

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Criminal Appeal (SJ) No.264 of 2001**

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1. **P. F. Topno**, son of late A. Topno, resident of village Jhoja Toli, P.S. Mamkum, District-Ranchi.
  2. **Mangal Mahto**, son of late Pathak Maoto, resident of Mohalla- Yarpur, P. S. Gardanibagh, District- Patna.
  3. **Vishwanath Jha**, son of Sri Ramakant Jha, resident of village-Alampur, P. S. Dalsingsarai, District-Samastipur.
  4. **Amarnath Pathak**, son of late Vishwanath Pathak, resident of village-Karanpur, P. S. Supaul, District- Saharsa.
  5. **Ghanshyam Paswan**, son of Johani Lal, resident of Mohalla-Dubar Tola, P. S. Katihar, District-Katihar.

.... .... Appellant/s

Versus

State of Bihar

.... .... Respondent/s

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**Appearance :**

For the Appellant/s :      Mr. Akhileshwar Prasad Singh-Sr. Advocate  
                                          Mr. Bimal Kumar Pandey-Advocate  
                                          Mr. Surya Swetabh-Advocate  
                                          Mr. Amrit Anand-Advocate

For the Respondent/s :      Mr. Sanjay Kumar-S.C.-C.B.I.

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**  
**CAV JUDGMENT**

**Date: 15 -09-2015**

K. L. Sen Gupta (since deceased), Jagannath Prasad (since deceased), Clement Kujur (since deceased), P. F. Topno, Mangal Mahto, Vishwanath Jha, Amarnath Pathak and Ghanshyam Paswan have been found guilty and sentenced therefore, vide judgment of conviction and sentence dated 07.08.2001 passed by the Special Judge, C.B.I., North Bihar, Patna in R. C. Case no.22 of 1986, Special Case no.55 of 1986 whereby and whereunder all have been found guilty for an offence punishable under Sections 120B/ 409 I.P.C., 477A I.P.C., 5(1)(c) read with Section 5(1)(d) of the P.C. Act



and K. L. Sen Gupta, Mangal Mahto each has been directed to undergo R.I. for one year under each count, respectively, with a further direction to run the sentences concurrently, while remaining namely Jagannath Prasad, Clement Kujur, P. F. Topno, Vishwanath Jha, Amarnath Pathak, Ghanshyam Paswan, each has been directed to undergo R. I. for two years under Section 120B/ 409 I.P.C., R. I. for one year under Section 477A of the I.P.C., R. I. for one year under Section 5(2) of the P. C. Act read with Section 5(1)(c) and 5(1) (d) of the P. C. Act with a further direction to run the sentences concurrently.

2. Bereft of unnecessary details, Inspector of C.B.I. R. P. Rai (not examined) recorded his own statement disclosing therein that from reliable sources, it has come to notice that Rameshwar Poddar, Jagannath Prasad and N. G. Rai entered into criminal conspiracy, who were Incharge of Shed No.I, II of F.C.I. Godown, Gulabbagh and misappropriated one wagon of wheat valued at Rs.59,000/- and derived pecuniary benefit for themselves and others.

3. After registration of R. C. Case no.22 of 1986, investigation commenced and concluded by way of submission of chargesheet against altogether ten accused persons under different sections of the I.P.C. as well as P. C. Act whereupon cognizance was taken, put on trial meeting with the ultimate result, the subject matter

of instant appeal.

4. It is also apparent that during course of trial, F.I.R. named accused namely Rameshwar Poddar as well as N.G. Rai died as a result of which proceeding was dropped against them while during pendency of instant appeal, three appellants namely K. L. Sen Gupta, Jagannath Prasad, Clement Kujur have died resulting abatement of appeal to their interest. Therefore, now, the appeal found alive relating to appellants P. F. Topno, Mangal Mahto, Vishwanath Jha, Amarnath Pathak and Ghanshyam Paswan.

5. The defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 Cr.P.C. is that of complete denial as well as false implication. However, neither any DW nor any kind of document has been exhibited on behalf of defence.

