

IN THE HIGH COURT OF JUDICATURE AT PATNA

Kamlesh Tiwary

vs.

The State of Bihar

CRIMINAL APPEAL (DB) No. 946 of 2017

22 June 2023

(Hon'ble Mr. Justice Ashutosh Kumar & Hon'ble Mr. Justice Shailendra Singh)

Issue for Consideration

Whether judgement of conviction and order of sentence passed by the learned 4th Addl. Sessions Judge, Bhojpur, Ara in Sessions Trial No. 378 of 2016 (arising out of Shahpur P.S. Case No. 30 of 2016 is correct or not?

Headnotes

Indian Penal Code, 1860—Section 302, 201—Murder—body of deceased was found dead in a dried-up river in village, which was spotted by the local chaukidar—identification of the deceased was based on photographs and clothing—on appellant's confession, knife was recovered.

Held: police has only resorted to guesswork and that also without any foundation—no evidence to connect the appellant with the offence—identification by the father and uncle of the deceased as their daughter and niece, was absolutely unbelievable for the reason that the identification was only by the photograph, when the face was unidentifiable as the fore-skin was not present on the dead body—connection of the offence on the basis of CDR of a telephone number stated to be that of the appellant is too vague to rely upon for convicting and sentencing the appellant; that also when the mandatory requirement under Section 65-B of the Act, 1872 with respect to admissibility of such CDR has not at all been followed—impugned judgement and impugned order of conviction set aside—appeal allowed.

(Paras 14, 20, 24, 25)

Case Law Cited

No specific case law cited.

List of Acts

Indian Penal Code, 1860; Indian Evidence Act, 1872.

List of Keywords

Murder; bus ticket; confessional statement; recovery on confession; CDR.

Case Arising From

From judgement of conviction dated 24.06.2017 and order of sentence dated 30.06.2017 passed by the learned 4th Addl. Sessions Judge, Bhojpur, Ara in Sessions Trial No. 378 of 2016 (arising out of Shahpur P.S. Case No. 30 of 2016.

Appearances for Parties

For the Appellant: Mr. Vikramdeo Singh, Advocate; Mr. Prabhat Kumar Singh, Advocate.

For the Respondent: Ajay Mishra, APP

Headnotes Prepared by Reporter: Abhas Chandra, Advocate

Judgement/Order of the Hon'ble Patna High Court
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IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.946 of 2017

Arising Out of PS. Case No.-30 Year-2016 Thana- SAHPUR District- Bhojpur

Kamlesh Tiwary, son of Sri Suraj Tiwary @ Sheo Yogi Tiwary, resident of
village - Barishwan, Police Station - Shahpur in the district of Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Vikramdeo Singh, Advocate
		Mr. Prabhat Kumar Singh, Advocate
For the Respondent/s	:	Mr. Ajay Mishra, APP

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

Date : 22-06-2023

We have heard Mr. Vikramdeo Singh, the
learned Advocate for the appellant and Mr. Ajay Mishra,
the learned APP for the State.

2. The sole appellant stands convicted under
Section 302/201 of the Indian Penal Code and has been
sentenced to undergo R.I. for life, to pay a fine of Rs.



50,000/- under Section 302 of the Indian Penal Code and R.I. for three years under Section 201 of the Indian Penal Code; and out of the fines so realized, the appellant has been directed to pay Rs. 25,000/- to the heirs of the deceased/victim Shahina Praveen @ Gauri, vide judgment of conviction dated 24.06.2017 and order of sentence dated 30.06.2017 passed by the learned 4th Addl. Sessions Judge, Bhojpur, Ara in Sessions Trial No. 378 of 2016 (arising out of Shahpur P.S. Case No. 30 of 2016.

3. The deceased, who has been identified as Shahina Praveen was found dead in a dried-up river in village- Bariswan, which was spotted by one Udai Narain Paswan, the local chaukidar, who has been examined as P.W. 9 at the trial.

