

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.392 of 1993

With

Criminal Appeal (DB) No.499 of 1993

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(AGAINST THE JUDGMENT OF CONVICTION, AND THE ORDER OF SENTENCE, DATED 16TH AUGUST, 1993, PASSED BY SHRI PRADEEP KUMAR, 2ND ADDITIONAL SESSIONS JUDGE, ARRAH, IN SESSIONS TRIAL NO. 328 OF 1989, ARISING OUT OF AGIAON BAZAR POLICE STATION CASE NO. 27 OF 1988).

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1. Deosaran Pandey son of Ram Briksh Pandey
 2. Bindhyachal Pandey son of Deosaran Pandey, Both residents of village Mahuari, P.S. Agion Bazar, District Bhojpur at Arrah
- Appellants **(In Criminal Appeal No. 392 of 1993)**

With

Keshwar Ram, son of Mahant Ram, resident of village Mahuari, P.S. Agiaon Bazar, District Bhojpur

.... Appellant **(In Criminal Appeal No. 499 of 1993)**

Versus

The State of Bihar

.... Respondent **(In both the Appeals)**

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Appearance :

(In CR. APP (DB) No. 392 of 1993)

For the Appellants : Mr. Sheo Nr. Singh, Advocate

For the Respondent: Mr. Ajay Mishra, APP

(In CR. APP (DB) No. 499 of 1993)

For the Appellant : None

For the Respondent: Mr. Ajay Mishra, APP

Mr. Neeraj Kumar@ Sanidh and Mr. Kumaresh Singh, Advocate as Amicus Curiae

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

AND

HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

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

Date: 07-04-2015

Under challenge, in the present appeals, are the judgment of conviction and the order of sentence, dated

16.08.1993, passed, in Sessions Trial No. 328 of 1989, by learned 2nd Additional Sessions Judge, Arrah, whereby various sentences have been passed against the accused-appellants.

2. By the impugned judgment, the learned trial Court has convicted the accused-appellant, namely, Keshwar Ram under Section 302 of the Indian Penal Code and under Section 27 of the Arms Act, 1959, accused-appellant, namely, Bindhyachal Pandey, under Section 302 read with Section 34 of the Indian Penal Code and Section 27 of the Arms Act, 1959, and the accused-appellant, Deosaran Pandey, under Section 302 read with Section 34 of the Indian Penal Code. For his conviction under Section 302 of the Indian Penal Code, accused-appellant, Keshwar Ram, has been convicted to suffer imprisonment for life and for his conviction under Section 27 of the Arms Act, 1959, he (Keshwar Ram) has been convicted to undergo rigorous imprisonment for a period of seven years. For his conviction under Section 302 read with Section 34 of the Indian Penal Code, the accused-appellant, Deosaran Pandey, has been sentenced to suffer imprisonment for life. For his conviction under Section 302 read with Section 34 of the Indian Penal Code, accused-appellant, Deosaran Pandey has been convicted to suffer imprisonment for life. All the sentences having been directed to run concurrently.

3. The case of the prosecution, as unfolded by

the First Information Report, may, in brief, be described as under:

(i) Awadh Kumar Ram died, on 26th July, 1986, at about 11.30 PM, in his house, at Mahuari. At the time of his death, the said deceased had come to his house on leave and had applied to the Government for settlement of a plot of land in his favour, whereas the said land was sought to be occupied and used by three accused-appellants, namely, Deosaran Pandey, Bindhyachal Pandey and Keshwar Ram.

(ii) The clash of interest between the deceased, Awadh Kumar Ram, on the one hand, and the accused-appellants, on the other, had led to strained relation between them.

(iii) On 26.07.1986, at about 11.30 PM, when the deceased was sleeping with his wife and his brothers were sleeping with their families separately, the three accused-appellants, namely, Deosaran Pandey, armed with *spear*, Bindhyachal Pandey, armed with gun, and Keshwar Ram, armed with pistol, entered the house by scaling wall of the house with the help of a piece of bamboo. As soon as they entered the courtyard of the house, PW 2 (Motijharo Devi), wife of Raj Kumar Ram (PW 1) and brother of the said deceased, who had gone out with her child for the purpose of enabling the child to make water, saw the three accused-



appellants, whereupon PW 2 screamed and, immediately, entered into her room, where her husband was sleeping. The three accused-appellants rushed into the room of PW 2 and when they aimed at shooting to death PW 1, PW 2 stood before her husband, blocking her husband and stopping, thus, the three accused-appellants from shooting her husband to death. The accused-appellants, then, went out of the room of PW 2 and entered into the room of her brother-in-law, Awadh Kumar Ram.

(iv) Having entered into the room of Awadh Kumar Ram, where he was sleeping on a cot with his wife, Lahasia (PW 4), while one of three accused-appellants pushed PW 4 away from the cot, the remaining two accused-appellants had a scuffle with Awadh Kumar Ram and, while so scuffling, Awadh Kumar Ram was shot to death by one of the assailants. On hearing the sound of firing, PW 2 and her husband, Raj Kumar Ram (PW 1), raised *hulla*. For a little while, though the assailants remained at the courtyard, but, upon hearing the sound of firing and *hulla*, when the members of the family of the said deceased came running, the accused took to their heels. However, while the accused were fleeing away, the members of the family of the said deceased saw the accused-appellants fleeing away. The accused-appellants, while fleeing away, were also seen by their co-villagers.



