

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.457 of 1993

(AGAINST THE JUDGMENT OF CONVICTION, DATED 22nd SEPTEMBER, 1993, AND THE ORDER OF SENTENCE, DATED, 28TH SEPTEMBER, 1993, PASSED BY SHRI SATYADEO PRASAD, 8TH ADDITIONAL SESSIONS JUDGE, BHOJPUR, ARRAH, IN SESSIONS TRIAL NO. 17 OF 1989, ARISING OUT OF KRISHNAGARH POLICE STATION CASE NO. 138 OF 1985).

Jai Sao @ Ajay Sao, S/o.Lauhar Sao, resident of village- Sheopur, P.S. Krishna Garh, District- Bhojpur.

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :

For the Appellant/s : Mrs. Fauzia Shakil, *Amicus Curiae*
Mr. Ashok Kumar Sinha 4, Advocate.
Mr. P. K. Joshi, Advocate.
Mr. Ram Pravesh Nath Tiwari, Advocate.
For the Respondent/s : Mr. Ajay Mishra, APP

CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI
and
HONOURABLE MR. JUSTICE GOPAL PRASAD
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)
Date: 11-03-2015

By the judgment, dated 22.09.1993, passed, in Sessions Trial No. 17 of 1989, by learned 8th Additional Sessions Judge, Bhojpur, Arrah, the appellant, Jai Sao @ Ajay Sao, stands convicted under Section 302 of the Indian Penal Code. In consequence of his conviction, the appellant stands, under the order, dated 28.09.1993, sentenced to suffer imprisonment for life.

2. The case of the prosecution, as unfolded at the trial, may, in brief, be described as under:



(i) On 10th August, 1985, at about 6.45 AM, an altercation between the female members of Dinesh Prasad (since deceased), on the one hand, and accused persons, namely, Moti Sao, Lauhar Sao and Jai Sao @ Ajai Sao, on the other hand, had taken place in the lane by the side of the house of the informant, following the altercation, accused Moti Sao started abusing Debanti Kumari, sister of the informant. When the informant, Awadhesh Sah, protested, accused Lauhar Sao and Jai Sao @ Ajai Sao also arrived there and accused Moti Sah assaulted the informant with *lathi*. And the informant received injury on his right hand finger. Accused Lauhar Sao, then, gave two blows by *lathi* on the informant, one on the right shoulder and the other on his head. In the meantime, when Dinesh Prasad (since deceased), brother of the informant, reached there, accused Lauhar Sao and Jai Sao assaulted him on his head with *lathi*. Dinesh Sao fell down and became unconscious. The villagers arrived and saw the occurrence. The informant, then, took his injured brother, Dinesh Sao, to Krishnagarh Police Station and gave to the police oral information, with regard to the occurrence. On the basis of the statement of the informant, S.D.E. No.147, dated 10.10.1985 (Ext-6), was recorded. The police sent both the injured to Sadar Hospital, Arrah, for treatment.

(ii) Treating the said *fardebayan* as the First



Information Report, Krishnagarh Police Station Case No.138 of 1985, under Section 307/323/34 of the Indian Penal Code, was registered, on 16.08.1985, against accused Moti Sao, Lauhar Sao and Jai Sao @ Ajai Sao. While remaining under treatment, as Dinesh Sao died, Section 302 of the Indian Penal Code was, later on, added to the case aforementioned.

(iii) During investigation, inquest was held over Dinesh Sao's dead body, which was also subjected to *post mortem* examination, and, on completion of investigation, *charge sheet* was laid, under Section 302/323/34 of the Indian Penal Code, against the three accused persons aforementioned.

(iv) As the present accused-appellant, Jai Sao @ Ajai Sao, had absconded, the trial of his two co-accused, namely, Moti Sao and Lauhar Sao, was held separately, their trial being covered by Sessions Trial No.195 of 1986. The said trial ended, on 16th January, 1991, in conviction of the said two accused aforementioned under Sections 323 and 325 read with Section 34 of the Indian Penal Code. However, the charge, under Section 302 read with Section 34 of the Indian Penal Code, failed and the two co-accused aforementioned were acquitted of the said charge.

3. At the trial of the present accused-appellant, a charge, under Section 302 read with Section 34 of the Indian Penal Code, was framed. To the charge so framed the accused-

appellant pleaded not guilty.

4. In support of their case, prosecution examined altogether 9 (nine) witnesses including the doctor, who had conducted the *post mortem* examination. The accused was, then, examined under Section 313 (1)(b) of the Code of Criminal Procedure, 1973, wherein the accused denied that he had committed the offence, which was alleged to have been committed by him, the case of the defence being that of denial. No evidence was adduced by the defence.

5. Having, however, found the accused-appellant, Jai Sao @ Ajai Sao, guilty of the offence, which he stood charged with, learned trial Court convicted him accordingly and passed sentence against him as mentioned above.

6. Aggrieved by his conviction and the sentence, which has been passed against him, accused-appellant, Jai Sao @ Ajai Sao, as a convicted person, has preferred this appeal.

7. We have heard Mrs. Fauzia Shakil, learned Counsel, appearing as *Amicus Curiae*, and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing on behalf of the State.

