

Criminal Appeal (DB) No. 638 of 2016
with
Criminal Appeal (DB) No. 288 of 2016
With
Criminal Appeal (DB) No. 1374 of 2016

Against the judgment and order of conviction dated 30.03.2015 and sentence dated 04.04.2015 passed by Sri Yogeshwar Mani, learned Additional Judicial Commissioner-XII, Ranchi in S. T. Case No. 285 of 2012

Pawan Lohra	...	Appellant (In Cr. Appeal (DB) No. 638/2016)
Manoj Toppo	...	Appellant (In Cr. Appeal (DB) No. 288/2016)
1. Bablu Lakra		
2. Brish Lakra @ Somra	...	Appellants (In Cr. Appeal (DB) No. 1374/2016)

Versus

The State of Jharkhand	...	Respondents (In all cases)
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PRESENT

HON'BLE MR. JUSTICE RONGON MUKHOPADHYAY
HON'BLE MR. JUSTICE SANJAY PRASAD

For the Appellants	: Mr. Lukesh Kumar, Advocate (In Cr. Appeal DB No. 638/2016) Mrs. Vani Kumari, Advocate (In Cr. Appeal DB No. 638/2016) Mrs. Anshu Dubey, Advocate (In Cr. Appeal DB No. 1374/2016)
For the Respondent	: Mrs. Priya Shrestha, Spl. P.P. (In Cr. Appeal DB No. 638/2016 & Cr. Appeal DB No. 1374/2016) Mr. Ashok Kumar, APP (In Cr. Appeal DB No. 288/2016)

C.A.V. on 03.01.2022

Delivered on 09.02.2022

Rongon Mukhopadhyay, J. These criminal appeals are directed against the judgment and order of conviction dated 30.03.2015 and sentence dated 04.04.2015 passed by Sri Yogeshwar Mani, learned Additional Judicial Commissioner-XII, Ranchi in S. T. Case No. 285 of 2012, whereby and whereunder, the appellants have been convicted for the offences punishable u/s 302/34 of the Indian Penal Code and Section 27 of the Arms Act and sentenced to rigorous imprisonment (R.I.) for life along with a fine of Rs. 10,000/- for the

offence punishable u/s 302/34 I.P.C. and R.I. for three years along with a fine of Rs. 3,000/- for the offence punishable u/s 27 of the Arms Act.

2. The prosecution story reveals that the informant was working as a Centering Mazdoor in the under construction St. Anna Nursing School. The Munshi of the Contractor, Guard and others were sleeping at around 9.30 p.m. on 13.10.2011 when at around 11.30 p.m., four unknown persons had entered into the room along with Vimal Munda. It has been alleged that out of the four two persons had country made pistols while one had a Farsa. They had demanded the phone number of the Contractor and the Munshi and had also stated about the warning given earlier with respect to a demand of Rs. 20 Lakhs. As they were giving the numbers all the miscreants went outside and started asking the name of the informant and the others present. It has been alleged that earlier the miscreants had entered the staff room and had shot Suresh Oraon on his leg. When the informant and the others craved for mercy, the miscreants had again fired at Suresh Oraon and had also assaulted him with a Farsa. Further allegation has been levelled that the informant and others fled away and went to the house of Sushil Runda and after 10-15 minutes when they came back, they found Suresh Oraon lying dead. The miscreants had in the meantime fled away. The informant had given a physical description of the miscreants.

Based on the aforesaid allegations, Namkum P.S. Case No. 210/2011 was instituted for the offences punishable u/s 302/34/120B of the I.P.C. On conclusion of the investigation charge-sheet was submitted against Pawan Lohra [Appellant in Criminal Appeal (DB) No. 638 of 2016], Manish Lakra, Brish Lakra @ Somra @ Dalda [Appellant No. 2 in Criminal Appeal (DB) No. 1374 of 2016], Manoj Toppo [Appellant in Criminal Appeal (DB) No. 288 of 2016] and Bablu Lakra [Appellant No.1 in Criminal Appeal (DB) No. 1374 of 2016] u/s 302/34 of the I.P.C. and Section 27 of the Arms Act. Cognizance was duly taken and after supply of police paper, the case was committed to the Court of Sessions on 13.03.2012. Charge was framed on 25.07.2012 for the offences punishable u/s 302/34 of the I.P.C. and Section 27 of the Arms Act and the contents of the charge were read over and explained to the accused in Hindi to which they pleaded not guilty and claimed to be tried. One of the accused Manish Lakra was declared a juvenile vide order dated 10.09.2014 and his case was split up and sent to

the learned Principal Magistrate, Juvenile Justice Board for trial and disposal.

