

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.100 of 2006

1. Manoj Kumar Mahto, Son of Kameshwar Mahto @ Binda Mahto, resident of Village- Bhdudra, P.S. Town, District- Madhubani.
2. Shyam Sahni, Son of Rameshwar Sahu, Resident of Village-Nehra, Police Station- Manigachhi, District- Darbhanga.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Advocate
		Ms. Vaishnavi Singh, Advocate
		Mr. Ritwik Thakur, Advocate
		Mr. Rakesh Kumar Sinha, Advocate
		Mr. Sanjay Singh, Sr. Advocate
For the State	:	Mr. S. A. Ahmad, Advocate

CORAM: HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA
ORAL JUDGMENT

Date: 17-03-2025

Heard Mr Ajay Kumar Thakur, learned counsel
for the appellants assisted by Ms. Vaishnavi Singh, Mr. Ritwik
Thakur and Mr. Rakesh Kumar Sinha and learned APP for the
State.

2. The present appeal is directed against the Judgment of conviction dated 27.01.2006 and order of sentence dated 28.01.2006 in Sessions Trial No. 10 of 2000 passed by the learned Additional Sessions Judge, Fast Track Court No.-1, Darbhanga has convicted the appellants under Section 395 of the Indian Penal Code (hereinafter referred as 'IPC') and sentenced them to undergo 10 years rigorous imprisonment.

3. The brief facts leading to the filing of the



present appeal on the basis of the fardbeyan of Lalan Kumar Choudhary, PW-4 in the night of 21/22.01.1998 stating therein that on the alleged night of occurrence at around 11:20 PM when the informant came out of his house in north for urination. Suddenly one person came and pointed out revolver on him and directed him to come inside the house. Thereafter, 4-5 persons also followed him and came inside the house, again 3-4 persons came thereafter. Out of them four were armed with revolver and five persons were armed with dagger. Thereafter the persons entered in the room situated in the north side of the house and asked informant's wife PW-11 to handover the keys of Godrej. Then those persons unlocked the Godrej and took out teeka, nathiya, mangal sutra, jhumka, angoothi, tops, silver Payal and silver ring worth Rs. 35,000/- and cash of Rs. 1,500/- along with one Yasika camera worth Rs. 2,000/- and sari worth Rs. 10,000/-. Then those persons entered in the third room and took out ornaments and cash of Rs. 20,000/- from the box and in the adjoining southern room in which the informant's sister and younger brother kept the articles. Those persons took away gold necklace set, ear-ring, mangal sutra, ring, silver darkas and Payal worth Rs. 25,000/- and clothes of the informant's brother. The informant was again persuaded on the point of revolver to



come in adjoining room of informant's uncle and those persons demanded all the articles but they did not find any article there. Then these persons after breaking the box of the informant's cousin sister, they took away three than of clothes each of ten meters cotton clothes worth Rs. 1,500/- and thereafter they reiterated from the north Darwaja of the informant's house. Then the house inmates raised alarm and villagers Barun Jha, Anand Jha, Vijay Mishra and Ashok Kumar came there and thereafter informant through telephone informed to the police station.

4. On the basis of the fardbeyan, Darbhanga Sadar P.S. Case No. 08 of 1998 dated 22.01.1998 was registered under Section 395 of the IPC. Thereafter, on the very next day i.e., 22.01.1998, two miscreants were apprehended in another police station and on getting information the Investigating Officer of the present case interrogated them who were Shyam Kumar Sahani and Manoj Kumar Mahto, who confessed their guilt and their confession was recorded and marked as exhibit-6 and 6/a. On the basis of the confessional statement, house of third co-accused Arjun Sah was raided and several ornaments were recovered.

5. On the basis of this investigation, the police



submitted chargesheet against three accused persons under Sections 395 and 412 of the IPC. Thereafter, the learned CJM took cognizance under the aforesaid sections and committed the case to the Court of Sessions vide order dated 10.12.1999.

