

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.673 of 2018

Arising Out of PS. Case No.-856 Year-2016 Thana- ARARIA District- Araria

VIJAY KUMAR YADAV @ VIVEK KUMAR @ GOLU S/o- Late
Ramanand Yadav, R/o- Upharail, Ward No- 9, P.S.- Maranga, District- Purnia.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Advocate Mrs. Vaishnavi Singh, Advocate Mr. Ritwik Thakur, Advocate Mr. Sushmita Mishra, Advocate
For the Respondent/s	:	Mr. Shashi Bala Verma

CORAM: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI
and
HONOURABLE MR. JUSTICE DR. ANSHUMAN
CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI)

Date : 17-12-2025

This is an appeal under Section 374 (ii) of the Code of Criminal Procedure (hereinafter described as 'CrPC' in short) filed by the convict assailing the judgment of conviction dated 11th April 2018 and the order of sentence dated 17th April 2018 passed by the learned Additional Sessions Judge IIIrd Court, Araria in Sessions Trial No. 203 of 2017 arising out of Araria P.S. Case No. 856 of 2017 whereby and whereunder the appellant was convicted under Section 302/34 of the IPC and sentenced to rigorous imprisonment for life and fine of Rs. 1,00,000/-, in default of non payment of



fine further simple imprisonment of one year and he was further convicted for committing offence under Section 201 of the IPC and sentenced for rigorous imprisonment for three years and fine of Rs. 10,000/- only, in default S.I. for further period of three months. Substantive sentence of R.I. was directed to run concurrently.

2. It is needless to say that the appellant has been in custody approximately for more than 7 years while suffering sentence.

3. We are not constrained to note that this case is a classic example of conviction upon inadmissible evidence by the learned trial Judge. Subsequent to the filing of the appeal, the appellant preferred a series of applications for suspension of sentence and bail, but his prayer was constantly rejected by this Court, also relying on inadmissible evidence.

4. Let us now describe the factual aspect of the incident. One Shambhu Dharkar, a village Chowkidar of Azam Nagar, Kushimar village under the police station and district Araria received an information on 23.12.2016 at about 08:30 AM that dead body of one unknown person was kept on the southern side of village Diwari Fatak Bridge in a bamboo grove of one Vishundev Yadav. In order to work out the said information, the above-named chowkidar went to the said spot. He found that



police party also reached the spot. He found one unknown dead body with blackish ligature mark around the neck and bleeding from the left ear. Seeing the dead body, the chowkidar approximately ascertained his age around 35 years. He was wearing a black jacket, pink colored Shirt, a blue colored warm vest, red colored T-shirt, white colored vest and blue colored jeans full pant. There was a black thread on his neck with a locket inscribed thereon 786 and 92. He also found a blank cartridge of 315 bore in one of his pocket. Local people assembled there. Nobody could identify him. It seemed to the said chowkidar that the deceased was murdered at some other place and his dead body was tied with a Simul tree by a rope. A belt was tied around his neck.

5. One Ashok Kumar Singh, Sub-inspector of police recorded the statement of the said Shambhu Dharkar and treated the same as FIR. On the basis of the said statement, duly signed by Shambhu Dharkar, the SHO of Araria police station registered FIR Case No. 856 of 2016 dated 23rd December 2016 under Section 302/301 IPC against unknown miscreants and entrusted Sub-Inspector King Kundan to investigate into the case.

6. The I.O., on completion of the investigation, submitted a charge-sheet against the appellant under Sections 302/34, 201/34, and 120(B) of the IPC against Vijay Kumar Yadav @ Vivek Yadav @ Golu (hereinafter described as 'Golu').



7. After filing of the charge-sheet, the case was committed to the Court of Sessions. The learned Principal Sessions Judge transferred the case record to the Court of Learned 3rd Additional Sessions Judge, Araria for trial and disposal. The learned trial judge framed charge against the appellant under Section 302/34 and 201/34 as well as 120 (B) of the IPC on 13 June 2017. As the appellant pleaded not guilty, trial of the case commenced. In order to bring home the charge against the accused/appellant, prosecution examined as many as 8 witnesses. Amongst them, PW-1 Sanjay Yadav was the Sarpanch of Kushiya village panchayat.

