

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.620 of 2023

Arising Out of PS. Case No.-275 Year-2019 Thana- MUNGER MUFFASIL District- Munger

Md. Danish Son of Late Saiyad Alam Resident of village - Sujawalpur, P.S. -
Muffasil, Distt. - Munger

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 656 of 2023

Arising Out of PS. Case No.-275 Year-2019 Thana- MUNGER MUFFASIL District- Munger

Gulsan Ara Wife of Md. Arshad Resident of Churamba, P.S. - Bariyarpur,
Distt. - Munger, presently residing at village Sujawalpur, P.S. - Mufassil,
Distt. - Munger

... .. Appellant/s

Versus

1. The State of Bihar
2. Md. Aarif @ Ashraf @ Vikas Son of Amanullah
3. Md. Ezaz Son of Md. Mukhtar
4. Md. Shahbaz @ Wit Son of Shakil

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 620 of 2023)

For the Appellant/s : Mr.Vaishnavi Singh, Adv.

For the Respondent/s : Mr. Abhimanyu Sharma, APP

(In CRIMINAL APPEAL (DB) No. 656 of 2023)

For the Appellant/s : Mr. P.N. Shahi, Sr. Adv.

Mr.Shivam, Adv

For the Respondent/s : Mr. Abhimanyu Sharma, APP

For Respondent No. 2 : Mr. Kumar Kamal Nayan, Adv.



CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE JITENDRA KUMAR
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 10-09-2024

1. Md. Danish, the appellant of Cr. Appeal (DB) No. 620 of 2023 has challenged his conviction under Sections 302/34 IPC and Section 27 of the Arms Act by the learned Additional District & Sessions Judge -I, Munger vide his judgment and order dated 25.04.2023/02.05.2023 passed in Sessions Trial No. 36 of 2020, arising out of Muffasil P.S. Case No. 275/2019, whereby, he has been sentenced to undergo R.I. for life along with a fine of Rs. 20,000/- and in default of payment of fine, to further suffer S.I. for six months for the offence under Section 302 IPC and R.I. for three years for the offence under Section 27 of the Arms Act.
2. He had been put on trial along with his three other associates who have been acquitted by the Trial Court.



3. Two young persons were murdered. The mother of one of the deceased has challenged their acquittal vide Criminal Appeal (DB) No. 656/2023.
4. Both the appeals have been heard together and are being disposed off by this common judgment.
5. For appellant/Md. Danish, we have heard Ms. Vaishnavi Singh, the learned Advocate whereas for the appellant /Gulsan Ara, the mother of one of the deceased, who has challenged the acquittal of respondents/Md. Aarif @ Ashraf @ Vikas; Md. Ezaz and Md. Shahbaz @ Wit, we have heard Mr. P.N. Shahi, the learned Sr. Advocate assisted by Mr. Shivam. The State, in both the appeals, has been represented by Mr. Abhimanyu Sharma, the learned APP. We have also heard Mr. Kumar Kamal Nayan, the learned Advocate for one of the respondents, namely, Md. Arif in Criminal Appeal (DB) No. 656/2023.
6. In a loathsome incident on 20.09.2019, two young students who had gone to a common place to



exchange notes were killed by gunshot. They belonged to two different communities. The mother of one of the deceased ('X'), namely, Nitu Kumari (PW3) had lodged a written report addressed to the Officer-in-Charge of Munger (Muffasil) police station on 21.09.2019 alleging therein that on the previous evening i.e. on 20.09.2019, her daughter had gone out of her house at 6.00 P.M. for collecting notes from Asif, another deceased. When she did not return till about 7.30 P.M., PW3 called on her mobile telephone, when 'X' told her that she would be coming home shortly. When she did not return, PW3 came out of her house in search of her daughter. It was further alleged by PW3 that the brother-in-law of Asif, namely, Dr. Mahid Ahmad (PW4) called her at about 11.00 'O' Clock in the night and informed her that somebody has killed 'X' and Asif, both. On the information that the dead bodies were lying in the mango orchard, PW3 started wailing and contacted Rajesh Kumar, the husband of her sister, who



incidentally has not been examined at the Trial. Along with Rajesh Kumar, PW3 went to the mango orchard where she found the dead body of 'X'. She also saw the dead body of Asif. A huge crowd had congregated there. She, therefore, requested that the miscreants be nabbed and punished.