6. In order to substantiate its case, prosecution had examined altogether twelve (12) PWs, out of whom, PW-1 Shankar Choudhary, PW-2 Shyam Kishun Prasad, PW-3 Ganga Prasad Singh, PW-4 Rajendra Prasad Bhagat, PW-5 Satya Narayan Bhatt, PW-6 S. G. Yahiya, PW-7 Jasbir Singh, PW-8 S. K. Das, PW-9 Md. Shakiur Rahman, PW-10 Babban Prasad Singh, PW-11 Nitya Nand Jha and PW-12 Dayaram Singh. Side by side had also exhibited the documents as Exhibit-1 sanction order and Exhibit-2, 2/1 written



report, Exhibit-3 series railway receiving register, Exhibit-4 receiving register, Exhibit-5 series disclosing receipt of 180 bags having been transported by wagon no.22664, Exhibit-6 delivery register, Exhibit-7 goods cash book, Exhibit-8 wagon register, Exhibit-9 report submitted by PW-4, Exhibit-10 series entry in the register, Exhibit-11 and 11/1, report regarding Phase-I and II, Exhibit-12 entry in the relevant register, Exhibit-13 arrival tally book (Form-D), Exhibit-14 weight check memo, Exhibit-15 advice dispatch, Exhibit-16 receipt, Exhibit-17 main gate receipt register no.1, Exhibit-18 stock register godown no.1, Exhibit-19 monthly statement relating to Shed no.I, Exhibit-20 railway receipt register, Exhibit-21 main gate register Shed no.II, Exhibit-22 Tally Book (Form-D) relating to Shed no.II, Exhibit-23 Daily statement of receipt relating to godown no.2, Exhibit-24 godown stock register, Exhibit-25 stock register godown no.2 and Exhibit-26 series godown stock register. As stated above, nothing has been exhibited on behalf of defence.

7. While assailing the judgment of conviction and sentence, it has been submitted on behalf of appellants that prosecution had miserably failed in proving its case. In order to substantiate the same, it has been submitted that when evidence of PWs is taken together with the charge, it is apparent that prosecution could not be able to substantiate. In order to stress over the issue, it

has been submitted that none of the witnesses have disclosed that who, out of the accused, were incharge of Godown no.1, Godown No.2 and in whose handwriting the entry in the relevant register happens to be. It has also been submitted that in likewise manner, prosecution also failed to disclose, who was commanding the gate during the relevant period.

8. It has also been submitted that there happens to be no controversy with regard to arrival of wheat on 16/17.05.1985 by wagon no.SC-22664 and the same was unloaded at Purnia Railway Station. It is also out of dispute that aforesaid wheat was acknowledged by accused Vishwanath Jha. As admitted by the prosecution witnesses themselves that there was labour strike and on account thereof, there was some delay in lifting of bags from the Purnia Station Yard. However, 130 bags were transported through a truck bearing registration no.BHK-9394 while the remaining bags along with other bags were lifted with another vehicle. Gate pass entry happens to be correctly endorsed, registers have been properly maintained, but on account of some sort of cutting, led suspicion in the mind of learned lower Court and on account thereof, the appellants faced with the judgment of conviction and sentence adverse to their interest, although the same was permissible as narrated by the witnesses.



9. Furthermore, it has also been submitted that there happens to be consistent evidence of the prosecution witnesses that it was PW-6, S.G. Yahiya, who had made physical verification of Shed no.I, II. Surprisingly, the reason best known to the prosecution, failed to exhibit the aforesaid document. Had there been, it would have exposed the real affair whether there was shortage of 180 bags of wheat. It has also been submitted that instead thereof, another kind of report alleged to be prepared by PW-5 has been exhibited wherefrom it is also evident that there happens to be lots of discrepancy visualizing there from which makes the report only a paper work which he does admit. Apart from this, it has also been pleaded that the persons whose writing have been proved, are dead. Hence, in absence of cogent, reliable evidence, the remaining appellants could not be convicted and sentenced at least with an aid of Section 120B I.P.C., nor could be held responsible for preparing forged documents. In likewise manner, application of P. C. Act is not attracted. That being so, appeal is fit to be allowed.

10. Learned counsel representing the C.B.I. supported the finding recorded by the learned lower Court and submitted that 180 bags of wheat, which was unloaded at Purnia Railway Station, was carried to Gulabbagh F.C.I. Godown wherefrom it was dishonestly misappropriated and that happens to be reason behind presence of

interpolation, cutting in different entries made under different registers in order to screen themselves under well designed criminal conspiracy and is also found supported with the evidences of the PWs. Hence, the judgment did not require interference.