(v) On the very night of the occurrence, i.e., on 26.07.1988, Dular Ram (PW 6), brother of the said deceased, orally informed the police about the occurrence. The oral information, so given, was reduced into writing as his *fardbeyan* and treating the said *fardbeyan* as First Information Report, Agion Bazar Police Station Case No. 27 of 1988, under Section 302/34 of the Indian Penal Code, was registered, on 27.07.1988, against accused-appellants, namely, Deosaran Pandey, Bindhyachal Pandey and Keshwar Ram.

(vi) During investigation, inquest was held over Awadh Kumar Ram's dead body, which was also subjected to *post mortem* examination, and, on completion of investigation, *charge sheet* was laid, under Sections 302/379/34 of the Indian Penal Code and Section 27 of the Arms Act, 1959, against the three accused persons aforementioned.

4. At the trial, a charge, under Section 302 read with Section 34 of the Indian Penal Code, was framed against accused, namely, Deosaran Pandey and Bindhyachal Pandey. A substantive charge, under Section 302 of the Indian Penal Code, was also framed against accused Keshwar Ram. A charge was further framed, under Section 27 of the Arms Act, 1959, against accused Keshwar Ram and Bindhyachal Pandey. In addition thereto, a charge, under Section 379 of the Indian Penal Code, was framed against all the accused-appellants. To

the charges so framed, all the accused-appellants pleaded not guilty.

5. In support of their case, prosecution examined altogether 8 (eight) witnesses including the doctor, who had, admittedly, conducted the *post mortem* examination. The 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.

6. Having, however, found the accused, namely, Deosaran Pandey and Bindhyachal Pandey, guilty of the offence under Section 302 read with Section 34 of the Indian Penal Code and having also found accused Keshwar Ram guilty under Section 302 of the Indian Penal Code and accused Bindhyachal Pandey and Keshwar Ram guilty under Section 27 of the Arms Act, 1959, the learned trial Court convicted them accordingly and passed sentences against them as mentioned above. All the accused-appellants have been acquitted of the charge under Section 379 of the Indian Penal Code.

7. Aggrieved by their conviction and the sentences, which have been passed against them, all the convicted persons have preferred the appeals.

8. Both these appeals having, thus, arisen out of

the judgment of conviction and the order of sentence, dated 16.08.1993, these appeals have been heard together and are being disposed of by this common judgment and order.

9. We have heard Mr. Neeraj Kumar @ Sanidh, learned Counsel, appearing as *Amicus Curiae* in Criminal Appeal (DB) No.392 of 1993, and Mr. Kumaresh Singh, learned Counsel, appearing as *Amicus Curiae* in Cr. Appeal (DB) No.499 of 1993. We have also heard Mr. Sheo Narayan Singh, learned Counsel, appearing on behalf of the appellants, in Criminal Appeal (DB) No.392 of 1993, and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing on behalf of the State, in both the appeals.

10. While considering the present appeals, it needs to be pointed out that the appeals at hand are not such appeals, wherein no incriminating evidence can be said to have been brought on record against the accused-appellants. We are, however, confronted with a very unpleasant situation inasmuch as we find that the learned trial Court has not put to the appellants various incriminating pieces of evidence, which became the basis of their conviction. The learned trial Court had merely put the case of the prosecution to the accused-appellants and that too very vaguely, while the accused appellants were being examined under Section 313 (1)(b) of the Code of Criminal Procedure. The result is obvious. 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 the reliance on an incriminating piece of evidence, which had not been put to the appellants, is impermissible in law and 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 due to the lapse on the part of the learned trial Court and the learned trial Court's perfunctory examination of the accused-appellants under Section 313 (1) (b) of the Code of Criminal Procedure.

11. The remedy, therefore, lies, in our considered view, in remanding the case to the learned trial Court for proper examination of the accused-appellants under Section 313 (1) (b) of the Code of Criminal Procedure and, then, to come to its own judicious conclusion depending upon the evidence on record and the responses of the accused-appellants, in their examination under Section 313 (1) (b) of the Code of Criminal Procedure.

12. 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."

13. 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."

14. 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 persons and their answer sought thereto. The very purpose of Section 313 of the 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 of the 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.

15. 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-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.

16. Situated thus, one has no option but to conclude that if the accused-appellants are not examined under Section 313(1)(b) of the Code of Criminal Procedure as warranted by law, it will deny to the accused-appellants a valuable right vested in them 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-appellants 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.

17. 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

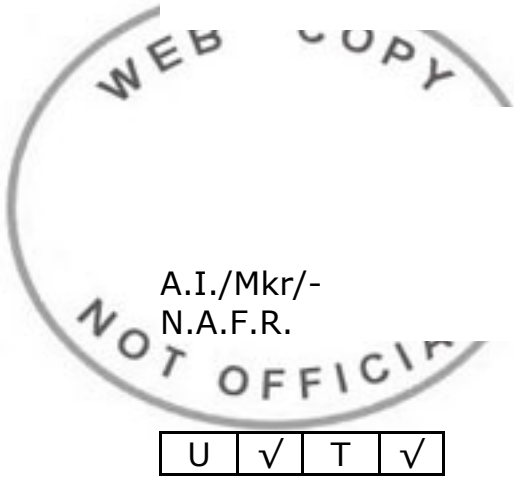


evidence on record is re-appreciated in this appeal, further examination of the accused-appellants, under Section 313 (1) (b) of the Code of Criminal Procedure, in accordance with the requirements of law contained in that behalf, is imperative and that the case, for this purpose, needs to be remanded 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 these appeals 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.

18. In the result and for the reasons indicated above, these appeals partly succeed. The impugned judgment and order are hereby set aside and the case is remanded to the learned Court below with direction to examine the appellants, 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 a copy of the judgment and order along with Lower Court Records.

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

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



(I. A. Ansari, J.)

(Gopal Prasad, J.)