

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.78 of 1993

Against the judgment of conviction, dated 23.12.1992 and the order of sentence, dated 02.01.1993, passed by Shri Sushil Kumar Dwivedi, Sessions Judge, Gopalganj, in Sessions Trial No. 94 of 1992, arising out of Kuchaikote Police Station Case No. 09 of 1991

Vyash Mishra, son of Khobhari Mishra, resident of village Sirisia Mauja, Police Station Kuchaikote, District Gopalganj

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :

For the Appellant : Mr. Y. V. Giri, Senior Advocate
Mr. S. K. Giri, Advocate

For the State : Mr. Ajay Mishra, A.P.P.

Mr. Neeraj Kumar @ Sanidh, learned Counsel, as Amicus Curiae

CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

AND

HONOURABLE JUSTICE SMT. NILU AGRAWAL

CAV JUDGMENT

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

Date: 01-05-2015

This is yet another appeal, which makes the Court confront a wholly unpleasant situation, where the error of the learned trial Court may force the hands of the Court to allow this appeal, which has arisen out of the judgment, dated 23.12.1992, passed, in Sessions Trial No. 94 of 1992, by learned Sessions Judge, Gopalganj, whereunder the appellant, Vyash Mishra, stands convicted under Section 302 of the Indian Penal Code and by the order, dated 02.01.1993, he has been sentenced to

undergo imprisonment for life and pay a fine of Rs. 10,000/- and, in default of payment of fine, suffer rigorous imprisonment for three years.

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

(i) The deceased, Sheo Charan Bin, was husband of Tetari Devi (PW 1) and, on 30.01.1991, at about 10:00 PM, while Tetari Devi (PW 1) was serving dinner to the said deceased at their house, accused Vyash Mishra, who, being a friend of the said deceased, was a frequent visitor to the house of the said deceased, came there and asked the deceased to come with him for strolling to the Railway Station. Having finished the dinner, the said deceased went with accused Vyash Mishra for a stroll.

(ii) After a little while, PW 1 heard cries of her husband, Sheo Charan Bin, coming from the direction of the saw-mill of one Pathakji, whereupon she rushed to Pathakji's saw-mill and saw her husband lying injured, on the ground, writhing in pain.

(iii) On being asked by his wife, Tetari Devi, her husband told her that Vyash Mishra (i.e., the accused herein) had stabbed him and fled away.

(iv) Witnessing her husband lying in seriously injured condition, as PW 1 began to yell, her co-villagers arrived there and, with their help, PW 1 carried her injured husband, on a

tractor, to Gopalganj Sadar Hospital, where her husband died.

(v) Before his death, while the injured was lying under treatment, his statement (Exhibit-2) was recorded by Dr. Girish Nath Singh (PW 2).

(vi) The reason for stabbing the husband of PW 1, in the manner indicated hereinbefore, was, according to PW 1, due to hot exchange of words, which had taken place between her husband and the accused on the issue of some transaction of money.

(vii) On the following day, i.e., on 01.02.1991, at 03.30 A.M., a *fardbeyan*, in writing, was lodged at Kuchaikote Police Station by Tetari Devi and, having registered the said *fardbeyan* as First Information Report, Kuchaikote Police Station Case No. 09 of 1991 was registered, under Section 302 of the Indian Penal Code, against accused Vyash Mishra.

3. During investigation, inquest was held over Sheo Charan Bin's dead body, which was also subjected to *post mortem* examination and, on completion of investigation, a *charge sheet* was laid, under Section 302 of the Indian Penal Code, against the accused Vyash Mishra.

4. At the trial, when a charge, under Section 302 of the Indian Penal Code, was framed against the accused, he pleaded not guilty thereto.

5. In support of their case, prosecution examined

altogether 10 (ten) witnesses including the Investigating Officer. The accused was, then, examined under Section 313 (1) (b) of the Code of Criminal Procedure and, in his examination aforementioned, 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.

6. Having, however, arrived at the finding that accused Vyash Mishra had been proved guilty of the charge under Section 302 of the Indian Penal Code, the learned trial Court convicted him accordingly. Following his conviction, sentence has been passed against the convicted person as mentioned above.

7. Aggrieved by his conviction and the sentence passed against him, accused Vyash Mishra, as a convicted person, has preferred this appeal.

8. We have heard Mr. Y. V. Giri, learned Senior Counsel, appearing on behalf of the appellant, and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing on behalf of the State. We have also heard Mr. Neeraj Kumar @ Sanidh, learned Counsel, appearing as Amicus Curiae.

9. While considering the present appeal, it needs to be pointed out that according to the evidence of the doctor (PW 2), who had, admittedly, on 01.02.1991, at 11.30 AM, had held

post mortem examination on the dead body of Sheo Charan Bin, he found following injuries:

"ANTE MORTEM INJURIES

Penetrating wound 3½" X ½" X hollow viscous deep on the right side of chest in between the 8th and 9th intercoastal space, which was transverse and oblique in direction.

ON DISSECTION:

The 8th coastal rib was found cut through and through the right lobe of the liver had a punctured wound piercing the diaphragm and the base of the right lung. The whole thoracic cavity was full of blood and blood clots."

10. In the opinion of the doctor (PW 2), cause of death was shock and hemorrhage resulting from the injury sustained by the said deceased, the injury having been caused by sharp penetrating weapon, such as, knife, the injury being sufficient to cause death of a person in ordinary course of nature.