6. The prosecution examined altogether 13 witnesses to substantiate the charges levelled against the appellants, who are namely PW-1 Salam Mustafa, PW-2 Madan Kumar Gara, PW-3 Ashok Kumar Yadav, PW-4 Lalan Kumar Chaudhary, PW-5 Sitaram Yadav, PW-6 Nityanand Choudhary, PW-7 Vijaykant Mishra, PW-8 Varun Kumar Jha, PW-9 Ganga Devi, PW-10 Saraswati Devi, PW-11 Rinku Choudhary, PW-12 Sugreev Singh and PW-13 Ambika Prasad Singh.

7. PW-1 Salam Mustafa, who has stated interalia that on 22.01.1998 at about 3.00 PM the police of Laheriasarai and Sadar raided the shop of Bahurani Jewellers and seized ornaments of silver, gold. He signed on the seizure list and he identified seizure list as Ext.1 and his signature as Ext.1/1. This witness has not identified the appellants Manoj Kumar Mahto and Shyam Sahni in the Court.

7.i. In cross examination he has stated that in his presence the police have not seized any article. Police came at his shop and took his signature. The same was not read over to



him. He further stated that he has not gone to Bahurani Jewellers at the time of raid, nothing was shown to him.

8. PW-2 Madan Kumar Gara was declared hostile.

9. PW-3 Ashok Kumar Yadav stated that on hulla he went to the house of Lalan Choudhary and by that time accused persons had fled away after committing dacoity. This witness has also not identified any of the two appellants in Court.

10. PW-4 Lalan Kumar Choudhary, the informant himself. He in his examination-in-chief has stated that on 22.01.1998 at about 11.30 he came out of the house for urinating. A person came pointed revolver on his temporal region and asked him to come into the house and the said accused came into the house along with him. 4-5 accused persons also entered the house. They took away key of Godrej and from the Godrej ornaments, sari worth Rs.35000/- and Rs.1500/- was taken by them and he has stated that accused persons also took away other articles. In the cross-examination PW-4 by seeing the accused persons, he stated that these two accused were not involved in the occurrence.

11. PW-5 Sitaram Yadav, the Block Development



Officer has conducted the Test Identification Parade of the articles.

12. PW-6 Nityanand Choudhary, uncle of the informant, who has stated interalia that about five years ago at about 11.00 in the night he was sleeping. Lalan Choudhary (informant) awoke him and he saw 4-5 persons have surrounded Lalan Choudhary and he too was surrounded and the accused took away the ear-ring of his wife and other articles. He further stated that he failed to identify any of the accused. In cross examination he has stated that he has not seen the face of any of the suspects.

13. PW-7 Vijaykant Mishra, who has stated interalia that he went to the house of Lalan Choudhary after dacoity and he has not identified any of the dacoits.

14. PW-8 Varun Kumar Jha has been declared hostile by the prosecution.

15. PW-9 Ganga Devi wife of Vidyanand Choudhary and she stated that the informant is his son and the occurrence took place three years ago. She was not present at the time of dacoity but she has stated that she identified the articles in the test identification parade on 01.02.1998 and she identified her signature which was marked as Ext. 1/f.



15.i. In cross examination she stated that 15 to 20 days after the occurrence, she has gone for identification and she cannot disclose the name of the articles which she identified and there was no sign on those articles which she identified. She further stated that she cannot disclose the size and design of the ornaments. How many jewellerys were kept in the Test Identification Parade she could not say. All jewellerys were of different kinds.

16. PW-10 Saraswati Devi wife of PW-6 stated that dacoits have come to the house and committed dacoity and took away articles but she failed to identify the accused persons.

17. PW-11 Rinku Choudhary, wife of Sri Lalan Kumar Choudhary. She also stated that dacoity was committed in her house and four persons had come armed with pistol and demanded key of Godrej and from the key they opened the Godrej and took away articles. She failed to identify any of the dacoits but in the test identification parade of articles she identified the articles and she also identified the signature on TIP of articles which was marked as Ext.1/g. In cross examination she stated that she cannot say how many articles were kept on the table. She further stated that there was no mark in any of the jewellerys. She further stated that on the blank



paper the signature of all the persons were taken.

