

IN THE HIGH COURT OF JUDICATURE AT PATNA
DEATH REFERENCE No.3 of 2019

Arising Out of PS. Case No.-24 Year-2015 Thana- ARA NAGAR District- Bhojpur

=====

THE STATE OF BIHAR

... .. Petitioner/s

Versus

Lamboo Sharma @ Munna Sharma @ Sachidanand Sharma Son of Samhaut
Sharma Resident of Village- Piro, P.S.- Piro, District- Bhojpur.

... .. Respondent/s

=====

with

CRIMINAL APPEAL (DB) No. 1150 of 2019

Arising Out of PS. Case No.-24 Year-2015 Thana- ARA NAGAR District- Bhojpur

=====

Shyam Vinay Sharma Son of Late Awadhesh Rai @ Awadhesh Sharma
Resident of Village - Chauri, P.S.- Chauri, Distt.- Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

with

CRIMINAL APPEAL (DB) No. 1162 of 2019

Arising Out of PS. Case No.-24 Year-2015 Thana- ARA NAGAR District- Bhojpur

=====

Rinku Yadav Son of Lal Babu Yadav Resident of Village - Pawarganj Ara,
P.S.- Ara Nawada, Distt.- Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

with

CRIMINAL APPEAL (DB) No. 1185 of 2019

Arising Out of PS. Case No.-24 Year-2015 Thana- ARA NAGAR District- Bhojpur

=====

Md. Naim Miya @ Naim Miya Son of Late Amin Miya Resident of Village -
Dharhara, Ara, P.S.- Ara (Town), District- Bhojpur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

with

CRIMINAL APPEAL (DB) No. 1210 of 2019

Arising Out of PS. Case No.-24 Year-2015 Thana- ARA NAGAR District- Bhojpur

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LAMBOO SHARMA @ MUNNA SHARMA @ SACHIDANAND
SHARMA Son of Samhut Sharma Resident of Village - Gandhi Chowk, Piro,
P.S.- Piro, Dist.- Bhojpur.

... .. Appellant/s

Versus



The State Of Bihar
... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 1246 of 2019
Arising Out of PS. Case No.-24 Year-2015 Thana- ARA NAGAR District- Bhojpur

Md. Chand Miya @ Chand Miyan Son of Late Amin Miya Resident of Village-Dharhara, Ara, P.S.-Ara(Town), District-Bhojpur.
... .. Appellant/s

Versus
The State of Bihar
... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 1271 of 2019
Arising Out of PS. Case No.-24 Year-2015 Thana- ARA NAGAR District- Bhojpur

Anshu Kumar Son of Sri Kamleshwar Sharma Resident of Village - Karari, Post - Dhobaha Bazar, P.S.- Ara Muffasil, District- Bhojpur
... .. Appellant/s

Versus
The State of Bihar
... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 1290 of 2019
Arising Out of PS. Case No.-24 Year-2015 Thana- ARA NAGAR District- Bhojpur

Akhilesh Upadhyay @ Musa Son of Late Gopal Upadhyay Resident of Village - Nonar, P.S.- Piro, District- Bhojpur
... .. Appellant/s

Versus
The State of Bihar
... .. Respondent/s

Appearance :

(In DEATH REFERENCE No. 3 of 2019)

For the Petitioner/s : Mr. Pratik Mishra, Amicus Curiae
For the Respondent/s : Mr. Vikram Deo Singh and
Mr. Sada Nand Roy, Advocates

(In CRIMINAL APPEAL (DB) No. 1150 of 2019)

For the Appellant/s : Mr. Prabhat Kumar Singh, Advocate
For the Respondent/s : Dr. Mayanand Jha, APP

(In CRIMINAL APPEAL (DB) No. 1162 of 2019)

For the Appellant/s : Mr. Manoj Kumar, Advocate
For the Respondent/s : Mr. Ajay Mishra, APP

(In CRIMINAL APPEAL (DB) No. 1185 of 2019)

For the Appellant/s : Mr. Surendra Singh, Sr. Advocate with
Mr. Ravindra Kumar, Advocate
For the Respondent/s : Mr. Dilip Kumar Sinha, APP

(In CRIMINAL APPEAL (DB) No. 1210 of 2019)

