

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.596 of 2007

Ashok Kumar Soni son of Late Ved Prakash Soni Resident of Village-
Anupgarh, Police Station Anupgarh, District- Sri Ganga Nagar (Rajasthan) at
present B.O.P. Madhwapur, S.S.B. 9th Battalion, Sitamarhi.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Anil Singh, (*Amicus Curiae*)
For the State : Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE KHATIM REZA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 23-11-2023

This appeal has been preferred by the appellant under Section 374(2) of the Code of Criminal Procedure, putting to challenge the impugned judgment of conviction dated 13.04.2007 and the order of sentence dated 18.04.2007, passed by learned Sessions Judge, Madhubani in Sessions Trial No.152 of 2006, arising out of Madhwapur P.S. Case No. 84 of 2005 corresponding to G.R. No. 1558 of 2005, whereby the appellant has been convicted and sentenced as under:



Cr. Appeal (DB) No. 596 of 2007				
Appellant	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Ashok Kumar Soni	Under Sections 302 of the IPC	R.I. for life	--	--
	Under Section 307 of the IPC	R.I. for ten years	--	--
	Under Section 27 of the Arms Act	R.I for five years	--	--

2. All the sentences have been ordered to run concurrently.

3. The informant Subhash Singh (PW-1) was posted as Incharge, Border Outpost (BOP in short) camp, Madhwapur under Sashastra Seema Bal (SSB), Sitamarhi, 9th Battalion. His *fardbeyan* recorded by the Officer- Incharge of Madhwapur Police Station on 23.09.2005 at 11:30 PM at BOP camp, Madhwapur is the basis for registration of the concerned Madhwapur P.S. Case No. 84 of 2005 on 24.09.2005, disclosing commission of offence punishable under Sections 302 and 307 of the Indian Penal Code (IPC in short) and Section 27 of the Arms Act. The proforma of the FIR indicates that the FIR was registered at 9:00 AM on 24.09.2005. The distance of the police station from the place of occurrence has been shown to be one kilometer.

According to the informant, there were altogether 25 *Jawans* (constables of the SSB) at the roll call in the evening on the date of occurrence. At the time when the was sitting near the



'front guard' and talking to constable Kewal Singh (not examined) at 10:15 PM, he heard several rounds of firing. Apparently, in order to protect himself, he proceeded crawled towards his room and in the meanwhile, he heard 5-6 rounds of firing. Upon equipping himself with a torch and a service carbine, he proceeded towards the direction from which the firings were made whereafter, he noticed a constable Mohan Lal lying on the cot, profusely bleeding and having sustained firearm injuries. It further appears from his *fardbeyan* that soon thereafter other constables also came and noticed the dead body of the deceased lying on the cot. They also noticed that another constable Indraj (PW-9) had also sustained firearm injury. PW-9 was immediately shifted to a hospital for treatment. Further, after getting PW-9 admitted in hospital, he returned to the camp and started inquiring about the the incident. The informant specifically alleged in his *fardbeyan* that he learnt from the 'rear guard' constable [name not disclosed in the *fardbeyan* but subsequently disclosed by the informant in his evidence at the trial as Ashok Singh (PW-3)] that the appellant was consuming liquor with the deceased and had killed the deceased by using the service Self Loading Rifle (SLR) of the deceased whereafter, he kept the said SLR by the side of the cot, on which the deceased was lying and left the place of occurrence. He is said



to have also disclosed the informant that because of the shots fired by the appellant the Indraj (PW-9) had also sustained firearm injury, as he was lying in a cot nearby the cot in which the deceased was found dead. The informant asserted in his *fardbeyan* that the appellant after snatching the SLR of Mohan Lal (the deceased) killed him and injured Indraj (PW-9). The police, upon completion of investigation, submitted chargesheet on 25.12.2005 whereafter cognizance was taken of the offences punishable under Sections 302 and 307 of the IPC and Section 27 of the Arms Act. The case was committed to the Court of Sessions for trial.

4. At the trial, the appellant was charged of commission of offence punishable under Sections 302 and 307 of the IPC and Section 27 of the Arms Act. The appellant denied the charge and claimed to be tried.