3. The prosecution has examined as many as nine (09) witnesses in support of its case.

P.W. 1 Pradeep Kachchhap is the informant who has stated that the incident is of 13.10.2011 at around 11.30 p.m. when he was at St. Anna Nursing School. He was sleeping along with Binod and Julius Kerketta while in the Staff Room Safu Kujur, Vimal Munda, Suresh Oraon and Gurudayal Oraon were sleeping. All of a sudden at around 11 p.m. five persons had entered and rebuked them for not opening the door. The miscreants stated about the warning given earlier demanding Rs. 20 Lakhs as extortion money from the Contractor. They thereafter took the phone number of the Contractor Roshan Lal Bhatiya. He has further stated that all the five persons came outside and started asking the name of the informant and others. He had seen Suresh Oraon writhing in pain as a bullet was shot at his leg. One of the miscreants suggested that the leg of Suresh Oraon has to be amputated which was protested by the informant and the others. This witness has further stated that all of a sudden one of the miscreants had fired a shot at the chest of Suresh Oraon while another one tried to assault him as well as the others with a Farsa. A Farsa blow was given on the neck of Suresh Oraon. This witness has further disclosed that he and the others fled away on the face of such onslaught and went to the house of Sushil Runda where the incident was disclosed to him. When they returned back to the place of occurrence, they saw Suresh Oraon lying dead. The Contractor was informed who in turn informed Namkum P.S. after which the police came and his Fardbeyan was recorded which was proved and marked as Ext. 1. He has also identified the seizure list which is with respect to seizure of blood stained earth and an empty cartridge and which has been marked as Ext. 2. The inquest report was also proved and marked as Ext. 3.

In cross examination, this witness has stated that it was dark when the incident occurred and therefore he was not able to properly see the faces of the miscreants.

P.W. 2 Vimal Munda has stated that on 13.10.2011 he was in the campus of Raja Ulatu Nursing School. It was around 11.30 p.m. and he was sleeping after having meal. With him Safu Kujur, Gurudayal Oraon and

Suresh Oraon were sleeping in one room while in the other room Pradeep and Binod Kerketta were sleeping. All of a sudden five persons had opened the door and while four of them came inside one had stood outside. He has stated that on entering the room, they started firing and one of the bullets struck Suresh Oraon on his leg. They were demanding the mobile number of the Contractor and the Munshi for demanding extortion money of Rs. 20 Lakhs. He has stated that Suresh Oraon was taken outside and made to sit near the door. Suresh Oraon was writhing in pain at which one of the miscreants suggested to cut his leg. One of the miscreants fired at Suresh Oraon while another gave a Farsa blow from behind on his neck. Safu Kujur also had a bullet struck on his right hand. The Contractor was informed and thereafter police came, prepared the inquest report and seized an empty cartridge on which he had put his signature and which has been marked as Ext. 3/A and 4. This witness has identified all the accused persons in the dock, but could not name anybody.

In cross examination, he has stated that he was working in the project for the last two months. Previously villagers from Chene village used to work in the project. He has stated that it was dark when the incident had taken place. The accused persons had threatened him at the time of giving his evidence. On the date of occurrence, he was sleeping with the lights off at which point of time, the miscreants had entered the room and started firing. After the murder, this witness had fled away. He had hid himself behind a bush and the accused persons were fleeing away through that road. He has further stated that at the time of the murder he had identified the assailants, but he was not able to identify them when he was hiding behind the bush. He was acquainted with the accused by their face, but was not knowing their names.

P.W. 3 Safu Kujur has disclosed that on the date of occurrence he was sleeping with Vimal, Gurudayal and Suresh and at around 11.30 p.m. four-five persons had entered and started firing and one bullet struck him on his hand. Suresh was also fired upon which hit his leg. This witness and Gurudayal managed to flee away and hid themselves in the paddy field. He has stated that he does not know any of the miscreants.