For the Appellant/s : Mr. Vikram Deo Singh and
Mr. Sada Nand Roy, Advocates



For the Respondent/s : Mr. Abhimanyu Sharma, APP
(In CRIMINAL APPEAL (DB) No. 1246 of 2019)
For the Appellant/s : Mr. Surendra Singh, Sr. Advocate with
Mr. Ravindra Kumar, Advocate
For the Respondent/s : Mr. Ajay Mishra, APP
(In CRIMINAL APPEAL (DB) No. 1271 of 2019)
For the Appellant/s : Mr. Ravindra Kumar, Advocate
For the Respondent/s : Mr. Ajay Mishra, APP
(In CRIMINAL APPEAL (DB) No. 1290 of 2019)
For the Appellant/s : Mr. Ravindra Kumar, Advocate
For the Respondent/s : Mr. Ajay Mishra, APP

**CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA
C.A.V JUDGMENT
(Per: HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA)**

Date : 23-03-2022

Death Reference No. 3 of 2019 has been registered on the reference made by the trial court under Section 366 of the Code of Criminal Procedure, whereby vide order of sentence dated 20.08.2019 passed by 3rd Additional Sessions Judge, Ara, Bhojpur in Sessions Trial No. 35 of 2016 arising out of Ara Town P.S. Case No. 24 of 2015, the convict Lamboo Sharma @ Munna Sharma @ Sachidanand Sharma has been awarded death sentence with fine of Rs. 25,000/- for the offence under Section 302 of the Indian Penal Code, in default, he has further been directed to undergo imprisonment for one more year.

2. The convict Lamboo Sharma has challenged the judgment of conviction dated 17.08.2019 and the order of sentence dated 20.08.2019 by filing Cr. Appeal (D.B.) No. 1210 of 2019.



3. Further, since Cr. Appeal (D.B.) Nos. 1150 of 2019, 1162 of 2019, 1185 of 2019, 1246 of 2019, 1271 of 2019 and 1290 of 2019 arise out of the same judgment of conviction dated 17.08.2019 and order of sentence dated 20.08.2019, they were tagged with this death reference and have been heard together.

4. In Sessions Trial No. 35 of 2016 the basis for awarding death sentence to the convict Lamboo Sharma has been stated to be his earlier convictions in Sessions Trial Nos. 128 of 2010 and 659 of 2008 in which he was sentenced to life imprisonment.

5. It is pertinent to note here that in relation to the above convictions no evidence has been taken by the trial Court while awarding death sentence to the convict Lamboo Sharma and thereby the procedure prescribed under sections 211(7), 236 and 298 of the Code of Criminal Procedure has not been followed.

6. Provisions of sections 211(7), 236 and 298 of the Code of Criminal Procedure are quoted here-in-below for ready reference :

Section 211 (7)- Contents of Charge -If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to



punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge; and if such statement has been omitted, the Court may add it at any time before sentence is passed.

Section 236. Previous conviction -- *In a case where a previous conviction is charged under the provisions of sub-section (7) of section 211, and the accused does not admit that he has been previously convicted as alleged in the charge, the Judge may, after he has convicted the said accused under section 229 or section 235, take evidence in respect of the alleged previous conviction, and shall record a finding thereon: Provided that no such charge shall be read out by the Judge nor shall the accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it, unless and until the accused has been convicted under section 229 or section 235.*

298. Previous conviction or acquittal how proved -- *In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force,-*

(a) by an extract certified under the hand of the Officer having the custody of the records of the Court in which such conviction or acquittal was held, to be a copy of the sentence or order; or

(b) in case of a conviction, either by a certificate signed by



the officer in charge of the jail in which the punishment or any part thereof was undergone, or by production of the warrant of commitment under which the punishment was suffered, together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

7. Consequently, the order of sentence dated 20.08.2019 passed by 3rd Additional Sessions Judge, Ara, Bhojpur in Sessions Trial No. 35 of 2016 arising out of Ara Town P.S. Case No. 24 of 2015 insofar as it relates to the convict Lamboo Sharma is, hereby, set aside. Accordingly, Death Reference No. 3 of 2019 is not confirmed.

8. The reference alongwith the entire record of Sessions Trial No. 35 of 2016 is remitted back to the court below with direction to pass the order afresh in respect of convict Lamboo Sharma in accordance with the prescribed procedure.

9. All the connected appeals are directed to be listed after the fresh orders are passed by the Court below.

Per Ashwani Kumar Singh, J:

1. I have had the privilege of perusing the judgment of my esteemed Brother Arvind Srivastava, J. I agree with his judgment and would like to indicate my own reasons as well.



2. Section 54 of the Indian Evidence Act clearly stipulates that bad character evidence is irrelevant in criminal proceedings unless it is in reply to an evidence of good character established by the other party. It reads as under:

“54. Previous bad character not relevant, except in reply.—In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant. Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue. Explanation 2.—A previous conviction is relevant as evidence of bad character.]”

