IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No. 862 of 2014

Arising Out of PS. Case No.-23 Year-2010 Thana- KHAGARIA GRP CASE District- Khagaria

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Amarnath Swarnkar Son of Rambabu Swrnkar resident of village- Sitanabad, Police Station- Bakhtiyarpur, District- Saharsa

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

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Appearance :

For the Appellant/s : Mr. Praveen Kumar, Advocate
Mr. Ravi Prakash Dwedi, Advocate

For the Respondent/s : Mr. Satya Narayan Prasad, APP

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CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA)

Date : 25-08-2023

Heard learned counsel, Mr. Praveen Kumar appearing for the accused/appellant as well as learned APP, Mr. Satya Narayan Prasad for the State.

2. The present appeal preferred by above named accused/appellant challenging the judgment of conviction dated 04.09.2014 and order for sentence dated 09.09.2014 passed in connection with S.Tr. No. 440 of 2010 arising out of Rail P.S. Saharsa (Banmankhi) Case No. 23 of 2010, whereby and

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whereunder learned Additional District and Sessions Judge, III, Khagaria convicted the appellant under Section 302 of the Indian Penal Code (In short 'IPC') and sentenced him to undergo imprisonment for life and fine of Rs.10,000/- (Ten Thousand) in default of payment of fine, further to undergo imprisonment for six (06) months.

3. The crux of prosecution case as it appears from the written information/ferdbeyan of informant Ashok Prasad Bhagat (PW-4) that on 04.09.2010 at about 9:45 PM when informant was going to close his sweet shop, he heard a rumour that a murder was committed, after hearing he came out and saw a person besmeared with blood lying in front of betel shop of one Sair Ali (PW-8). The informant also saw one person fleeing away towards west direction but that person was apprehended by local people. He was found with a blood stained dagger in his hand and disclosed his name as Amarnath Swarnkar (accused/appellant). Apprehended accused further disclosed that he along with Bhushan Swarnkar and Srawan Kumar Swarnkar (PW-7) was doing the business of cleaning of ornaments in villages and due to division of earning money, dispute was going on leading to the incident of murder.

4. After completion of investigation, police

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submitted charge-sheet against accused/appellant vide charge-sheet no. 30/10 dated 31.10.2010 under Section 302 of I.P.C., where charges were also framed under Section 302 of I.P.C. against accused/appellant. Aforesaid charges were duly explained to accused/appellant, where he pleaded "not guilty" and claimed trial.

5. To establish its case before the learned trial court the prosecution altogether examined total of fifteen (15) witnesses, namely, Nago Sah (PW-1), Kishore Chanchal @ Jai Kishore Chanchal (PW-2), Sarda Devi (PW-3), who is mother of the deceased, Ashoka Prasad Bhagat (PW-4), who is informant of this case, Natho Sonar (PW-5),who is brother of the deceased, Buddhan Swarnkar (PW-6), who is also brother of the deceased, Srawan Kumar Swarnkar (PW-7), Sair Ali (PW-8), Rajendra Poddar (PW-9), Md. Saeed Khan (PW-10), who is 1st Investigating Officer of this case, Dr. Yadubansh Kumar Sharma (PW-11), Subodh Kumar (PW-12), who is 2nd Investigating Officer of this case, Santosh Kumar (PW-13), Manash Singh (PW-14) and Rabindra Jha (PW-15).

6. The prosecutions also exhibited the following documents during the trial which are as under:

1. **Exhibit 1** – Signature of Witness Nago Sah (PW-1) on seizure-list.

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2. **Exhibit 1/1**- Signature of witness Rajendra Poddar (PW-9) on seizure-list.
3. **Exhibit 1/2** - Seizure-list.
4. **Exhibit 2 -** Confessional Statement of Appellant.
5. **Exhibit 2/1** - Statement of witness Sharwan Kumar Swarnkar
6. **Exhibit 3** - Fardbeyan.
7. **Exhibit 4** - Forwarding on Ferdbeyan.
8. **Exhibit 5 -** Inquest Report.
9. **Exhibit 6 -** Copy of application for recording the statement under Section 164 of Cr.P.C.
10. **Exhibit 7** – Post mortem report.

7. After closure of the prosecution case, the statement of accused/appellant was recorded under Section 313 of the Code of Criminal Procedure (In short 'Cr.P.C.'), where he shows his complete innocence by denying all incriminating circumstances/evidences explained to him.