In cross examination he has stated that the place where they were sleeping was dark. He had not seen the faces of the miscreants.

P.W. 4 Sushil Runda in his examination-in-chief has stated that on 13.10.2011 at around 11.30 p.m. Pradeep Kachchhap woke him up and disclosed that Suresh Oraon has been murdered. Pradeep had disclosed about the manner of occurrence. About four days prior to the incident four persons had come and demanded the phone number of the Contractor and the Munshi. This witness has stated that those persons were demanding money.

P.W. 5 Julius Kerketta in his examination-in-chief has stated that on 13.10.2011 at about 11.30 p.m. he was in the Nursing School along with Pradeep and Binod. Vimal came and told them to open the door. Some persons had opened the gate at which four persons armed with pistol and Farsa entered and started demanding the phone numbers of the Contractor and the Munshi. They were also demanding extortion money of Rs. 20 Lakhs. This witness has stated that the miscreants had fired at Suresh Oraon who was crying in pain and Suresh Oraon was also assaulted with Farsa. There were five miscreants and he had identified all of them in the dock. According to this witness it was a moonlit night.

In cross examination he has stated that on 08.10.2011 some miscreants had come, but no information was given to the police. He was not knowing these miscreants from before. He had not gone to the jail for T.I.P. He has further stated that he and the others had not gone for T.I.P. He had disclosed to the police that due to darkness, he could not identify any of the assailants and he had requested not to force him to attend the Test Identification Parade.

P.W. 6 Dr. Jyotsna Kumari was posted on 14.10.2011 in the Department of F.M.T. at RIMS as Junior Resident. She had conducted autopsy on the dead body of Suresh Oraon and had found the following:-

- (i) Average built rigor mortis is present all over the body.
- (ii) Abdomen slightly distended. Dry blood stained face, neck, front of upper part of chest and cloth.

Fire Arm Injury

- (i) Wound of entrance 2 cm X 1 cm on front of right chest upper part 12 cm right to midline and 10 cm above the right nipple tattooing area.

- (ii) 20 cm X 10 cm front of right chest upper part and fronto lateral aspect of upper part of right arm adjoining front of right shoulder.

Exit Wound

The projectile passes through soft tissue makes exit wound 3 cm X 1 cm left lateral chest middle part.

Wound of Entrance

2 cm x 1 cm right ankle lateral side, the projectile pass through soft tissue to break of right tibia bone lower part makes exit wound 3 cm X 2 cm right leg lower part on medial side.

Incised Wound

- (i) 15 cm X 2 cm X bone deep over left occipital lateral side and left temporal and left ear cutting of soft tissue underline bone dura matter and brain
- (ii) 10 cm X 2 cm at bone deep left cheek with cutting of soft tissue and underline bone
- (iii) 15 cm X 2 cm X bone deep on fronto lateral aspect of upper part of left neck adjoining left side of chin and cutting of soft tissue blood vessel, trachea, oesophagus and cutting of second cervical vertebra
- (iv) 10 cm X 2 cm X bone deep on fronto lateral aspect of left neck middle part and cutting of soft tissue blood vessel, trachea, oesophagus and completely cut of fourth cervical vertebra.

Internal Organ

All the internal organs are pale. There is blood and blood clots on soft and bony tissue.

Opinion

- (i) The above noted injures are ante mortem. Fire arm injuries are caused by firearm weapon.
- (ii) Incised wound is caused by heavy sharp cutting weapon.
- (iii) Death is due to above noted injuries.

This witness has proved the postmortem report which is in her handwriting and bears her signature and which has been marked as Ext. 5.

