

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 265 of 2013**

1. Tulesh Kumar Sahu S/o Ram Das Sahu Aged About 19 Years R/o Village Mudipar, P.S. Gatapar, Distt. Rajnandgaon C.G., Chhattisgarh
2. Chandrakumar S/o Bhagoli Gond Aged About 28 Years R/o Kusumkuwa, P.S. Gatapar, Distt. Rajnandgaon C.G., District : Rajnandgaon, Chhattisgarh

----Appellants**Versus**

- State Of Chhattisgarh Through - SHO, Gatapar, Distt. Rajnandgaon C.G., Chhattisgarh

---- Respondent

For Appellants	:	Shri Harish Khuntiya, Advocate
For Respondent / State	:	Shri Akhil Mishra, Govt. Adv.

Hon'ble Shri Justice Manindra Mohan Shrivastava**Hon'ble Smt. Justice Rajani Dubey****Order On Board****Per Manindra Mohan Shrivastava, J.****23/10/2018**

This appeal is directed against impugned judgment of conviction and order of sentence dated 28/09/2012 passed by the Additional Sessions Judge, Khairagarh, District – Rajnandgaon in Sessions Trial No.01/2011 whereby and whereunder the appellants as also other accused namely Shesh Narayan, Rajesh Rawat, Madan Lal Sahu, Puran Sahu and Niranjana Yadav have been held guilty of commission of offences as described below -

	<u>Conviction</u>	<u>Sentence</u>
1	U/s 396 of IPC	Life imprisonment with fine of Rs.500/- (in default of payment of fine, additional R.I. of 3 months)
2	U/s 396 of IPC	Life imprisonment with fine of Rs.500/- (in default of

		payment of fine, additional R.I. of 3 months)
3	U/s 25 of Arms Act	R.I. for 1 year with fine of Rs.100/- (in default of payment of fine, additional R.I. of 1 month)

2. Prosecution story, as unfolded from the records of the case and impugned judgment is that in the intervening night of 31/08/2010 and 01/09/2010, dacoity took place in the house of the deceased Bhawarlal and next morning, when his son Lalchand Jain (PW1) came, he saw that his father Bhawarlal and daughter – Ku. Akshita were lying dead in blood bath. The articles kept in the room were scattered, box was open and gold and silver ornaments were not there. Intimation of murder of Bhawarlal and Ku. Akshita was received at the spot by the police and recorded in merg intimation (Ex.P/2) and (Ex.P/3). On the spot, *dehati nalishi* (spot FIR) was also recorded in Ex.P/1 that in the intervening night of 31/08/2010 and 01/09/2010, Bhawarlal and Akshita were murdered by unknown persons and dacoity had taken place in the house in which, gold and silver ornaments were stolen. The dead bodies were sent for post mortem, post mortem was conducted and report was prepared. The post mortem report indicated multiple injuries and according to the doctor, the death was homicidal in nature. The needle of suspicion pointed towards the present appellants (two in number) as also other co-accused and all of them were taken into custody. Further case of the prosecution is that memorandum statement of those persons were recorded in which, the appellants herein and other co-accused stated that they had entered into the house of the deceased, murdered and looted gold and silver ornaments. Further case of the prosecution is that on the basis of disclosure statement given by the other accused, weapons alleged to be used in the commission of offence and looted gold and silver ornaments were recovered in the presence of independent witnesses from the place stated by the accused in their memorandum statement given to the police in presence of the witnesses. In respect of looted ornaments, identification proceedings were also drawn by the Executive Magistrate in

the presence of the witnesses and it is said that the witnesses identified those looted articles. During the course of their examination in the Court, this witness stated that they had pledged their gold and silver ornaments with Bhawarlal by way of security for re-payment of loan. The finger prints of the appellants and co-accused were also collected and sent for report of FSL along with seized weapons and clothes. The forensic report of expert showed that in the Almirah kept in the house of the deceased, finger prints of one of the co-accused– Madanlal was found. Further case of the prosecution is that on the memorandum of all the accused, weapons alleged to have been used for commission of offence were recovered. As far as appellant – Tulesh Kumar is concerned, in addition to recovery of weapon alleged to be used by him along with other co-accused, on his memorandum, the looted jewelery and ornaments were also recovered from a hidden place and later on, these articles were identified by number of witnesses who had pledged their ornaments with late Bhawarlal while taking loan. Upon completion of investigation, charge sheet was filed. Learned Trial Court, on the basis of material contained in the charge sheet, framed separate charge against each of the appellants. The appellants abjured guilt and were therefore put to trial.