8. No witness was examined in defence during trial as well as no document was exhibited in defence.

9. After conclusion of trial, learned trial court by taking note of evidences available on record, legal positions and

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argument advanced by the parties, convicted the appellant for the offences under Section 302 of the Indian Penal Code, where upon conviction, accused/appellant was sentenced for life imprisonment for the offence committed under Section 302 of the Indian Penal Code alongwith fine of Rs. 10,000/-, being aggrieved with aforesaid order of conviction and sentence accused/appellant preferred the present appeal.

10. Hence, the present appeal.

ARGUMENT OF LEARNED COUNSEL FOR THE APPELLANT

11. Learned counsel appearing on behalf of accused/appellant submitted that PW-4, namely, Ashoka Prasad Bhagat, who is the informant of this case declared hostile during the trial. It is submitted that in early hour of morning i.e. 3:00-3:35 AM, PW-4 was called by SHO and obtained his signature on white paper. It is pointed out that this case rests heavily upon circumstantial evidence. Learned counsel submitted that as appellant was arrested by private persons having blood stained knife in his hand about 100 mt. west from alleged place of occurrence i.e. temple, he was connected with crime in question. It is further submitted that said seized knife was not sent for any forensic or serological examination as to ascertain that blood as found upon blade of knife was of human being. It

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is also pointed out that the occurrence took place in a temple which was open from all side and accessible by general public and merely only of said incriminating circumstance as accused/appellant was found with blood stained knife in his hand and found running away from the place of occurrence cannot be connected with crime in question. It is also submitted that during the time of occurrence PW-7, namely, Srawan Kumar Swarnkar was also available and consumed liquor along with deceased and accused/appellant. It is submitted that PW-7 was also arrested in this case, which is evident from his deposition but later on released and became court witness. While travelling over the argument, learned counsel submitted that even the statement of witnesses as recorded under Section 164 of Cr.P.C. during the course of investigation is not suggesting anything further incriminating and moreover, statement recorded under Section 164 of the Cr.P.C. can be used only for corroborative purposes and it cannot replace substantial evidences. It is further pointed out that the prosecutions failed to explain how the dead body of deceased was travelled up to 20-25 steps ahead towards east of temple, which is alleged place of occurrence, where deceased was sleeping along with accused/appellant and PW-7 on intervening night of occurrence

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i.e. 04.09.2010. It is further pointed out that this case also rests upon extra-judicial confession, where previous enmities assigned as motive behind the crime in issue. It is submitted as said extra-judicial confession was obtained out of physical assault, therefore, same becomes irrelevant in view of provisions as laid down under Section 24 of Indian Evidence Act. While concluding the argument learned counsel for the accused/appellant relied upon the report of ***Rustomje vs. State (AIR 1971 SC 1087), State of Punjab vs. Bhajan Singh (AIR 1975 SC 258), Sarad Vridhi Chandra Sarda vs. State of Maharashtra*** reported in ***1984 (4) SCC 116*** and ***Guna Mahto vs. State of Jharkhand*** reported in ***(2023) 6 SCC 817.***

ARGUMENT OF LEARNED COUNSEL FOR THE STATE

12. Learned APP, while opposing the appeal submitted that the accused/appellant was immediately apprehended after committing the occurrence by public having blood stained knife in hand. It is also submitted that the deposition of doctor, PW-11 *qua* nature of injuries also appears in corroboration with the nature of weapon for murder as alleged to be used for committing crime in question. It is submitted that accused/appellant was with deceased on last occasion and as

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such the circumstance is appearing so convincing which clearly established the guilt of accused/appellant beyond reasonable doubt. While arguing over the matter learned APP relied upon the report of ***State of Goa vs. Sanjay Thakran*** reported in ***2007 (3) SCC 255*** and submitted that "last seen" together becomes relevant in a case when there was no possibility of any other person meeting or approaching deceased at the place of incident or before the commission of crime in said intervening period and therefore, landing of learned trial court over finding of conviction is correct.

CONCLUSION

13. PW-4 is the informant of this case, namely, Ashok Prasad Bhagat, who appears to be a shopkeeper near to Banmankhi Railway Station, who came out from his shop on public alarm at about 9:30 PM. He came to know that one person is lying beside tea stall near to his shop in pool of blood and the person who assaulted with knife run away towards western direction. He closed his shop and went his home. It appears from his deposition that between 3:30 AM to 4:00 AM, police came to his house and obtained his signature on a white paper and his statement was never recorded during the course of investigation. This witness declared hostile by prosecution,

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where nothing substantial surfaced during his cross-examination by State, which may used for the purpose of contradiction and corroboration of the alleged fact. He specifically deposed in para 8th of his cross-examination that police did not show any knife to him. It also appears from his deposition that the temple, which is place of occurrence is also being used as night shelter by public, and priest of temple also remains there.