P.W. 7 Satyendra Kumar Singh is the Investigating Officer who has stated that on the relevant date he was posted as Officer-in-Charge,

Namkum P.S. On receiving the information of murder he had proceeded to the place of occurrence, recorded the Fardbeyan, prepared the inquest report and recorded the statement of the witnesses. The place of occurrence is the under constructed St. Anna Nursing School situated at village Raja Ulatu. Besides the main gate three rooms of bricks and asbestos had been constructed from where one empty cartridge, a misfired cartridge and the dead body of Suresh Oraon were recovered. He had prepared the seizure list with respect to the seized empty cartridge and misfired empty cartridge where he had signed and which has been marked as Ext. 2/1. Initially Pawan Lohra had given a confessional statement followed by the other co-accused persons. This witness has further stated that on the confession of the accused, three country made pistols with cartridge and a misfired cartridge were recovered from under the earth of the house of Pawan Lohra. A Farsa was also recovered from his house. A seizure list was prepared which has been marked as Ext. 6. A cartridge was also recovered from behind the bushes as per the confession of Pawan Lohra and a seizure list was duly prepared which has been marked as Ext. 7. He has also proved his signature and writing in the Fardbeyan which has been marked as Ext. 1/1. The registration of the F.I.R. has been marked as Ext. 1/ 2 and the formal F.I.R. has been marked as Ext. 9. He has proved his signature and writing over the inquest report which has been marked as Ext. 3/b.

In cross examination he has stated that in the Fardbeyan the informant never claimed to have identified the assailants and he was in a state of terror. None of the witnesses stated about the identification of the assailants as all were in a state of shock. The informant as well as the other witnesses were noticed to attend the T.I.P., but all had expressed their inability since they seemed to be totally terrorized. He has also disclosed that Vijay Munda and Julius Kerketta had never claimed to have identified the assailants.

P.W. 8 Karma Lohra has identified his signature in the seizure lists which have been marked as Ext. 6/1 and 7/1. In his cross examination he has stated that on the direction of the police he had signed on blank papers.

P.W. 9 Dr. H. K. Sinha who was posted in the State Forensic Laboratory has stated that one sealed wooden box was received in his office on 04.01.2012 which contained two paper packets marked 'A' and 'B'. The packet marked 'A' contained some blackish colour said to be blood which

bore reddish brown stain practically all over. The packet marked 'B' contained one rusted Farsa fitted with bamboo handle. The blade of Farsa measured 34.5 cm. in length and bamboo handle was 109 cm. in length. It bore only a dot of reddish brownish blood.

The result of the examination was that blood had been detected all over the packet marked 'A' while the blood detected on packet marked 'B' was too small for serological test. As per the serological examination the packet marked 'A' contained human source of blood of origin of Group B.

4. The appellants in their statements u/s 313 Cr.P.C. have merely denied their involvement in the occurrence.

5. Mr. Lukesh Kumar, learned counsel appearing for the appellant in Cr. Appeal DB No. 638/2016 has submitted that the identification of the appellant itself is doubtful. He has submitted that there are contradictions galore in the evidence of the so called eye witnesses with respect to presence of the appellant in the place of occurrence. It has been submitted that identification in the dock without any Test Identification Parade itself negates such identification being a weak piece of evidence. While referring to the evidence of P.W. 1 Mr. Lukesh Kumar submits that he had identified Manoj Toppo (Appellant in Cr. Appeal DB 288 of 2016) and Bablu Lakra (Appellant No. 1 in Cr. Appeal DB 1374 of 2016), in the dock by their physical features and not the other accused while in his evidence he has stated that it was dark and he could not identify the assailants. Learned counsel submits that P.W. 2 and P.W. 5 had also identified the accused persons in the dock, but their evidences are also fraught with doubt. Learned counsel adds that the Investigating Officer (P.W. 7) in his cross examination had disclosed that none of the witnesses had claimed to have identified the assailants as all were in a state of shock. So far as the recovery of arms and ammunitions on the confession of the present appellant is concerned, learned counsel submits that the same have not been proved as P.W. 8 who is a seizure list witness has clearly stated that the police had taken his signature in a blank piece of paper. Mr. Lukesh Kumar adds that the learned trial court has convicted the appellant u/s 27 of the Arms Act only on the basis of assumption as neither the Sergeant Major was examined nor the report prepared by him exhibited. He submits that P.W. 7 was not confronted with the report of the Sergeant Major. It has been submitted that

though Farsa was purportedly recovered on the confession of the appellant, but no serological test could be conducted as the blood detected on the Farsha was too little for such test.