8. While considering the present appeal it needs to be pointed out that the appeal at hand is not an appeal, wherein no incriminating evidence can be said to have been brought on record against the accused-appellant. We are,



however, confronted with the very unpleasant situation inasmuch as we find that the learned trial Court has not put to the appellant various incriminating pieces of evidence, which became the basis of his conviction. The learned trial Court has merely put the case of the prosecution and that too very vaguely, while the accused appellant was being examined under Section 33 (1)(b) of the Code of Criminal Procedure. The result is obvious, if the accused-appellant is not properly examined under Section 313 of the Code of Criminal Procedure, none of the incriminating pieces of evidence can be relied upon by this Court, for, placing of reliance on an incriminating piece of evidence, which had not been put to the appellant, would cause serious prejudice to the accused-appellant. At the same time, if the accused-appellant is given the benefit, because of the vital omission or lapse on the part of the learned Trial Court, it would cause serious prejudice to the prosecution inasmuch as prosecution cannot be made to suffer, because of the lapse on the part of the learned Trial-Court.

9. The remedy, therefore, lies, in our considered view, in remanding the case to the learned Trial Court for proper examination of the accused-appellant under Section 313 of the Code of Criminal Procedure and, then, to come to its own judicious conclusion depending on what surfaces from the record.

10. We may refer, at this stage, to the case of **Sharad Birdhi Chand Sarda v. State of Maharashtra (AIR 1984 SC 1662)**, wherein their Lordships have succinctly laid down the law on the above subject as follows:

"As these circumstances were not put to the Appellants in their statement under Section 313 of the Code of Criminal Procedure they must be completely excluded from consideration because the Appellants did not have any chance to explain them. This has been consistently held by this Court as far back as 1953, wherein the case of Hata Singh Bhagat v. State of Madhya Bharat MANU/SC/0073/1951 : AIR 1953 SC 468 this Court held that any circumstances in respect of which an accused was not examined under Section 342 of the Code of Criminal Procedure cannot be used against him. Ever since this decision there is a catena of authorities of this Court uniformly taking the view that unless the circumstances appearing against an accused is put to him in his examination under Section 342 of Section 313 of the Criminal Procedure Code, the same cannot be used against him....It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court in this view of the matter the circumstances, which were not put to the Appellant in his examination under Section 313 of the Code of Criminal Procedure have to be completely excluded from consideration."

(Emphasis is supplied by

me)

11. Even in the case of **State of Maharashtra v. Sukdeo Singh and Anr. (MANU/SC/0416/1992 : AIR 1992 SC 2100)**, their Lordships have observed as follows:

"The trial judge is not expected, before he examined the accused under Section 313 of the Code, to sift the evidence regarding any incriminating material to determine whether or not to examine the accused as that material. To do so, would be to prejudice the evidence without hearing the prosecution under Section 314 of the Code. Therefore, no matter how weak or scanty prosecution evidence is in regard to certain incriminating material, it is the duty of the Court to examine the accused and seek his explanation thereon."

(Emphasis is added by me)

12. It is, now, settled beyond dispute by a catena of judicial pronouncements that every circumstance, on which a trial Court relies upon to hold an accused guilty, must be put to the accused person and his answer sought thereto. The very purpose of Section 313 Code of Criminal Procedure will stand defeated if a trial Court, without asking for explanation of an accused on the circumstances, which appear to it to be incriminating, bases its conviction on such circumstances. It is in this view of the matter that the examination of an accused person, under Section 313 Code of Criminal Procedure, is

considered a solemn act of a trial Court and it cannot, and must not, be treated as an empty formality.

13. In the case at hand, the incriminating circumstances, spoken to by each prosecution witness, on which the learned trial Court has relied upon, ought to have been put to the accused-appellant, when he was being examined under Section 313 (1) (b) of the Code of Criminal Procedure and the same having not been done, learned trial Court ought not to have based its findings on such incriminating pieces of evidence. In fact, it appears to us that the learned trial Court had not put to the accused-appellant, in the present case, even the sum-total of the prosecution's case, which, in our considered view, does not satisfy the requirements of law.

14. Situated thus, one has no option but to conclude that if the accused-appellant is not examined under Section 313(1)(b) of the Code of Criminal Procedure as warranted by law, it will deny to the accused-appellant a valuable right vested in him by law to properly and effectively project his defence. At the same time, prosecution, to our mind, cannot be made to suffer solely for the lapse on the part of the learned trial Court in properly examining the accused-appellant under Section 313(1)(b) of the Code of Criminal Procedure. We are, therefore, clearly of the view, if we may reiterate, that this

case needs to be remanded to the learned trial Court.

15. Ordinarily, we would have re-appreciated the entire evidence on record to arrive at a legally correct finding; but in the case at hand, since we have found that before the evidence on record is re-appreciated in this appeal, further examination of the accused-appellant, under Section 313 (1) (b) of the Code of Criminal Procedure, in accordance with the requirements of law contained in that behalf, is imperative and that the case, for this purpose, needs to be remanded back to the learned Court below, we do not wish to enter into the merit of the various grounds on which the judgment has been impugned in this appeal and we do not even remotely wish to make any observation about the reliability of the relevant evidence on record so that the learned trial Court does not get fettered by any of the observations of this Court on any piece of evidence on record and it may feel free to come to its own independent findings.

16. In the result and for the reasons indicated above, this appeal partly succeeds. The impugned judgment and order are hereby set aside and the case is remanded to the learned Court below with direction to examine the appellant, with respect to the incriminating pieces of the evidence as discernable from the evidence on record, and, then, dispose of the case in accordance with law, preferably, within a period of

three months from the date of receipt of the Lower Court Records.

17. Let the *Amicus Curiae* be paid a fee of Rs.5000/-.

18. Send back the Lower Court Records with a copy of this judgment and order.

(I. A. Ansari, J.)

(Gopal Prasad, J.)

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