

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.158 of 2020

Arising Out of PS. Case No.-166 Year-2014 Thana- JAMUI District- Jamui

Nasima Khatoon @ Md.Nasima Khatoon, Wife of Late Mustakin Mian @ Mustakin, Resident of Village - Manjhwe, P.S. and District - Jamui.
... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Satya Prakash Parasar, Advocate Mr. Ashish Kumar, Advocate Ms. Ayushi, Advocate
For the Respondent/s	:	Mr. Sujeet Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
and
HONOURABLE MR. JUSTICE SOURENDRA PANDEY
C.A.V. JUDGMENT
(Per: HONOURABLE MR. JUSTICE SOURENDRA PANDEY)

Date : 15-10-2026

Heard Sri Satya Prakash Parasar assisted by Ms. Ayushi, learned counsel for the appellant and Sri Sujeet Kumar Singh, learned Additional Public Prosecutor for the State.

2. The present appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (herein after referred to as the “Cr.P.C.”), has been preferred against the judgment of conviction dated 04.09.2019 (hereinafter referred to as the ‘*impugned judgment*’) and the order of sentence dated 05.09.2019 (in short referred to as the ‘*impugned order*’) passed by the learned Additional District and Sessions Judge-III, Jamui in connection with Sessions Trial No.295 of 2014, arising out of



Jamui P.S. Case No. 166 of 2014.

3. By the impugned judgment, the appellant, namely, Nasima Khatoon @ Md.Nasima Khatoon has been convicted for the offences under Sections 302 and 201 of the Indian Penal Code (in short referred to as the 'IPC') and has been sentenced to undergo rigorous imprisonment for life under Section 302 of the Indian Penal Code with fine of Rs. 10,000/- (Ten Thousand) and in default thereof, she has been further directed to undergo imprisonment for a period of six months. The appellant has been further sentenced to undergo rigorous imprisonment for seven years under Section 201 of the Indian Penal Code with a fine of Rs. 5,000/- (Five Thousand) and in default thereof, she has been directed to further undergo imprisonment for a period of three months. Both the sentences have been directed to run concurrently.

Prosecution Case:

4. The prosecution case is based on the fardbeyan of Hamid Khan (P.W.-2) and grand father of the deceased), recorded by Sub-Inspector of Police of Jamui Police Station, namely Sanjay Kumar Singh on 27.06.2014 at 07:45 A.M. The informant has stated that on 26.06.2014, at about 11:00 A.M., when he returned to his house, he started looking for his



grandson, namely, Firoz Khan, whereupon he was informed by his daughter-in-law that Firoz had not returned from school. Thereafter, the informant, his daughter-in-law, and his granddaughter started searching for the missing Firoz Khan. At about 12:00 P.M., the informant's elder daughter-in-law told him that Firoz had been following her, but she had asked him to go back and he returned. The informant noticed bloodstains on the clothes of his elder daughter-in-law (appellant) and she immediately took bath and washed her clothes. The informant and the other family members continued searching for the boy, but he could not be found till late in the evening. On the following morning, they came to know that the dead body of his grandson was lying near the Teriyahi Puddle. Thereupon, the informant reached the place of occurrence and found that his grandson had been killed by inflicting injuries on his head and face. In his fardbeyan, the informant has raised suspicion against the present accused/appellant, namely, Nasima Khatoon @ Md. Nasima Khatoon, and his son-in-law, namely, Irshad.

5. On the basis of the aforesaid *fardbeyan*, Jamui P.S. Case No. 166 of 2014 dated 27.06.2014 was registered under Sections 302 and 34 of the Indian Penal Code against the appellant and one Irshad Miyan.



6. After completion of investigation and finding the case to be true against the appellant, the Investigating Officer (I.O.) (P.W. 6) had filed charge-sheet being Charge-Sheet No. 118 of 2014 dated 20.09.2014 under Sections 302 and 201 of the IPC only against the Appellant.

7. On the basis of the police report, cognizance was taken by the learned Magistrate *vide* order dated 20.09.2014 under Sections 302 and 201 of the IPC against the accused/appellant Nasima Khatoon @ Md.Nasima Khatoon. The case was then committed to the Court of Sessions *vide* order dated 05.11.2014 and was numbered as Sessions Trial No.295 of 2014. The learned Trial Court had then framed charges under Section 302/201 of the Indian Penal Code against the appellant, namely, Nasima Khatoon @ Md.Nasima Khatoon to which she pleaded not guilty and claimed to be tried.

