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**HIGH COURT OF CHHATTISGARH, BILASPUR****CRA No. 229 of 2014**

- Narendra Kumar Sahu S/o Shri Radheshyam Sahu, aged about 22 years, R/o village Sendripali, Police Station Kartala, District Korba, Civil & Revenue District Korba (C.G.)

**---- Appellant****Versus**

- State of Chhattisgarh Through : Station House Officer, Out Post : Urga, Police Station : Kotwali Korba, District Korba (C.G.)

**---- Respondent****And****CRA No. 215 of 2014**

- Durgesh Kumar Sahu, aged about 20 years, S/o Balram Prasad Sahu, R/o village Faraswani, Chowki Urga, District Korba, Civil and Revenue District Korba (C.G.)

**---- Appellant****Versus**

- State of Chhattisgarh Through : P.S. Chowki Urga, P.S. Kotwali, Korba, District Korba (C.G.)

**---- Respondent**


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|------------------------------------|---|--------------------------------|
| For Appellant in Cr.A. No.229/2014 | : | Shri R.K. Jain, Adv.           |
| For Appellant in Cr.A.No.215/2014  | : | Shri Punit Ruparel, Adv.       |
| For Respondent/State               | : | Shri Subhash Yadav,<br>Dy.G.A. |

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**D.B. : Hon'ble Shri Justice Manindra Mohan Shrivastava &  
Hon'ble Smt Justice Rajani Dubey**

**Judgment On Board****15.02.2019****Per Manindra Mohan Shrivastava, J**

This order shall govern disposal of aforesaid two appeals which

arise out of the same judgment of conviction and order of sentence filled by two different accused Durgesh Kumar Sahu in Cr.A.No.215/2014 and Narendra Kumar Sahu in Cr.A.No.229/2014.

02. The appellants have been convicted in Sessions Trial No.07/2013 vide judgment dated 31.01.2014 passed by learned Additional Sessions Judge (FTC), Korba (C.G.) on the allegation of commission of offence of loot and murder of one Pushpendra and sentenced as described below:-

| CONVICTION               | SENTENCE                                                                                                           |
|--------------------------|--------------------------------------------------------------------------------------------------------------------|
| Under Section 302/34 IPC | Imprisonment for life and fine of Rs.5000/- each, and in default of fine, to undergo additional R.I. for one year. |

03. The prosecution case is that deceased Pushpendra had dispute with regard to return of loan amount borrowed by him from appellant Durgesh Kumar Sahu. It is alleged that Pushpendra left his house at about 7.30 PM on 31.10.2012 and, thereafter, he did not return. Later on, dead body of Pushpendra was found near a dam situated in village Faraswani. A merg intimation in Ex.P/1 was given in the police out post Urga, which was taken by Ashwani Rathore (PW/18). A merg inquiry was made and then numbered merg was recorded in the Police Station at Korba. An FIR (Ex.P/13) was, thereafter, recorded. In the merg as well as in the FIR, it was recorded that Pushpendra was working in Railway and on 31.10.2012 he came back from his duty and then again left the house at 8.00 PM in his motorcycle No.CG-11-K-8271 without informing anybody. When attempt was made to contact Pushpendra on his mobile number 7415783944, the same was

reported to be switched off and, thereafter, on 01.11.2012 at about 9.00 AM, Sarpanch of village Dewalapat saw the dead body, which, later on, was found to be that of Pushpendra, who had suffered various crush injuries on his head, forehead and many parts of the body. Inner wear and footwear were found around the dead body. Nobody was named or even suspected in the FIR.

During investigation, when the family members of the deceased informed that Durgesh Kumar Sahu, one of the appellant, had some dispute with deceased Pushpendra as Pushpendra was repeatedly insisting for repayment of loan, the needle of suspicion was pointed on Durgesh, and it is said that Durgesh was taken into custody and his memorandum statement was recorded by the police in which he said to have disclosed that he along with Narendra Kumar Sahu murdered Pushpendra. On this basis, Narendra Kumar Sahu, the other co-accused was involved, his memorandum statement was also taken. The police came out of the case of memorandum given by appellant Durgesh and Narendra on which, the motorcycle of the deceased and his mobile was seized. While motorcycle is said to have been seized from a well, mobile is said to be seized from appellant Narendra. Upon conclusion of usual investigation, the prosecution filed charge sheet before the concerned jurisdictional Magistrate, who in turn, committed the case for trial to the Sessions Court. On the basis of material contained in the charge sheet, learned trial Court framed charges against the appellants for commission of offence under Sections 302/34 and 397/34 IPC. Appellants abjured guilt and were, therefore, put to trial. In order to prove its case, the prosecution examined as

many as 18 witnesses. The appellants were also examined under Section 313 Cr.P.C. in respect of incriminating evidence and circumstances appearing against them in the evidence led by the prosecution. Appellants denied having committed the offence and stated that they have not committed the offence and have been falsely implicated in the crime in question.

