

AFR

**HIGH COURT OF CHHATTISGARH AT BILASPUR****Criminal Appeal No. 131 of 2012**

Uday Prakash, S/o. Lagan Singh Gond, Aged about 35 Years, R/o. Village Dumarपाली, P.S. Basna, Distt. Mahasamund, Chhattisgarh.

---- Appellant

Versus

State Of Chhattisgarh, Through - Police Station Basna, Distt. Mahasamund, Chhattisgarh.

---- Respondent

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For Appellant : Mr. C.J.K. Rao, Advocate

For State/Respondent : Mr. Sangharsh Pandey, Dy. Govt. Advocate.  
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**Hon'ble Shri Justice Goutam Bhaduri &  
Hon'ble Shri Justice Parth Prateem Sahu**

**Judgment on Board****Per Goutam Bhaduri, J****04.08.2018**

1. This appeal is against the judgment dated 01.12.2011 passed in Session Trial No.34/2011 by the Sessions Judge, Mahasamund, whereby the appellant has been convicted under Section 302 of Indian Penal Code and has been sentenced to life imprisonment and fine of Rs.1000/-.
2. As per the prosecution case, on 18.02.2011 a dead body of one Sahani Das was found lying in the field for which a merger intimation was registered by Ex.P-2. The case of the prosecution is that Sahani Das, the deceased, went along with the appellant Udai Prakash as they were cousin at about 7 A.M. in the morning. Subsequently, dead body of Sahani Das was found at 2:30 in the field and the body when was seen different injuries were found on his head and apprehension was made that Udai Prakash, the present appellant, has committed the offence. Thereafter, on 18.02.2011 on the report of the complainant, the FIR was registered by Ex.P-1 and crime

was registered bearing Crime No.12/2011. Thereafter the dead body was sent for post mortem. The post mortem report also confirmed the fact that the cause of death of the deceased was homicidal in nature and from the spot the cycle, spectacles and blood stained soil was seized by Ex.P-15. Thereafter, on the basis of memorandum statement of the appellant, an Axe was recovered by Ex.P-9 alongwith shirt & pant, which the appellant was alleged to have wearing at the time of incident by Ex.P-11. The FIR was registered by Ex.P-17. The seized goods were sent for FSL, however, the FSL report was not filed before the trial Court. The police thereafter recorded the statement of the witnesses during the course of trial and the charge sheet was filed under Section 302 of I.P.C.

3. During the course of trial, the appellant/accused abjured his guilt and claimed to be tried. The prosecution on their behalf had examined as many as 13 witnesses and the Court below after evaluating the facts and evidence convicted the appellant/accused as aforesaid; hence this appeal.

4. Learned counsel for the appellant would submit that there is no iota of evidence existing against the present appellant and only on the presumption, the appellant has been convicted. It is stated that the incident happened in the alleged broad day light and the prosecution failed to bring any eye-witness of the incident. Further it is contended that only on the basis that at the morning the appellant was along-with the deceased that was the sole basis of conviction which cannot be sustained.

5. Per contra, learned State counsel opposes the submission made by the appellant and would submit that the conviction made by the Court below is well merited, as the appellant has failed to discharge his liability to show his innocence. It is further stated that the witness No.1, 3 & 7 have clearly stated that the deceased was last seen in the company of the appellant, therefore, there was no other way left before the Court below to acquit the

appellant and the conviction is well merited, which do not call for any interference.

6. We have heard learned counsel for the parties at length and perused the record of the Court below.
7. One Sahani Das died on 18.02.2011. The dead body was sent for post mortem and same was conducted on 18.02.2011 itself at 4:45 P.M. The post mortem report shows that the deceased has eight injuries, four incise wound over the head and lacerated wound on other part of thigh and hand. According to the post mortem, the cause of death was respiratory failure due to head injury and the nature of death was homicidal in nature caused between 8-10 hours before the post mortem was carried out. The post mortem report is marked as Ex.P-6, which is proved by the Doctor S.R.Sidar, PW-4. According to the Doctor, the cause of death was because of the head injury, therefore, the death of Sahani Das is not in dispute.
8. The question falls for consideration as to whether the prosecution has failed to prove the fact beyond the reasonable doubt that the appellant has caused the death or not, for which the prosecution has examined three witnesses PW-1, PW-3 & PW-7 to show that the deceased was in the last seen and was in the company of the appellant before his death.
9. Perused the statement of Sahdev Das (PW-1), he stated that on the date of incident on 18.02.2011 the deceased Sahani & Udai Prakash both came to him and asked for his cycle, the cycle was given to them, thereafter Sahani Das, the deceased, went alongwith the appellant but they did not returned back till 10 A.M. and subsequently the dead body of Sahani Das was found on the road. The said witness PW-1 has also proved the Dehati First Information Ex.P-1, Merg intimation Ex.P-2 and Nakshapanchnama of the dead body Ex.P-3.

