
deceased was found in his home guard uniform. The relevance of the
plan of the deceased to go to his Aunt's house or his plan to buy clothes
etc. is also not clear. This is in no way linked to the incident of death of G
the deceased. Prosecution has failed to show a link between the proposed
visit of the deceased to his Aunt's house with the guilt, if any, of the
Accused Respondents.

29. The evidence of the first Prosecution Witness Dhanjaya Tadu,
brother of the deceased, that he had found the motor cycle of the H

A deceased in front of the shop of the accused persons on the evening of the 22nd June 2014, is difficult to accept. He said he had asked the second accused about whereabouts of his brother to which the second accused had expressed ignorance, but on the next day, the second Accused Respondent and his father informed them that his brother was lying senseless. It seems rather unnatural that this witness, who was the
B brother of the deceased, should have chosen not to make any inquiry either in the police station or in the neighbourhood, even after seeing the motor cycle of the deceased in front of the shop, and after being told his brother was not in the shop. No attempt was made to look for the deceased even though he did not return home all night.

C 30. The eighth Prosecution Witness, Dr. Bhisma Parida, who had at the time of death of the deceased been posted as Medical Officer at CHC Chandabali and had conducted the autopsy/post mortem examination of the deceased at around 1.00 p.m. on 24th June 2014, deposed that the deceased died due to electrical injury, suffered within
D 24 hours of the autopsy. The stomach of the deceased was full of food particles including meat and there was smell of alcohol. The deceased had been intoxicated with alcohol. The Medical Officer found electrical wounds in the leg which were sufficient to cause death. He opined that the injuries sustained by the deceased might have been due to contact with live electric wire. He opined that the contact was prolonged. The
E injuries were ante mortem. This witness was of the opinion that the death may have been accidental or homicidal, but not suicidal.

31. Nothing significant has emerged from the oral evidence of the ninth Prosecution Witness, Smt. Kumari Behera, the Investigating Officer, to establish the guilt of the Accused Respondents. She only stated that
F the fifth Prosecution Witness had in course of examination stated before her that the first Accused Respondent and the deceased used one of the quarters where they regularly took tiffin and they were both present there on the date of the incident in Court. The fifth Prosecution Witness, however, denied having made any such statement to the Police and
G remained unshaken in cross-examination by the Public Prosecutor. He only admitted that he had a saloon in the area, but denied knowing the deceased, the Accused Respondents or the informant. The fifth Prosecution Witness said that the Police had neither examined him, nor recorded his statement.

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32. In her deposition, the Investigating Officer also said that some local persons had stated that the first Accused Respondent, Banabihari had, out of animosity, killed the deceased by applying electric current. The oral evidence of the Investigating Officer in this regard is totally vague and devoid of particulars. The Investigating Officer (PW-9) had neither named the local persons nor enquired into the source of their information if any. The local persons have not been examined as witnesses.

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33. The Prosecution miserably failed to establish the guilt of the Accused Respondents. The Trial Court rightly acquitted the Accused Respondents. There is no infirmity in the judgment of the Trial Court, that calls for interference

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34. As held by this Court in *Sadhu Saran Singh v. State of U.P.* reported in 2016 (4) SCC 357, an appeal against acquittal has always been on an altogether different pedestal from an appeal against conviction. In an appeal against acquittal, where the presumption of innocence in favour of the accused is reinforced, the appellate court would interfere with the order of acquittal only when there is perversity. In this case, it cannot be said that the reasons given by the High Court to reverse the conviction of the accused are flimsy, untenable or bordering on perverse appreciation of evidence.

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35. Before a case against an accused can be said to be fully established on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn must fully be established and the facts so established should be consistent only with the hypothesis of guilt of the accused. There has to be a chain of evidence so complete, as not to leave any reasonable doubt for any 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.

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36. In *Shanti Devi v. State of Rajasthan* reported in (2012) 12 SCC 158, this Court held that the principles for conviction of the accused based on circumstantial evidence are:

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“10.1. The circumstances from which an inference of guilt is sought to be proved must be cogently or firmly established.

10.2. The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

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A 10.3. The circumstances taken cumulatively must form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.

B 10.4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

C 37. Keeping the above test in mind, we have no iota of doubt that the Trial Court rightly acquitted the Accused Respondents. There is a strong possibility that the accused, who was as per the opinion of the doctor who performed the autopsy, intoxicated with alcohol, might have accidentally touched a live electrical wire, may be while he was asleep. The impugned judgment of the High Court dismissing the appeal on the ground of delay does not call for interference under Article 136 of the Constitution of India.

D 38. It is well settled by a plethora of judicial pronouncement of this Court that suspicion, however strong cannot take the place of proof. An accused is presumed to be innocent unless proved guilty beyond reasonable doubt. This proposition has been reiterated in **Sujit Biswas v. State of Assam** reported in AIR 2013 SC 3817.

E 39. In **Kali Ram v. State of Himachal Pradesh** reported in AIR 1973 SC 2773, this Court observed:-

F “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 where in the guilt of the accused is sought to be established by circumstantial evidence.”

G 40. For the reasons discussed above, we find no ground to interfere with the impugned judgment and order of the High Court under Article 136 of the Constitution of India. Consequently, the Special Leave Petition is dismissed. Pending application stands disposed of.