18. PW-12 Sugreev Singh Police Sub-Inspector and he stated that the confessional statement of Manoj Kumar Mahto and Shyam Sahni was written by Ambika Prasad Singh which were marked as Ext.6 and 6/A. He further stated that he took the charge from Ambika Prasad Singh on 04.05.1998 and on 13.08.1998 he submitted chargesheet.

19. PW-13 Ambika Prasad Singh, Retired Sub Inspector. He has stated that on telephonic information he was informed that dacoity was committed in the house of Lalan Kumar Choudhary on 22.01.1998 at about 01.00 in the night. After instituting Station Diary Entry 306 dated 22.01.1998 he along-with other police personnel went to the place of occurrence and recorded the fardbeyan of Lalan Kumar Choudhary which he identified as Ext.2. On the said fardbeyan, F.I.R. was drawn up and he inspected the place of occurrence and recorded the statement of witnesses. He further stated that at about 12.00 in the day time he went to police station where he learnt that two criminals were arrested at Laheriasarai police station. He came to Laheriasarai police station where Manoj Kumar Mahto, Shyam Sahni gave their confessional statement. He further stated that on their confessional statement he went to



Bahurani jewellers along with other two accused and Bahurani jewellers were searched and the alleged articles were seized on which Madan Kumar Gara and Gulam Mustafa put their signature. On 23.01.1998 he produced the accused persons in Court. On 01.02.1998 the seized articles were put on T.I.P. before the B.D.O. Sadar, where Ganga Devi, Rinku Kumari, Sarita Devi identified the articles.

19.i. In cross examination he stated that at about 1'0 clock in night Lalan Kumar Choudhary has informed him about dacoity and on the basis he went to the place of occurrence. In para-8 he stated that through telephone he learnt that at Laheriasarai police station two accused persons were apprehended with revolver and he has no informed that dacoits were arrested.

20. Learned counsel for the appellants submits that the impugned judgment of conviction and order of sentence are not sustainable in the eye of law or on facts. Learned trial Court has not applied its judicial mind and erroneously passed the judgment of conviction and order of sentence. From perusal of the evidences adduced on behalf of the prosecution it is crystal clear that none of the prosecution witnesses have identified the appellants in the Court including the informant



PW-4, his uncle Nityanand PW-6 and his mother Ganga Devi (PW-9) and his aunt Saraswati Devi PW-10. He further submitted that informant PW-4 has specifically stated in the Court that both accused (Manoj Kumar Mahto and Shyam Sahni) were not present in the occurrence vide para-1 of his deposition. He further submitted that it is well settled law that confession of accused made before the police is not admissible and no incriminating material has been recovered from possession of the appellants. The appellants were not charged under Section 412 of the IPC. Even a TIP conducted in the presence of a police officer is inadmissible in light of Section 162 of the Code of Criminal Procedure, 1973 (*Chunthuram v. State of Chhattisgarh (2020) 10 SCC 733* and *Ramkishan Mithanlal Sharma v. State of Bombay (1955) 1 SCR 903*).

20.i. The learned counsel for the appellants further contended that confession made before the police is not admissible and Section 27 of the Evidence Act provides that when any fact is deposed to as discovery in consequence of information received from the person, accused must be in custody of police officer, so much of information were missing to confession or not, as relates distinctly to the fact discovered, may be proved and thus on basing as per said confession does



not only be said that the articles are of Bahurani jewellery shop and except that nothing will be admissible. He further submitted that from the statement of witnesses it will be evident that there was no identification mark in any of the articles which they allegedly identified and the seizure list witnesses PW-1 has stated in cross-examination that his signature was obtained at this shop by the police and he has not gone to Bahurani Jewellery. He further submitted that failure on the part of the police to prepare panchanama at the place of occurrence demolishes the entire case of the prosecution of recovery of jewellery of the informant based on the disclosure made by the appellants in their confessional statement. He further submitted that the confessional statement of the appellants was not recorded in the presence of any Magistrate or any independent witness, and is therefore not admissible in evidence. No presumption can be drawn against the appellants on the basis of the so-called confession particularly once the said confession was not made in presence of any independent witness. He has submitted that the chain of circumstances cannot be said to have been proved to reach a definite conclusion that the appellants were guilty of the offences of which they were charged with. None of the articles have been produced in Court as material



exhibits in the present case. From the aforesaid facts it is clear that absolutely there is no legal material to connect the appellants with the crime in question. The Learned trial Court has failed to appreciate the evidence its right perspective and impugned judgment of conviction is bad in law as well as on fact and such to set aside.