3. From a bare reading of Section 54 along with its two explanations, it would be evident that there are two exceptions where bad character evidence would be relevant:

1. Where bad character evidence of any person is itself in issue.
2. A previous conviction is relevant in evidence of bad character.

4. Explanation 2 of Section 54 of the Indian Evidence Act makes it amply clear that if a person is previously convicted of a crime it could be used as evidence to prove his bad character.



5. It is of salience to note here that despite Section 54 of the Indian Evidence Act clearly stipulating that evidence of bad character shall not be relevant and providing two exceptions to it, this Section does not override its other provisions or any provision made under any other statute which makes admissible such an evidence.

6. The evidence relating to previous conviction is made relevant under Sections 211(7), 236, 248(3) and 298 of the Code of Criminal Procedure (for short 'the Cr.P.C.').

7. The aforesaid provisions of the Cr.P.C. are being extracted hereunder:-

“Section 211(7)-Contents of Charge - *If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge; and if such statement has been omitted, the Court may add it at any time before sentence is passed.”*

“Section 236. Previous conviction -- *In a case*



where a previous conviction is charged under the provisions of sub- section (7) of section 211, and the accused does not admit that he has been previously convicted as alleged in the charge, the Judge may, after he has convicted the said accused under section 229 or section 235, take evidence in respect of the alleged previous conviction, and shall record a finding thereon: Provided that no such charge shall be read out by the Judge nor shall the accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it, unless and until the accused has been convicted under section 229 or section 235.”

“Section 248(3)- *Where, in any case under this Chapter, a previous conviction is charged under the provisions of sub- section (7) of section 211 and the accused does not admit that he has been previously convicted as alleged in the charge, the Magistrate may, after he has convicted the said accused, take evidence in respect of the alleged previous conviction, and shall record a finding thereon: Provided that no such charge shall be read out by the Magistrate nor shall the accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it, unless and until the accused has been convicted under sub-section (2).”*



Section 298. Previous conviction or acquittal how proved- *“In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force,-*

(a) by an extract certified under the hand of the Officer having the custody of the records of the Court in which such conviction or acquittal was held, to be a copy of the sentence or order, or

(b) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was undergone, or by production of the warrant of commitment under which the punishment was suffered, together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.”

8. Antecedents are unacceptable to criminal law to arrive at a finding of guilt, for entering a conviction as against an offence/offences charged. Antecedents, that too resulting in a previous conviction alone, are relevant; only if such a previous conviction makes the offender liable for enhanced punishment.

9. In any legal system, justice for the members of the society is of prime importance. Sentencing is not a mechanical act and has preventive, retributive, reformatory and deterrent



functions. Having once been convicted and sentenced, if the accused has failed to reform himself then substantial justice mandates that more severe sentence be entailed upon him. Capital punishment or the death penalty is the extreme penalty of law. The right to life is a fundamental right and according to Article 21 of the Constitution of India, no person shall be deprived of his life or personal liberty except according to the procedure established by law.

10. In **Mahomed Hanif and another v. Emperor [(1942) 44 BOM, L.R. 456; (1942) AIR (B215)]**, it was observed that if a person has shown from his past actions that he intends to adopt a criminal career, three things should be borne in mind while sentencing him; first, it is necessary to pass a sentence upon him which will make him realize that a life of crime becomes increasingly hard, and does not pay; secondly, the sentence should serve as a warning to others who may be thinking of adopting a criminal career; and thirdly, the public must be protected against people who know that they are going to ignore the rules framed for the protection of society. However at the same time principles of natural justice demand that the accused may be afforded an opportunity to explain his previous conviction in such a way that the Court is not prejudiced during



trial by the fact of previous conviction. Navigating this delicate balance of natural justice is like walking a tightrope.

11. Sections 236 and 211(7) of the Code of Criminal Procedure (for short 'the Cr.P.C.') are the guiding Sections in this behalf.

12. From a bare reading of Section 236 Cr.P.C., it is evident that in order to sentence the accused to an enhanced punishment under Section 236, it is imperative that a charge should have been framed under Section 211(7) of the Cr.P.C.

13. Further, from a bare reading of Section 211(7) Cr.P.C., it would be evident that the accused is to be charged with the previous conviction at the same stage when he is charged with the subsequent offence. If at the end of the trial, the accused is found guilty for the subsequent offence, he would be tried on the charge of previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence. It would also indicate that if there is omission in the framing of charge at the initial stage, the Court may add it at any time before sentence is passed.

