

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.500 of 2013

(Appeal against the Judgment of conviction and sentence order dated 09.05.2013 and 16.05.2013 passed by the Additional Sessions Judge-II, Bhagalpur, in Sessions Trial No. 1348 of 2010 arising out of Kahalgaon P.S. Case No. 440 of 2009)

Arbind Yadav, Son of Mansadi Yadav @ Mansari Yadav, Resident of Village- Nadaya Tola, Police Station Kahalgaon, District- Bhagalpur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
Criminal Appeal (DB) No. 610 of 2013

Karu Yadav, S/O Late Gaina Yadav, Resident of Village- Nadiya Tola, P.S- Kahalgaon, District- Bhagalpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In Criminal Appeal (DB) Nos. 500 of 2013 & 610 of 2013)

For the Appellant/s :	Mr. Ranjan Kumar Jha, Advocate.
	Mr. Dr. Manoj Kumar, Advocate.
	Mr. Dharamveer, Advocate.
	Mr. Mritunjay Kr. Mishra, Advocate.
	Mr. Sweety Sinha, Advocate.
For the State :	Mr. S.C.Mishra (APP)
	Mr. Dilip Kr. Sinha, (APP)

CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA
and
HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA



ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA)

Date : 31-08-2018

1. Both the above stated Criminal Appeals have arisen out of common judgment of conviction and sentence order dated 09.05.2013 and 16.05.2013 respectively passed by learned Additional Sessions Judge-II, Bhagalpur, in Sessions Trial No. 1348 of 2010, by which and whereunder, he convicted both the appellants for the offences punishable under Sections 394, 302/34 of the Indian Penal Code and Section 27 of the Arms Act and sentenced them to undergo rigorous imprisonment for ten years each for the offence punishable under Section 394 of the Indian Penal Code and to undergo rigorous imprisonment for life each for the offence punishable under Section 302/34 of the Indian Penal Code and to undergo rigorous imprisonment for two years each for the offence punishable under Section 27 of the Arms Act though the minimum sentence under Section 27 of the Arms Act is up to three years. However, the learned Additional Sessions Judge-II, Bhagalpur, directed that all the sentences shall run concurrently. Since both the appeals have arisen out of the common judgment and sentence order, accordingly, both the above stated appeals were heard together and the common Judgment is being passed.



2. P.W.7, Purusottam Panigrah, gave his Fardbeyan to S.I. A.K.Roy (P.W.6) of Kahalgaon Police station on 17.09.2009 to this effect that on the same day, at about 7A.M., he along with his staff, Sikandar Kumar Shah, proceeded to go to village Shailendra by motorcycle bearing Registration No. BR-08B-3913 and as soon as, they reached between village Anadipur and Kahalgaon, three persons came on motorcycle and stopped him and his staff and snatched his bag containing Rs. 85,000/- and thereafter, took out Rs. 85,000/- and other articles from the aforesaid bag. However, his staff, Sikandar Kumar Shah, made protest but one of the culprits opened fire on him, as a result of which, he fell down on the ground, having sustained firearm injury. The culprits along with bag of the informant and cash took fled away from there.

3. On the basis of Fardbeyan of P.W.7, Kahalgaon P.S. Case No. 440 of 2009 for the offence punishable under Section 394 of the Indian Penal Code was registered against three unknown persons on 17.09.2009 but subsequently, after death of injured, Sikandar Kumar Shah, section 302 of the Indian Penal Code was added on 13.10.2009.

4. P.W.6, Arun Kumar Ray, took the charge of investigation and in course of investigation, he collected one chip of mobile in which allegedly, conversation of appellant, Karu Yadav with spy of police was recorded. P.W.6 got prepared Compact Disc (C.D.) of the



aforesaid chip and seized the aforesaid C.D. in accordance with law. However, before completion of investigation, he handed over charge of investigation to P.W.5, Rajeshwar Prasad Singh, who completed the investigation and after completion of investigation submitted charge sheet against the appellants for the offences punishable under Sections 394 and 302 of the Indian Penal Code. The cognizance of the offence was taken and the commitment of the case was made in usual course. The appellants were put on trial and stood charged for the offences punishable under Sections 394, 302/34 of the Indian Penal Code and Section 27 of the Arms Act. They denied the charges and claimed to be tried.

5. In course of trial, prosecution examined, altogether, ten prosecution witnesses and also got exhibited inquest report, postmortem report and seizure list etc. and got exhibited Compact Disc as material Ext. *Ka*. The statements of appellants were recorded under Section 313 of the Code of Criminal Procedure in which they denied the prosecution case and claimed themselves to be innocent. No evidence was produced by the appellant in support of their defence but from perusal of the statement recorded under Section 313 of the Code of Criminal Procedure, it is obvious that the appellants are claiming themselves to be innocent.