6. Mrs. Vani Kumari, learned counsel appearing for the appellant in Cr. Appeal DB No. 288/2016 has submitted that the evidence of P.W. 2 and P.W. 5 who claimed to have identified the appellant in the dock are full of contradictions and not corroborative of each other. She adds that the witnesses had the opportunity to participate in the Test Identification Parade, but they did not do so. Since the identification of the appellant has not been conclusively proved, the appellant deserves to be acquitted from the charges levelled against him.

7. Mrs. Anshu Dubey, learned counsel appearing for the appellants in Cr. Appeal DB No. 1374/2016 has basically reiterated what has been submitted by the learned counsels for the other appellants.

8. Mrs. Priya Shrestha, learned Spl. P.P. has appeared in Cr. Appeal DB No. 638/2016 and Cr. Appeal DB No. 1374 of 2016 while Mr. Ashok Kumar, learned A.P.P. has put in appearance in Cr. Appeal DB No. 288 of 2016.

Mrs. Shrestha submits that the identification of the appellants have been proved beyond any reasonable doubt. She has referred to the evidence of P.W. 2 and P.W. 5. She has submitted that it was a moon lit night and therefore identification of the appellants was quite possible. She has also submitted that the all the appellants had confessed and in fact on the confession of the appellant Pawan Lakra arms, ammunitions as well as the Farsa used in the murder were recovered. Mrs. Priya Shrestha adds that the identification of the appellants in the dock by P.Ws. 2 and 5 is a clear indication about the involvement of the appellant and non-participation in the Test Identification Parade would not cast a shadow of doubt over such identification.

Mr. Ashok Kumar, learned A.P.P. has reiterated the submissions advanced by Mrs. Priya Shrestha, learned Spl. P.P.

9. We have considered the rival submissions and have gone through the lower court records. The issue for determination to prove the charge u/s 302 I.P.C. is whether the presence of the appellants at the place of occurrence was beyond any reasonable doubt and if so whether all the appellants showed a common intention or not.

10. The First Information Report reveals about some miscreants armed with country made pistols and Farsa having entered into the room of the informant along with Vimal Munda (PW 2). The miscreants had earlier gone to the staff room and shot at Suresh Oraon on his leg. In spite of craving for mercy by the persons present they had again shot at Suresh Oraon and hacked him with a Farsa. Since the miscreants could not be identified, the First Information Report was instituted against unknown persons.

11. The informant has been examined as P.W. 1. He has identified Manoj Toppo and Bablu Lakra by their physical description, but he has not properly identified them by face. In cross examination P.W. 1 has stated that it was dark when the incident had taken place and as such he could not properly see the face of the assailants.

P.W. 2 Vimal Munda has described the occurrence and in the dock he had identified all the accused persons. This witness had identified the appellants, but could not name them. In cross examination he has stated that police did not take him to jail for identifying the accused. He was sleeping by putting off the lights when the accused persons had barged into the room. He had fled away and hid behind a bush. At the time of the incident he had identified the assailants but when they left they could not be identified by him from behind the bush. He has also stated that he was knowing the accused from before though he did not know their names.

P.W. 3 Safu Kujur is another eye witness who was also struck by a bullet on the elbow of his right hand. At the time of the incident he was sleeping in a room along with Vimal (PW 2), Gurudayal and Suresh (deceased). He has not identified any of the miscreants. In his cross examination he has stated that it was dark at the place where they were sleeping and he had not seen the faces of any of the accused.

P.W. 5 Julius Kerketta had shared the office room with Pradeep (PW 1) and Binod. He had identified all the accused persons in the dock. It was a moon lit night. In cross examination he has stated that he was not knowing the accused from before and came to know about them on the date of the occurrence. They had not gone to attend the Test Identification Parade. He had told the police that since it was night he could not identify any of the accused. He had also stated that he may not be forced to attend the Test Identification Parade.

The Investigating Officer (PW 7) in his evidence has stated that at the time of investigation none of the witnesses had disclosed about identifying the miscreants. The witnesses had refused to attend the Test Identification Parade since they were in a state of terror and would not be able to identify the assailants.