11. Gone through the evidences, exhibits as well as statement of the accused/ appellants recorded under Section 313 Cr.P.C. Before coming to the floor of the case, it looks desirable to have legal consideration over the theme of criminal conspiracy, its ingredients and the evidences, which the prosecution is required to place in support thereof. In *Devender Pal Singh v. State of N.C.T. of Delhi and another* reported in 2002 Criminal Law Journal Page-2034, it has been held:-

**11.** Section 120-B IPC is the provision which provides for punishment for criminal conspiracy. Definition of “criminal conspiracy” given in Section 120-A reads as follows:

“120-A. When two or more persons agree to do, or cause to be done,—

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an

*agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof."*

**12.** *The elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime is designated to curb immoderate power to do mischief which is*

*gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. (See American Jurisprudence, Vol. II, Section 23, p. 559.) For an offence punishable under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done an illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against*

*promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.*

**13.** *No doubt, in the case of conspiracy there cannot be any direct evidence. The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing by illegal means, an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.*

**14.** *In Halsbury's Laws of England (vide 4th Edn., Vol. 11, p. 44, para 58), the English law as to conspiracy has been stated thus:*

*"Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an*

*indictable offence at common law, the punishment for which is imprisonment or fine or both in the discretion of the court.*

*The essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however, it may be. The actus reus in a conspiracy is the agreement to execute the illegal conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other.”*

**15.** *There is no difference between the mode of proof of the offence of conspiracy and that of*

*any other offence; it can be established by direct or circumstantial evidence. [See Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra (AIR 1965 SC 682 at p. 686).]*

**16.** *Privacy and secrecy are more characteristics of a conspiracy, than of a loud discussion in an elevated place open to public view. Direct evidence in proof of a conspiracy is seldom available, offence of conspiracy can be proved by either direct or circumstantial evidence. It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object, which the objectors set before themselves as the object of conspiracy, and about the manner in which the object of conspiracy is to be carried out, all this is necessarily a matter of inference.*

**17.** *The provisions of Sections 120-A and 120-B IPC have brought the law of conspiracy in India in line with the English law by making the overt act unessential when the conspiracy is to commit any punishable offence. The English law on this matter is well settled. Russell on Crime (12 Edn., Vol. 1, p. 202) may be usefully*

noted—

*“The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se, enough.”*

**18.** *Glanville Williams in Criminal Law (2nd Edn., p. 382) states:*

*“The question arose in an Iowa case, but it was discussed in terms of conspiracy rather than of accessoryship. D, who had a grievance against P, told E that if he would whip P someone would pay his fine. E replied that he did not want anyone to pay his fine, that he had a grievance of his own against P and that he would whip him at the first opportunity. E whipped P. D was acquitted of conspiracy because there was no agreement for ‘concert of action’, no agreement to ‘cooperate’.”*

**19.** *Coleridge, J., while summing up the case to the jury in R. v. Murphy (1837) 173(ER 502 at p. 508) states:*



*“I am bound to tell you, that although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design and to pursue it by common means, and so to carry it into execution. This is not necessary, because in many cases of the most clearly established conspiracies there are no means of proving any such thing, and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is ‘Had they this common design, and did they pursue it by these common means, the design being unlawful?’ ”*

**20.** *As noted above, the essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence,*



*then in that event no overt act is necessary to be proved by the prosecution because in such a situation criminal conspiracy is established by proving such an agreement. Where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120-B read with the proviso to subsection (2) of Section 120-A, then in that event mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction under Section 120-B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions, in such a situation, do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfilment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established, the act would fall within the trappings of the provisions contained in Section 120-B. (See Suresh Chandra Bahri v. State of Bihar (AIR 1994 SC 2420).*

**21.** *The conspiracies are not hatched in the open, by their nature, they are secretly planned,*

*they can be proved even by circumstantial evidence, the lack of direct evidence relating to conspiracy has no consequence. (See E.K. Chandrasenan v. State of Kerala AIR 1995 SC 1066.)*

**22.** *In Kehar Singh v. State (Delhi Admn.)(AIR 1988 SC 1833 at p. 1954) this Court observed: (SCC pp. 732-33, para 275)*