8. In the course of trial, the prosecution has examined as many as seven witnesses and exhibited several documents to prove the prosecution case, which are detailed herein below:-

List of Prosecution Witnesses:

P.W.1	Madan Yadav
P.W.2	Hamid Khan (Informant)
P.W.3	Afreen Khatoon
P.W.4	Md. Jabbar Ahmed
P.W.5	Isharat Khatoon
P.W.6	Bidya Nath Prasad (I.O.)



P.W.7	Dr. Bhim Ram
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List of Exhibits on behalf of the Prosecution:

Exhibit-1	Fardbeyan
Exhibit-2	Formal FIR Jamui P.S. Case No.166 of 2014
Exhibit-3	Postmortem Report

Submission on behalf of the Appellant

9. The learned counsel appearing on behalf of the appellant has submitted that from the evidence of the prosecution, it would be evident that the prosecution has miserably failed to prove its case beyond all reasonable doubts, much less there is any evidence to prove the charges under Sections 302 and 201 of the Indian Penal Code. It has been submitted that the theory of last seen is not proved through the deposition of the witnesses, who have improved upon their statements right since the fardbeyan till the stage of Trial. It has further been submitted that Section 106 of the Evidence Act confers the burden of proving the fact upon the person who states the fact to be within his knowledge. The learned counsel has submitted that from the perusal of the fardbeyan, which was recorded on 27.06.2014 at 07:45 A.M., it cannot be said to be an information under Section 154 of the Code of Criminal Procedure rather the same is a statement under Section 162 of



the Code of Criminal Procedure.

10. Learned counsel for the appellant has pointed out that P.W.2, informant of the case, in paragraph '2' of his deposition has stated that the child (deceased) had bitten the appellant, which was also seen by the police, however, contrary to such specific averment, the mandatory provision as contained in Section 53 of the Code of Criminal Procedure, i.e., examination of accused by Medical Practitioner at the request of police officer, has not been adhered to. It has been submitted that the appellant should have been produced before the Medical Practitioner for examination of such teeth bites, which has been stated by the informant during the course of the trial. It has further been submitted that the saree, which is stated to have blood stains over it, was never seized by the police and thus was also not sent for forensic examination in order to ascertain the fact of the appellant having killed the grandson of the informant. Referring to Section 114 of the Indian Evidence Act, 1872, the learned counsel for the appellant submits that illustration contained in Section 114 (g), which states that the Court may presume that evidence which could be and is not produced, if produced, would be in favor of the person who withholds it, are attracted in the facts and circumstances of the present case.



11. The learned counsel for the appellant further submits that the examination of the accused/appellant under Section 313 of the Code of Criminal Procedure is also not as per the statutory requirement and has not been recorded as per the requirement of law. It has been submitted that the incriminating circumstances appearing during the recording of the prosecution's evidence have not been put to the accused/appellant specifically, distinctively and separately. It has been submitted that there are three incriminating circumstances against the appellant, which are (a) last seen with the deceased, (b) dispute between the family and (c) washing of blood-stained cloths as seen by the witnesses, however the same were not put to the accused/appellant by the Court so as to provide an opportunity to the appellant to explain the same. It has been submitted that the prosecution has not been able to prove the chain of circumstances, which is the most essential ingredient in cases of circumstantial evidence and is the cardinal principle for conviction.

12. The learned counsel for the appellant has relied upon the judgment rendered by the Hon'ble Apex Court in the case of *Sharad Birdhichand Sarda vs State of Maharashtra*, reported in *AIR 1984 SC 1622* in support of his arguments,



especially with regard to the chain of circumstances not being proved.

Submissions on behalf of the State

13. Mr. Sujit Kumar Singh, learned APP appearing on behalf of the State has submitted that admittedly the present case is a case of circumstantial evidence and from a plain reading of the depositions of P.W.1, P.W.3, P.W.4 and P.W.5, it would be evident that they have all clearly stated that they had seen the deceased in the company of the accused/appellant shortly before his death. Referring to the depositions, he has pointed out that P.W.3 and P.W.5 had seen the appellant taking the boy from her house while P.W.1 and P.W.4 had seen her taking the boy towards the place of occurrence.

14. Learned APP, though, has admitted that there have been some difference in the timing of the said evidence, but such discrepancies are not fatal for the prosecution case. He has further pointed out that the motive is admittedly dispute with regard to the share of the deceased husband of the appellant. It has been submitted that since the appellant was seen with the boy (deceased) shortly before the occurrence, therefore, the burden was on the appellant to prove her innocence and give a valid explanation to break the chain of circumstances. It has



been submitted that the chain of circumstances is complete and there are no mitigating circumstances to show and therefore, the appellant has rightly been convicted.

Evidence produced on behalf of the prosecution:

15. Besides hearing the learned counsel for the parties, we have minutely perused both the evidence, i.e., oral and documentary. Before proceeding further, it is necessary to cursorily discuss the evidence.