3. In order to prove its case, the prosecution examined 24 witnesses and also produced documentary evidence. Each of the appellants were thereafter subjected to examination under Section 313 CrPC in respect of the incriminating evidence and circumstances appearing against them in the evidence led by the prosecution. The appellants denied and stated that they have been falsely implicated. No defence witness was examined.

4. Learned Trial Court, however, relying upon the evidence led by the prosecution, held that as from the possession of the appellants, weapons alleged to have been used in commission of offence was recovered on the basis of disclosure statement and from appellant – Tulesh Kumar, on his memorandum, looted ornaments were also

recovered, which were duly identified by witnesses in a reliable identification proceedings conducted by the Executive Magistrate, present appellants including all other co-accused were found guilty of commission of offence and sentenced as described above.

5. Assailing correctness and validity of impugned judgment of conviction and order of sentence, learned counsel for the appellants argued that the conviction is based only on doubtful circumstantial evidence which the prosecution has failed to prove beyond reasonable doubt. Learned counsel further argued that the prosecution case, as far as appellant – Chandrakumar is concerned, it is founded only on recovery of certain weapon from an open place and except this, there is no other evidence to connect this appellant with the commission of offence because no blood stains much less that of the origin and group of the deceased was found on the weapon. As far as appellant – Tulesh Kumar is concerned, it is contended that recovery of ornaments at his instance, is highly doubtful because the prosecution has examined only one witness namely Moolchand Jain (PW21) whose evidence is not reliable. It is next contended that the looted ornaments were not found in the house of Tulesh Kumar nor is there any evidence that he was in exclusive possession of the ornaments, but from a place under a culvert which is open and accessible to all. Further submission is that the prosecution witnesses brought to prove pledging of their respective ornaments at the time of borrowing money from Late Bhawarlal and so called identification of their respective ornaments is highly doubtful because they have failed to state as to on what basis and peculiar mark, make, shape, design or any other sign, they could identify the particular piece of ornament as belonging to them. Moreover, it is argued that the manner in which identification proceedings were conducted itself shows that it was only a farce and contradictory statements have been made by the Police Officers and witnesses of identification proceedings as also those, who claim to have identified their respective ornaments. Therefore, conviction of the appellant – Tulesh Kumar on the

basis of such doubtful recovery and identification of ornaments is unsustainable in law.

6. On the other hand, learned State counsel supports the judgment of conviction and order of sentence and submits that present is a case where dacoity had taken place in the night in the house of Bhawarlal in which, Bhawarlal and his grand daughter Akshita both were murdered. He submits that right from the beginning, it was reported in the police station that 13 Kgs of silver and gold ornaments have been looted and then looted jeweleries were recovered on the basis of disclosure statements given by co-accused -Tulesh Kumar Sahu in presence of independent panch witnesses. The recovery of gold ornaments kept in a bag found in a '*naala*' (culvert) and identification in a duly conducted identification proceedings in the presence of the Executive Magistrate proves the case of the prosecution.

7. It is relevant to note at this stage that other convicts namely Madanlal Sahu, Puran Sahu, Shesh Narayan, Niranjana Yadav and Rajesh @ Dabal Nepali also filed their appeals numbered Cr.A.No.1069/2012, 1078/2012, 1088/2012 and 1131/2012. Though the appeals of present appellants namely Tulesh Kumar Sahu and Chandrakumar were also listed for hearing analogously, as the counsel for the appellants in the present case did not appear on 22/10/2018, this appeal was de-linked from other appeals and is heard today. In the appeals of aforesaid appellants, this Court has acquitted all other accused except Madanlal Sahu. It has been held that conviction of other appellants except Madanlal in those appeals could not be sustained only on the basis of recovery of weapons because even if recovery of weapon on the disclosure statement of those appellants is proved, in the absence of any close and live link that on those weapons, blood of the group or origin of the two deceased or any of them or human blood was found, it was not safe to convict those appellants. This Court further recorded in the judgment dated 22/10/2018 passed in the appeals of Shesh Narayan and others that except recovery of weapon, there was no other

incriminating evidence proved by the prosecution against Shesh Narayan, Puran Sahu, Niranjan Yadav and Rajesh Rawat @ Dabal Nepali and therefore, they were acquitted.

