

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.15 of 1993

(Against the judgment of conviction, dated, 23rd November, 1992, and the order of sentence, dated, 23rd November, 1992, passed by Shri Sashi Kumar Chaudhary, Ist Additional Sessions Judge, Saharsa in Sessions Trial No.161 of 1990, arising out of Sour Bazar P.S. Case No. 155 of 1989).

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1. Jagdish Rishideo, son of Bana Rishideo		
2. Krishi Rishideo, son of Jagdish Rishideo, resident of village Zeorwa, P.S. Saur Bazar, district Saharsa		 Appellants
	Versus	
The State of Bihar		 Respondent
	With	

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Criminal Appeal (DB) No. 56 of 1993

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1. Jagdish Rishideo, son of Bana Rishideo		
2. Krishi Rishideo, son of Jagdish Rishideo, resident of village Zeorwa, P.S. Saur Bazar, district Saharsa		 Appellants
	Versus	
The State of Bihar		 Respondent

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Appearance :

(In BOTH THE APPEALS)

For the Appellants: NONE

For the Respondent: Mr. Ajay Mishra, APP

Ms. Soni Srivastava, learned Counsel, appearing as *Amicus Curiae*

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

And

HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)

Date: 23-06-2015

Under the judgment, dated 23.11.1992, passed, in Sessions Trial No. 161 of 1990, by learned 1st Additional Sessions Judge, Saharsa, both the accused-appellants, namely, Jagdish Rishideo and Krishi Rishideo, stand convicted under Sections 302 read with Section 34 and 148 of the Indian Penal



Code. The accused-appellant Jagdish Rishideo has further been convicted under Section 323 of the Indian Penal Code too. In consequence of their conviction under Section 302 read with Section 34 of the Indian Penal Code, both the accused-appellants, under the order, dated 23.11.1992, have been sentenced to suffer imprisonment for life and, under Section 148 of the Indian Penal Code, to suffer imprisonment for a period of one year. For his conviction under Section 323 of the Indian Penal Code, accused-appellant, Jagdish Rishideo, stands further sentenced, under the said order, to suffer rigorous imprisonment for a period of six months. The sentences have been directed to run concurrently.

2. The case of the prosecution, as unfolded by the First Information Report, may, in brief, be described as under:

(i) On 29.08.1989, at 08:00 A.M. when Sadanand Singh, accompanied by his younger son, Raj Kishore Singh (since deceased), was returning home and reached near the house of accused Jagdish Rishideo, accused Jagdish Rishideo came out with a *farsa* (a sharp cutting weapon) saying that Raj Kishore Singh ought to have been murdered, because he got cases filed against them (i.e., the accused) and, in the meantime, other accused persons, namely, Rajo Rishideo, Narain Rishideo, Krishi Rishideo, all armed with *farsa*, and Lalo Rishideo, armed with bow and arrow, arrived there and



surrounded Raj Kishore Singh and his father, Jagdish Rishideo, who is the informant of the case, assaulted on the neck of Raj Kishore Singh, but the blow fell on the right hand of Raj Kishore Singh. Accused Krishi Rishideo, then, gave a blow, by means of a *farsa*, on the left side of the neck of Raj Kishore Singh. Other accused also gave blows by means of *farsa* on the said deceased and the said deceased, having run to some distance, fell down and died. On hearing rumour on 29.08.1989 itself that a murder had taken place in village Jirwa, the Officer-in-Charge, Saur Bazar Police Station (PW 13), who investigated the case, went to the place of occurrence and held inquest over the dead body of Raj Kishore Singh, which, in course of time, was subjected to *post mortem* examination.

(ii) At the place of occurrence, statement of Raj Kishore Singh, son of Sadanand Singh, was recorded as his *fardbeyan* and treating the said *fardbeyan* as the First Information Report, Saur Police Station Case No. 156 of 1989 was instituted, under Sections 147/148/149/324/307/302 of the Indian Penal Code, against Jagdish Rishideo, Rajo Rishideo, Narayan Rishideo, Krish Rishideo and Lalo Rishideo.

(iii) When P.W.13 returned to his police station, he found the accused, Jagdish Rishideo and Krishi Rishideo, present at the police station, who, in turn, reported to PW 13 that the said deceased, accompanied by his father, had cut plantains of

banana on the land of the accused and when the accused protested, they were assaulted and injured. In fact, both the accused were examined and treated by the doctor.