7. On the basis of the afore-noted written report, a case vide Munger (Muffasil) P.S. Case No. 275 of 2019 dated 21.09.2019 was registered for investigation under section 302/34 IPC and Section 27 of the Arms Act.

8. The F.I.R was registered at about 2.30 A.M. in the morning of 21.09.2019. However, the same was sent to the Court of the Chief Judicial Magistrate only a day after i.e. on 22.09.2019. It further appears from the records that at around the same time that 'X' had not returned to her home, Vinay Kumar Singh (PW6), the Officer-in-Charge of Munger (Muffasil) police station had received a secret information that two persons have been killed near the block field. On



such information received in the police station at 9.40 P.M. on 20.09.2019, PW6 along with Pappan Kumar and Lalit Kumar, the police officers posted in the police station and the police team proceeded to the P.O. At the P.O., PW6 saw a huge crowd surrounding the two dead bodies, one of Asif's and other of 'X'. He promptly swung into the action and secured the P.O. so that the crime scene is not compromised. He had taken special care for the reason that two youths belonging to two different communities had been killed. Since it was late in the night therefore with the help of dragon light, the place was inspected. This was done after the inquest on the dead bodies were done (Ext. 9).

9. At the P.O., PW6 could spot a black coloured scooty of Honda company and a ladies sandal near the dead bodies. Those were also seized and seizure lists were made (Ext. 10 and 10/1). All this happened on the PW6 and his team having reached the P.O. without any clue as to who had killed the deceased.



10. Till such time there was no suspicion against anyone.
11. After the F.I.R. was registered in the wee hours of 21.09.2019, PW6 again visited the P.O. and took stock of the dead bodies. From the trouser pocket of Asif, the keys of the scooter was found. The clothes of 'X' was found to be dishevelled. She appeared to have been hurt on her head and was also bleeding. There were superficial wounds on her neck as well. The police team awaited the arrival of FSL team. However, before the FSL team arrived, a spot map was prepared (Ext. 11).
12. It was sometimes around the morning of 21.09.2019 that PW6 had learnt through his assets/sources that one Md. Danish/appellant was spotted talking to Asif between 7 to 8 P.M. on 20.09.2019.
13. Taking this as a breakthrough lead, PW6 immediately proceeded for the house of Md. Danish where he was found to be hiding beneath a cot. He



was interrogated. After some reluctance, Md. Danish is said to have confessed his guilt and also named his associates in the crime, namely, Md. Aarif @ Ashraf @ Vikas Md. Ezaz and Md. Shahbaz @ Wit (the respondents in Cr. Appeal (DB) No. 656/2023).

14. On the pointing of Md. Danish, the mobile telephones of Asif and 'X' were recovered from near the house of one Md. Saadullah. The mobile phones were found to have been thrown in the nearby bush. Those were seized. The seizure list was prepared by a police officer, namely, Lalit Kumar and signed by Mahesh Prasad and Santosh Kumar (Ext. 12).

15. Thereafter, on the pointing of Md. Danish, a pistol was also recovered near the house of one Md. Sonu. The pistol was loaded with two cartridges of 7.65 bore. That was also seized but without any local witness as nobody was ready to be the seizure witness. The seizure list of the loaded pistol was also prepared by Lalit Kumar and signed by Mahesh Prasad and Santosh Kumar (Ext. 13).