6. Learned trial court having analyzed the evidences available on the record passed the judgment of conviction on the basis of material Ext. *Ka* and held that in the aforesaid Compact Disc, the conversation of appellant Karu Yadav with spy of police was recorded and the aforesaid conversation fully proves the guilt of appellants.

7. Learned counsel appearing for the appellants challenged the impugned Judgment of conviction and sentence order arguing that the learned trial court failed to take note of this fact that the material Ext. *Ka* has not been brought in evidence in accordance with Section 65 (B)(4) of the Indian Evidence Act, 1872. He submits that no doubt, the electronic evidence is admissible in evidence but before admitting the electronic evidence, the Court has to see, as to whether the requirements, as mentioned in Section 65(B)(4) of the Indian Evidence Act, have been complied with or not and if the requirements of Section 65(B)(4) of the Evidence Act have not been complied with, the electronic evidence cannot be taken in evidence. He submits that in present case, the prosecution completely failed to comply with the mandatory provision of Section 65(B)(4) of the Evidence Act, and, therefore, material Ext. *Ka* has no evidenciary value in the eye of law. He, further, submits that moreover, the prosecution failed to prove that the voice recorded in material Ext. *Ka*, was the voice of appellant, Karu Yadav, and furthermore, the prosecution failed to bring evidence



on record to show that so called mobile, by which, the aforesaid conversation was made was of the appellant, Karu Yadav, and except the bald statement of P.W.6 in this regard, there is no any other evidence to sow that the appellant had talked with spy of police on his mobile phone. He, further, submits that P.W.7, the informant of this case, is only an eye witness of the alleged occurrence, but P.W.7 has, nowhere, claimed to have identified the appellants, even in course of trial. He, further, submits that the appellants were not put on Test Identification Parade and except the so called recorded conversation of the appellant Karu Yadav, there is nothing against the appellants.

8. On the other hand, learned Additional Public Prosecutor for the State supported the impugned Judgment of conviction and sentence order arguing that material Ext. *Ka* clearly establishes the involvement of the appellants in such a heinous crime, in which, one person was killed for the purpose of loot and he, further, submits that the learned trial court rightly convicted the appellants on the basis of material Ext. *Ka*.

9. Having heard the contentions of both the parties, we went through the record. P.W.2 and P.W.3 are witnesses of seizure list and P.W.2 stated that police had given a chip for preparation of Compact Disc to him but he expressed his inability to say what was in the aforesaid Compact Disc. P.W.3 simply stated that he had signed the



seizure list, but he expressed his inability to say what was in the seizure list. P.W.1 Vijay Kumar, P.W.4 Brajesh Kumar, P.W.8 Akhilesh Kumar Singh and P.W.10 Babloo Kumar are the officials of the finance company of P.W.7 and all the aforesaid prosecution witnesses stated that after the occurrence, they learnt that Sikandar Kumar Shah sustained firearm injury in a case of loot. The aforesaid witnesses are not the eye witness of the alleged occurrence nor P.W.7 disclosed the name of any culprits to them.

10. P.W.7, Purusottam Panigrah, is the informant of this case. This witness supports the occurrence of loot and murder but this witness has also not disclosed the name of any culprits.

11. P.W.5, Rajeshwar Pd. Singh, has simply stated that he completed the investigation and submitted charge sheet at the direction of his higher officials.

12. P.W.9, Dr. Arun Kumar Singh, is a doctor who had conducted the postmortem examination on the dead body of deceased, Sikandar Kumar Shah.

13. The most important evidence is of P.W.6, Arun Kumar Ray. This witness states at paragraph 5 of examination-in-chief that in course of investigation, he contacted his spy and came to know that four persons were involved in the alleged crime and he also came to know that the appellants and two other persons were absconding from



their respective houses. This witness, further, states at paragraphs 8 and 9 of his examination-in-chief that he directed his spy to get the conversation with appellants recorded and, thereafter, his spy got recorded the conversation of appellant, Karu Yadav, in his mobile. P.W.6 states that mobile no. 9097543120 and mobile no. 9504330536, where of appellant Karu Yadav, whereas mobile no. 9162885354 was of one Ajay Gupta. He, further, states that the location of mobile of appellant, Karu Yadav, was found near Bhagalpur. This witness, further, states at paragraph 12 of his examination-in-chief that he got prepared Compact Disc of the above stated conversation and also recorded the conversation of appellant, Karu Yadav, at paragraphs 103 and 104 of the case diary. This witness, further, states that he seized the aforesaid Compact Disc. On being cross-examined by the defence, this witness admitted at paragraph 17 that he did not take any step to ascertain this fact, who was owner of the above stated mobiles. This witness, further, states that he did not take any steps to get the Compact Disc examined in Forensic Lab. He also admitted that he did not put the appellants on Test Identification Parade. Further at paragraph 20 of his cross examination, this witness admitted that except mobile and Compact Disc, he did not find any other evidence against the appellants.