5. At the trial, the prosecution examined altogether 16 witnesses, including the informant (PW-1), the Investigating Officer (PW-15), the doctor who had conducted the postmortem examination (PW-13) and the doctor who had examined the injured constable (PW-14). The son of the deceased Sunil Bishnoi was examined as PW-16. Rest of the witnesses, who were examined at the trial, i.e., PW-2 (Om Prakash), PW-3 (Ashok Singh), PW-4 (Parmatma Singh), PW-5 (Amar Singh), PW-6



(Choga Ram), PW-7 (Shambhoo Das), PW-8 (Balbir Choudhary), PW-10 (Nand Ram), PW-11 (Rajendra Prasad) and PW-12 (Ramesh Chandra Sharma), were the constables of the SSB who were posted at BOP, Madhwapur Camp. The injured constable Indraj deposed at the trial as PW-9. We consider it apt to notice, at this juncture itself that Ashok Singh (PW-3), who according to the informant, had told him that it was the appellant who had killed the deceased and injured PW-9 did not support the prosecution's case and accordingly he came to be declared a hostile witness at the instance of the prosecution. The injured constable (PW-9) also did not support the prosecution's case and, therefore, he too came to be declared hostile at the instance of the prosecution. Further two other witnesses, namely, PW-2 (Om Prakash) and PW-5 (Amar Singh) also did not support the prosecution's case and came to be declared hostile at the instance of the prosecution. PW-4 (Parmatma Singh), PW-6 (Choga Ram), PW-7 (Shambhoo Das), PW-8 (Balbir Choudhary), PW-10 (Nand Ram), PW-11 (Rajendra Prasad) and PW-12 (Ramesh Chandra Sharma) are hearsay witnesses. The son of the deceased (PW-16) is also a hearsay witness. Further, it emerges from the evidence of the PW-10, PW-11, PW-12 and PW-16 that they were deposing at the trial for the



first time and they were not examined by the police during the course of investigation.

6. The appellant, according to the Investigating Officer, had confessed his guilt whose confessional statement (Exhibit-8) was recorded by him in acknowledgement of which the appellant had put his signature. Apart from the oral evidence of the prosecution's witnesses, the prosecution brought on record at the trial, following documentary evidence in support of the charge:-

Sl. No.	Description	Exhibit No.
1	Signature of PW-1, Subhash Singh on <i>fardebayan</i>	Exhibit-1
2.	Signature of Om Prakash Singh on <i>fardebayan</i> in English and Hindi	Exhibit-1/1
3.	<i>fardebayan</i>	Exhibit-2
4	Signature of PW-1, Subhash Singh on seizure list	Exhibit- 1/2
5	Signature of Parmatma Singh on Seizure list	Exhibit 1/3
6	Seizure list	Exhibit-3
7	Postmortem Report of Mohan Lal	Exhibit-4
8	Injury Report of Sri Indraj	Exhibit-5
9	Case Diary, Page 1 to 41 pages	Exhibit-6
10	FSL Report bearing no. 945/2005 dated 13.02.2006	Exhibit-7

7. After closure of the evidence of the prosecution the appellant was examined under Section 313 of the Code of



Criminal Procedure (CrPC in short) by the trial court, so as to give him an opportunity to explain the incriminating circumstances emerging against him, based on the evidence of the prosecution's witnesses. The trial court, after having scrutinized and appreciated the evidence adduced at the trial, has convicted the appellant of the offences punishable under Sections 302 and 307 of the IPC and Section 27 of the Arms Act and sentenced him to undergo imprisonment, as has been noted at the outset.

8. When this appeal was called out for final hearing, there was no representation on behalf of the appellant. As the appeal was pending since 2007, it was deemed appropriate by this Court to appoint an *amicus curiae* to present the case of the appellant. On the Court's request, Mr. Anil Singh, learned counsel agreed to assist this Court as an *amicus curiae* to present the appellant's case. Accordingly, we have heard Mr. Anil Singh, learned *amicus curiae* and Ms. Shashi Bala Verma, learned Additional Public Prosecutor for the State.