16. P.W.1, namely, Madan Yadav, is a co-villager who has stated in his evidence that he had seen the accused/appellant with the deceased while he was at his house between 10:00 A.M. to 11:00 A.M., however P.W.1 has admittedly not witnessed the incident.

17. P.W.2, Hamid Khan, who happens to be the informant of the case and the grandfather of the deceased, in his deposition has stated that Madan Yadav (P.W.1) and Md. Jabbar Ahmed (P.W.4) had informed him that they had seen the appellant with the deceased. In paragraph '2' of his deposition, P.W.2 has categorically stated that the accused/appellant had blood stains over her saree, which was taken from her and handed over to the police. P.W.2 has also stated that he had given his statement to the police and thereafter, he had put his



LTI on the said statement and then he had put his LTI on the inquest report. He has stated that around 2 O'clock when he was inquiring with the co-villagers, he came to know from Madan, Jabbar and Afreen that they had seen the accused/appellant with the boy.

18. During his cross-examination, P.W.2 has admitted that he had not witnessed the crime and has also admitted that he had been living separately from the appellant for the last 6 years. In paragraph '6' of his cross-examination, P.W.2 has stated that neither his fardbeyan nor his beyan (statement) was recorded by the police. In paragraph '7' of his deposition, P.W.2 has categorically stated that he had seen the appellant in a saree at around 06:00 P.M., however, he had not gone to the police station. He has stated that he had given the saree to the police. He has further stated that two stones were also seized by the police. He has further deposed that he had been at the Pokhar (Pond) from 10:00 A.M. till 11:00 A.M.. He has next stated that the police came at around 11:00 A.M. and thereafter, had taken him to the police station at around 12:30 P.M.

19. P.W.3, Afreen Khatoon, is the sister of the deceased and is admittedly 11 years old, hence a child witness. From perusal of the deposition of P.W.3, it is evident that no



question was put to her by the learned Trial Court to ascertain as to whether the child was competent enough to answer the queries and as to whether she understood the facts. In her statement she has stated that the accused/appellant had taken her brother (deceased). She has stated that the accused/appellant was giving different versions when she had inquired about her brother. During her cross-examination, this witness has stated that she had seen the occurrence and it was the appellant who has killed her brother. She has stated that she was giving the statement for the first time. She has also stated that the property of grandfather would devolve upon her and she has further admitted that the police were not informed earlier.

20. P.W.4, Md. Jabbar, is a co-villager and he claims to have last seen the accused/appellant going along with the deceased. In his examination-in-chief, he has stated that he was going to Lakhisarai on the fateful day and he had seen the accused/appellant going along with the deceased. He has further deposed that when he returned the next morning then he came to know that the dead body of the boy was recovered from near the Pokhar (Pond).

21. P.W. 5, namely, Isharat Khatoon, is the mother of the deceased. In her examination-in-chief, she has stated that she



had seen the accused/appellant with blood-stained saree and blood on her face. She has further stated that she had gone to the place of occurrence and had seen the body of her own son with a stone on his back and he was lying dead with only his pants on. In her cross-examination, she has submitted that she got suspicious on seeing the bloodstains on the saree of the appellant and on her face. She has further stated that the appellant was present at her home and the police had arrested her. She has next stated that she had not seen the occurrence and the police had taken the clothes of the appellant, however the clothes of her son (deceased) were not taken. In paragraph No. '5' of her cross-examination she has categorically stated that the accused/appellant and her son-in-law were at the door of their house, they had offered Khazoor (Dates) to her son and had taken him along with them.

22. P.W.6, Baidya Nath Prasad, is the I.O. of the case and in his examination-in-chief, he has identified his handwriting and signature on the fardbeyan, which has been marked as Exhibit-1, while he has also got the formal FIR exhibited as Exhibit-2. P.W.6 has described the place of occurrence and has stated that there is land on all sides of the Pokhar. He has also stated that the inquest report was prepared



by him, however the same has not been found to be on record. During his cross-examination, P.W.6 has stated that the murder was committed by stone, however he has accepted that there is no proof of any violence at the place of occurrence. He has also admitted that no stone was recovered from the place of occurrence. In paragraph No. '10' of his cross-examination, P.W.6 has stated that none of the witnesses during the investigation have stated that they had seen the appellant killing the grandson of the informant (deceased). In paragraph No. '11' of his cross-examination he has admitted that he had not recovered the clothes of the appellant, while in paragraph No. '12' he has admitted that he had not verified about the reasons for the dispute between the informant and the accused/appellant. P.W. 6 has further deposed that, apart from suspicion, there is no evidence of murder.