12. The narration of P.W. 1, P.W. 2, P.W.3, P.W. 5 and P.W. 7 does not unequivocally prove the presence of the appellants during the commission of the murder. The common thread which runs through the evidence of P.W. 1, P.W. 2 and P.W.3 is that it was dark when the incident is said to have taken place. The lone dissenting evidence seems to have come from the mouth of P.W. 5 who has stated that it was a moon lit night though in the later part of his evidence he has stated about not identifying any of the accused.

13. It appears that P.W. 2 and P.W.3 were in the same room when the assault had taken place. Both have stated that it was dark when the incident had taken place and while P.W. 3 has been unable to identify any of the assailants, P.W. 2 under the same circumstances claimed to have been able to identify them. The identification of the accused in the dock by P.W. 5 seems to have been considerably diluted by virtue of the cross examination of P.W. 5. Therefore it is only P.W. 2 who is consistent in stating about identifying all the accused, but his evidence regarding identification is fraught with contradictions. According to P.W. 2 he was sleeping by putting off the lights and when the accused persons had barged into the room he had fled away. This witness therefore seems to have at best managed a fleeting glimpse of the accused considering the close proximity of time between the entering of the accused into the room and the fleeing away of this witness. Such identification supposedly by P.W. 2 and without there being any corroborative evidence would be dangerous to rely upon to convict an accused. In fact the identification as claimed by P.W. 2 appears to have even been contradicted by P.W. 7, the Investigating Officer.

14. Thus there appears to be frailty in the evidence of the eye witnesses regarding the identification of the appellants at the time of the incident. We shall therefore now consider the evidentiary value of an accused being identified in the dock for the first time. In this context reference be made to

the case of **Sheo Shankar Singh v. State of Jharkhand and another** reported in (2011) 3 SCC 654 and the relevant are quoted as under:

46. *It is fairly well settled that identification of the accused in the court by the witness constitutes the substantive evidence in a case although any such identification for the first time at the trial may more often than not appear to be evidence of a weak character. That being so a test identification parade is conducted with a view to strengthening the trustworthiness of the evidence. Such a TIP then provides corroboration to the witness in the court who claims to identify the accused persons otherwise unknown to him. Test identification parades, therefore, remain in the realm of investigation.*

47. *The Code of Criminal Procedure does not oblige the investigating agency to necessarily hold a test identification parade nor is there any provision under which the accused may claim a right to the holding of a test identification parade. The failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the court. As to what should be the weight attached to such an identification is a matter which the court will determine in the peculiar facts and circumstances of each case. In appropriate cases the court may accept the evidence of identification in the court even without insisting on corroboration.*

15. The identification of the accused for the first time in Court though is a substantive piece of evidence, but in absence of any T.I.P., the veracity of such identification has to be sourced out by looking at other corroborative piece of evidence. It is not a case where the police had not taken any endeavour to hold the T.I.P. after the accused persons were apprehended, but the witnesses refused to attend such T.I.P. as according to P.W. 7 they were in a state of terror. As indicated above, out of four eye witnesses, P.W. 3 has failed to identify any of the accused persons. The evidence of P.W. 2 cannot be clinching in nature as he and P.W. 3 were in the same room and both have given different versions regarding the identification of the accused. So far as P.W. 1 is concerned, he has identified Manoj Toppo and Bablu Lakra by virtue of their physical description, but it would be imprudent to rely on such identification. The evidence of P.W. 5 who is an eye witness does not state with certainty regarding the identification of the accused. In such background facts, it would be unreliable to convict the accused. The learned trial court has primarily relied upon the evidence of P.W. 2 and P.W. 5 who had stated that it was a moon lit night and therefore doubt cannot be raised about the identification of the accused by the said witnesses. It has considered “ bits and pieces” of the evidence of the witnesses and not the totality of their version which as noted above has

generated varied contradictions and which cannot form the basis of conviction u/s 302 I.P.C. We must state herein that we also cannot be oblivious to the probability of the witnesses having seen the appellants earlier as they have been examined after more than one year from the date of the incident.

16. The appellants also seem to have been convicted u/s 27 of the Arms Act. The basis for conviction is the recovery of firearm and cartridges on the confession of the appellant Pawan Lakra. Learned trial court has relied upon the evidence of P.W. 8 who had identified his signature in the seizure list. The learned trial court has also taken note of the report of the Sergeant Major as attached with the case diary.