In so far as the case of appellant – Chandrakumar is concerned, his case is identical to that of Shesh Narayan, Puran Sahu, Niranjan Yadav and Rajesh Rawat in so far as recovery of weapon is concerned. Except recovery of weapon, on which no blood stain was found, there is no other incriminating circumstances connecting the present appellant – Chandrakumar with the alleged commission of offence.

8. As the conviction of the appellants is based on circumstantial evidence and there is no eye witness account, it would be appropriate at this stage to refer to certain principles on which the prosecution can succeed in a case based on circumstantial evidence. One of the earlier judgments of the Supreme Court in this regard is rendered in the case of **Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622**, wherein Hon'ble the Supreme Court delineated the principles and laid down as to what is required to be proved by the prosecution to base conviction on circumstantial evidence. In para 152 of the said judgment, it was held as below -

“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 Sahebrao Bobade Vs. 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."

9. In the present case, conviction of the appellants is based on recovery of weapon alleged to be used in murdering Bhawarlal and Ku. Akshita on the basis of disclosure statement given by the appellants, recovery of looted ornaments and jewelery, identification of looted jewelery by witnesses, coupled with the evidence of these witnesses that gold and silver ornaments were pledged with Bhawarlal as security towards repayment of loan and finger print expert's report that finger prints of one of the co-accused Madanlal were found on the Almirah kept in the house of the deceased – Bhawarlal and further that as far as appellant – Tulesh Kumar is concerned, on his disclosure, looted ornaments were recovered from a hidden place which were identified by the owners of those ornaments who had pledged their ornaments with late Bhawarlal while borrowing loan from him. According to the prosecution, the incident of dacoity and murder took place in the night intervening 31/08/2010 and 01/09/2010 in village – Muddhipar.

10. Lalchand Jain (PW1), son of deceased – Bhawarlal has deposed that on

31/08/2010, he along with his wife and younger daughter went to sleep in the room upstairs at 9:30 PM and his father with his daughter – Akshita were sleeping in the verandah. When he came out at 6 AM in the morning, he saw that his father and his daughter were lying in blood bath on the cot. Upon giving a call, Moolchand and others arrived, store room was opened and the box was also lying open. He has further deposed that gold and silver ornaments were not found. He saw that his father had sustained injury on his temporal part and neck possibly given by a sharp weapon and temporal part and neck of his daughter was also cut by a sharp edged weapon. He has further stated that the ornaments were placed with his father by Sonao Sinha, Dwarika Sahu, Dudhe Ram Verma, Jam Bai, Ramnath Sinha and others. He further deposed that merg intimation and *dehati nalishi* were also recorded at his instance and he has proved his signature in *dehati nalishi* (Ex.P/1) and merg intimation (Ex.P/2 and Ex.P/3).

11. The appellants and other co-accused were taken into custody being suspects of commission of offence of dacoity and murder. The memorandum statement and disclosure statement were recorded by S.L.Nayak (PW24), the investigating officer. He deposed in his evidence that upon receipt of information regarding death of Bhawarlal and Ku. Akshita and dacoity in their house, he had recorded merg intimation and *dehati nalishi* and on the basis of that, recorded FIR (Ex.P/57) and proved his signature. He deposed that on 02/09/2010, in the presence of witnesses Moolchand and Nirmalchand, he had recorded memorandum statement of present appellants – Tulesh Kumar Sahu and Chandrakumar as also memorandum statement of other accused. At the instance of appellant – Chandrakumar, recovery of sword containing blood stains is said to have been made vide Ex.P/43. The investigating officer deposed that on the basis of disclosure statement, the weapon was recovered from Khapri Naala.