8. PW-2 Dharmendra Kumar was a Mukhiya of village Kochgama.

9. PW-3 Prem Kumar @ Pirup Yadav was examined as a witness to seizure of some articles recovered from the house of the appellant.

10. PW-4 Shambhu Dharkar is the village chowkidar and informant of the case.

11. PW-5, Prabhat Kumar Yadav is another seizure witness in respect of the articles seized from the house of the appellant.

12. PW-6, S.I. King Kundan was the I.O. of this case.



13. PW-7 Dr. Santosh Bipin was the Autopsy Surgeon and PW-8 Md. Inteqab Alam is the elder brother of deceased Niyaz Ahmed.

14. It appears from the evidence of PW-1 Sanjay Kumar Yadav, PW-2 Dharmendra Kumar that about 7/8 months before the date of their deposition, they found a dead body of a young man lying in the bamboo grove belonging to one Vishundev Yadav. Police came to the spot and asked the above-named witnesses if they knew the deceased or anything about the incident. They conveyed their innocence.

15. Both PW-3 and PW-5, who were examined as witnesses to the seizure of some articles, viz., one ATM card, two Nokia mobile phones, and some other documents from below the pillow kept on a bed in the house of Golu, stated in their evidence that they were not present during the seizure of the aforesaid articles with the I.O., and that the said articles were not recovered by the police in their presence. They put their signature at Maranga Police Station, on being asked by the police officer. They also could not identify the accused during trial of the case. Surprisingly enough, the above-named two witnesses were not declared hostile by the prosecution during trial of the case. Therefore, we do not have any hesitation to hold that the prosecution failed to produce any evidence regarding seizure of some articles and documents from the house of the appellant during investigation of the case.



16. It is needless to say that Section 100 of the CrPC lays down provisions regarding the search of a closed place like a house. Sub-Section (4) of Section 100 of the CrPC states that before making a search under Section 100 of the CrPC, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situated, or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search, and may issue an order in writing to them or any of them so to do.

17. Sub-Section (5) of Section 100 obligated the police officer to conduct search in presence of two or more independent and respectable inhabitants of the locality or if any such person is available, two independent persons and if any article is seized, the police officer shall prepare a list of all things seized in the course of such search and of the place of which they are respectively found and the seizure list shall be signed by the witnesses. PW-3 and PW-5 were cited by the prosecution as witnesses to search and seizure but they did not support the prosecution case. Therefore, seizure of articles, namely, one ATM Card and two Nokia Mobile phones and some other documents were not proved during trial of the case.

18. PW-4 is the informant, he corroborated his statement made in Ferd Beyan.



19. None of the above-named witnesses could identify the accused. They also did not know how the deceased was murdered. The identity of the deceased was first ascertained on 24th December 2016 when a photograph of the deceased was published by the investigating authority in Urdu Daily. Seeing the photograph, PW-8 Md. Inteqab Alam identified the photograph of the deceased as his brother's. In his affidavit, he stated that his brother Niyaz Ahmed was missing since 22nd December 2016. After he saw the photograph in Urdu Daily on 24th December 2016, he identified the deceased to be his brother Niyaz Ahmed and went to P.S. Araria. From the P.S., he came to know that the dead body was kept in the *post-mortem* room. He went there and identified the dead body as of his brother's. Thereafter, he filed an application and received the dead body of his brother. The said application was marked as Exhibit 5/A during trial of the case. PW-8 also could not identify the accused. It appears from his cross-examination that in his application PW-8 wrote that for few days before the death of his brother, he was having dispute over landed property with one Sah Alam, Noor Mohammad, Elias Rashid, Zabul and, Noor Salam. The said persons threatened him with dire consequences and abduction. In his application, he further averred that he believed that the aforementioned persons had committed murder of his brother due to personal enmity and had thrown away the dead body at the location from which it was



subsequently recovered, with the intention of obliterating evidence. From the evidence of PW-8, it is also ascertained that on 26.12.2016, police went to the medical shop of his brother situated at Purnea Market. Police recorded the statement of one Haider Ali and Samshul who used to work in the said shop. It is important to note that the above-named persons, whose names were disclosed by PW-8 were not made accused in Araria P.S. Case No. 56 of 2016 dated 23rd December 2016 and the I.O. did not find it necessary to ascertain the complicity of the said persons against whom PW-8 raised doubt.