14. PW-1, Nago Sah, who is appearing a seizure list witness before I.O. of this case, seized blood stained knife from accused/appellant, where he deposed in para 6th that *"I signed over seizure list but did not read its content. I did my signature on the instruction of Darogaji"*.

15. PW-2, Kishore Chanchal, who is also a nearby shopkeeper, who came out from his shop on public alarm and found that accused/appellant was found running away in front of his shop, which is 100 mt. from alleged temple where occurrence took place. He caught hold accused/appellant with help of public, where appellant/convict first time disclosed his name as Amarnath Swarnkar and confessed to commit murder before public. It is appearing clear from his examination-in-chief that when public started to assault appellant/convict only after that he confessed to commit crime. It further appears from his

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deposition that more than 100 shops were available near to place of occurrence. He failed to depose the name of public who raised alarm. He also deposed to visit place of occurrence i.e. temple at about 10:30 PM and found blood stain thereof. He specifically deposed that the dead body was found 20-25 steps towards east near to a road from temple.

16. PW-3, Sharda Devi, who is mother of deceased, who deposed that it was accused/appellant who took away her deceased son Bhushan Swarnkar to Banmankhi in connection with employment. In cross-examination, this witness deposed that her deceased son was in inimical term with accused/appellant since last two years and out of said enmities her deceased son was not even in talking terms with accused/appellant.

17. PW-5, namely, Natho Sonar, who is brother of deceased and his entire deposition appears relevant to the extent with only aspect that deceased and accused/appellant were known to each other and they usually visited each other's home but some time they had hot exchange of words.

PW-6, Budhan Swarnkar, who is also appearing the brother of deceased, who categorically stated in para 7th that his deceased brother was not in inimical terms with anyone.

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18. The deposition of **PW-7,** Srawan Kumar Swarnkar is appearing more important in the context as he was the person, who was present at Durga Temple, which is the place of occurrence along with deceased and this accused/appellant, who consumed liquor and were sleeping together, where after some time certain people came apprehending Amarnath Swarnkar (accused/appellant) having blood stained knife in his hand and was disclosed to him that he committed murder of Bhushan Swarnkar. It also appears from his deposition that he along with accused/appellant were brought to local police station together. He was also put inside police Hazat for 24 hours and thereafter he was released on the basis of certain undertakings. Interestingly, in his cross-examination in para 6th, he deposed that accused/appellant was already available in police custody. It appears from his deposition that accused/ appellant also offered liquor to deceased and he also consumed liquor. From his deposition, it appears that on the date of occurrence several people were sleeping in said temple, where dead body/deceased was found 20 steps ahead toward east of temple. He disclosed his relation with deceased as cousin uncle. This witness also examined as a court witness no. 1, where he narrated almost in same manner as he deposed as PW-7.

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19. PW-8, Sair Ali, who is also a nearby shopkeeper to the place of occurrence, who declared hostile during the trial by prosecution and nothing substantial can be gathered from his cross-examination, which may be used for the purpose of corroboration.

20. PW-9, Rajendra Poddar, who is also a seizure list witness, who specifically deposed in his cross-examination that he neither read the contents of seizure list nor anyone explained him about the contents. He also claimed not to see any material as explained through seizure list.

21. PW-10, Md. Sayeed Khan, who is the investigating officer of this case who stated before the court during trial that during the course of investigation statement of witnesses were recorded by him. Details of alleged recovered knife, which was used by accused/appellant for committing murder was given by him as it was with 6 inch blade and 3 inch butt and said knife was also stained with blood. It was also deposed that said knife was recovered from the hand of accused/appellant. It appears that alleged knife was not produced before him, while he was deposing before the court, where he categorically stated in his cross-examination that he was not directed for examination of blood stained soil from

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place of occurrence and knife.

PW-12, Subodh Kumar, who is also the investigating officer of this case, recorded statement of witnesses during the course of investigation under Section 161 and 164 of the Cr.P.C. and thereafter, submitted charge-sheet against accused/appellant on 31.10.2010 *vide* charge-sheet no. 30/10.

22. PW-11, Dr. Yadubansh Kumar Sharma, who is a doctor and on 05.09.2010, he was posted at Sadar Hospital, Purnea as Medical Officer and on that day, he conducted post mortem examination on the dead body Bhushan Swarnkar aged about 30 years S/o Lodhai Soar by Village-Sitana, P.S.-Simari Bakhtiyarpur, Distt.-Saharsa at 3:00 P.M. and found following *ante mortem* injuries:-

> 1. Rigor Morties was present and one penetrating wound left Sab mandibular area measuring 5” deep x 1”x 1”.
>
> **<u>On Dissection</u>**
>
> 2. Head & Neck- Penetrating wound left sub-mandibular area which has severed left carolid artery, J’ugulac vein and trachea. Trachea was full of Blood.
>
> 3. <u>Thorax</u>:- Lungs congested and heart

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empty.