23. P.W.7, Dr. Bhim Ram is the Doctor who has conducted the postmortem and prepared the postmortem report and has described the injury, as referred to in the postmortem report, which has been marked as Exhibit-3 (Exhibit-3 is not found in the records of the learned Trial Court). During his cross-examination, he has admitted that he had not got the x-ray of the nose done and has admitted that if an animal eats the fist



of a dead body, the same would be severed from the hand. It would be relevant to reproduce herein below the relevant portion of the deposition of P.W. 7:-

“I found following wound on dead body of Firoj Khan in Antemortem.

(i) Rt. hind absent for wrist

(ii) Multiple fracture of Nasal bone

(iii) Lacerated wound over scalp size $2\frac{1}{2}$ " x 2" x 1"

(iv) Lacerated wound over Lt. Arm size $1\frac{1}{2}$ " x $\frac{1}{2}$ "

(v) Whole musces (muscles) of right arm and fore arm absent, bone exposed

(vi) Rt. Side pectoral musces (muscles) are absent

(2) On Dissection:-

(i) Skull bone and brain matter maninges (meninges)

(ii) On chest, dissection heart empoty (empty), lung pailed (paled) line, splea (spleen), kidney pailed (paled).

(iii) Large and small intestine full gases and fecal matter.

Cause of death- Heamorrhage (Hemorrhage) and shock due to above injury, caused by hard and blunt substances

(iv) this postmortam (postmortem) report is in my pen and signature which is exbited (exhibited) as -3”



24. After closing of the prosecution evidence, the learned Trial Court recorded the statement of the accused/appellant on 26.03.2019 under Section 313 of the Code of Criminal Procedure for enabling her to personally explain the circumstances appearing in the evidence against her, however she claimed to be innocent and stated that she would produce witness in her defence.

Findings of the Learned Trial Court:

25. The learned trial court, upon discussion of the depositions of various prosecution witnesses, has observed that though there are certain discrepancies regarding the time of seeing the deceased in the company of the accused/appellant by P.W.1 and P.W.4, however, considering the distance between the village and the place of occurrence, the same is immaterial. The learned Trial Court has held that the reading of the evidence of P.W.1, P.W.3, P.W.4 and P.W.5 makes it quite clear that it is the accused/appellant who took the deceased along with her to the place of occurrence. The learned Trial Court has also held that the motive is admittedly the dispute of the share of the deceased husband of the present accused/appellant and the said dispute is admitted by the defence itself and can be thus inferred from the suggestions given by the defence counsel. It has been held that



in the present case, the circumstances taken together, points towards the culpability of the accused/appellant and there are no mitigating circumstances. It has, thus, been held that the chain of circumstances are complete and therefore, the accused/appellant deserves to be convicted. The learned Trial Court has thus found the appellant guilty of the charges under Section 302 of the Indian Penal Code and since the evidence on record shows that the accused had tried to show that the death was caused by accident, the appellant has also been held guilty of the offence under Section 201 of the Indian Penal Code and accordingly the appellant has been sentenced to imprisonment and fine as stated above by the impugned judgment and order.

Consideration

26. Having heard the learned counsel for the appellant as well as the learned APP for the State and after perusal of the Trial Court Records and the evidence led on behalf of the prosecution, we find that the present case is indeed a case which is based on circumstantial evidence. Circumstances in the present case are twofold, one being the last seen theory, which was stated right at the inception i.e. in the fardbeyan and even during the course of trial. The prosecution witnesses have come out with a case where P.W.1, P.W.3, P.W.4 and P.W.5 have all



stated that they had seen the accused/appellant with the deceased leaving the house and going towards the place of occurrence.

27. On perusal of the deposition of such prosecution witnesses, this Court finds that P.W.1, who happens to be a co-villager has stated that he had seen the appellant with the deceased while he was at his house between 10:00 A.M. to 11:00 P.M., while P.W.3, sister of the deceased, who is a child witness, has stated that it was the appellant who had taken her brother (deceased) along with her and she had gone on to even say that she had seen the occurrence with her own eyes. P.W.4, who is also a co-villager, has claimed that he had seen the accused/appellant going along with the deceased and P.W.5, who is the mother of the deceased, has stated that the accused/appellant and her son-in-law were at the door of their house and they had offered Khazoor (Dates) to her son and then they took him along with them.