9. Mr. Anil Singh, learned *amicus curiae* has at the outset, submitted that the entire case of the prosecution becomes doubtful because of inordinate delay in forwarding the First Information Report to the court inasmuch as for an occurrence said to have taken place on 23.09.2005, the FIR was registered on



24.09.2005, a copy of which was received in the court of learned Chief Judicial Magistrate on 26.09.2005. He further submits that the entire case of the prosecution is based on the confessional statement of the appellant recorded by the Investigating Officer and there is no other material worth evidence on record to prove the charges against the appellant. He has further argued that according to the Investigating Officer, the appellant was arrested at 1:30 AM on 26.09.2005 at the camp itself. He has vehemently argued that the confessional statement of the nature recorded by the police, when the appellant was in custody is not admissible in evidence, in view of the statutory bar under Sections 25 and 26 of the Evidence Act. He has also argued that the finding of conviction recorded by the trial court verges on perversity for the reasons that there is no eye-witness to the occurrence and there is no evidence at all adduced at the trial which can be said to be proving the appellant's role in commission of offence based on circumstantial evidence. He has placed reliance on a Supreme Court decision rendered in the case of *Chotkau v. State of Uttar Pradesh* reported in 2022(4)PLJR (SC) 385 to submit that delayed transmission of FIR to the Court by the police renders the prosecution's case doubtful. Referring to the depositions of the witnesses, he has submitted that the prosecution's evidence on the point of arrest of



the appellant is not consistent rather self-contradictory. He has further argued that the trial court has committed gross error by taking in evidence entire case diary exhibited at the trial by way of Exhibit-6. Relying on the Supreme Court's decision in case of ***Habeeb Mohd. v. State of Hyderabad***, reported in ***(1953) 2 SCC 231*** and ***Shamshul Kanwar v. State of U.P.***, reported in ***(1995) 4 SCC 430*** he contends that police diary is neither substantive nor corroborative evidence and the trial court was in error making use of the police diary. He has further argued that the prosecution's witnesses have deposed, at the trial, that after the occurrence, the appellant was found discharging his duties as constable in the camp till he was formally arrested by police. He contends that it is highly improbable that after having committed an offence of such nature, the appellant would have continued discharging his duties as constable in the BOP camp. He has also submitted that though mark of finger print available on SLR used for committing the offence was obtained by the forensic team and sent for forensic examination along with the finger print of the appellant for the purpose of matching, the prosecution did not bring on record during the trial the outcome of the said forensic examination to connect the appellant with the occurrence leading to death of the deceased and injury caused to PW-9 (Indraj). He submits that



result of forensic examination would have been a significant piece of evidence to establish the appellant's role or his innocence. Failure on the part of the prosecution to establish at the trial that the mark of the finger print available on the SLR was that of the appellant is fatal to the prosecution's case and the appellant deserves acquittal on this ground alone.

10. Learned Additional Public Prosecutor appearing on behalf of the State defending the finding recorded by the trial court has submitted that though the witnesses have not fully supported in their depositions at the trial, the appellant's role in commission of offence, the circumstances emerging from the evidence of the prosecution witnesses coupled with the confessional statement of the appellant recorded by the police while in custody proves the appellant's role in commission of offence. She submits that the circumstances suggest eloquently that it was the appellant who had killed the deceased upon snatching his service SLR and injured PW-9 (Indraj).

11. We have perused the impugned judgment and order of the trial court as well as the trial courts records. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties. We find force in the submission advanced on behalf of the appellant that in the present set of facts and



circumstances, the confessional statement of the appellant said to have been recorded by the police while in police custody is inadmissible in view of the clear provision under Sections 25 and 26 of the Evidence Act. It is not in dispute that the said confessional statement said to have been recorded by the police when the appellant was in custody did not lead to discovery of any fact. Apart from the said confessional statement of the appellant, which is the sheet anchor of the prosecution's case, upon close scrutiny of the evidence of all the prosecution's witnesses, we are satisfied that the charge of commission of the offences punishable under Sections 302 and 307 of the IPC and Section 27 of the Arms Act cannot be said to have been proved against the appellant beyond all reasonable doubts. This is also for the reason, as has been noted hereinabove, that evidently, there is no eye witness to the occurrence. The informant, in his *fardbeyan*, had mentioned that a rear guard (constable) had told him (informant) that it was the appellant who had shot dead the deceased and injured PW-9. Name of the said rear guard was not mentioned in the *fardbeyan*. In his evidence at the trial, the informant disclosed the name of the said rear guard as Ashok Kumar Singh (paragraph 2 of evidence of PW1). Ashok Kumar Singh has been examined at the trial as PW-3, who has not supported the prosecution's case and has