*“Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy required some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two*

*persons is necessary. Nor is it necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient.”*

*Conspiracy can be proved by circumstances and other materials. (See State of Bihar v. Paramhans Yadav (1986 PatLJR 688). To establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or services in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborators would do, so long as it is known that the collaborator would put the goods or services to an unlawful use.” (See: State of Maharashtra v. Som Nath Thapa (1996 Cri LJ 2448 at p. 2453, SCC at p. 668, para 24.)*



12. Now, the evidences of the prosecution witnesses is to be seen whether they have been able to fulfil the parameters laid down by the Hon'ble Apex Court as referred above. Save and except substantiating that Exhibit-21, 21/1 relating to Shed No.II happens to be in pen of Vishwanath Jha, Exhibit-16 receipt of 130 bags happens to be in pen of Jagannath Prasad while Exhibit-15 advice dispatch happens to be in pen of Mangal Mahto, nothing more has been brought up by the prosecution either orally or through documentary evidence identifying the status of each of the accused as well as connecting through either direct or circumstantial evidence regarding activity of accused persons, identifying their role, exposing their conduct to suggest that they have hatched a conspiracy in order to siphon as well as misappropriate the wheat for which they were custodian being an employee of the F.C.I. Moreover, from the judgment impugned, it is apparent that learned lower Court had identified the cause relating to 130 bags only and on account thereof, identification of Exhibit-21, 21/1 relating to Vishwanath Jha virtually lost its glamour.

13. From the judgment impugned, it is further apparent that learned lower Court had put much reliance over the evidence of PW-5 and basically, evidence of PW-5 along with exhibits has been considered as back-bone of the prosecution case. On account thereof,



evidence of PW-5 has been gone through. It is apparent that he had failed to identify any of the accused to be godown incharge of Shed No.I, Shed No.II and further, his mode of report, as under Para-1, he had stated that he was called upon by the C.B.I. at its office where, he had gone through the relevant documents and then, had prepared his report which he had exhibited as Exhibit-11 and 11/1. These documents legally would not be permissible, because of the fact that no such provision is found under Cr.P.C., more particularly under Section 161 nor his report could be considered in terms of Section 45 of the Evidence Act. He had also exhibited the other registers, forms, but he had not stated in whose handwriting it happens to be, in whose handwriting the cutting was made and whether aforesaid exercise was done with malafide intention. Surprisingly, PW-12, the I.O. also failed to get the registers examined by the handwriting expert after obtaining the handwriting of the accused persons in order to substantiate, who happens to be the author of the entry. The same sequence relates with the evidences of PW-6, PW-8. PW-9 had identified the signature of Mangal Mahto over Exhibit-14, Exhibit-17, Jagannath Prasad, Exhibit-10, Exhibit-26, PW-10 had exhibited Exhibit-13/1, 16/1 to be in pen of Jagannath Prasad while Exhibit-22/1 under signature of Vishwanath Jha, Exhibit-23/1 in the signature of N. G. Rai, Exhibit-14/1 in the pen of Mangal Mahto, Exhibit-10/3 under signature of

Jagannath Prasad, Exhibit-26/q under signature of Jagannath Prasad. From his evidence at Para-14, it is evident that those documents were not written in their presence.

14. From the evidence of the I.O., PW-12, it is evident that though he had submitted charge sheet, he failed to conduct physical verification.

15. Apparently, prosecution itself relied upon the evidence of PW-6 and further, stated that it was PW-6, who had conducted physical verification, but aforesaid physical verification report, which was conducted before institution of the case, neither been allowed have an exhibit of the record nor had occasion to be placed before, PW-12, the I.O. Hence, conduction of physical verification whereunder shortage has been found, as alleged by the prosecution is found duly balked. Because of the fact that witnesses have admitted that some sort of correction is permissible in the register during course of calculation, PW-5 para-21 and on account thereof, appearance of cutting at the relevant places of the different exhibits, in absence of physical verification report, would not lead to conclusion that the cutting was made under criminal design/ conspiracy for the purpose of misappropriation.

16. The other kind of insufficiency in the prosecution case is found exposed from the fact that there happens to be no

specific entry with regard to 50 bags. Although, the same has been identified as spillage and further, is found included with bulk of wheat bags having proper entry, and on account thereof, the learned lower Court did not treat it as wale of teem and is irresolute.