Even though the weapons alleged to be recovered from Chandrakumar is

proved, the prosecution could not prove by leading report of FSL that this weapon contained human blood much less group and origin of Bhawarlal and Ku. Akshita. Therefore, as far as appellant – Chandrakumar is concerned, his case is similar to that other appellants, except Madanlal, who have been acquitted in appeals decided on 22/10/2018. Therefore, his conviction cannot be sustained.

Involvement of appellant – Tulesh Kumar is based mainly on recovery of looted articles i.e. ornaments on the disclosure statement given by him. S.L.Nayak (PW24), investigating officer has clearly deposed in para 7 of his evidence that on 02/09/2010 at about 12:05 hrs., he had recorded memorandum statement of Tulesh Kumar in the police station–Khairagarh, in the presence of witnesses – Moolchand and Nirmalchand in Ex.P/32 and he has proved his signature thereon. He further deposed in para 9 of his evidence that on the basis of disclosure statement given by Tulesh Kumar, on the same day at about 13:15 hrs., a cloth bag with green label was recovered from Salgapaath naala (culvert), which was full of silver ornaments. He has deposed that this bag containing ornaments was hidden in the bushes under the *naala* and it was taken out by the appellant – Tulesh Kumar. He has specifically given details of the ornaments found in the bag recovered at the instance of appellant – Tulesh Kumar. He has deposed that in order to get those ornaments weighed at the spot, he had brought Sushil Kumar Jain, Proprietor – Sushil Jewellers, Khairagarh. He has also proved the seizure memo (Ex.P/19) containing his signature.

12. The recording of memorandum statement (Ex.P/32) of appellant – Tulesh Kumar and seizure of ornaments vide Ex.P/19 proved by the investigating officer (PW24) is corroborated from the evidence of independent witness of memorandum and seizure. Moolchand (PW21) has deposed in para 3 of his evidence that in his presence, the police had interrogated the appellant – Tulesh Kumar Sahu in Khairagarh Police Station in which, he has disclosed that gold-silver ornaments have been hided by him in the bushes under Salgapaath naala (culvert). He proved his signature in

memorandum (Ex.P/32). In para 5 of his evidence, he has deposed that in his evidence, the ornaments were taken out by appellant – Tulesh which were seized vide Ex.P/19 and he has proved his signature thereon. He further deposed that in his presence, the police got those ornaments weighed by Mr. Sushil Jain. Nothing could be elicited in the cross examination of this witness to doubt that memorandum statement of Tulesh Kumar was not recorded in his presence or that Tulesh Kumar had not given any disclosure statement regarding the place where he hid the looted ornaments. Though this witness has been subjected to detailed cross examination, in para 18 of his cross examination, he has stated that the village is away from Salgapaath *naala* (culvert). He has also deposed that at that spot, first Tulesh Kumar went under the *naala* and took out the bag containing ornaments and has denied suggestion that the bag of jewelery was already kept in the police vehicle. The suggestion that the appellant – Tulesh did not go inside the *naala* has been denied. It has been specifically denied that he did not come out with any articles. In para 19, he further explains that the place of seizure was covered with bushes all around. Suggestion that he is giving statement as tutored by Lalchand- son of the deceased, has been denied.

13. Sushil Kumar Jain (PW10), Proprietor-Sushil Jewellers, who was brought to the spot and had weighed the looted ornaments which were recovered on the disclosure statement of Tulesh Kumar on the spot itself, has fully supported the case of the prosecution and has deposed that he had weighed various articles of ornaments and had issued weighment certificate (Ex.P/18). He has also deposed that all the ornaments weighed by him were seized in his presence and has proved his signature in seizure memo (Ex.P/19). In the cross examination, he stated that he was taken by police people to Salgapaath *naala* (culvert) where he had carried out weighment.