14. Thus, a conjoint reading of Section 211(7) and Section 236 Cr.P.C., would make it evident that the prosecution is bound to prove the previous conviction and if the fact relating to previ-



ous conviction is not mentioned in the charge, the same cannot be used for the purpose of enhancing the sentence.

15. In **Prakash v. State of M.P. [1983 J.L.J. 448 MP: (MANU/MP/0286/1982)]**, previous conviction was neither stated in the charge nor was added to it at a later stage. The accused admitted the previous conviction. It was held that mere admission by the accused is not enough to award the enhanced sentence under Section 75 of the Indian Penal Code. A mere allegation that at the time when the accused committed the offence, he had been previously convicted of offences punishable under the Indian Penal Code would not satisfy the requirements of Section 211(7) of the Cr.P.C. The Court held that where the previous conviction did not form part of the charge, the enhanced sentence ought to be set aside and the Sessions Judge must be required to reopen the trial on that charge giving the accused an opportunity of making a fresh defence to it.

16. In **Bhagwangiri v. State [MANU/RH/0070/1955]**, it has been observed by the Rajasthan High Court that Section 310 of the Cr.P.C. (Section 236 Cr.P.C. in new code) relates to trials before a Court of Sessions. The usual procedure which is followed in the Court of Sessions is that when the Court is ready to commence the trial, then according to Section 271 Cr.P.C., the



charge should be read out to the accused and explained to him and he should be asked whether he pleads guilty of the offence of which he is to be tried. Section 310 Cr.P.C. (old code) lays down a different procedure in cases where the accused is further charged that by reason of a previous conviction, he is liable to enhanced punishment or punishment of a different kind for the subsequent offence. It clearly says that the procedure prescribed by the foregoing provisions of this chapter must be modified and the charge about the previous conviction should not be read out in the Court and the accused should not be asked to plead thereto. The prosecution should not even refer to the charge nor any evidence should be adduced thereon so long as the accused is not convicted of the subsequent offence or the jury have delivered their verdict or the opinions of the assessors have been recorded on the charge of such subsequent offence. In other words, when the Court is either convicting the accused of the subsequent offence or the jury have delivered their verdict or the opinions of the assessors have been recorded, then only the charge about the previous conviction should be read out by the Court.

17. In **Raju v. Emperor** [AIR (1927) L.A.H. 774], the Lahore High Court observed:-



“The provisions of Section 310 (old code) are imperative and that the further charge about the previous conviction and the accused’s statement in respect thereof should not have been read out and he should not have been questioned in respect thereof unless and until he had been convicted or the opinions of the assessors had been recorded on the charge of the subsequent offence.”

18. In **Teka Ahir v. Emperor [AIR (1920) Patna 351]**, it was held by a Division Bench of the Patna High Court that:

“It is illegal, during the course of trial of an accused person for a substantive offence, to record evidence of a previous conviction. Such evidence amounts to evidence of bad character and is expressly forbidden by Section 54 unless and until the accused offers evidence of good character.”

19. Thus, in view of the statutory provisions under Section 211(7) read with Section 236 of the Cr.P.C. and the judgments noted above, it is amply clear that the details of previous conviction are required to be mentioned in the charge at the time when the accused is charged for the subsequent offence. If the previous conviction is omitted to be mentioned at the framing of charge, it can be added at any time before passing sentence and not afterwards. If the fact about the previous conviction is not



stated at all in the charge at any stage, it cannot be used for the purpose of enhancing the punishment.

20. It is of salience to note that in the light of the proviso to Section 236 Cr.P.C, the factum of previous conviction is not to be read over to the accused at the stage of framing of charge for the subsequent offence, nor the accused shall be asked to plead thereto. The prosecution cannot even refer to or adduce evidence regarding previous conviction unless and until the accused has been convicted under Section 229 or 235 Cr.P.C. for the subsequent offence. Thus, Section 236 Cr.P.C. implies trial in two stages. Firstly, the accused shall have to face trial for the subsequent offence and, if he is convicted, secondly, Court should read over the charge relating to previous conviction and, if he pleads not guilty thereto, evidence as provided under Section 298 Cr.P.C. should be led to prove the previous conviction.