17. The evidence of railway employees as well as exhibits at their end regarding arrival, unloading, transportation from yard happens to be out of controversy, therefore, the same has got not of much relevance.

18. With regard to oral evidence, it is to be segregated in two parts. The first part is to be considered relating to status of the accused, while second part relating to different reports submitted by them.

19. So far first part is concerned, none of the PWs had identified the accused regarding duties having entrusted to them, so much so that they failed to identify who, out of these appellants were entrusted with incharge of Shed no.I as well as Shed no.II. Furthermore, they also failed to depose whether, apart from these appellants, others were also posted there, or only these appellants were posted. Furthermore, as stated above, they failed to disclose pre-meeting of mind in order to commit the offence.

20. Now coming to second part, it is evident from the evidence of PW-4, in examination-in-chief, he had stated that as



directed, he conducted physical verification of Shed nos.I and II, took duplicate of opening balance from depot incharge, but he did not utter who was Depot Incharge. Further, in Para-2 had stated that all papers regarding physical verification remained at Depot. Those papers never been produced. Further, in Para-3, had stated that he was shown Form no.O, before evidence at C.B.I. Court, from which it transpired shortage of 130 bags relating to Shed no.I. He had also found cutting over register relating to Shed No.II, but never deposed regarding shortage at Shed no.II. In Para-4, he had stated that he was entrusted with peripheral counting. He explained that during peripheral counting, only the bags staked at front side, would be counted. Then had stated that 'O' Form was placed before him at C.B.I. Office. In cross-examination, at Para-7 had stated that there happens to be every possibility of increasing or decreasing during peripheral counting. In Para-10, he had stated that physical verification is conducted at every quarter. In Para-12, had stated that there was labour strike in 1985. In Para-13, had stated that physical verification report is not before him. In Para-15, he had stated that he came to know regarding shortage of 130 bags at C.B.I. Office.

21. PW-5 in examination-in-chief had stated that in the month of December, 1986, he gone to C.B.I. Office, where he was directed to scrutiny the records. He had seen records of Shed no.I and



II and submitted his report and had exhibited the same. Then he had deposed over manner of functioning, he also exhibited different registers, forms, entry regarding 130 bags. But he failed to divulge in whose handwriting those documents happens to be. Furthermore, from Para-21, he had stated that during physical verification, no shortage was found. He had further stated that he had not conducted physical verification. He had further stated that there happens to be provision of correction in case error is found. So, from his evidence, it is apparent that he had prepared his report on the basis of documents shown by C.B.I. at its office. From the evidence of PW-12, it is evident that he is completely silent over seizure of document, directing the officials to scrutiny the documents and submit report. Prosecution is also silent over mode of seizure of document, from whose custody, as well as with regard to the fact that all the documents have been seized, or only selected one.

22. PW-6 had submitted report as per direction of the D.M., F.I.C. Furthermore, I.O. had seized certain document from his possession and for that exhibited seizure memo. From Para-5 of his cross-examination, it is apparent that said report was not before him.

23. PW-7 had stated that in 1988, he was Local Manager and had exhibited sanction order and so happens to be formal in nature.



24. PW-8 had stated that in 1984-89, he was District Manager, F.C.I., Purnea. Though, he had exhibited some documents, but his testimony became formal in nature. At Para-8 of his examination in-chief, he had stated that he got the matter enquired and found shortage of 180 bags. His testimony is found contradictory to the evidence of PW-4 and PW-5 and further, he failed to disclose, by whom enquiry was conducted, and report, if any, at his end. He had not spoken on that very score. In Para-9, had stated that physical verification is quarterly affair. He had seen physical verification report of Gulabbagh Godown to June, September, December, 1985. He further said that he is not remembering whether there was any shortage. In September, 1985, he got report about shortage. An enquiry was done immediately, based on papers. Basing on those papers, he submitted report. It is evident that the successive physical verification reports have not been produced before Court nor was handed over to PW-12, I.O.

25. PW-9 is formal in nature and had exhibited certain documents. In likewise manner, PW-10 had deposed exhibiting certain documents.