20. The appellant was made an accused in Araria P.S. Case No. 56 of 2016 by the I.O. on the basis of the following evidence which he collected during the investigation of the case. On 24th December 2016, the I.O. (PW-5) came to know the mobile phone number of the deceased. It was 9204249967. The mobile phone number was found switched off from 22 December 2016. The I.O. collected the CDR and C.A.I.F. of the said mobile phone number from the office of the Superintendent of Police, Araria. On 25th December 2016, he received the Call Details Report and Customer Details of the said mobile phone from the office of the Superintendent of Police, Araria. The CDR was marked as Exhibit-6. On examination of the CDR of the said mobile phone, the I.O. came to know that the SIM number was allotted in the name of the deceased, Niyaz Ahmad. On 22 December 2016, two SMS were



sent to the said mobile phone at about 11:40:49 and 11:43:29 from DM-I.D.B.I. Bank. On 26th December 2016, he went to I.D.B.I. Bank, Purnea, to ascertain whether the said SMS were sent from the bank or not. He came to know that the deceased had an account in the said bank, and it was ascertained that on 24th December 2016, a sum of Rs. 75,000/- was withdrawn from the account of the deceased and paid to Maa Lakhi (Laxmi) Jewelers. He interrogated the shop owner, namely, Vimal Kr. Soni. On being asked, he told that on 24th December 2016, a boy came to his shop at about 04:00 PM with his mother and sister, ordered some jewelery, and paid a sum of Rs. 75,000/- by ATM card transaction. He also stated that the said boy was an old customer of his shop and that he took the name of the appellant. The I.O. also seized a copy of the receipt from the SBI Swipe Machine. He further seized CCTV footage of the said shop under a seizure list. The said seizure list was marked as Exhibit-7. On 27th December 2016, the appellant was arrested and brought to Maranga P.S. The appellant admitted his guilt before the I.O. The I.O. took the signature of the accused on the said statement, and during trial, the statement of the accused was marked as Exhibit-9. The said alleged statement, though inadmissible in evidence, was treated as the fulcrum of the prosecution case, and the appellant was held guilty on the basis of his inculpatory statement recorded by the I.O.



21. The evidence of the I.O. also reveals that while admitting his guilt, the appellant admitted that the ATM card of deceased Niyaz Ahmad was kept in a black-colored purse under the pillow of his bed. In order to ascertain the truth of the said statement, the I.O. went to his house with two independent witnesses and recovered one purse, one ATM card of IDBI Bank, the original receipt issued by the shop owner of Maa Lakhi Jewelers, the original receipt generated from the swipe machine, two Nokia mobile phones, and one WagonR car. The original receipt generated from the ATM card swipe machine and the original receipt of Maa Lakhi Jewelers were marked as Exhibit-10 and 10/A. The ATM card issued by IDBI Bank, in which the name of Niyaz Ahmad was written, was marked as Exhibit-11, and the two mobile phones were marked as Exhibit-12 and Exhibit-12/A, respectively. The seized WagonR car was registered in the name of the brother-in-law of the appellant. The entire seizure list was marked as Exhibit-1/B. He also proved the formal FIR, which was marked as Exhibit-13 during the trial of the case.

22. Section 25 of the Indian Evidence Act clearly states that no confession made to a police officer shall be proved against a person accused of any offence. It is a rule of thumb that a confession made to a police officer, of whatever rank and at whatever time, is inadmissible in evidence under the purview of Section 25. Section 26 of the Indian Evidence Act states: "No



confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved against such person."

23. Without going into details as to how confession is required to be recorded by a Magistrate, it is only necessary to state in the instant appeal that confession of an accused while in custody can only be recorded by a Magistrate in terms of Section 26 of the Indian Evidence Act read with Section 164 of the CrPC. Any statement recorded by an I.O. during investigation of the case of any witness or an accused is a statement under Section 161 of the CrPC and Section 162(1) clearly states that no statement made by any person to a police officer in the course of an investigation under Chapter XII of the CrPC shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, except to contradict such witness in the manner provided under Section 145 of the Indian Evidence Act.