(iv) On completion of investigation, a *charge sheet* was laid, under Sections 324/307/302/34 of the Indian Penal Code, against accused Jagdish Rishideo and Krishi Rishideo.

3. At the trial, charges, under Section 302 read with Section 34 of the Indian Penal Code and Section 148 of the Indian Penal Code, were framed against both the accused. A charge, under Section 323 of the Indian Penal Code, was also framed against accused Jagdish Rishideo. Both the accused pleaded not guilty to their respective charges.

4. In support of their case, prosecution examined as many as 14 witnesses. The two accused were, then, examined under Section 313 (1) (b) of the Code of Criminal Procedure, wherein the accused denied that they had committed the offences, which were alleged to have been committed by them, the case of the defence being that of denial. No evidence was adduced by the defence.

5. Having, however, found the two accused-appellants guilty of the offence under Section 302 read with Section 34 of the Indian Penal Code, which they stood charged with, learned trial Court convicted them accordingly and, having also found the accused-appellants, Jagdish Rishideo, guilty of the

offence under Section 323 of the Indian Penal Code, which he stood charged with, learned trial Court convicted him accordingly and sentences were passed against them as already mentioned, whereas the remaining three accused aforementioned absconded.

6. Aggrieved by their conviction and the sentences, which have been passed against them, the accused, as convicts, have preferred this appeal.

7. We have heard Ms. Soni Srivastava, 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 broadly in tune with each other, the evidence of Sadanand Singh (PW 8), informant of this case, who is the father of the said deceased, and other witnesses is that at about 07:00 AM when he, accompanied by his son, Raj Kishore Singh, reached the road situated opposite to the house of accused Jagdish Rishideo, accused Jagdish Rishideo came armed with *farsa* in his hand and, indicating towards Raj Kishore, accused Jagdish Rishideo started abusing him (the said deceased) and told that Raj Kishore had lodged cases against them and wanted to get them arrested by the police and instigated, thus, the other co-accused persons to kill Raj Kishore and, in the mean-time, other co-accused persons, namely, Rajo Rishideo, Narayan



Rishideo, Krishi Rishideo, Lalo Rishideo and 4-5 other unknown persons surrounded Raj Kishore and, amongst them, while accused Lalo Rishideo was armed with bow and arrow, others were armed with *farsa*. It is in the evidence of PW 8 that accused Jagdish Rishideo gave a blow by means of *farsa* on the hand of Raj Kishore and again, accused Jagdish Rishideo gave another blow by means of *farsa*, which hit left side of the neck of Raj Kishore. It is in the evidence of PW 8 that accused Rajo Rishideo and Narayan Rishideo also gave blows by means of *farsa* on Raj Kishore, Raj Kishore started fleeing away, but fell down after reaching the gate of their co-villager, Suresh Rishideo. It is the further evidence of PW 8 that when he (PW 8) went to save his son, Raj Kishore, accused Jagdish gave a blow by means of *farsa*, which hit his left shoulder and co-accused, Lalo Rishideo, shot an arrow on Shakaria Kumari, daughter of his co-villager, Pathak Rishideo, and thereafter, all the accused persons fled away.

9. Before proceeding further, it needs to be noted that the description of the occurrence, as given by the father of the said deceased and others, do not explain as to how the two accused-appellants, namely, Jagdish Rishideo and Krishi Rishideo, sustained injuries, though they had appeared at, according to the evidence on record, at the police station soon after the occurrence and had alleged that they had sustained

injuries at the hands of the informant and his said deceased son. This apart, the evidence on record also shows that both the accused-appellants had, indeed, sustained injuries. How these injuries were caused have, however, not been explained explained by the prosecution witnesses nor is there any explanation discernible, in this regard, from the evidence on record.

10. What logically follows from the above discussion is that the prosecution witnesses have not come out with complete truth at the Court.

11. Be that as it may, whether various pieces of incriminating evidence, which have surfaced from the evidence on record, shall or shall not be believed, or whether these pieces of evidence shall or shall not be relied upon, would be a question to be answered only after appropriate examination of the accused-appellants under Section 313 of the Code of Criminal Procedure.

12. Sadly enough, we find that while examining the accused-appellants under Section 313 (1) (b) of the Code of Criminal Procedure, the learned trial Court has not put to the appellant the incriminating pieces of evidence, which became the basis of conviction of the appellants. If the accused-appellants are 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 appellants, would cause serious prejudice to the accused-appellants. At the same time, if the accused-appellants are 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.