14. Thus, from the reliable evidence of Moolchand Jain (PW21), S.L.Nayak, (PW24)

and Sushil Kumar Jain (PW10), it is proved beyond doubt that on the disclosure statement given by appellant – Tulesh Kumar, the ornaments were recovered from under Salgapaath culvert from a hidden place under the bushes and it is the appellant – Tulesh Kumar who had gone under the culvert, taken out bag full of ornaments which was seized by the Investigating Officer (PW24) in the presence of seizure witness. The entire proceedings of recording of memorandum statement and recovery of ornaments from a hidden place is proved from the evidence of prosecution witnesses. The prosecution has examined number of witnesses who had deposed that while borrowing loan, they had pledged their ornaments with Late Bhawarlal. Sonau Ram (PW2), Jambai Sahu (PW4), Moolchand Jain (PW5), Maan Singh (PW12), Ramadhar Gond (PW13), Dudheram (PW16), Dwarika Sahu (PW18) and Ramnath (PW19) are those witnesses who have stated having pledged their respective ornaments with specific description, which was identified by them. S.L.Nayak (PW24), the investigating officer has stated that identification of those ornaments was conducted by the Executive Magistrate.

R.P.Achla, Tahsildar (PW20) had proved proceedings of identification of seized ornaments by witnesses - Dwarika Sahu, Ramnath, Sonau, Arjun Sahu, Jaambai, Maansingh and Moolchand in the presence of identification witnesses namely Bhawarlal and Sheetal. He has stated that these articles were mixed with other articles and the witnesses were called one by one and the series in which the articles were kept, were also changed and that these witnesses had identified their ornaments. He has proved identification proceedings (Ex.P/21) and his signature thereon Ex.P/11, Ex.P/22, Ex.P/25, Ex.P/23, Ex.P/26, Ex.P/12 and Ex.P/14. He has been subjected to detailed cross examination and nothing material could be elicited to create any doubt over the proceedings of identification and except certain minor contradictions, nothing could be elicited so as to disbelieve the testimony. In his cross examination, it has come that the articles which were brought for identification were mixed with similar articles / ornaments.

15. Witness of identification proceedings Bhawarlal Khatri (PW11) has corroborated the statement of Tahsildar, R.P.Achla. He has stated that in his presence, identification proceedings were drawn and he has proved his signature in identification proceedings relating to identification of various ornaments by different witnesses as stated above and nothing could be elicited from his cross examination to disbelieve his testimony. The fact that Seth Bhawarlal was engaged in money lending has been proved by Sonau, Dwarika Sahu, Ramnath, Jaambai, Dudheram and others who had pledged their ornaments with the deceased – Bhawarlal. It has also been proved from the evidence of his son- Lalchand (PW1) and this fact has been corroborated from the evidence of Sunil Kumar Jain (PW7), who is a business man. In para 5 of his cross examination, he has stated that the deceased – Bhawarlal used to give money by taking security. Number of witnesses mentioned hereinabove have stated that they had borrowed loan and pledged their respective ornaments with Bhawarlal.

16. It is, thus, proved beyond doubt that loot of huge quantity of ornaments which were in possession of Late Bhawarlal were looted from him and Bhawarlal and Ku. Akshita were murdered in that night of loot. Recovery of these ornaments on the disclosure statement of appellant – Tulesh and identification have also been found proved from overwhelming evidence. In his examination under Section 313 CrPC, Tulesh has failed to explain all these incriminating circumstances. He has not come out with any evidence or any explanation that he had purchased these ornaments from a third party. Though appellant -Chandrakumar is entitled to be given benefit of doubt, case against Tulesh Kumar Sahu is fully proved beyond reasonable doubt that he was one of the accused who had looted ornaments in the house of Bhawarlal and murdered Bhawarlal and Ku.Akshita.

17. In the appeal of other accused which has been decided by this Court on 22/10/2018, only Madanlal has been found guilty and his conviction has been affirmed

whereas conviction of all other appellants has been set aside. In the present appeal, only appellant – Tulesh Kumar Sahu has been found guilty. As the total number of accused found is less than 5, though guilt of the appellant in the commission of offence of double murder of Bhawarlal and Ku. Akshita and loot of ornaments is proved, conviction of the appellant-Tulesh Kumar Sahu is altered to one under Section 302 R/w Section 34 IPC, Section 392 / 34 of IPC and Section 25 of the Arms Act. Sentence part i.e. life imprisonment of Tulesh Kumar Sahu shall remain as it is.

18. In the result, appeal of **Chandrakumar** is allowed and his conviction is set aside. Chandrakumar be set at liberty forthwith. Conviction of appellant – **Tulesh Kumar Sahu** is affirmed and his appeal is dismissed.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge