

**Sharad Dhakar Vs. State**

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**Court :** Rajasthan

**Decided On :** Dec-19-1996

**Reported in :** 1996(2)WLN563

**Judge :** Rajendra Saxena and; Gyan Sudha Misra, JJ.

**Appeal No. :** D.B. Cr. Appeal No. 502 of 1995

**Appellant :** Sharad Dhakar

**Respondent :** State

**Advocate for Pet/Ap. :** Shri. S.R. Bajwa

**Judgement :**

**Rajendra Saxena, J.**

1. This order shall dispose of two applications filed by the learned Public Prosecutor and one application dated 3.12.96 filed on behalf of accused appellant Sharad Dhakar under Section 391, Cr.P.C. for taking further evidence in these appeals.

2. The learned Public Prosecutor has prayed that the daily diary entries Nos. 1745/dated 24.4.94. 1861 & 1866/dt. 31.8.94 & entries in Malkhana register dated 1.6.94, 22.7.94 and 31.8.94 of Police Station Sodala, the order of the Superintendent of Police, Jaipur City Jaipur dated 16.3.96, daily diary entries Nos.

638/dt.8.7.94, 957/dt. 12.7.94, & entry dated 13.7.94 of Malkhana register of Police Station Manak Chowk, Receipt of Malkhana articles dt. 22.7.94. daily diary entries Nos. 1497 and 1525/dated 18.7.94 and Malkhana register entries of PS Shastri Nagar, daily diary entries Nos. 1016 and 1032 dt. 17.8.94, and entries of Malkhana register dated 25.7.94 of Police Station Sodala be taken on record. He has further prayed that as many as nine witnesses be examined to prove the afore mentioned documents for deciding these appeals effectively and for reaching at the correct conclusion about guilt or innocence of the accused appellants.

3. On behalf of accused appellant Sharad Dhakar, it has been prayed that the daily diary entry Nos. 1064/dt. 13.3.94, 1067/dt. 14.3.94 of PS Sodala be taken on record, which speak volumes against the prosecution story and create serious suspicion about the alleged recovery of ornaments at his instance from the garage of the Universal Auto Works.

4. Shri S.R. Bajwa Sr. Advocate, learned Counsel for appellant Manish Dixit has stoutly opposed the applications filed by the State on the ground that the prosecution should not be allowed to fill up the gaps as the same will cause serious prejudice to his client.

5. We have given our thoughtful consideration and carefully perused the relevant record in extenso. D.B. Cr. Appeal Nos. 501/95 and 502/95 have been filed by accused appellants Manish Dixit and Sharad Dhakar, respectively against their conviction for offences under Sections 302/34, 364/34, 379/34, 120B IPC 7/27(1)(A) of the Arms Act passed by the learned Sessions Judge, Jaipur City, while Cr. Appeal No. 9/96 has been filed by the State for enhancement of their punishments.

6. It is the prosecution case that a bullet was taken out of the body of deceased Gulshan Makhija by the doctor on 24.2.94, who after sealing the same in a bottle had handed over the same to the investigating party of the police station Sodala vide D.D. entry No. 1745/dt. 24.2.94 of PS Sodala. The said bottle containing bullet was received in the said police station. Daily diary Entries No. 1861 & 1866/dt. 26.2.94 indicate that the said bullet was sent to the State Forensic Science Laboratory and after examination thereof, the F.S.L. sent back the said

sealed bottle containing the bullet to the police station Sodala vide daily diary entry No. 37 1.6.94. Its corresponding entry was also made in the Malkhana register. On 22.7.94, the said bullet was again sent to the State F.S.L. vide D.D. entry No. 1527 dated 22.7.94. Vide D.D. entry No. 1996 dated 31.8.94 the said bottle containing bullet was again received back from the State F.S.L. at police station Sodala and its corresponding entry Ex. P. 37 was also made in the Malkhana register.