04. During trial, the prosecution came out with the circumstantial evidence of there being a dispute between the deceased and the appellants, and recovery of motorcycle & mobile of the deceased on the memorandum of the appellants. The learned trial Court based conviction on these incriminating evidence.

05. Assailing correctness and validity of the impugned judgment of conviction and order of sentence, learned counsel for the appellants would raise common submission that the prosecution case is otherwise based mainly on so-called recovery of motorcycle and mobile phone on the memorandum of the two appellants, but both the memorandum witnesses namely Ramcharan (PW/11) and Munna Ram (PW/12) have not supported the prosecution case, and the manner in which they have deposed in their examination-in-chief and also in the cross-examination, render the case of the prosecution highly doubtful and only on the basis of evidence that there was some dispute because Pushpendra was claiming repayment of loan from Durgesh, without any other evidence, the conviction of the appellants could not be sustained. It is argued that the evidence of Kumari Savita Rathore (PW/15), sister of the deceased, that her brother had received phone call from SIM No. 9753338139, could not be proved to be that of

Narendra as the prosecution has not led any specific evidence in this regard nor that SIM number was seized from the possession of the Narendra. Therefore, the entire case of the prosecution is extremely doubtful and conviction could not be sustained because in such a situation, the appellants are entitled to be given benefit of doubt.

06. On the other hand, learned counsel for the State argued that even though, there is no direct evidence, the evidence of mother Sorin Bai (PW/4) and sister Kumari Savita Rathore (PW/15) proved that there existed a dispute between appellant Durgesh and deceased Pushpendra and when Pushpendra was insisting on repayment of loan, appellant Durgesh had threatened him. It is next submitted that though there are discrepancies in the evidence of witnesses of memorandum and seizure of motorcycle and mobile phone, Ashwani Rathore (PW/18) - the Investigating Officer, has proved that memorandum of the two appellants were recorded by him and on the basis of said memoranda of the appellants, the motorcycle and mobile phone of the deceased were recovered. He would also submit that in his examination under Section 313 Cr.P.C., appellant Narendra has not specifically denied that SIM No. 9753338139 did not belong to him.

07. We have heard learned counsel for the parties and perused the record and the impugned judgment.

08. The judgment of the learned trial Court is based mainly on three circumstantial evidence, which are (1) existence of dispute over claim of repayment of loan by deceased Pushpendra from appellant Durgesh, (2) recovery of motorcycle and mobile of the deceased on the

memorandum of the appellants and (3) call made from one mobile number to the other in which it is said that call was made by appellant Narendra to deceased Pushpendra when he was leaving his house at about 7.00 PM on 31.10.2012.

09. Since the entire case of the prosecution is based on circumstantial evidence, the law requires that all the circumstances have to be proved beyond reasonable doubt to form a complete chain so that an inference could be drawn that, in all probability, it is the appellants and the appellants alone who must have killed the deceased.

10. As far as the existence of the dispute between appellant Durgesh and deceased Pushpendra is concerned, we find that the evidence of Sorin Bai (PW/4) and Kumari Savita Rathore (PW/15), the mother and sister of the deceased, is that there was a quarrel during Dussehra over repayment of loan amount between Pushpendra and the appellants and it was disclosed to Sorin Bai (PW/4) by Pushpendra that they are threatening him. Kumari Savita Rathore (PW/15), sister, has also stated on similar lines stating that her brother Pushpendra had given loan to appellant Durgesh and when her brother used to ask for repayment, Durgesh used to threaten him that if he asks for repayment, he would kill him and Durgesh had also come to her house along with Narendra on the day of Dussehra and also threatened her brother Pushpendra. This evidence of the prosecution shows that there existed some dispute between deceased Pushpendra and appellant Durgesh over repayment of loan said to be advanced by Pushpendra to Durgesh.

11. The prosecution case is that the appellants had killed the deceased and his motorcycle was thrown in a well and mobile of the deceased was kept by appellant Narendra. In order to lay credence to the prosecution story on recovery of motorcycle and mobile on the basis of memoranda given by the two appellants, the prosecution has examined two independent witnesses Ramcharan (PW/11) and Munna Ram (PW/12).

Ramcharan (PW/11), in his examination-in-chief, states that when inquiry was made from the appellants (without specifically naming), appellants stated that motorcycle is in well and it was seized. He then says that motorcycle was seized from appellant Narendra and says that he has signed two memoranda Ex.P/6, P/16 and P/17. He then states that in his presence nothing was seized from appellant Durgesh nor Narendra was interrogated in his presence. But he proved his signature on seizure memos Ex.P/18, P/19 and P/20. This witness was declared hostile by the prosecution, and then in the cross-examination, he has admitted that appellant Durgesh got a motorcycle CG-11-BC-8271 seized from the well near the field of one Radheshyam, but he denies that any seizure was made from appellant Narendra on the basis of seizure memo Ex.P/19 or P/20. In his cross-examination, this witness then admits that he is seeing other accused Durgesh for the first time in the Court. He then admits suggestion that appellant Durgesh was not arrested in his presence. He also admits that memorandum of Durgesh in Ex.P/17 was not recorded as disclosed. He also admits that Durgesh had not disclosed what was written in Ex.P/17 nor had stated anything regarding the motorcycle.

