

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.350 of 2013

Arising Out of PS.Case No. -195 Year- 2006 Thana -TARABARI District- ARRARIA

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Dayanand Mandal @ Bidyanand Mandal, son of Somati Mandal, resident of villae
Gahpur, P.S. Tarabari, District- Araria

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Rabi Bhushan Prasad, Advocate

For the State : Mr. Dilip Kumar Singh, APP

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY)

Date: 09-09-2017

This jail appeal has been filed on behalf of the
sole appellant by the Patna High Court Legal Services Committee
and vide order dated 21.6.2013 Shri Rabi Bhushan Prasad,
Advocate was directed to appear as counsel in this case.

2. The sole appellant has filed the instant appeal
against the judgment of conviction dated 25th March, 2010 and
order of sentence dated 29th March, 2010 passed by Additional
Sessions Judge, Fast Track Court No. V, Araria in Sessions Trial
No. 184 of 2008/ 64 of 2009 arising out of Araria (Tarabari P.S.
Case No. 195 of 2006, whereby the learned Additional Sessions
Judge, Fast Track Court convicted the appellant for an offence



under Section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life with fine of Rs. 5,000/- and in default of payment further imprisonment for five months.

3. The prosecution case, in short, is that on 1.5.2006 at about 6.00 P.M. the informant gave fardbeyan before the Sub-Inspector of Police, Tarabari Police Station that at about 4.30 P.M. while he was cutting earth in his field with his mother, Sajiya Devi, daughter Ranjana Kumari, wife Manjula Devi and sister Madhwi Devi, suddenly his brother-in-law Dayanand Mandal (appellant herein) reached there and took away the spade from the field and gave spade blow on the head of his sister and thereafter fled away from the spot after throwing the spade. He has explained in the fardbeyan the reason for the incident that his sister couple days earlier came to his house from her sasural against the wish of the appellant. Earlier also the appellant used to assault his sister and there was some Panchayati held in the village and approximately two months back his brother-in-law (the appellant) has alienated five Kathas of land which was objected by his sister and as such he claimed that the appellant has committed murder of his sister. On the basis of the aforesaid fardbeyan Araria (Tarabari) P.S. Case No. 195 of 2006 was registered under Section 302 of the Indian Penal Code and the police after investigation submitted charge



sheet and thereafter cognizance was taken on 11.8.2006 and on 22.8.2008 the case was committed to the Court of Sessions.

4. The appellant pleaded total innocence and claimed to be falsely roped in the instant case.

5. On behalf of the prosecution 8 witnesses have been examined. P.W. 1 is the informant of the case, P.W. 2 is the wife of the informant. P.Ws. 3 to 5 are witnesses who reached the place of occurrence after the incident, P.W. 6 is the Doctor who conducted the post mortem of the deceased, P.Ws. 7 and 8 are the Investigation Officers of the case.

6. P.W. 1 in his deposition has stated the manner of occurrence as stated in the fardbeyan. There was reference in the Fardbeyan that accused Dayanand Mandal took spade from the field and assaulted Madhvi Devi whereas in his deposition he has stated that while he along with his family were digging the field and his sister, namely, Madhvi Devi was sitting, the appellant came and took away the spade from the hand of the son of the informant, Upendra and gave spade blow on the head of Madhvi Devi as a result of which her skull was broken and she died on the spot. P.W.2 Manjula Devi, wife of the informant, Manjula Devi has supported the case of prosecution stating that Madhvi Devi is her sister-in-law. She came from her Sasural on account of some



dispute with her husband and while they were cutting soil in the field, the husband of her sister-in-law, the appellant suddenly appeared at the spot, took away the spade from her son and gave spade blow on the head of Madhvi Devi as a result of which she fell down and died at the spot. P.W.3 Balbodh Mandal has deposed that on hulla he went near the bamboo clumps and saw accused Dayanand Mandal fleeing away and his wife Madhvi Devi was lying dead there. P.W. 4 Kripanand Mandal in his statement stated that he has put his LTI on the inquest report prepared by the police. In his cross-examination he stated that he reached the place of occurrence after hearing hulla about the incident. P.W.5 Sushil Kumar Jha in his deposition stated that while he was standing approximately 20-25 yards away from the place of occurrence along with 15-20 people, suddenly on hulla, he saw that one man was fleeing away and many people were chasing him and he also chased him but the man fled away. Thereafter he claimed that he came to the place of occurrence and saw the dead body of Madhvi Devi. He stated that he has signed on the seizure list, Ext. 1/1. He stated that Panchnama was prepared in his presence. P.W.6 is Dr. Chandra Prakash Mandal who has conducted the post mortem of the dead body of the deceased. In his opinion the cause of death was due to hemorrhage and shock as a result of injury. P.W.7 is the