20.ii. At this stage, learned counsel has placed reliance upon the decision rendered by Hon'ble Supreme Court in the following cases: -

(a) *Subramanya Vs. State of Karnataka*,
reported in **2022 SCC OnLine SC 1400**.

(b) *Ramanand @ Nandlal Bharti Vs. State of Uttar Pradesh*, reported in **2022 SCC OnLine SC 1396**.

21. However, learned APP for the State defends the impugned judgment of conviction and the order of sentence submitting that there is no illegality or infirmity in the impugned judgment and order of sentence, because prosecution has proved its case against the appellants beyond all reasonable doubts. In view of the aforesaid statements and the evidence on record, learned trial Court has rightly convicted the appellants and the present appeal should not be entertained.



22. At this stage, I would like to appreciate the relevant extract of entire evidence led by the prosecution and defence before the Trial Court and have thoroughly perused the materials on record and aforesaid judgments referred by the learned counsel for the appellants as well as given thoughtful consideration to the submissions advanced by both the parties.

23. Having deeply studied and scrutinized the facts and the material available on record of the present case and aforesaid decisions rendered by the Hon'ble Supreme Court, it is evident to note here that when the Investigating Officer steps into the witness box for proving such disclosure statement, he would be required to narrate what the accused stated to him. The Investigating Officer essentially testifies about the conversation held between himself and the accused which has been taken down into writing leading to the discovery of the incriminating facts. In the present case, from the evidence of the prosecution witnesses including the Investigating Officer, it is clear that the Investigating Officer gave no description at all of the conversation which had transpired between himself and the accused which was recorded in the disclosure statements. Thus, I am of the view that this type of disclosure statements cannot be read in evidence and the recovery made in furtherance



thereof are *non est* in the eyes of law. In view of the judgment rendered by Hon'ble Supreme Court in the case of ***Sujit Biswas*** reported in ***AIR 2013 SC 3817***, it is well settled that the circumstances not put to the accused while recording statement under Section-313 of the Code cannot be used against the accused. Para-12 of the aforesaid judgment reads as under:

“12. It is a settled legal proposition that in a criminal trial, the purpose of examining the accused person under Section 313 Code of Criminal Procedure, is to meet the requirement of the principles of natural justice, i.e. Audi alteram partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination Under Section 313 Code of Criminal Procedure, cannot be used against him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement.”



24. If we read the entire oral evidence of the Investigating Officer then it is clear that the Investigating Officer did not followed the procedure laid down by the Apex Court which is deficient in all the aforesaid relevant aspects of the matter which makes the evidence of test identification parade suspectful and in that view of the matter it is not safe to act upon it. Informant and other prosecution witnesses have stated in their deposition that they have not identified the accused/appellants present in the Court. Apart from the confessional statement of appellants, I find no other evidence put forth by the prosecution to prove the guilt of the accused/appellants for offences punishable under Section 395 of the Indian Penal Code. On the point of recovery, it would be relevant that the charge has not be framed under Section 412 of the IPC against the appellants, so the appellants cannot be convicted under the same. I would like to refer the decision rendered by the Hon'ble Supreme Court in the case of *Subramanya (supra)*, has held in Para 76 to 79 as under: -

“76. Keeping in mind the aforesaid evidence, we proceed to consider whether the prosecution has been able to prove and establish the discoveries in accordance with law. Section 27 of the Evidence Act reads thus:

“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.”

77. The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the discovery of a fact relevant under Section 27 of the Evidence Act.

78. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the accused while in custody makes such statement before the two independent witnesses (panch-witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer



may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch-witnesses) would proceed to the particular place as he may be led by the accused. If from that particular place anything like the weapon of offence or blood-stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter.