14. On perusal of the evidence of P.W.6, it is explicit clear that except mobile and Compact Disc, there is no any other evidence against the appellants. P.W.6, in course of his examination, produced the seized Compact Disc, which was marked as Ext. *Ka*. Now, it has to be seen as to whether the aforesaid Compact Disc has been exhibited in accordance with law or not. Section 65(B) of Evidence Act says that contents of electronic records may be proved in accordance with the provision of Section 65(B) of the Evidence Act. Section 65(B) of the Evidence Act prescribes the mode for proof of contents of electronic records but has put certain riders which have been described in sub-clause 2 of Section 65(B) of the Evidence Act. Sub-clause 4 of Section 65(B) of Evidence Act says that in any proceeding, where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things i.e. to say;

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-Section 2 relate, and purporting to be signed by a



person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this Sub-section, it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

15. Admittedly, in the present case no separate certificate has been given in respect of the aforesaid Compact Disc and prosecution has brought only seizure list of the aforesaid Compact Disc. In our view, the aforesaid seizure list cannot be treated as certificate, as required by Sub-clause 4 of Section 65(B) of the Evidence Act, because the aforesaid seizure list says only that a Compact Disc was seized from a shop in presence of the witnesses but there is nothing in the aforesaid seizure list to show as to in which manner and by which device, therefore, in our view, the prosecution could not succeed to prove the authenticity of the aforesaid Compact Disc in accordance with law and the aforesaid compact Disk (Material Ext. *Ka*) is not admissible in evidence. Furthermore, the impugned Judgment goes to show that the learned trial court mentioned in the impugned Judgment that the seized C.D. was played in the court on Laptop and after listening the aforesaid C.D., the learned trial court came to conclusion that the voice recorded in the aforesaid C.D. was



of appellant, Karu Yadav, but in our opinion, only by listening the C.D., no one can say with certainty that the voice recorded in a C.D. is a voice of a particular person, unless the voice recorded in the C.D. is compared with the voice of the aforesaid person in Forensic Science Laboratory.

16. In the present case, no attempt was made by the prosecution to get the voice of appellant compared with the voice recorded in the C.D. (material Ext. *Ka*) and, therefore, in our view, learned trial court committed an error in coming to the conclusion that the voice recorded in C.D. (material Ext. *Ka*), was voice of appellant Karu Yadav. Furthermore, we are of the opinion that when the prosecution failed to bring material Ext. *Ka* in evidence in accordance with law and except the aforesaid material Ext. *Ka* (Compact Disc) and mobile number, there is no any other evidence to show the involvement of the appellants in the alleged crime, the conviction and sentence order of the appellants cannot be sustained.

17. Furthermore, we would like to note here that the learned trial court while recording the statement of appellants under Section 313 of Cr.P.C. did not put specific question in respect of the recorded conversation of appellant Karu Yadav with spy of the police nor put specific question to appellant Karu Yadav in respect of his so-called mobile numbers. The above stated latches of the trial court has



caused serious prejudice to appellants as they could not get opportunity to explain the circumstances which have been taken by the learned trial court for convicting the appellants. Since there are other infirmities also in the prosecution case, we do not think it proper to send the case to the trial court for recording the statement of appellants under Section 313 of the Cr.P.C. afresh.

18. On the basis of the aforesaid discussions, both the above stated Criminal Appeals are allowed and the impugned Judgment of conviction and sentence order are, hereby, set aside and both the appellants are acquitted of the charges. Appellant, Karu Yadav, is in jail custody and accordingly, he is ordered to be released forthwith from jail custody, if not wanted in any other case. The office is directed to issue release order of appellant, Karu Yadav at once. So far as the appellant, Arbind Yadav, is concerned, he is on bail, he is discharged from liabilities of his bail bonds.

(Hemant Kumar Srivastava, J)

Bhardwaj/ Rahul

(Rajendra Kumar Mishra, J)

AFR/NAFR	
CAV DATE	
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