13. Does the remedy, now, lie, in remanding the case to the learned trial Court for proper examination of the accused-appellants 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?

14. 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)

15. Even in the case of **State of Maharashtra v. Sukdeo Singh and Another (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 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."

16. 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.

17. In the case at hand, the incriminating pieces of evidence, on which the learned trial Court has relied upon, ought to have been put to the accused-appellants, when they were 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-appellants, 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.

18. Referring to the case of **Machander v. The State of Hyderabad (AIR 1955 SC 792)**, Ms. Soni Shrivastava, learned Amicus Curiae, has submitted that the case at hand may not be remanded to the learned trial Court for its omission to appropriately examine the accused-appellants under Section 313 (1) (b) of the Code of Criminal Procedure at this distinct point of time inasmuch as the alleged occurrence took place on 29.08.1989 and the appellants stood convicted by the judgment under appeal, on 23.11.1992 and, hence, about 23 years have already elapsed since the time the appeal has been pending in this Court.

19. From the case of **Machander** (supra), we find that the Supreme Court considered it inappropriate to remand the case for appropriate examination of the appellant under Section 342 of the Code of Criminal Procedure, when a period of four-and-a-half years had passed. This does not, however, mean, we may hasten to clarify, that there is any definite time frame within which a case can be remanded to a trial Court for examination of an appellant under Section 313 (1) (b) of the Code of Criminal Procedure.

20. Reference made, in this regard, by Ms. Soni Shrivastava, learned Amicus Curiae, to the case of **Nar Singh v. State of Haryana**, reported in **(2015) 1 SCC 496**, is not misplaced inasmuch as the Supreme Court, in **Nar Singh** (supra), has exhaustively examined the law on the subject of Section 313 of

the Code of Criminal Procedure and having taken a holistic view of the law in this regard, has laid down various courses of action available to a Court, when a plea with regard to omission to put appropriate question to an accused, while being examined under Section 313 (1) (b) of the Code of Criminal Procedure, is raised. The relevant observations, appearing at paragraph 30, in **Nar Singh** (supra), read as under:

"30. Whenever a plea of omission to put a question to the accused on vital piece of evidence is raised in the appellate court, courses available to the appellate court can be briefly summarised as under:

30.1. Whenever a plea of non-compliance of Section 313 Code of Criminal Procedure is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer.

30.2. In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits.

30.3. If the appellate court is of the opinion that non-compliance with the

provisions of Section 313 Code of Criminal Procedure has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused Under Section 313 Code of Criminal Procedure and the trial Judge may be directed to examine the accused afresh and defence witness if any and dispose of the matter afresh.

30.4. The appellate court may decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused."

21. Though it is true that it is the duty of the Court to see that the person, accused of commission of an offence, as serious as murder, is given a fair trial and receives speedy justice, the Court cannot also avoid taking into account the sufferance of the victim of the offence and justice cannot be made to suffer for laches or omission on the part of the Court. Points out the Supreme Court, in **Nar Singh** (supra), that criminal justice is not one-sided. It has many facets and we have to draw a balance between conflicting rights and duties.



22. In the case at hand, since after the conviction of the accused-appellants, a period of almost 23 years has elapsed and, in such circumstances, especially, when one of the appellants, namely, Jagdish Rishideo, according to the materials on record, is about 75 years of age, we do not find that it would subserve in the interest of justice to remand the case at this distinct point of time to the learned trial Court for examination of the accused-appellants in accordance with the mandate of Section 313 (1) (b) of the Code of Criminal Procedure.

23. Because of what have been discussed and pointed out, this appeal needs to be allowed.

24. In the result and for the foregoing reasons, we allow this appeal. The impugned conviction of the accused-appellants and the sentences passed against them by the judgment and order, under appeal, are hereby set aside. The accused-appellants are held not guilty of the offences, which they stand convicted of, and they are accordingly acquitted of the same.

25. Since the accused-appellants are already on bail, their bail bonds are hereby cancelled and their sureties shall stand accordingly discharged.

26. Let the Amicus Curiae be paid a fee of Rs. 5,000/- for each appeal.

27. Registry shall, forthwith, send a copy of this

judgment and order to the learned trial Court along with the
Lower Courts Record.

(I. A. Ansari, J.)

(Vikash Jain, J.)

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