11. Neither the findings of the doctor nor his opinion, with regard to the cause of death of the said deceased and/or his opinion with regard to the nature of weapon, which might have been used, to cause death of the said deceased, were disputed either by the prosecution, or by the defence. This apart, we, too, do not notice anything inherently incorrect or improbable in the evidence given by the doctor (PW 2).

12. From the unshaken evidence of the doctor (PW 2), what clearly transpires is that Sheo Charan Bin had met with *homicidal* death. The question, however, remains whether the accused-appellant was the one, who had caused Sheo Charan Bin's death?

13. Bearing in mind the question posed above, when we revert to the evidence of the doctor (PW 2), we notice that according to him (PW 2), he had recorded the *dying declaration* of Sheo Charan Bin (since deceased) in the emergency room of Gopalganj Sadar Hospital and that the said *dying declaration* having been read out to Sheo Charan Bin, Sheo Charan Bin put his left thumb impression thereon and he (PW 2) also attested the said thumb impression. It has also been clarified by the doctor (PW 2) that Exhibit-2 (*dying declaration* of Sheo Charan Bin) was prepared in a carbon process along with original meaning thereby that Exhibit-2 is the primary evidence of the *dying declaration* having been made by injured Sheo Charan Bin shortly before he died.

14. What is of immense importance to note, while considering the evidence of the doctor (PW 2), is that his evidence that he had recorded the *dying declaration* of Sheo Charan Bin and/or that Exhibit-2 is the said *dying declaration* was not disputed at all, at the trial, by the defence. The evidence so given by the doctor (PW 2), therefore, remains intact and

undisputed.

15. What needs to be, now, noted is that according to the evidence of the informant, Tetari Devi (PW 1), at about 10:00 PM, while she was serving food to her husband, accused came there and took her husband to the west of their house. It is in the evidence of the informant (PW 1) that the accused was a frequent visitor to her house and, on being asked by her, the accused told her that they would come back after taking a stroll to the railway station, but after sometime, she heard her husband's cries, his cries coming from the direction of the saw-mill of one Pathakji and when she rushed to the place from where her husband's cries were raised, she found her husband lying in injured condition in a pool of blood and her husband told her that Vyash Mishra had stabbed him, whereupon she started crying and, with the help of others, she took her husband to the Sadar Hospital, Gopalganj, by a tractor. It is also in the evidence of the informant (PW 1) that her husband mentioned the name of Vyash Mishra before the doctor, too, by saying that Vyash Mishra had stabbed him (i.e., the deceased). It is further in the evidence of the informant (PW 1) that her husband died, while remaining under treatment at the said hospital.

16. It has been asserted, in her evidence, by PW 1 that there was exchange of hot words between her husband and the accused about two days before the occurrence on the issue

of monetary transaction and it was for this reason that accused Vyash Mishra had killed her husband.

17. The material particulars of the evidence given by the informant (PW 1) remained unchallenged by the defence at the trial.

18. Situated thus, it becomes clear that the unimpeached evidence on record, appearing against the accused-appellant, are oral *dying declaration* made by Sheo Charan Bin, the informant's husband, when he was lying injured and the *dying declaration* made by the said injured to the doctor (PW 2), while the injured Sheo Charan Bin was lying in the hospital, the name of the accused-appellant had been mentioned as the assailant.

19. Whether these two pieces of incriminating evidence, which have surfaced from the evidence on record, shall or shall not be believed, or whether these two pieces of evidence shall or shall not be relied upon, would be a question to be answered only after appropriate examination of the accused-appellant under Section 313 of the Code of Criminal Procedure.

20. Sadly enough, we find that while examining the accused-appellant under Section 313 (1) (b) of the Code of Criminal Procedure, the learned trial Court has not put to the appellant the two incriminating pieces of evidence, which became the basis of conviction of the appellant. If the accused-



appellant is not properly examined under Section 313 of the Code of Criminal Procedure, none of the two 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.

21. Does the remedy, now, lie, 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?

22. 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)

23. 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 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."

24. 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.

25. In the case at hand, the two incriminating pieces of evidence, 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.

26. Referring to the case of **Machander v. The State of Hyderabad (AIR 1955 SC 792)**, Mr. Y. V. Giri, learned Senior Counsel, has submitted that the case at hand may not be remanded to the learned trial Court for its omission to appropriately examine the accused-appellant 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 30.01.1991 and the accused stood convicted by the judgment under appeal, on 23.12.1992 and, hence, about 23 years have already elapsed since the time the appeal has been pending in this Court.

27. 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.

28. Reference made, in this regard, by Mr. Neeraj Kumar, 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."



29. 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.*

30. In the case at hand, since after the conviction of the accused-appellant, a period of almost 23 years has elapsed and, in such circumstances, especially, when the appellant, according to the materials on record, is about 70 years of age, we do not find that it would be 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-appellant in accordance with the mandate of Section 313 (1) (b) of the Code of Criminal Procedure.

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

32. In the result and for the foregoing reasons, we allow this appeal. The impugned conviction of the accused-appellant and the sentence passed against them by the

judgment and order, under appeal, are hereby set aside. The accused-appellant is held not guilty of the offence, which he stands convicted of, and he is accordingly acquitted of the same under benefit of doubt.

33. Since the accused-appellant is already on bail, his bail bonds are hereby cancelled and his sureties shall stand accordingly discharged.

34. Let the Amicus Curiae be paid a fee of Rs. 5,000/-

35. 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.)

Nilu Agrawal, J. : I agree.

(Nilu Agrawal, J.)

Prabhakar Anand/
AFR

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