In his cross examination P.W. 8 has stated that he had put his signature on blank papers. Such seizure therefore becomes doubtful. So far as the Sergeant Major is concerned, neither he has been examined nor the report submitted by him exhibited. In fact the Investigating Officer (PW 7) was not even confronted with any question regarding such report. Such circumstances render the seizure of arms and cartridges doubtful.

In this context it would be profitable to refer to the judgment of the Hon'ble Supreme Court in the case of Mahabir Singh and others v. State of Haryana reported in (2001) 7 SCC 148 and the relevant paragraphs for the purposes of the present case are quoted herein below:-

13. *If a Public Prosecutor failed to get the contradiction explained as permitted by the last limb of the proviso to Section 162(1) of the Code, is it permissible for the court to invoke the powers under Section 172 of the Code for explaining such contradiction? For that purpose we may examine the scope of Section 172 of the Code. That section deals with the diary of proceedings in investigation. Sub-section (1) enjoins on the investigating officer to enter in a diary the time at which he began and the place or places visited by him during the course of investigation. Such entries should be made on a day-to-day basis. Sub-sections (2) and (3) of Section 172 read thus:*

"172. (2) Any criminal court may send for the police diaries of a case under enquiry or trial in such court, and may use such diaries, not as evidence in the case, but to aid it in such enquiry or trial.

(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the court; but, if they are used by the police officer who made them to refresh his memory, or if the

court uses them for the purpose of contradicting such police officer, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply."

14. *A reading of the said sub-sections makes the position clear that the discretion given to the court to use such diaries is only for aiding the court to decide on a point. It is made abundantly clear in sub-section (2) itself that the court is forbidden from using the entries of such diaries as evidence. What cannot be used as evidence against the accused cannot be used in any other manner against him. If the court uses the entries in a case diary for contradicting a police officer it should be done only in the manner provided in Section 145 of the Evidence Act i.e. by giving the author of the statement an opportunity to explain the contradiction, after his attention is called to that part of the statement which is intended to be so used for contradiction. In other words, the power conferred on the court for perusal of the diary under Section 172 of the Code is not intended for explaining a contradiction which the defence has winched to the fore through the channel permitted by law. The interdict contained in Section 162 of the Code, debars the court from using the power under Section 172 of the Code for the purpose of explaining the contradiction.*

17. We must also indicate herein that so far as the blood stained Farsa is concerned, the same could not undergo a serological test as the blood detected was too little for carrying out such test as stated by P.W. 9 and therefore the Farsa cannot be ascertained to be one of the weapons used in the commission of the murder.

18. On consideration of the aforesaid facts, we come to the conclusion that the prosecution has miserably failed to prove its case beyond all reasonable doubts against the appellants u/s 302/34 I.P.C. and u/s 27 of the Arms Act. We accordingly, set aside the judgment and order of conviction and sentence dated 30.03.2015 (sentence dated 04.04.2015) passed by Sri Yogeshwar Mani, learned Additional Judicial Commissioner-XII, Ranchi in S. T. Case No. 285 of 2012, whereby and whereunder, the appellants have been convicted for the offences punishable u/s 302/34 of the Indian Penal Code and Section 27 of the Arms Act and sentenced to rigorous imprisonment (R.I.) for life along with a fine of Rs. 10,000/- for the offence punishable u/s 302/34 I.P.C. and R.I. for three years along with a fine of Rs. 3,000/- for the offence punishable u/s 27 of the Arms Act.

19. These appeals are allowed.

20. Since the appellants in Cr. Appeal DB No. 638 of 2016 and Cr. Appeal DB No. 1374 of 2016 are in custody, they are directed to be released forthwith, if not wanted in any other case. So far as the appellant Manoj Toppo in Cr. Appeal DB No. 288 of 2016 is concerned, since he is on bail, he is discharged from the liability of his bail bond.

(RONGON MUKHOPADHYAY,J.)

(SANJAY PRASAD, J.)

Jharkhand High Court, Ranchi
Dated the 9th February, 2022
MK/N.A.F.R.