4. Abdomen :- Stomach was empty.

5. Small Int. :- Illegible fluid and gas present.

6. Large Int. :- Gas and illegible.

7. Uninary :- Buldder was empty.

8. Liver :- Spleen and Kidney was pale.

9. The time since death between 12-24 hours.

10. Caused of Death:- In my opinion to died of shock and hemorrhage following above mentioned penetrating injury.

This post mortem report is in my writing and signature and it is marked as **Extibit no. - 7**.

X X Cross Examination.

12. In post mortem report I have written in word "Ante mortem".

13. I have not mention in basis of time of 12 to 24 hours of death of deceased.

14. Column No. 6 of P.M. report has knowingly not filled up by me.

15. Jugular vein is coming from brain to

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heart.

16. No injuries is possible of 1" width by and instrument of 25 C.M. width.

23. PW-13, Santosh Kumar, who is also a nearby shopkeeper *qua* place of occurrence, who came outside from his shop on public alarm and found that public were holding accused/appellant and found them coming towards place of occurrence having blood stained knife in his hand. He deposed in his cross-examination that the persons, who were holding accused/ appellant were known to him and said public crowd was disbursed after 10-15 minutes as **pit** proceeded towards police station along with accused/appellant. He failed to give any description about the knife. It was also deposed by him that the accused/appellant was assaulted by public.

24. PW-14, Manish Singh, who is also appearing one of the nearby shopkeepers and also one amongst public, who apprehended accused/appellant along with blood stained knife. He identified accused/appellant before trial court as Amarnath Swarnkar who was apprehended along with blood stained knife by public on the date of occurrence. It was deposed by him that his statement was recorded by Investigating Officer of this case on same very day at police station. He

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deposed that it was the accused/appellant who was apprehended by him along with other local persons/nearby shopkeepers and was produced before the police. He denied the suggestion that he apprehended and handed over an innocent person to police after assaulting him brutally.

25. PW-15, Rabindra Jha, who is also seizure list witness, who produced seized knife before the court which was of 6 inch (blade + butt) in total length, having folding point in mid of blade and butt, where blade can be closed with butt. Alleged knife was exhibited as **Exhibit no. 1.** It appears from his cross-examination that the paper which was pested with knife was not bearing any seal and signature.

26. We have considered the submissions canvassed by the learned counsel for the parties. We have also perused the materials placed on record, where it appears that the present case rests heavily upon circumstantial evidence, where motive becomes a relevant factor. It appears from the deposition of PW-2, who apprehended accused/appellant with help of public about 100 mt. west to place of occurrence and when public started to assault accused/appellant it was disclosed by him that as he was in inimical terms with deceased Bhushan Swarnkar, he killed him by using knife. This fact was also deposed and

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supported by PW-13 and PW-14. These witnesses stated that accused/ appellant confessed before them that he committed murder of Bhushan Swarnkar. On critical analysis, it appears that this extra-judicial confession is immediate basis for implication of this appellant/accused. Now, the question is, whether this extra-judicial confession as confessed by accused/appellant before PW-2, PW-13 and PW-14 are reliable and sufficient to record the finding of conviction. From perusal of the depositions of these witnesses, it appears that when accused/appellant was apprehended by PW-2, number of public surrounded him along with PW-13 and PW-14 and when public started to assault him, only after that accused/appellant confessed that he committed murder of Bhushan Swarnkar with knife, which was in his hand, where motive of occurrence was confessed as previous enmities. The fact of case forced us to look into legal propositions as available under Section 24 of the Indian Evidence Act, which is as under:-

> ***24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.***—*A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the*

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> *accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."*

In the matter of ***Rustamji (supra),*** it has been held by Hon'ble Supreme Court that when the confession is hit by Section 24 of the Indian Evidence Act, same is not admissible. In order to be admissible as a confession, the confession must be true and voluntarily as it was held in ***Mahavir Bishwas vs. State (1995) 2 SCC 25.*** In the backdrop of legal positions and factual matrix, it is clear that extra-judicial confession of accused/appellant regarding committing murder of deceased Bhushan Swarnkar out of previous enmities was obtained only when he was assaulted physically and as such same is directly hit by provision laid under Section 24 of the Indian Evidence Act and as such, same is not appearing admissible. It is further held in the matter of ***Bhajan Singh (supra)*** that extra-judicial confession is a very weak type of evidence and when the court, taking into consideration surrounding circumstances, entertains about its voluntary nature, it will not be safe to rely upon it.