28. On fine perusal of the aforesaid statements of the four witnesses, we find that the fact that P.W.1 and P.W.4 had seen the boy along with the appellant going towards the place of occurrence was not stated by the informant (P.W.2) in his fardbeyan. In the fardbeyan, the informant has stated that he had



seen his grandson (deceased) going along with his daughter-in-law (appellant) towards Pokhar. We also observed that the informant has not named either his other daughter-in-law, i.e., mother of the deceased or Madan Yadav (P.W.1) or Md. Jabbar Ahmed (P.W.4) to have told him about the said incident. In fact, the informant, (P.W.2) in his examination-in-chief has stated that he had been looking for his grandson in the neighbourhood and in the evening he got to know from Madan Yadav (P.W.1), Md. Jabbar Ahmed (P.W.4) and Afreen Khatoon (P.W.3) that they had seen the appellant going along with the boy (deceased).

29. We take note of the fact that the informant was aware of the fact that the deceased had gone along with the appellant as told to him by P.W.1 and P.W.4, still in his fardbeyan, he did not state anything about them rather he claims himself to be a witness to the same, however, during the Trial he has not stated any fact about witnessing the appellant going along with the boy. Such contradictions raises serious question over the veracity of the Statement of the informant, especially for the reason that on further perusal of the evidence of P.W.4, it would be evident that he has stated that he was going to Lakhisarai on the fateful day when he had seen the accused/appellant with the boy and he came back on the next



morning. On conjoint reading of the two depositions, it is clear that P.W.4 was not present at the village in the evening, as he had gone to Lakhisarai, however, P.W.2, the informant, has specifically stated in his examination-in-chief that he got to know from Madan Yadav (P.W.1) and Md. Jabbar Ahmed (P.W.4) in the evening of the same day. Such discrepancies go to the root of the prosecution's case and raise a question as to whether even Jabbar was a witness to the same.

30. In a case of circumstantial evidence, the chain of circumstances needs to be proved and in the present case, we find that even the last seen theory is being contradicted not only with regard to the time being stated by the prosecution witnesses but also with regard to the manner in which it has been stated.

31. We have taken note of the facts which were in the knowledge of the mother of the deceased, who is the most interested witness and it has not been stated in the fardbeyan by the informant that she had seen the appellant and her son-in-law offering Khazoor (Dates) to her son and who had taken him along with them. Such a fact being not stated at the first instance while lodging the FIR raises a serious doubt over the statement of P.W.5, the mother of the deceased.

32. The Hon'ble Supreme Court in the case of **Sharad**



Birdhichand Sarda (supra) has enumerated the conditions which must be fulfilled before a case against the accused can be said to be fully established, based on circumstantial evidence. The relevant part of the same is being reproduced hereunder:

“152. 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 : (AIR 1973 SC 2622)] where the following observations were made:

“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.

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156. This indicates the cardinal principle of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. Horry's case [1952 NZLR 111] was approved by this Court in Anant Chintaman Lagu v. State of Bombay [AIR 1960 SC 500 : (1960) 2 SCR 460 : 1960 Cri LJ 682]. Lagu's case [AIR 1960 SC 500 : (1960) 2 SCR 460 : 1960 Cri LJ 682] as also the principles enunciated by this Court in Hanumant's case [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] have been uniformly and consistently followed in all later decisions of this Court without any single exception. To quote a few cases — Tufail's case [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] , Ramgopal's case [(1972) 4 SCC 625 : AIR 1972 SC 656] , Chandrakant Nyalchand Seth v. State of Bombay [Criminal Appeal No 120 of 1957, decided on February 19, 1958], Charambir Singh v. State of Punjab [Criminal Appeal No 98 of 1958 decided on November 4, 1958]. There are a number of



other cases where although Hanumant's case [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] has not been expressly noticed but the same principles have been expounded and reiterated, as in Naseem Ahmed v. Delhi Administration [(1974) 3 SCC 668, 670 : 1974 SCC (Cri) 198, 200 : (1974) 2 SCR 694 (696)], (AIR 1974 SC 691 at p. 693), Mohan Lal Pangasa v. State of U.P. [(1974) 4 SCC 607, 609 : 1974 SCC (Cri) 643, 645 : AIR 1974 SC 1144 (1146)] , Shankarlal Gyarsilal Dixit v. State of Maharashtra [(1981) 2 SCC 35, 39 : 1981 SCC (Cri) 315, 318-19 : (1981) 2 SCR 384 (390): AIR 1981 SC 765 at p.767) : 1981 Cri LJ 325] and M.G. Agarwal v. State of Maharashtra [AIR 1963 SC 200 at p.206 : (1963) 2 SCR 405, 419 : (1963) 1 Cri LJ 235] — a five-Judge Bench decision.”