16. It was thereafter that Md Danish was formally arrested and an attempt was made to nab his associates, namely, Md. Aarif @ Ashraf @ Vikas; Md. Ezaz; and Md. Shahbaz @ Wit.
17. His confession was also recorded.
18. Before the Trial Court, PW6 has narrated the entire sequence of events confessed by Md. Danish. This was put on record but under protest by the defense.
19. We have purposely eschewed from referring to the confession of Md. Danish through the mouth of PW6 for the reasons that shall be explained later.
20. After the recovery of the weapon, another empty cartridge of 7.65 bore was recovered from near a wall of the house of Md. Danish which also was seized and a seizure list was prepared (Ext. 14). Since Md. Danish had narrated in his confession that he and his associates were smoking grass before they decided to go to the P.O. A pot (smoking pipe) meant for smoking grass was also recovered at the instance of



Md. Danish (Ext. 15).

21. This is how the police came to the conclusion that Md. Danish and his associates had committed the double murder.

22. PW6 unwittingly believed the afore-noted confession and taking into account the recoveries referred to above, it was concluded by him that Md. Danish attempted to and committed rape on 'X' and, thereafter, shot her and Asif dead.

23. Very surprisingly, all this had happened in the presence of Md. Mobassir and Md. Gulzar Ahmad, both in their teens and who have been examined as PWs 1 and 2 at the Trial.

24. Gulzar (PW2) is the cousin of Asif, who gave statement to PW6 but only after the confession of appellant / Md. Danish, that he was called by Asif. He, then took along Md. Mobassir to the field where Asif was camping. In his presence, Md. Danish, Asif and 'X' went to some distance. Later, he heard two gunshots. Shortly thereafter, Md. Danish is said to



have approached him and threatened that he should not disclose his name to anybody.

25. Similar statement has been made by Mobassir (PW1).

26. Both of them told PW6 that after the occurrence, they came back to their homes; tried to contact the family of Asif and then again went to the P.O. and in their presence, the police had arrived.

27. Ms. Vaishnavi Singh, the learned Advocate for the appellant / Md. Danish has argued that if at all Mobassir and Gulzar were present at the crime scene when PW6 along with his team had arrived, the only natural conduct of theirs would have had been to spill out everything. After all, Gulzar was the cousin of Asif who had been mercilessly shot dead and Mobassir was friend of Gulzar. That apart, there is a serious doubt about their having witnessed any part of the occurrence, as they have given their statements to the police only after the confession of Md. Danish was extracted.



28. We are at a loss to understand as to how the Trial Court has relied so heavily on the deposition of the afore-noted two witnesses, namely, Md. Mobassir and Md. Gulzar Ahmad (PWs 1 and 2 respectively) in coming to the conclusion that they had seen Md. Danish in company of Asif. Because both, Md. Mobassir and Md. Gulzar Ahmad, did not name the associates of Md. Danish, the Trial Court acquitted them.

29. Could they have been believed ?

30. There may not be too much of a hiatus between the occurrence and the time when they disclosed before the police about the occurrence but the very fact that they tried to come forward only after Md. Danish had made his confession, makes their statements very doubtful. It gives an impression that they had been set up to support the prosecution case, which perhaps is based on the information of spy and some recoveries, which do not appear to be genuine.

31. As we have already noted, the first information



to PW6 (the investigator) was through a spy and some other people, who have not been named by him. Because the name of Md. Danish had appeared as a person who was seen talking to Asif sometimes between 7.00 to 8.00 P.M. on 20.09.2019, that was taken to be the most reliable of the smoking guns for PW6 to proceed further in the investigation.