7. From the evidence recorded in this case, it transpires that a special team for conducting investigation was constituted by the Additional Director General of Police (Law & Order) consisting of police officers of as many as three police stations namely P.S. Sadala, Manak Chowk & Shastri Nagar, Jaipur. It is the case of prosecution that the said special team of investigation headed by Umesh Singh SHO PS Manak Chowk went to Delhi on 8.7.94 for apprehending accused appellant Manish Dixit. D.D. entry No. 638/dt. 8.7.94 of PS Manak Chowk pertains to the departure of the said team to Delhi. It is the case of prosecution that accused appellant Dixit was arrested in Delhi in a Hotel and from his possession a Revolver and three Live cartridgeges were recovered. D.D. entry No. 957/dt. 12/13.7.94 PS Manak Chowk records arrival of the police team after arresting accused appellant Manish Dixit and the seizure of recovered three Live cartridgeges from his person. A corresponding entry regarding the deposit of those articles in the Malkhana was also made in the Malkhana register dated 13/7/94. On 22.7.94 the sealed packets of the said revolver & three cartridgeges were handed over to the official of police station Sodala & a receipt thereof was also procured. The prosecution wants to produce the said D.D. entries and the receipt in evidence.

8. It is also the case of prosecution that appellant Manish Dixit in pursuance to his disclosure statement got recovered certain ornaments. D.D. entry Nos. 1497 & 1525/dt. 18.7.94 of P.S. Shastri Nagar records the departure of the police team and their return to the said police station on that day. Similarly entry No. 131 was made in the Malkhana register whereby the alleged recoverable ornaments were deposited in the Malkhana of PS Shastri Nagar. On 25.7.94, the sealed packets of the ornaments were sent to the police station Sodala. On 17.8.94 the said sealed packets of the recovered ornaments were taken out from the Malkhana of Police

Station Sodala for being taken to the Executive Magistrate for identification parade and thereafter those packets were deposited in the said police station. D.D. entries Nos. 1062 and 1032/dt. 17.8.94 of PS Sodala relate to the said transaction.

9. The aforementioned entries of various daily diary entries of aforesaid three police stations and the Malkhana register entries prima facie appear to have been made in regular transaction of the business and genuineness thereof cannot be doubted. The afore mentioned entries are very much material and relevant to form 'link evidence' to prove the movement of the sealed bottle containing the bullet, recovered from the body of the deceased, regarding the factum of the arrest of appellant Manish Dixit in Delhi, and the alleged recovery of Revolver and three live cartridgeges from his person and the movements thereof from police station Manak Chowk to Police Station Sodala as also the alleged recovery of ornaments at the instance of the said appellant and the movement of the sealed packets of ornaments recovered at the instance from police station Sodala to the Court of the Executive Magistrate and return thereof after test identification parades.

10. As mentioned earlier, in this sensational case, special team of police officials drawn from three police stations, Sodala, Manak Chowk, & Shastri Nagar, was formed for the investigation. But, it appears that at the time of filing the challan, due to lack of co-ordination of the various members of the investigating team and lack of vision, negligence, inadvertence, and carelessness of the SHO PS Sodala, the aforesaid documents were not submitted alongwith the charge sheet.

11. Section 391, Cr.P.C. proclaims that in dealing with any appeal under Chapter XXIX of the Code of Criminal Procedure, the appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session, and that the accused or his Pleader shall have the right to be present when the additional evidence' is taken. Section 391, Cr.P.C. forms an exception to the general rule that an appeal must be decided on the evidence, which was recorded by the trial Court, and being an exception to the general rule. The power under this Section should always, be exercised with cirumpsection and for meeting the ends of justice. The object of this section is to