33. In view of such observations being made by the Hon'ble Supreme Court and applying the same in the present case, it is evident that the prosecution has not been able to prove the chain of circumstances, especially with respect to the theory of last seen. The evidence of the prosecution at best can lead to a situation that the appellant 'may' have been involved in the killing of the said child however the evidence which could have led to her conviction, being the blood stained Saree, was never collected / seized by the police and therefore it cannot be said with conviction that it was the appellant who had killed the child. The I.O., P.W.6 in his deposition has stated that he had not observed any mark of violence at the place of occurrence and no



stone as stated by P.W.5 was recovered. Thus, as observed by the Hon'ble Apex Court, conviction cannot be based on '**May**' or '**Might**' but has to be proved with a '**should**' or '**Must**' in such cases of circumstantial evidence. It is a trite law, as has been held in a judgment rendered by the Hon'ble Apex Court in the case of *Rambraksh alias Jalim vs. State of Chhatisgarh*, reported in *(2016) 12 SCC 251*, that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased.

34. We have minutely perused the statement of the accused/appellant under section 313 Cr.P.C. and have taken note of the fact that the incriminating circumstances/evidence were not put specifically to the accused/appellant during her statement recorded under Section 313 of the Code of Criminal Procedure resulting in depriving her from an opportunity to explain the same, hence such evidence cannot be used against the appellant, thus such conviction based on such evidence is bad in law.

35. The Hon'ble Supreme Court in the case of *Suresh Sahu and Anr. vs. State of Bihar*, reported in *2025 SCC OnLine Sc 2637* has observed as under:

“20. In this regard, we may refer to the judgment of this Court in the case of Ashok v. State of



Uttar Pradesh, wherein a three-Judge Bench of this Court observed as follows: -

*“14. Now, we come to the appellant's statement, recorded per Section 313 of the CrPC. Only three questions were put to the appellant. In the first question, the names of ten prosecution witnesses were incorporated, and the only question asked to the appellant was what he had to say about the testimony of ten prosecution witnesses. In the second question, all the documents produced by the prosecution were referred, and a question was asked, what the appellant has to say about the documents. In the third question, it was put to the appellant that knowing the fact that the victim belongs to a scheduled caste, he caused her death after raping her and concealed her dead body, and he was asked for his reaction to the same. **What PW-1 and PW-2 deposed against the appellant was not put to the appellant. The contents of the incriminating documents were not put to the appellant.***

15. In the case of Raj Kumar, in paragraph 17, this Court has summarised the law laid down by this Court from time to time on Section 313 of the CrPC. Paragraph 17 reads thus:

“17. The law consistently laid down by this Court can be summarized as under:

- (i) **It is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction;***
- (ii) The object of examination of the accused under*



Section 313 is to enable the accused to explain any circumstance appearing against him in the evidence;

(iii) The Court must ordinarily eschew material circumstances not put to the accused from consideration while dealing with the case of the particular accused;

(iv) The failure to put material circumstances to the accused amounts to a serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused;

(v) If any irregularity in putting the material circumstance to the accused does not result in failure of justice, it becomes a curable defect. However, while deciding whether the defect can be cured, one of the considerations will be the passage of time from the date of the incident;

(vi) In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him; and

(vii) In a given case, the case can be remanded to the Trial Court from the stage of recording the supplementary statement of the concerned accused under Section 313 of CrPC.

(viii) While deciding the question whether prejudice has been caused to the accused because of the omission, the delay in raising the contention is only one of the several factors to be considered.”

36. Drawing an analogy from the aforesaid judgment, we find that the questions/incriminating circumstances put to the



appellant need to be discussed and considered in light of the observations made by the Hon'ble Apex court.

37. The accused/appellant was asked the following questions:-

(i) Did you hear the evidence of the witnesses ?

(ii) There is an allegation against you and the witnesses have also stated that you have committed murder of the grandson of the informant, Hamid Khan, namely, Md. Firoz on 26.06.2014 at 11:00 A.M.?

(iii) Do you have to say anything in your defence?

(iv) Do you want to produce witnesses in defence?

38. The first question, as we can best understand, was being asked with regard to all the evidence in general and about all the witnesses having stated their version of the story. We imagine the plight of a rustic lady belonging from a village background to recall the entire evidence which she might have heard in the court room sitting behind and the depositions were recorded spanning over a period of 2 years and 3 months, i.e. between 10.04.2015, when the first prosecution witness was examined till 25.07.2017 when the last prosecution witness was examined. More importantly the statement under section 313 Cr.P.C. was recorded on 26.03.2019 i.e. almost 1 year and 8



months after the prosecution evidence was closed. We are constrained to record our displeasure regarding the way questions were put to the accused as it is just humanly impossible for any person to recall and recollect what evidence was led by the prosecution after a lapse of about 2 years from the date of the last witness having been examined.