26. So, from the evidence of aforesaid witnesses, who happens to be F.C.I. Officials, it is apparent that pick and choose methodology was adopted during course of production of documents.

At least, physical verification report should have been produced for the relevant period to suggest that the Competent Authority had made physical verification and found shortage. At the other hand, though it happens to be evident from different exhibit that there happens to be cutting at different registers, but that cutting has been found permissible at the end of witnesses itself. The evidence of prosecution witnesses, as recorded above, did not divulge that cutting was made in order to screen the offence of misappropriation.

27. Apart from this, when the statements of the accused have been gone through, it is found misanthropic. From perusal of the same, it is apparent that none of the incriminating materials, circumstances have been confronted to each of the accused, more particularly regarding their status, the part played by each of the accused, the adverse circumstances justifying the event of conspiracy and by such omission certainly, the accused persons have been deprived of to explain and had caused prejudice to the accused.

28. In *Nar Singh v. State of Haryana reported in (2015) 1 SCC 496*, the aforesaid eventualities have been perceived and further, explained:

*“9. The power to examine the accused is provided in Section 313 CrPC which reads as under:*

*“313. Power to examine the*

*accused.*—(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court—

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under subsection (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry

*or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.*

*(5) The court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section.”*

**10.** *There are two kinds of examination under Section 313 CrPC. The first under Section 313(1)(a) CrPC relates to any stage of the inquiry or trial; while the second under Section 313(1)(b) CrPC takes place after the prosecution witnesses are examined and before the accused is called upon to enter upon his defence. The former is particular and optional; but the latter is general and mandatory. In Usha K. Pillai v. Raj K. Srinivas (1993)3 SCC 208, this Court held that: (SCC p. 212, para 3)*

*3. ... the court is empowered by [Section 313(1)] clause (a) to question the accused at any stage of the inquiry or trial; while [Section 313(1)] clause (b) obligates*

*the Court to question the accused before he enters his defence on any circumstance appearing in prosecution evidence against him.*

**11.** *The object of Section 313(1)(b) CrPC is to bring the substance of accusation to the accused to enable the accused to explain each and every circumstance appearing in the evidence against him. The provisions of this section are mandatory and cast a duty on the court to afford an opportunity to the accused to explain each and every circumstance and incriminating evidence against him. The examination of the accused under Section 313(1)(b) CrPC is not a mere formality. Section 313 CrPC prescribes a procedural safeguard for an accused, giving him an opportunity to explain the facts and circumstances appearing against him in the evidence and this opportunity is valuable from the standpoint of the accused. The real importance of Section 313 CrPC lies in that, it imposes a duty on the court to question the accused properly and fairly so as to bring home to him the exact case he will have to meet and thereby, an opportunity is given to*

*him to explain any such point.*

*12. Elaborating upon the importance of a statement under Section 313 CrPC, in Paramjeet Singh v. State of Uttarakhand (2010) 10 SCC 439, this Court has held as under: (SCC p. 449, para 22)*

*“22. Section 313 CrPC is based on the fundamental principle of fairness. The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Therefore, the court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. Circumstances which were not put to the accused in his examination under Section 313 CrPC cannot be used against him and have to be excluded from consideration. (Vide Sharad Birdhichand Sarda v. State of*

*Maharashtra<sup>5</sup> and State of Maharashtra v. Sukhdev Singh (1992) 3 SCC 700.)”*

*13. In Basavaraj R. Patil v. State of Karnataka<sup>7</sup>, this Court considered the scope of Section 313 CrPC and in paras 18 to 20 held as under: (SCC pp. 752-53)*

*“18. What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is ‘for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him’. In Jai Dev v. State of Punjab<sup>8</sup> Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focussed on the ultimate test in determining whether the provision has been fairly complied with. He observed thus: (AIR p. 620, para 21)*

*‘21. ... The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it*

*appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity.'*

*19. Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion.*

*20. At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim audi alteram partem. The word 'may' in clause (a) of sub-section (1) in Section 313 of the Code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well settled that a circumstance about which the accused was*

*not asked to explain cannot be used against him.”*

**14.** *Main contention of the appellant is that since the material evidence Ext. P-12 and ballistic expert opinion was not put to him in his statement under Section 313 CrPC, it must be completely excluded from consideration and barring the same, there is no other evidence to sustain the conviction and reliance was placed upon Avtar Singh v. State of Punjab (2002) 7 SCC 419.*