32. Thereafter, everything appears to have been fabricated.

33. We say so for more than one reason.

34. Before the name of Md. Danish had cropped up, a black coloured scooty and one of the pair of ladies slipper was spotted and seized. Till then, there was no clue about Md. Danish having consummated the crime. Nonetheless, on the seizure of the afore-noted scooty and the slipper, there is the signature of Md. Danish. Secondly, in the recovery memo of the pistol with two cartridges and the mobile telephones of the deceased, two official witnesses have signed, namely, Mahesh Prasad and Santosh Kumar. Both of them incidentally



are police personnel posted in the same police station. Even they have not been brought as witnesses to prove the contents of the recovery memo. Thirdly, the recoveries of the weapon and the mobile telephones do not appear to us to be on the pointing of Md. Danish. Fourthly, there is no *panchnama* on record reflecting that based on the confession of Md. Danish, PW6 decided to take Md. Danish to the place where recoveries were made. That *panchnama* had to be prepared first for lending credence to any discovery which would have been admissible under Section 27 of the Evidence Act ; and lastly, that even if the recovery or the discovery of the weapon would have been made after following the due procedure so as to make it admissible under the Indian Evidence Act, that by itself would not prove anything except the fact that a weapon was recovered at the instance of the appellant.

35. It appears to be rather queer that the next of the recoveries was an empty cartridge, which was brought back by Md. Danish to his home to screen the



offence and was hidden in his own house. Though an attempt was made to pitch in forensic affirmation of the recoveries being relatable to the offence but the prosecution has miserably failed to draw any nexus.

36. The forensic reports indicate that the empty cartridge was shot by the same weapon, which was recovered. This means nothing, especially when the entire recovery process is shrouded in doubts.

37. There is yet another attempt of the prosecution to give an adroit appearance to the case having been investigated properly; but that effort of the Investigator, in itself, is one of the reasons for us to doubt whether the investigation was fair.

38. Epithelial swabs of the hands of 'X' and of Danish were taken and sent for chemical/forensic examination whether it bore any mark of gun powder or any event, which would have led to some reference to the offence charged.

39. Out of many a swabs some (both of 'X' and of Md. Danish) tested positive for barium presence.



40. We are surprised to note that the Trial Court believed in such forensic report in the absence of any proof of such samples having been lifted properly. There is nothing on record which would indicate that the samples were collected under the supervision of the F.S.L. team and remained uncontaminated before they were put to any chemical/ forensic test. In fact, PW-6 has even claimed to have got Md. Danish tonsured for collecting his hair for forensic examination.

41. For what purpose was that done remains unexplained to us.

42. If the story-line projected by the prosecution that Md. Danish was known to Asif and in fact, he was called at the P.O. by Asif only, is accepted to be correct, then it would leave too many probable inferences; one being that Asif himself played a truant and called his friend/Danish. The motive would have been to take advantage of 'X' being vulnerable and alone. If this were not so, then perhaps anybody who



attempted at mauling 'X', was a regular criminal who took advantage of the two students talking to each other in solitude, under the stealth of darkness.

43. There has been no investigation on this issue viz, whether Md. Danish was known to Asif from before or that it was only a casual meeting of Md. Danish and Asif whereafter Md. Danish had left Asif and 'X' alone. This could have been investigated to reach a definite conclusion about the motive of Md. Danish. That Md. Danish was seen by spies and local people, talking to Asif, is in itself no information to jump to any conclusion. However, the prosecution appears to used this solitary information to spin a story which has thrown the investigation of this case in an uncharted territory.

44. Neither the mother of 'X' nor the brother-in-law of Asif (PW-4) had any idea about any association of Asif with Md. Danish.

45. That 'X' was friend of Asif was known to the mother of 'X'. This further presupposes that the



mother did not have any doubts about Asif. Both of them were students. They were seriously pursuing their ambition as the meeting was only for exchanging academic notes.

46. What must have gone wrong ?
47. Did they become prey to stray predators who saw two young people and mistook them for lovers ?
48. Did the incident have anything to do with two deceased being members of two different communities?
49. Was Asif reliable ?
50. If Asif was acting as a conduit for Danish, which does not appear to be so, why was he shot dead ?
51. Did Asif protest against physical overtures of anybody towards 'X' ?.
52. Nobody knows because of the faulty investigation.
53. Asif and X were not looted of their possession.

The scooty lay at the crime scene. The keys of the scooty were found in the pocket of Asif.