79. In the aforesaid context, we may refer to and rely upon the decision of this Court in the case of Murli and Another v. State of Rajasthan reported in (2009) 9 SCC 41, held as under:

“34. The contents of the panchnama are not the substantive evidence. The law is settled on that issue. What is substantive evidence is what has been stated by the panchas or the person concerned in the witness box.”



(Emphasis supplied) ”

25. In the case of Ramanand (supra), the Hon'ble

Supreme Court has held in Para 51 to 53 as under: -

“51. It is the case of the prosecution that on 24.01.2010 the accused appellant was picked up by the investigating officer from nearby a bus stand and was arrested in connection with the alleged crime. After the arrest of the accused appellant and while he being in the custody at the police station, he is said to have on his own free will and volition made a statement that he would like to point out the place where he had hidden the weapon of offence (Banka) and his blood-stained clothes after the commission of the alleged crime. According to him, after such statement was made by the accused appellant, he along with his subordinates set forth for the place as led by the accused. There is something very unusual, that we have noticed in the oral evidence of the investigating officer. According to him while the police party along with the accused were on their way, all of a sudden, the investigating officer realized that he should have two independent witnesses with him for the purpose of drawing the panchnama of discovery. In such circumstances, while on the way the investigating officer picked up PW-2, Chhatarpal Raidas and Pratap to act as the panch witnesses. According to the investigating officer the accused led them to a coriander field and from a bush he took out the weapon of offence (Banka) and the blood-stained clothes. The weapon of offence and the blood-stained clothes were



collected in the presence of the two panch witnesses and the panchnama Exht. 5 was accordingly drawn. The weapon of offence and the blood-stained clothes thereafter were sent for the Serological Test to the Forensic Science laboratory. We are of the view that the Courts below committed a serious error in relying upon this piece of evidence of discovery of a fact, i.e., the weapon & clothes at the instance of the accused as one of the incriminating circumstances in the chain of other circumstances. We shall explain here below why we are saying so.

52. Section 27 of the Evidence Act, 1872 reads thus:

“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.”

53. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence along with his blood stained clothes then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may



desire in regard to point in 53. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the wg out the place where he is said to have hidden the weapon of offence. When the accused while in custody makes such statement before the two independent witnesses (panch witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood-stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire



oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter.”

26. In similar situated case, ***Singhasan Sahni @ Sahdeo Sahni v. State of Bihar 2025 PLJR 844*** this Court took the view that-

“The unexplained delay in holding the test identification parade with further non-explanation or not putting the appellant on test identification parade makes the evidence of test identification parade suspectful and in that view of the matter it is not safe to act upon it..... Apart from the TIP, I find no other evidence put forth by the prosecution to prove the guilt of the accused for offences under Section 392 of the Indian Penal Code. On the other hand, defence has also established his case as the accused person was not present at the place of occurrence and he has shown his driving license to the Investigating Officer while he was on patrolling duty. Since the prosecution has not been able to prove its case and the defence has put forth stronger evidence showing that he was not present at the place of occurrence and at the time of occurrence, the accused/appellant is hereby given the benefit of doubt and the appeal is allowed.”

27. In view of the above discussion, I am of the view that the confessional statement of the appellants are inadmissible under Section 27 of the Evidence Act as the prosecution has failed to complete the chain of circumstances by



leading cogent evidence to prove the guilt against the appellants and the prosecution put forth no other evidence than the confessional statement of the appellants to prove the guilt of the accused/appellants, despite which the Trial Court has passed the impugned judgment and order of conviction and sentence dated 27.01.2006 and 28.01.2006 in Sessions Trial No. 10 of 2000 arising out of Sadar P.S. Case No. 08 of 1998. Therefore, the same deserve to be quashed and set aside.

28. Hence, the Judgment of conviction dated 27.01.2006 and order of sentence dated 28.01.2006 in Sessions Trial No. 10 of 2000 arising out of Sadar P.S. Case No. 08 of 1998, passed by learned Additional Sessions Judge, Fast Track Court No-I, Darbhanga is set aside and the accused/appellants are acquitted from the charges leveled against them. As the appellants are on bail, they are discharged from liability of their bail bonds.

29. Accordingly, this appeal stands allowed

(Ramesh Chand Malviya, J)

Anand Kr.

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