4. The appellant, a resident of the same village, has been held guilty of having killed her. The fore-skin of the deceased had worn off. She appears to have been identified by her father and uncle, namely, Islam Hussain and Md. Nasim, who have been examined as PWs. 4 and 5. respectively. They appear to have identified the dead body



of the deceased by the photographs and some clothes which were never handed over to them. The appellant could be located on the basis of some scribbings on a bus-ticket which was found near the dead body. Seat nos. 27 and 28 was and a cell phone no. 8405057548 were also found written on the back side of the ticket-foil.

5. The afore-noted number was found to be of one Sumit Kumar Paswan @ Sonu, a person who had sold the bus tickets. Aforesaid Sumit Kumar Paswan @ Sonu was examined as P.W.7. He has admitted of having issued two tickets for Rs. 500/- from Kishanganj to Patna. He, later in the night, received a telephone call from cell no. 7319417684 that when the bus in question had stopped at Kadhagola near Katihar, the person who had purchased the ticket and his lady companion had got down to have snacks but the bus, in the meantime, left. Afore-noted Sonu advised the caller to talk to the bus conductor, namely, Bipin but later it was found that the person who had called him had boarded another bus. The cell no. 7319417684 was found to be registered in the name of one Rajiv Das. When the CDR



of these two numbers were analyzed, one telephone number was found to have been used from different locations, falling in between Kishanganj and Patna, a number of times (eight times) through which the appellant could be located.

6. Hence his prosecution.

7. Before proceeding to analyze the evidence against the appellant, we are constrained to observe that a peculiar approach was adopted by the investigating agency in concluding the investigation and sending up the appellant for trial. We are equally perturbed with the manner in which the case has been dealt with by the learned Judge, who has recorded the finding of conviction and has imposed life sentence on the appellant. The evidence is completely lacking with respect to the mobile telephone number of the appellant having been used sometimes prior to the death of the deceased; the identification of the appellant; the identification of the deceased or for that matter for any connection between the appellant and the deceased. During the course of investigation and also trial, it came to light that in the Child Helpline Desk at Kishanganj, a message was



recorded that Shahina Praveen aged about 14 years, who is the daughter of Nasim is missing. The deceased, in the present case, had been assessed to be of 24 years of age. The so-called confessional statement of the appellant leading to recovery of the weapon of assault and ornaments have also not been proved in any manner whatsoever. We have stated the afore-noted facts as a prelude to discuss the peculiar manner in which the case has been investigated and tried.

8. The Chaukidar, who lodged the FIR, as noted above, has been examined as P.W.9. He has alleged that on 22.01.2016 at about 12 O' clock in the day, he heard a rumour that a dead body of an unknown female was lying in *Kusha Badhar* canal. P.W. 9 sent the afore-noted information to the police station and visited the spot, where he found the dead body of a woman whose throat had been slit. From the ornaments worn by the deceased, it appeared to him that she was a married woman. At that time, because of the information given by P.W.9 to the police, the police party had also arrived. An attempt was made to have the



deceased identified but to no avail. The dead body was sent by the police party for postmortem to Sadar hospital.

9. On the basis of the afore-noted fardbeyan statement of P.W.9, a case vide Shahpur P.S. Case No. 30 of 2016 dated 22.01.2016 was registered for investigation for the offencess under Sections 302/301/34 of the Indian Penal Code.

10. The investigation was initially taken up by Sanjay Kumar (P.W.-11), who at the relevant time was posted as Sub-Inspector of Police in Shahpur police Station in the district of Bhojpur. He has deposed before the trial court that on the day when the FIR was lodged, the dead body was not identified. The inquest report was signed by Sitaram Tiwary and Dadan Tiwary, out of whom, Dadan Tiwary had been examined as P.W.6 who has testified to the fact that the inquest was prepared in his presence. What is of relevance is to note that afore-noted Dadan Tiwary has categorically stated in his cross-examination that the face of the deceased was not at all identifiable. P.W.11 has further deposed that from near the dead body, a bus ticket was



recovered, some wearing apparel and slippers were also recovered which were seized and the seizure list was prepared. A photographer from R.K. Studio was called, who took four photographs of the dead body which were later enlarged. The negative of those photographs still lay with the R.K. Studio. The photographs were exhibited as Exhibit X, X/1, X/2 and X/3. From the physical assessment of the dead body, P.W.11 was of the view that she was around 24 years of age. The skin of the face was found to be completely worn off.