ensure that the justice is done between the prosecutor and the person prosecuted. The object of this section is also prevention of a guilty person's escape through some inadvertence, carelessness or ignorant proceedings at the stage of investigation or the trial or the vindication of a wrongfully accused person's innocence, where the same inadvertence, carelessness or ignorance has omitted to record circumstances essential to the elucidation of truth. Another reason for enactment of this section is to save public time by taking only the additional evidence necessary instead of remanding the whole case for examining once again the witnesses already examined and ordering for the de novo trial. It has further to be taken into consideration that the appellate court should also not take additional evidence to remove lacuna left by the prosecution. But at the same time, it should not ignore the interest of justice. The appellate court is fully empowered to take further evidence if it finds that some formal difficulty or lacuna may be apparent or some material evidence, which was not available before the trial Court or the same was subsequently found or that necessary evidence was not produced due to the inefficiency or inadvertence or carelessness of the investigating officer of the prosecutor. In other words, to avoid failure of justice should be the prime consideration for the appellate court. In exercising discretion given under this Section.

12. In *Rajeshwari Prasad Misra v. State of West Bengal* AIR 1965 SC 1887 while interpreting provisions of Section 428 of the Old Code of Criminal Procedure, which were analogous to Section 391, Cr.P.C 1973, the Apex Court held that the Code gives power to the appellate court to take additional evidence, which, for the reasons to be recorded, it considers necessary, leaving a wide discretion to fit to deal appropriately with different cases. The additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power has to be exercised sparingly and only in suitable cases. The Apex Court further held that once such action is justified, there is no restriction on the kind of evidence which may be received, it may be formal or substantial. It must not, however, be received in such a way as to cause prejudice to the accused, as for example, it should not be received as a disguise for a retrial, or to change nature of the case against him.

13. In *Akhtar Ali v. State of Rajasthan* 1976 WLN (UC) 574, the appellant was convicted under Sections 3/14 of Foreigners Act and 307/34 1PC. Under Section 9 of the Foreigners Act, the burden was cast upon the appellant to prove that he was an Indian national. Before the trial Court, he could not produce necessary documents. However, in appeal he submitted voter list as well as the passport and the saving bank pass books, which were relevant to the question involved in the case. This Court held that it was in the interest of justice to admit those documents in evidence and keeping in view the facts and circumstances of the case, the case was remanded back to the trial court.

14. In *State of Gujarat v. Mohanlal* AIR 1987 SC 1321 the request of the State for adducing additional evidence was rejected by Gujarat High Court on the ground of delay, It was held by the Apex Court that the mere fact that six years had elapsed for which time-lag the prosecution was in no way responsible, was no good ground for refusing to act in order to promote the interests of justice in an age when delays in the Court have become a part of life and the order of the day and it was, therefore, directed that the additional evidence be allowed. In that case, the prosecution wanted to adduce the additional evidence to prove a letter received from the Mint Master certifying that the article in question was made of gold having purity of 99.60%. It was further held that the alleged lacuna was technical one in the sense that while the opinion of the Mint Master had admittedly been placed on record, it had not been formally proved. The report completely supported the prosecution case that the Gold was of specified purity. The Apex Court observed that to deny the opportunity to remove such a formal defect was to abort a case against an economic offender, and that the ends of justice are not satisfied only when an accused in a criminal case is acquitted and that the Community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the Community deserves equal treatment at the hands of the Court in the discharge of its judicial functions.

15. In the instant case, the prosecution has filed the report of the ballistic expert in respect of the bullet taken out from the body of the deceased but the corresponding Malkhana and D.D. entries about the movement of the said bottle containing the bullet were not filed alongwith the challan. Similarly the D.D. &