He also admits that no motorcycle was seized at the instance of Durgesh. He further deposes that disclosure statement of Narendra in Ex.P/16 was not made in his presence and further admits that neither any statement was made by him nor any seizure was made at the instance of Narendra, vide Ex.P/19 and P/20. He then proceeds to say by admitting suggestion that Narendra also not disclosed regarding the motorcycle.

The manner in which this witness has deposed in the Court, he is wholly unreliable and no reliance can be placed on his evidence to support the prosecution case with regard to recording of memorandum in his presence, much less recovery, whether it be a case against appellant Durgesh or against Narendra. It is to be noted that he had gone to the extent of saying that he is seeing Durgesh for the first time in the Court.

12. The other independent witness Munna Ram (PW/12) has deposed that he does not know the other appellant and only knows Narendra, who was arrested by police. He then states that police people had taken him to a well in village Chandrapali and when they asked Narendra then Narendra stated regarding motorcycle being there in the well. He has been declared hostile because, according to the prosecution case, memorandum statement regarding whereabouts the motorcycle was given by appellant Durgesh and not by Narendra. After having been declared hostile, he admits that when he went near the well, Ramcharan was already present but he denied that any disclosure statement in Ex.P/16 was given by Narendra regarding possession of mobile phone in his house. This witness has denied

suggestion that any memorandum statement Ex.P/17 was given by Durgesh regarding motorcycle having been thrown in the well. He has denied that any seizure of motorcycle or mobile was made either in his presence or in presence of Durgesh. Though, he states that he has seen police people taking out motorcycle, and while it was being taken out, Durgesh was there. In his cross-examination, he has not supported the prosecution case by deposing that he was not given any notice by the police to come near the well and has stated that when he was going for work in the morning, he was called by the police, asked to sit in the vehicle and then he was taken. He admits that no disclosure was given in his presence by appellant Narendra nor any disclosure with regard to location of motorcycle was given by Narendra. He also states that nothing was seized in his presence from Narendra. He has not supported the prosecution story of appellant Durgesh having given any memorandum statement in Ex.P/17 in his presence. He has finally stated that the police of their own had taken out the motorcycle from the well and his signature and thumb impression were obtained.

13. The aforesaid evidence, is wholly unreliable and could not be made a basis to prove the memorandum of disclosure or the seizure or recovery of the articles on the basis of said memorandum and, as per the statement given in the memorandum by two appellants.

14. True it is that the Investigating Officer (PW/18) has stated in his evidence that he had recorded memoranda of the two appellants and recovery was made, taking into consideration that in the present case, this is the one of the main incriminating circumstance to involve the two

appellants in the alleged commission of offence, it would be wholly unsafe to base conviction of the appellants on the basis of such a shaky evidence with regard to recording of memorandum and recovery of articles on the basis of such memoranda of the two appellants.

Connecting the appellant Narendra on the basis of he having given call to deceased Pushpendra, on the basis of call made from one cell to the other is neither here nor there. There is no evidence led by the prosecution that the SIM number from which call was given to deceased Pushpendra belongs to Narendra. The police has not even seized any mobile cell containing SIM No.9753338139.

15. Submission of learned counsel for the State that accused Narendra, in his examination under Section 313 Cr.P.C., has not specifically denied that the aforesaid mobile number 9753338139 did not belong to him, should be taken as an incriminating circumstance, could be accepted. Unless the prosecution has come out with the incriminating evidence of the nature that mobile SIM No. 9753338139 was found from the possession of Narendra, the appellant Narendra could not be involved on the basis that in reply to the question that a call was made from this number to the mobile number of Pushpendra, which is said to be belonging to him, the accused Narendra has stated that he does not know. The purpose of Section 313 of Cr.P.C. is to afford the accused an opportunity to explain incriminating material and circumstances led by the prosecution in its evidence. Unless there is an incriminating evidence or circumstance, the statement of the accused cannot be made a basis to prove an incriminating circumstance. This would amount to shifting burden on the accused. It

is not an admission of guilt by Narendra.

16. In view of above consideration, we are unable to uphold the judgment of conviction and order of sentence of the appellants. The appellants, in these circumstances, as we have discussed above, are entitled to benefit of doubt.

17. The aforesaid appeals are accordingly allowed. The impugned judgment of conviction and order of sentence is hereby set aside and the appellants are acquitted of the charges levelled against them by extending them benefit of doubt. The appellants are reported to be in jail, they be set at liberty forthwith, if not required in any other case.

Sd/-

**(Manindra Mohan Shrivastava)**  
**Judge**

Sd/-

**(Rajani Dubey)**  
**Judge**