54. In this context, we have also examined the deposition of Dr. Kumar Ranjan (PW-5) who had conducted the postmortem examination on the two dead bodies. Both had died of gunshot. However, 'X' had suffered some injury on her neck. The injuries were not at all indicative of any sexual attack on her. Of course, there were signs of struggle as her clothes were found to be dishevelled. However, since there was no indication of any sexual attack, the appellant/Md. Danish was acquitted of the charge under Section 376 of the Indian Penal Code.

55. Thus, the story of the prosecution does not present a whole picture.

56. Why were the deceased killed ?

57. If it was not for satisfying sexual lust, or for robbing them then it remains a mystery which has not been resolved.

58. A word about inadmissibility of the recoveries sought to be relied upon by the investigation and unfortunately by the Trial Court in convicting the



appellant/ Md. Danish.

59. Section 27 of the Evidence Act reads as hereunder:-

"27. How much of information received from accused may be proved.

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved".

60. Confession to a Police Officer is not to be proved against the accused. However, Section 27 provides an exception to the said rule. It is based on the theory of confirmation. There are certain checks, which if not followed, would make such discoveries inadmissible. The confession must be made by the accused while he is in custody of the police. If such confession indicates that he is willing to lead the police party to the place where the weapon of offence or any other incriminating material is hidden, then that *panchnama* has to be drawn in front of two witnesses. Thereafter,



the recovery memo is to be prepared. The contents of the recovery memo has got to be proved. Not doing it would lead to such recovery being inadmissible in law and not related to the purpose (refer to ***Ramanand Bharti @ Nandlal Bharti Vs. State of Uttar Pradesh, 2022 SCC OnLine SC 1396; Bobby Vs. State of Kerala, 2024 SCC OnLine SC 561; and Rajesh and Anr. Vs. State of Madhya Pradesh, 2023 SCC OnLine SC 1202***).

61. The Trial Court by relying upon such discoveries has in fact bleached out the basic tenets of appreciating the evidence.

62. We thus are of the view that the prosecution has miserably failed to prove the prosecution case beyond all reasonable doubts.

63. The same set of reasons would apply in Cr. Appeal (DB) No. 656 of 2023 where the acquittal of three of the respondents has been challenged.

64. In the case of ***Rajesh Prasad Vs. The State of Bihar and Anr., (2022) 3 SCC 471***, while



recapitulating the basic principles while dealing with an appeal against an order of acquittal, the Supreme Court has held that an appellate court must bear in mind that in case of an acquittal, there is a double presumption in favour of the accused. Firstly; the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly; the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the Trial Court. There is yet another principle which has been noted down with clarity in ***Rajesh Prasad*** (supra) that if two reasonable conclusions are possible on the basis of evidence of record, the appellate Court should not disturb the finding of acquittal recorded by the Trial Court.

65. There must be some substantial and compelling reasons for interfering with the acquittal.



66. In fact, we have found the conviction in the case of appellant /Md. Danish to be absolutely unwarranted. In that event, no interference is required with the acquittal of the respondents of Cr. Appeal (DB) No. 656 of 2023, namely, Md. Aarif @ Ashraf @ Vikas; Md. Ezaz and Md. Shahbaz @ Wit.
67. Thus not approving of the judgment of the Trial Court in case of appellant/ Md. Danish, we set aside his conviction and consequent order of sentence and direct for his release.
68. The appellant / Md. Danish is in custody since 22.09.2019. He is directed to be released forthwith unless his detention is required in connection with any other case.
69. As noted above, the appeal against acquittal also stands dismissed, upholding the acquittal of the respondents therein.
70. Both the appeals are thus disposed off.
71. Interlocutory application/s, if any, also stands disposed of.



72. Let a copy of this judgment be communicated to the Superintendent of concerned jail for record and compliance.

73. Let the records of these appeal be also returned to the concerned Trial Court.

(Ashutosh Kumar, J)

(Jitendra Kumar, J)

sunilkumar/-

AFR/NAFR	AFR
CAV DATE	NA
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