24. Therefore, the evidence of the appellant admitting the guilt before the I.O. is not admissible in evidence and the said document could not be marked as exhibit by the trial court. The trial court committed illegality in relying on such statement allegedly made by the appellant.



25. Section 27 of the Evidence Act is an exception to the general rule contained in Sections 25 and 26 of the Act. Section 27 of the said Act states that when any fact is deposed to as discovered in consequence of information received from an accused of any offence while he is in custody, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

26. In other words, the language of Section 27 of the Evidence Act indicates that when any fact is deposed to as discovered in consequence of information received from a person who is in the custody of the police in connection with an offence, it must relate distinctly to the facts so discovered.

27. The phrase 'facts thereby discovered' is preceded with words "that so much of such information, whether it amounts to confession or not as relates distinctly". The word 'distinctly' as used in Section 27 of the Evidence Act is made to exclude certain language and to limit and confine the information which may be proved within definite limits and not necessarily to include everything which may relate to that information. The word "distinctly" indicates directly, indubitably, strictly and unmistakably, apparently, used in Section 27 to limit and define the scope of probable information. Therefore, only that much information as is clearly connected with the fact discovered can be treated as relevant under the phrase 'facts discovered'.



28. In the instant case, the trial court in violation of Section 25 and Section 26 wrongly brought entire statement of the accused in evidence marking the same as Exhibit-9.

29. Had it been the fact that the accused made such a statement before the I.O. while he was in custody, so much of such information as relates distinctly to the fact thereby discovered, i.e., the discovery of the black purse, ATM card, bill of Maa Lakhi Jewelers, and original receipt generated from the ATM machine, etc., would have been admissible in evidence. It is needless to say that the discovery of a fact must be distinctly connected with the statement of the accused; when the discovery of a fact is distinctly connected in consequence of information, that part of the statement made by the accused is admissible under Section 27 of the Evidence Act. The decision of the Hon'ble Supreme Court in ***Govind v. State of Haryana***, reported **2025 SCC OnLine SC 2456** may be relied on in support of the above observation. There is no evidence as to whether the appellant accompanied the police party and the independent witness during discovery of ATM Card of the deceased and other materials. The witnesses to whom prosecution claimed to be the seizure witnesses did not support the prosecution case. From their evidence, it is clear that they were not present at the time of seizure of ATM Card of the deceased and other materials. They put their signature on the seizure list at Maranga



P.S. on being instructed by a police officer. Therefore, seizure of the materials was also not proved.

30. Last but not the least, Call Details Report, CAIF, receipt generated from ATM Swipe Machine are electronic records which could have been proved only under Section 65 (B) of the Evidence Act.

31. In the instant case, the I.O. did not collect any certificate from IDBI Bank to prove the SMS sent to the mobile phone of the deceased from service provider. Certification of CCTV footage electronically generated money receipt from ATM swipe machine was also not obtained from the concerned authority by the I.O. Prosecution did not take any attempt to examine the shop owner of Maa Lakhi Jewelers. The appellant was not identified by any independent witness except the I.O.

32. For the reasons stated above, we have no other alternative but to hold that the trial court illegally without considering the basic requirement of the Evidence Act and the manner in which the charge can be proved held the accused guilty for committing offence and convicted and sentenced him accordingly. For such gross mistake, the accused unnecessarily remained in custody for more than 7 years. As a result, the instant appeal is allowed.

33. The judgment of conviction dated 11.04.2018 and order of sentence dated 17.04.2018 is hereby set aside. Let the



appellant be released forthwith in connection with Sessions Trial
No. 203 of 2017 arising out of Araria P.S. Case No. 856 of 2017, if
not required in other case.

(Bibek Chaudhuri, J)

I agree.
Dr. Anshuman, J:

(Dr. Anshuman, J)

Suraj Dubey/-

AFR/NAFR	NAFR
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