**15.** *In Avtar Singh case Avtar Singh v. State of Punjab, (2002) 7 SCC 419, when the accused were examined under Section 313 CrPC, the essence of accusation, particularly the possession of goods was not brought to their notice. It was also noticed that the possibility of the accused persons being labourers of the truck was not ruled out by the evidence. Avtar Singh case<sup>9</sup> was rendered on consideration of several peculiar factual aspects of that case and it does not lay down the law of universal application as it had been decided on its own facts.*

**16.** *Undoubtedly, the importance of a*



*statement under Section 313 CrPC, insofar as the accused is concerned, can hardly be minimised. The statutory provision is based on the rules of natural justice for an accused, who must be made aware of the circumstances being put against him so that he can give a proper explanation to meet that case. If an objection as to Section 313 CrPC statement is taken at the earliest stage, the court can make good the defect and record additional statement of the accused as that would be in the interest of all. When objections as to defective Section 313 CrPC statement is raised in the appellate court, then difficulty arises for the prosecution as well as the accused. When the trial court is required to act in accordance with the mandatory provisions of Section 313 CrPC, failure on the part of the trial court to comply with the mandate of the law, in our view, cannot automatically enure to the benefit of the accused. Any omission on the part of the court to question the accused on any incriminating circumstance would not ipso facto vitiate the trial, unless some material prejudice is*

*shown to have been caused to the accused. Insofar as non-compliance with mandatory provisions of Section 313 CrPC is concerned it is an error essentially committed by the learned Sessions Judge. Since justice suffers in the hands of the court, the same has to be corrected or rectified in the appeal.*

*17. So far as Section 313 CrPC is concerned, undoubtedly, the attention of the accused must specifically be brought to inculcable pieces of evidence to give him an opportunity to offer an explanation, if he chooses to do so. A three-Judge Bench of this Court in Wasim Khan v. State of U.P.,<sup>10</sup> and Bhoor Singh v. State of Punjab<sup>11</sup> held that every error or omission in compliance with the provisions of Section 342 of the old CrPC does not necessarily vitiate trial. The accused must show that some prejudice has been caused or was likely to have been caused to him.*

*18. Observing that omission to put any material circumstance to the accused does not ipso facto vitiate the trial and that the accused must show prejudice and that miscarriage of justice had been sustained by*

him, this Court in *Santosh Kumar Singh v. State* (2010) 9 SCC 747, has held as under: (SCC p. 779, para 92)

“92. ... the facts of each case have to be examined but the broad principle is that all incriminating material circumstances must be put to an accused while recording his statement under Section 313 of the Code, but if any material circumstance has been left out that would not ipso facto result in the exclusion of that evidence from consideration unless it could further be shown by the accused that prejudice and miscarriage of justice had been sustained by him.”

**19.** In *Paramjeet Singh v. State of Uttarakhand* (2010) 10 SCC 439, this Court has held as under: (SCC p. 451, para 30)

“30. Thus, it is evident from the above that the provisions of Section 313 CrPC make it obligatory for the court to question the accused on the evidence and circumstances against him so as to offer the accused an opportunity to explain the same. But, it would not be enough for the accused to show that he has not been questioned or examined on a



*particular circumstance, instead he must show that such non-examination has actually and materially prejudiced him and has resulted in the failure of justice. In other words, in the event of an inadvertent omission on the part of the court to question the accused on any incriminating circumstance cannot ipso facto vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the court.”*

**20.** *The question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance with Section 313 CrPC has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under Section 313 CrPC, it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that the accused has suffered some disability or detriment in relation to the safeguard given to him under Section 313*

*CrPC. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The burden is upon the accused to prove that prejudice has been caused to him or in the facts and circumstances of the case, such prejudice may be implicit and the Court may draw an inference of such prejudice. The facts of each case have to be examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused.*

29. After giving overall consideration of the materials available on the record, it is found and held that the case of the prosecution is not found above board. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower Court is set aside. Appeal is allowed. Appellants are on bail, hence, are discharged from its liability.

**(Aditya Kumar Trivedi, J)**

Patna High Court,  
Dated-15.09.2015  
Vikash/-

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