39. The second question is the allegation levelled upon the appellant which even forms part of the FIR that - '***you are accused of killing the grandson of the informant at around 11 AM after taking him to the Pokhar (Pond)***'. Taking a lead from the judgment rendered by the Hon'ble Supreme Court of India in the case of **Suresh Sahu** (Supra) we do not find any specific query being put to the accused/appellant with regard to what had been deposed by P.W.1, P.W.2, P.W.3, P.W.4 and P.W.5, who all have claimed at various stages to have witnessed the appellant going along with the boy (Deceased). Such questions/circumstances having been not put to the accused/appellant has prejudiced the accused/appellant, who was not given a fair chance to explain the circumstances as has come in the evidence. As observed by the Hon'ble Supreme Court the learned trial court has failed in its duty to provide a fair opportunity to the accused/appellant as it was the duty of the



Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The observation with regard to material circumstance may be reiterated - *“The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction.”*

40. That leads us to a finding that the learned trial court has not done its duty by not putting the circumstances to the accused/appellant and those circumstances having not been put to the accused under section 313 Cr.P.C., cannot be held against her.

41. Though no arguments have been advanced by the parties with regard to the fact that P.W.3 was a child witness and she ought to have been subjected to some preliminary questions in order to ascertain as to whether she understands the question put to her and gives rational answers and only having being satisfied that she understands the importance of telling the truth then only her statement could have been recorded. From perusal of the deposition of P.W.3 it would be evident that no such preliminary questions have been put to the said child witness in order to ascertain her capability to answer such questions.

42. The Hon'ble Supreme Court in the case of



Pradeep versus The State of Haryana, reported in (2023) 19

SCC 221 has in paragraphs 12 and 13 observed as under -

“12. It is a well-settled principle that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. A child witness of tender age is easily susceptible to tutoring. However, that by itself is no ground to reject the evidence of a child witness. The Court must make careful scrutiny of the evidence of a child witness. The Court must apply its mind to the question whether there is a possibility of the child witness being tutored. Therefore, scrutiny of the evidence of a child witness is required to be made by the Court with care and caution.

13. Before recording evidence of a minor, it is the duty of a Judicial Officer to ask preliminary questions to him with a view to ascertain whether the minor can understand the questions put to him and is in a position to give rational answers. The Judge must be satisfied that the minor is able to understand the questions and respond to them and understands the importance of speaking the truth. Therefore, the role of the Judge who records the evidence is very crucial. He has to make a proper preliminary examination of the minor by putting appropriate questions to ascertain whether the minor is capable of understanding the questions put to him and is able to give rational answers. It is advisable to record the preliminary questions and answers so that the Appellate Court can go into the correctness of the opinion of the Trial Court.”

43. We have still carefully scrutinized the evidence of the minor witness, Afreen who has given her own version of



seeing the appellant going with her brother and has also gone on to state that she had seen the appellant killing her brother. This statement of P.W.3 was made may be after having been tutored by her mother and other relatives; however she being a child was not able to know the importance of speaking truth and has thus exaggerated and stated that she had seen the appellant killing her brother, which was neither the case of the prosecution nor the same is supported by attending circumstances and evidence. Thus, as per the settled law, the evidence of P.W.3, a minor cannot be taken into account while coming to any finding, for the reasons as discussed herein above.

44. We must also record our finding with respect to the material and fatal lapse in the prosecution case to the effect that the informant (P.W.2) and P.W. 5 have specifically stated that the Saree with blood stains, belonging to the appellant was seized by the Police however the I.O., P.W.6 has denied having made any seizure of Saree. Despite specific averment of P.W.5 that there was a stone on the body of the deceased, no stone was seized for forensic examination. The I.O. in fact has stated categorically that no stone was seized and no mark of violence was found. Such contradiction raises serious doubt over the veracity of the prosecution case. No motive was alleged against



the appellant for committing such crime, however during the course of evidence it has been stated that due to property dispute this act was committed by the appellant. The I.O., P.W.6 in his deposition has accepted that he had not investigated the point of dispute of property.

45. We also take note of two peculiar facts in the prosecution case. One, that the informant and the mother of the deceased boy have claimed to have seen the appellant in a Saree with blood stains all over but despite the fact that the boy was missing for the whole day, no complaint or report was made to the Police with regard to the said fact on the same day rather they waited for the body to be recovered and then the statement was given to the police. Such acts of the informant and others do not seem to be natural and persuasive. Moreover, the place of occurrence was around 2 kms from the house of the informant and despite a hectic search for almost the entire day, the body of the boy could not be found by the family nor any of the villagers. Such a situation also gives rise to suspicion as to whether the boy (Deceased) was at the place of occurrence, the previous day and whole night? This situation was neither investigated nor asserted by the prosecution and therefore the story of the prosecution coupled with reliance only on the last



seen theory, to our understanding is not enough to hold the appellant guilty beyond all reasonable doubts, muchless convict the appellant.