21. While considering the powers of Court under Section 311 Cr.P.C., in **Mohanlal Shamji Soni v. Union of India And Another** [1991 Supp (1) SCC 271], the Supreme Court held:

“A judge under Section 236 (Section 310 old code) or a Magistrate under Section 248(3) [Section 251-A(13) and 255-A (old code)] is empowered to take evidence in respect of the previous



convictions of the accused person concerned if he is charged with the previous conviction under sub-section (7) of Section 211 and if he does not admit the previous conviction. Under Section 367 (Section 375 old code) if, when sentence of death passed by the Court of Sessions is submitted for confirmation to the High Court under Section 366(1) (Section 374 of the old code), the High Court thinks fit that a further enquiry should be made into or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself or direct it to be made or taken by the Court of Session”.

22. The next important issue would be as to how the previous conviction is to be proved. The proof of previous conviction requires the consideration of the following aspects:-

- (i) Stage at which the evidence of previous conviction is to be adduced.
- (ii) Manner of proving previous conviction.
- (iii) Proving that the accused is the same person who was previously convicted.

23. The mode of proving previous conviction is provided under Section 298 Cr.P.C, which reads as under:-

“In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may



be proved, in addition to any other mode provided by any law for the time being in force,-

(a) by an extract certified under the hand of the Officer having the custody of the records of the Court in which such conviction or acquittal was held, to be a copy of the sentence or order, or

(b) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was undergone, or by production of the warrant of commitment under which the punishment was suffered, together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.”

24. It is crystal clear from the aforequoted Section 298 Cr.P.C, that there are two ways by which proof of previous acquittal or conviction may be proved but at the same time it is expressly provided that these modes shall be in addition to any other mode provided by any law for the time being in force. Hence, the prosecution may prove a previous conviction not only by the modes provided under Section 298 Cr.P.C, but also by the modes provided under any other law which includes Evidence Act also.

25. In **State of Kerala v. Jayanandan @ Jayan [2017 CRI.L.J 2218]**, the counsel for the appellant/accused had raised



a contention that the previous conviction of the accused was not properly proved under Section 298 of the Cr.P.C. and that the admission by the accused while he was examined before the High Court would not be a substitute for proof under Section 298 Cr.P.C.

26. In that case while being examined before the High Court, the accused stated that he was involved in eighteen cases, out of which, five cases were there pending. He stated that he was involved in five murder cases and in three cases for escaping from the jail. He also stated that he was convicted in five cases. The question before the Kerala High Court was whether the statement made by the accused while being examined before the High Court would be a substitute for proving the previous conviction in accordance with Section 298 of the Cr.P.C.

27. The Kerala High Court held that the voluntary statements made by the accused while being examined before the Court cannot be taken into account for the purpose of proof of conviction under Section 298 of the Cr.P.C.

28. In **Amra Ram v. State of Rajasthan [1991 (1) Crimes 711 (RAJ)]**, the Rajasthan High Court observed that mere mentioning in the charge-sheet that the accused has been convicted in two cases does not absolve the duty of the



prosecution from proving the same in the specific mode prescribed in Section 298 Cr.P.C. I am in complete agreement with the views expressed by the Kerala High Court and the Rajasthan High Court in the aforestated judgments.

29. Thus, the effect of Section 298 Cr.P.C. is that together with the proof of previous conviction evidence is also required to be adduced as to the identity of the accused person with the person so convicted.

30. In the light of the requirements of framing charge as required under Section 211(7) of the Cr.P.C. and the requirements of leading evidence in case where previous conviction is denied by the accused in terms of Section 236 of the Cr.P.C., a question arises before this Court as to whether the death sentence awarded by the Trial Court to the convict Lamboo Sharma in the Sessions Trial No. 35 of 2016 can be confirmed by this Court even if the fact about the previous conviction was not mentioned in the charge at initial stage and was also not added afterwards at any stage before awarding the sentence. The answer would be clearly in the negative. The best course in such case would be to set aside the sentence awarded against convict Lamboo Sharma by the Trial Court and remand the reference made by the Trial Court to this Court under



Section 366 Cr.P.C. for confirmation of death sentence, for passing a fresh sentence after following the procedure as laid down under Sections 211(7) and 236 of the Cr.P.C.

31. It is made clear that the Trial Court would be at liberty to frame charge of previous conviction against the convict Lamboo Sharma under Section 211(7) of the Cr.P.C. and, if such, charge is framed, it has to follow the procedure laid down in Section 236 of the Cr.P.C. before passing a fresh sentence.

32. With the aforestated views of mine, I reiterate my agreement with the judgment of Brother Arvind Srivastava, *J.*

(Ashwani Kumar Singh, J)

(Arvind Srivastava, J)

Manish/Rohit

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