accordingly been declared hostile at the instance of the prosecution. We do not find any incriminating circumstance emerging from the evidence of PW-3, who has been declared hostile supporting the prosecution's case in any manner. Thus, the only person who, according to the informant, had seen the occurrence and had told the informant did not support the prosecution's case at the trial.

12. PW-9 is another important witness in this case who himself had sustained firearm injury said to have been caused by the same service SLR belonging to the deceased. PW-9 has also not supported the prosecution's case and has been declared hostile. Further PW-2 and PW-5, constables posted at BOP camp have not supported the prosecution's case and have been declared hostile. The depositions of PWs 4,6,7,8,10,11,12 and 16 are of no evidentiary value, they being hearsay witnesses. We also find force in the submission made on behalf of the appellant as regards conduct of the appellant subsequent to the occurrence. The informant (PW-1) deposed at the trial that when all the constables were made to stand down in line after the occurrence, the appellant was there. His evidence further suggests that the appellant remained in the camp till his arrest by the police. PWs 2,4,6,7,8,10 and 11 have deposed in no uncertain terms that the appellant was



discharging his duties in the camp and had also performed his duties in the night. PW-10 in his evidence deposed that after he had come out from the barrack after the occurrence he had seen the appellant sleeping in his cot.

13 On close scrutiny of the depositions of the prosecution's witnesses, we are of the view that the prosecution cannot be said to have proved the charge against the appellant of commission of offence punishable under Sections 302 and 307 of the IPC and Section 27 of the Arms Act. Though several points have been raised on behalf of the appellant by learned *amicus curiae* while presenting the appellant's case, we need not go into all such aspects since we are of the view that prosecution has miserably failed to prove the appellant's guilt beyond all reasonable doubts. It has been rightly pointed out by Mr. Anil Singh learned *amicus curiae*, referring to Supreme Court's decision in case of ***Dilavar Hussain versus State of Gujarat and another reported in (1991) 1 SCC 253*** that acquittal or conviction depends on proof or otherwise of the criminological chain which invariably comprises of why, where, when, how and who. In order to prove an offence, each knot of the chain has to be proved, beyond shadow of doubt. Each link must be so consistent that the



only conclusion which must follow is that the accused is guilty.

The Supreme Court in case of ***Dilavar*** (supra) has observed :-

“No free man should be amerced by framing or to assuage feelings as it is fatal to human dignity and destructive of social, ethical and legal norm. Heinousness of crime or cruelty in its execution howsoever abhorring and hateful cannot reflect in deciding the guilt.”

14. Accordingly, for the reasons set out hereinabove, the appellant stands acquitted of the charge of offences punishable under Sections 302 and 307 of the IPC and Section 27 of the Arms Act. The impugned judgment of conviction dated 13.04.2007 is hereby set aside. The order of sentence dated 18.04.2007 also stands set aside.

15. This appeal is accordingly allowed.

16. Since the appellant is on bail, he stands discharged from the liability of his bail bonds and sureties, if any.

17. Before we part with the present judgment we must indicate that we totally disapprove the trial court's approach permitting the entire case diary being marked as Exhibit which is hit by the provision under Section 172(2) of the CrPC which reads as under:-

“(2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such



Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.”

18. We put on record our sincere appreciation for the effective and valuable assistance extended to this Court by Mr. Anil Singh learned *amicus curiae*. This Court has noticed the commendable preparation made by him while assisting this Court. We direct the Patna High Court Legal Services Committee to pay to Mr. Anil Singh a sum of Rs. 20,000/- (Twenty Thousand) as a token amount for extending valuable assistance to this Court in deciding this appeal.

(Chakradhari Sharan Singh, J)

(Khatim Reza, J)

Shyambihari/
Suraj-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	11-12-2023
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