27. As it is evident from the deposition of PW-2

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that his shop is located 100 mt. east from Durga Temple, which is place of occurrence. He saw dead body towards east of said temple near to a road. PW-7 categorically stated that he along with accused/appellant and deceased were slepping together in said temple after consuming liquor. With the available set of depositions, prosecutions failed to explain, as how the body of deceased travelled up to 20-25 steps towards west, where occurrence took place at the temple. PW-7 was also arrested in connection with present case and he was also kept in police custody for 24 hours. Therefore, initially investigating agency was not sure that who is the real culprit of crime and entire implications appears presumptively proceeded with acquired assumption of guilt of the accused by the learned court below for the reason that accused/appellant was apprehended by private persons/public with blood stained knife, where confession was obtained by public after physical assault as discussed above. In the matter of ***Guna Mahto (supra) ,*** it was held in paragraph 17 as under:-

> *17. We may reiterate that, suspicion howsoever grave it may be, remains only a doubtful pigment in the story canvassed by the prosecution for establishing its case beyond any reasonable doubt. [Venkatesh v. State of Karnataka, 2022*

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SCC OnLine SC 765;Shatrughna Baban Meshram v. State of Maharashtra, (2021) 1 SCC 596;Pappu v. State of Uttar Pradesh, (2022) 10 SCC 321]. Save and except for the above, there is no evidence: ocular, circumstantial or otherwise, which could establish the guilt of the accused. There is no discovery of any fact linking the accused to the crime sought to be proved, much less, established by the prosecution beyond reasonable doubt.

28. Therefore, it appears that save and except suspicions nothing survives against this accused/appellant as to connect him with crime in question. It is further relevant to look into the depositions of PW-15, who brought seized knife before the Court from '*Malkhana'* (warehouse). He deposed before the court that the total length of knife was 6 inch including blade and butt, whereas PW-10, who is the I.O. of this case deposed in his examination-in-chief that length of knife was 9" (inch) out of which 6" (inch) was its blade with 3" (inch) butt, which was seized during the course of investigation. This creates a heavy doubt regarding case of prosecution as the knife which was produced before the court was total of 6" (inch). Interestingly, PW-4, who is the informant of this case categorically stated in his cross-examination that no knife was shown to him by police.

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He declared hostile also by prosecutions. PW-11, who is the doctor deposed specifically that the wound was penetrating and was 5" (inch) deep, which not appears possible to be caused by a knife having 3" (inch) of blade as produced before the court by PW-15. As per PW-11, autopsy conducting doctor stomach found empty, where nothing appears to suggest about presence of alcohol, which must ought to be there in view of deposition of PW-7. PW-11 categorically submitted that no injury of 1" (inch) width is possible by instrument of 0.25 cm width, which also creates a further doubt regarding use of alleged knife for committing crime in question by disturbing the entire chain of circumstances.

29. At this stage, it is apposite to take a guiding note from the legal report as reported through ***Sarad Vridhi Chandra Sarda (supra),*** the principles of "Panchsheel" was laid down, which must require to be established in a case based upon circumstantial evidence, as of present, which is as under:-

> *152. "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the*

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circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground far a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused." 153. 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 & Anr. v. State of Maharashtra (') 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

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> *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. 154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.*

30. It is our bounden duty to ensure that miscarriage of justice is avoided at all costs and the benefit of doubt, if any, be given to the accused, the principles which were laid down by Hon'ble Apex Court in the matter of ***Hanumant Govind Nargundkar vs. State of M.P.*** reported in ***(1952) 2 SCC 71***.

31. Accordingly, in view of above factual discussion and legal propositions, we find that prosecutions failed miserably to establish its case beyond reasonable doubt.

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32. Hence, the appeal stands allowed.

33. The impugned judgment of conviction dated 04.09.2014 and the consequent order for sentence dated 09.09.2014 passed by the learned Additional District and Sessions Judge, III, Khagaria in Sessions Trial No. 440 of 2010 arising out of Rail P.S. Saharsa (Banmankhi) Case No. 23 of 2010, are set aside. The accused/appellant is acquitted of the charges levelled against him. He is directed to be set at liberty forthwith unless his detention is required in any other case.

34. LCR, if any, be sent back to learned trial court along with the copy of this judgment. Fine if any paid by accused/appellant in furtherance of order of sentence, be refunded to him immediately.

(Vipul M. Pancholi, J)

(Chandra Shekhar Jha, J)

Archana/-

AFR/NAFR	AFR
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