10. Perusal of the inquest report would show, which is proved as Ex.P-5 that the dead body was found in a Dumarpali road with the injuries on it. The said fact is also corroborated by Ex.P-25, which is a map prepared where the incident happened and proved by PW-13. Therefore, this fact is not in dispute that the place of incident was shown in the road itself, which was a common thoroughfare for the public at large. The prosecution however has not brought any eye-witness to establish the fact that the said injuries to deceased were actually caused by the appellant himself.
11. The other witness about last seen theory is Dhanmoti (PW-3) and Tejram Sahu (PW-7). They have deposed that on the date of incident in the morning the appellant/accused was seen in the company of the deceased. PW-3 had further stated that the deceased has also mortgaged his land to the appellant Udai Prakash. Except this fact, in the cross examination of this witness, nothing has come to fore to say that any overt act was done by the appellant. Likewise, Tejram Sahu, PW-7, in his statement, has deposed that on the date of incident, the deceased Sahani Das had come to his Hotel along with him Udai Prakash was also there. Except this fact, nothing has come on record wherefrom any inference can be arrived at in favour of the prosecution.
12. The record would show that the seizure was made on the basis of memorandum Ex.P-10 whereby an Axe, shirt & pant having blood stained was seized. The seizure witness PW-5 Ramesh Kumar & PW-11 Somnath Jagat are the witnesses to the memorandum and seizure. Both of them have not supported such memorandum of seizure and were hostile. The cross examination of the witnesses namely PW-5 & PW-11 also do not corroborate any fact in support of the prosecution. According to the prosecution, the seized article i.e. Axe and cloths were sent for FSL by Ex.P-22 so as to find out whether the cloths were having the blood stain of human or not. The record however do not show that any FSL report was

placed on record. Therefore, the conviction is completely on the basis of circumstantial evidence of statement of PW-1, 3 & 7 who have said that the deceased was seen in the company of the appellant.

13. In the case of **State of Himachal Pradesh Vs. Raj Kumar**<sup>1</sup> Court reiterated the law laid down in case of **Sharad Birdhichand Sarda v. State of Maharashtra**<sup>2</sup> wherein five principles as regards the proof of a case based on circumstantial evidence was reiterated which are as under:-

“(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

(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.”

14. As has been held in case of **Mani v. State of T.N.**<sup>3</sup> which has been reiterated in case of **Sangili alias Sanganathan Vs. State of Tamil Nadu Representated by Inspector of Police**<sup>4</sup> the discovery is a weak kind of evidence and cannot be wholly relied upon and conviction in such a serious matter cannot be based upon the discovery. Once the discovery fails, there would be literally nothing which would support the prosecution case. The closed scrutiny of the statement of PW-1, PW-3 & PW-7 only

<sup>1</sup>(2014) 14 SCC 39

<sup>2</sup>(1984) 4 SCC 116

<sup>3</sup>(2009) 17 SCC 273

<sup>4</sup>(2014) 10 SCC 264

points out one fact that the deceased was seen in the company of the appellant at about 7 A.M. and subsequent for some time. The time of incident according to the prosecution was at about 2-2:30 P.M. The map which is filed by the prosecution shows that it is a common road of public thoroughfare; thereby the circumstances' inference would show that the incident happened in the broad day light. There are certain fields have been shown adjacent to the land but not a single eye-witness has been produced who was said to be working in the field who has seen the incident. The seizure though was made has not been proved individually by the prosecution witness namely PW-5 & PW-11 and the FSL which was called for by the prosecution was also not produced. The conviction was only on the basis of the statement of last seen theory and the Court below has convicted the appellant on the circumstances which leads to show that the prosecution has established the fact that the guilt may be committed by the accused/appellant.

15. Under the circumstances, the Supreme Court in case of **Anjan Kumar Sarma & Others v. State of Assam**<sup>5</sup> has held as under :

“14. Admittedly, this is a case of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by this Court are :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned “must” or “should” and not “may be” established;

(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;

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<sup>5</sup>(2017) 14 SCC 359

(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. (See **Sharad Birdhichand Sarda v. State of Maharashtra<sup>4</sup>** & **M.G. Agarwal v. State of Maharashtra<sup>6</sup>**.)”

16. The evidence further shows the chain of circumstances has not been proved within all human probability that the crime was committed and the facts would lead to draw the principles laid down in case of **Vijay Shankar v. State of Haryana<sup>7</sup>** that when the chain of circumstances of the circumstantial evidence are absent and it is proved within all human probability the crime was committed and is incapable of explanation of any hypothesis other than that of the guilt of the accused, conviction cannot be sustained.

17. Under the circumstances, we are of the considered opinion that the conviction made by the learned Court below requires interference and cannot be sustained. In the result, the appeal is allowed and the judgment of conviction dated 01.12.2011 is set aside. The appellant is acquitted of the charges leveled against him. As per the record, the appellant is on bail, his bail bonds shall continue for a period of six months subject to the provisions of Section 437-A Cr.P.C.

Sd/-  
(Goutam Bhaduri)  
JUDGE

Sd/-  
(Parth Prateem Sahu)  
JUDGE

ashok

<sup>4</sup>AIR 1963 SC 200

<sup>7</sup>(2015) 12 SCC 644