46. We must record that the medical evidence i.e. the Post Mortem report (Exb-3) did contain reference to ante mortem injuries including fracture of nose, however in absence of any incriminating article like stone or any weapon having being seized the said injuries can be said to be inflicted by the appellant merely on suspicion.

Findings:

47. After having gone through the entire evidence of the prosecution and also taking into account the facts and circumstances of the case, we are of the view that the five conditions of the rule of circumstantial evidence as enunciated in the case of *Shard Birdhichand Sarda's case* (Supra) are not satisfied in the present case. It cannot be said that the circumstances from which the conclusion of guilt is to be drawn is being fully satisfied. The facts established do not solely point towards the guilt of the appellant rather other possibilities of the child being done to death by another co-villager or his school friends or by an act of an animal (the fist of the deceased was separated from his hands) cannot be ruled out. The



circumstances cannot be held to be conclusive in nature especially for the reason that different versions of last seen have been given right from recording of fardbeyan till recording of the deposition of the prosecution witnesses during trial. Last but not the least, the chain of evidence is not complete in order to leave no doubt about the culpability of the appellant. It is a well settled law that an accused may appear to be guilty on the basis of suspicion but no matter how strong the same may be it cannot take place of a legal proof.

48. *“Graviora delicta gravioribus probationibus indigent”*, meaning graver offences require graver proof. It is no more res integra that graver the charge, the stricter the scrutiny of the evidence.

49. This case might seem to be shocking to the conscience of any person including the Courts, yet suspicion however great cannot take place of proof. Thus, taking into account the evidence of the prosecution we find that there is dearth of ocular evidence so as to make the same a basis for proving the guilt of the appellant beyond all reasonable doubt. Moreover, we find that the prosecution has failed to prove the links of incriminating circumstantial evidence individually and they do not hold an unbroken chain consistent only with the



guilt of the accused/appellant and totally inconsistent with her innocence, hence the appellant could not have been convicted on the basis of the evidence available on record.

50. Thus, taking into account an overall perspective of the entire case, emerging out of the totality of the facts and circumstances, as indicated herein above and having perused the entire evidence on record, we find that the Ld. Trial Judge has convicted the Appellant merely on suspicion and nothing more. In a criminal case, the Court has a duty to ensure that mere conjecture, surmises and suspicion do not take the place of legal proof. The phrase “may be proved” signifies a possibility or uncertainty while “must be proved” indicates a certainty or a legal necessity. The defence and outcome of a criminal case lies in the degree of certainty or the level of evidence required. The large mental difference between “may be proved” or “must be proved” must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution before an accused is condemned as a convict, which does not seem to have been traversed in the present case.

51. Having carefully considered all the issues raised by the learned counsel for the parties and having re-appreciated the evidence on record, we find that the reasons offered by the



learned Trial Judge to convict the appellant is not in consonance with the principles of criminal jurisprudence, but the learned Trial Judge has erred on facts as also on law while convicting the present appellant merely on the basis of suspicion.

52. From the entire conspectus of the case and considering the factual matrix, it can be gathered that the prosecution has failed to prove the link in the chain to connect the circumstances by cogent and reliable evidence and in fact there is no evidence on record to prove the guilt of the appellant beyond all reasonable doubt, hence in the facts and circumstances of the case, as discussed hereinabove and for the foregoing reasons, we are of the view that there are compelling reasons in the present case which necessitates that the appellant of the aforesaid appeal be given the benefit of doubt, thus the appellant deserves to be acquitted of the charges in absence of any reliable and credible evidence against him.

53. Accordingly, the finding of conviction recorded by the learned Trial Judge, in our opinion, is not sustainable and requires to be interfered with. Therefore, judgment of conviction and order of sentence dated 04.09.2019 and 05.09.2019, respectively passed by the learned Court of Additional District and Sessions Judge-III, Jamui in Sessions Trial no. 295 of 2014



(arising out of Jamui P.S. Case No. 166 of 2014) are set aside.
The appellant of the aforesaid appeal is acquitted of the charges levelled against her.

54. The appellant is already on bail, hence she is discharged from the liability of her bail bonds.

55. The aforesaid Criminal Appeal i.e. Cr. Appeal (DB) No.158 of 2020 stands allowed. Let the lower court records be sent to the learned Trial Court forthwith.

(Sourendra Pandey, J)

Mohit Kumar Shah, J:

(Mohit Kumar Shah, J)

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AFR/NAFR	AFR
CAV DATE	28.07.2026
Uploading Date	15.10.2026
Transmission Date	15.10.2026