11. The further investigation was carried out by one Shiv Shankar Ram (P.W.10), who had taken over the investigation on 22.01.2016. He has deposed before the trial court that on the back of the bus ticket, two seat nos. 27 and 28 and a mobile phone number were found written on the back side of the ticket, which on inquiry was found to be of Sonu. On being contacted, aforesaid Sonu had told him that he had issued two tickets on 20.01.2016 to a person who was accompanied by a girl. The ticket was for travel from Kishanganj to Patna. At about 10 'O clock in the night



of 20.01.2016, the person who had been issued ticket had called him on his mobile telephone to inform that he had missed to board the bus again at Kadhagola but later the bus conductor informed Sonu that the traveller had boarded another bus. The number from which Sonu had received the call was found to have been registered in the name of one Rajiv Das of Jalpaiguri. Neither from the material exhibits nor from the deposition of the witnesses have we been able to find any connection with respect to the use of the mobile no. 9955329844 which is said to be registered in the name of appellant/ Kamlesh Tiwary, who presently is posted as Head Constable in B.S.F. Battalion No. 109, who was alleged to be the murderer.

12. Be it noted that the identity of the appellant had not been established as to whether he was serving as Head Constable with the B.S.F. There is no evidence on record to indicate that afore-noted telephone number was registered in the name of the appellant. All that has been derived during the course of investigation, from the analysis of CDR of various telephone numbers from the above-noted



telephone number, there were eight calls and the location of the holder of such telephone number was between Kishanganj to Patna in the night of the travel, which date has been taken as a reference point only for the reason that the bus ticket with seat numbers was found near the dead body.

13. It would also be relevant to state that none of those CDRs have been proved. There is no certification of the person producing such CDR to the effect that it was taken out from the computer which was in ordinary course of nature used for taking out such CDR.

14. Be that as it may, P.W.10 has further deposed that the appellant had made a confession and on his pointing, the weapon of assault, namely, a knife and ornaments from Laxmi jewellers were recovered. It would also be relevant here to state that the P.W.10 has not at all stated about the exact words used by the appellant in his confession which had led to the recovery. The so-called weapon of assault was found buried in mud without any blood mark and the ornaments which were recovered from



Laxmi Jewellers in raid was not put on any test identification parade before anyone to justify that such ornaments belonged to the deceased and those were sold by the appellant. Thus, even with the aid of Section 27 of the Evidence Act, there was no information which was admissible in the eyes of law for the investigation to have proceeded on the right lines. It need not be adumbrated here that confession of an accused before the police is not to be proved but with an exception of so much of information in such confession which would lead to discovery of a fact in that context. The recovery of the knife and of the ornaments cannot be equalled to the discovery as ordained under Section 27 of the Evidence Act.

15. P.W.10 claims to have, during the course of investigation, gone to Kishanganj bus stand and interrogated Sumit Kumar Paswan @ Sonu (P.W.7) when he got to learn that somebody accompanied by a girl had got a ticket booked from Kishanganj to Patna. The bus tickets were not seized by him but by Sanjay Kumar, the first I.O. of this case, who was never interrogated by P.W.10. It has further



been stated by him that during the course of investigation, he learnt that a *Sanaha* with respect to missing of Shahina Praveen was lodged at Kishangaj on 23.10.2015 which was obtained and exhibited as Exhibit-13. In that entry, Shahina Praveen was stated to be only 14 years of age. He has admitted that the ornaments recovered from Laxmi Jewellers were never put on any test identification parade.