Malkhana entries regarding the deposit of the sealed packet of the revolver and the live cartridges, alleged to have been recovered from the person of appellant Manish Dixit of police station Manak Chowk and such entries of the daily diary and Malkhana register of police station Shastri Nagar in respect of the ornaments recovered at the instance of the said appellant were not filed alongwith the charge sheet by the SHO PS Sodala, due to the lack of co-ordination among various members of the investigating team and for his lack of vision, negligence and inadvertance. Thus, these relevant documents forming the vital link evidence were not placed before the trial Court. For the negligence, carelessness or inadvertance of the officer, who submitted the challan in this case, the interest of justice cannot be allowed to be suffer. As mentioned earlier, the afore mentioned entries of the daily diary and Malkhana registers of the aforementioned police stations prima facie appear to have been made in regular course of business and the genuineneness thereof cannot be doubted in the first instance. These entries fall within the meaning of public document. In our considered opinion, it is necessary to take these documents on record as additional evidence for the fair and final adjudication of these appeals. In these circumstances, if these documents are allowed to be taken into evidence, at this stage in our considered opinion, no prejudice shall be caused to the accused appellants because they will be at liberty to rebut those entries and to cross examine the prosecution witnesses. The alleged incident took place on 23.2.1994 and the trial in this case has been concluded expeditiously and without any due delay. The witnesses, whose names have been mentioned in the application filed by the prosecution by the learned Public Prosecutor have simply to formally prove these documents, in case the appellant do not admit their genuineness Under Section 294, Cr.P.C.

16. Shri Bajwa has relied upon the decision in *Bir Singh v. State of UP* : 1978 CriLJ177a , wherein It has been held that though an appellate Court has power to take additional evidence in a suitable case, yet the discretion should not be exercised to fill up the gap in lacunae in the prosecution evidence. The facts and circumstances of that case are clearly distinguishable from the facts of the case on hand. In that case, the evidence of the Investigating Officer was held to be utterly unreliable and the accused was acquitted. The High Court in appeal against acquittal allowed the additional evidence on the question of filing the FIR. The

Apex Court held that the High Court was not justified in allowing the additional evidence in such a case. Apparently, such are not the facts of the instant case.

17. In our considered opinion, the afore mentioned entries of the daily diary and the Malkhana register of various police stations are material and relevant documents for effectively deciding this case. Hence these documents are taken on record and the prosecution is allowed to prove these documents by examining the witnesses, whose names have been mentioned in the application.

18. As regards the order dated 16.3.96 issued by the Superintendent of Police directing all the SHOs of the police stations of Jaipur City to deposit all the packets of the viscera and other articles of blood stained clothes and other articles received from the doctors Inquest/ post mortem cases, which are required to be sent to the State Forensic Science Laboratory, and enter there into the Malkhana register and directing them to send those packets to the State FSL within seven days of their receipt. This order is not at all a relevant document in this case to show the practice of the police officer not to make such entries of those articles in the Malkhana register of Police Station. Besides this, the said order has been passed on 16.3.96, whereas the alleged incident in this case took place on 23.2.94. Therefore, this document cannot be taken into evidence at this stage.

19. As regards the application filed on behalf of the accused appellant Sharad Dhakar, the DD entry Nos. 1064 & 1068/dt. 14.3.94 of PS Sodala appear to be relevant regarding the factum of arrest and the alleged recovery of ornaments made at the instance of appellants Sharad Dhakar. These entries prima facie appear to have been made during regular course of business. These are public documents and fall within the meaning of public documents. Therefore, in the interest of justice, the afore mentioned entries of the daily diary of the Police Station Sodala are also taken on record.

20. The learned Public Prosecutor as also the learned Counsel for the accused appellants have requested that the statements of the prosecution witnesses be got recorded in this Court instead directing the learned trial Court to record their statements. Since we have already heard major part of the arguments in these appeals, we feel that the statements of the witnesses should be recorded by this

Court for expeditious disposal of these appeals.

21. We accordingly partly allow these applications filed by the learned Public Prosecutor and Shri R.K. Agarwal learned Advocate for accused appellant Sharad Dhakar, and order that if the genuineness of these documents are not admitted Under Section 294 Cr.P.C. by the parties concerned then the statements of the witnesses mentioned in the application filed by the learned Public Prosecutor be recorded by this Court in this case.

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