16. There is no discovery *challan* available on record.

17. This takes us to the evidence of Nasim (P.W.5), the father of the deceased. He has expressed his complete unawareness of the manner in which his daughter was killed. He had given the information to the police about his daughter having gone missing. On such complaint, he had also affixed the photograph of his daughter. He later read a news item seeking identification of the dead body by means of photograph which was published. On seeing such news item, he went to the police station where his statement was recorded. However, he had not told the police that he had lodged a missing report on 01.10.2015. He identified



the dead body to be that of his daughter only from the photograph which was shown to him.

18. We are at a loss to accept such statement when the witness to the inquest as also the police officer who conducted the inquest have clearly stated that the face was unidentifiable for the reason of the skin having worn off and by general assessment the deceased was found to be of 24 years of age. The wearing apparel were also the indicators for P.W.5 to have identified that those belonged to his daughter. This identification was also on the basis of photographs.

19. One of the uncles of the deceased, namely, Islam Hussain (P.W.4) also had no clue about how the deceased had died. He had never made any statement before the police and had deposed before the trial court for the first time. However, he has admitted that the identification was made by his brother (father of the deceased) on the basis of the photograph which was produced before him. He has also admitted that his niece had gone missing from 01.10.2015 only. The information



of the death of a woman resembling his niece was received by him only on 22.01.2016. He also is said to have identified the deceased as his niece by the photograph only.

20. Thus for all practical purposes, we find from the evidence on record that the police has only resorted to guesswork and that also without any foundation. As noted above, there is no evidence to connect the appellant with the offence. We say so for the following reasons:-

(i) Admittedly, the deceased was assessed to be of 24 years of age as opined by the doctor as also P.W.11, the first I.O. while making the inquest report; whereas Shahina Prveen was only 14 years of age, who had gone missing in the month of October, 2015 for which a report has been lodged in Child Help Line at Kishanganj.

(ii) The identification by the father and uncle of the deceased as their daughter and niece respectively, is absolutely unbelievable for the reason that the identification was only by the photograph, when the face was unidentifiable as the fore-skin was not present on the dead body.



(iii) Sumit Kumar @ Sonu, the person who had issued the ticket may have had an eidetic memory of having issued tickets to a person accompanied by a girl for Kishanganj to Patna, but he has never identified the appellant as the person who had come for the purchase of the ticket. Who was the purchaser of the ticket then is not known. Aforesaid Sonu had received a call at about 10 'O clock in the night of the day when he had issued the ticket in the afternoon that the ticket holder could not board the bus at Kadhagola. The telephone number identified was of a person belonging to Jalpaiguri. Whether the appellant was the person who has purchased the ticket and had travelled thus does not get established; and

(iv) The connection of the offence on the basis of CDR of a telephone number stated to be that of the appellant is too vague to rely upon for convicting and sentencing the appellant; that also when the mandatory requirement under Section 65-B of the Evidence Act with respect to admissibility of such CDR has not at all been followed.



21. During the 313 statement, we are surprised to note, the learned trial did not even try to find out whether the appellant was posted as Head Constable in B.S.F. Battalion anywhere. Why we say so, is that the telephone number through which connection with the appellant has been established, is the number of a person who was employed as Head Constable in B.S.F. Battalion. The appellant also has not stated anything about his present vocation.

22. This whole process therefore appears to be burlesque rather than a trial for murder; least said the better. We find that there is no evidence to connect the appellant with the crime or to even identify the deceased as the daughter of Nasim (P.W.5).

23. The conviction and sentence of the appellant therefore is found to be absolutely unmerited.

24. We have thus no option but to set aside the judgment and order of conviction and direct for setting the appellant at liberty forthwith from jail if not detained or required in any other case.



25. The appeal stands allowed.

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

27. The records of this case be returned to the concerned court below forthwith.

(Ashutosh Kumar, J)

(Shailendra Singh, J)

Rajiv/Sunil-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	26.06.2023
Transmission Date	26.06.2023