Investigating Officer of the case who was posted at the relevant time at Tarabari Police Station as Incharge. He deposed that he received information as a rumour about the murder of a wife by husband. He deposed that he reached the place of occurrence at 5.50 P.M. and saw the dead body of the Madhvi Devi lying in the Khalihan and he recorded the fardbeyan of the informant at the spot and forwarded the same to Araria Police Station. He stated that spade with blood stain was recovered from the place of occurrence, he has stated that he recorded the statements of the witnesses and during the course of investigation he found the case to be true. However, subsequently he was transferred and as such he handed over the investigation of the case to Sri Binay Pal, Sub-Inspector of Police, who has submitted charge sheet in the case. In his deposition P.W.7 has stated in one go that he arrested the accused Dayanand Mandal at the spot at the same time he said that it does not reflect from the diary that from where he arrested the appellant Dayanand Mandal and there is nothing recorded in the diary. He stated that he has recorded the statements of the witnesses at spot itself. However, he has admitted that seized spade was lying in the Malkhana. There is no statement that any effort was made for obtaining FSL report on seized soil with blood stain and the spade used in the commission of offence even the time of



recording the statement of the witness is not mentioned in the diary. P.W. 8, Binay Pal, Sub-Inspector of Police is the successor of P.W. 7 and he has submitted charge sheet after completion of the investigation.

7. The appellant was examined under Section 313 Cr.P.C. The question posed was as follows:

“प्रश्न :- आपने गवाहों का ब्यान सुना ?

उत्तर :- जी हाँ

प्रश्न :- आपके विरुद्ध साक्ष्य है कि आपने दिनांक 1.05.06 को साढ़े चार बजे दिन के करीब ग्राम— दभड़ा खाड़ी टोला, थाना ताराबाड़ी , जिला अररिया में आपकी पत्नि माधवी देवी का जान बुझकर हत्या कर दिए। क्या कहना है ?

उत्तर :- झूठी बात है।

प्रश्न :- सफाई में कुछ कहना है ?

उत्तर :- निर्दोष हूँ।

(sig. or mark of the accused)”

8. The appellant disputed the same by saying that he is innocent.

9. On scrutiny of evidence oral and Exhibits, the Additional Sessions Judge, Fast Track Court convicted and sentenced the appellant for offence under Section 302 of the Indian Penal code.

10. Mr. Rabi Bhushan Prasad appearing on behalf of the appellant has submitted that the judgment of conviction and



order of sentence is erroneous on facts as well as law. He submitted that there is contradiction in the statement of the informant in the fardbeyan and in his deposition. In the fardbeyan which was recorded at the spot the informant has stated that his mother Sajiya Devi, daughter Ranjana Kumari, wife Manjula Devi and sister Madhvi Devi were cutting earth in the field and the appellant suddenly reached there and took spade from the field and assaulted Madhvi Devi and thereafter throwing the spade he fled away, whereas in his deposition in the Court there is departure, the informant and his wife Manjula Devi made specific statement that the appellant reached the place of occurrence and took away the spade from the hands of their son Upendra. In addition thereto he submitted that from the deposition of the informant in para-9 it appears that at the time and place of occurrence his son, daughter, wife, mother and sister were present at the spot but neither the daughter nor son or the mother who are eye witness of the occurrence, were examined in the present case and as such he submitted that the Court should draw adverse inference from withholding the evidence of the material witnesses who could have unfolded the true version of the incident. He categorically submitted that in view of the specific deposition of the informant and his wife in the court that the appellant took away the spade



from the hands of their son Upendra, it was obligatory on the part of the prosecution to have examined Upendra as witness as he was the most important and material witness on the point of manner of occurrence but the prosecution has not examined the aforesaid Upendra from whose hands allegedly the appellant took away the spade and assaulted the deceased. He thus, submitted that apart from the contradiction in the fardbeyan regarding the manner of occurrence in the evidence and the statement before the court, the prosecution has not explained the reasons for withholding the material witnesses. He submitted that the mother of the informant, daughter of the informant and the son of the informant, who were said to be the eye witnesses and present at the spot were competent eye witnesses and would have unfolded the true story and since the prosecution withheld the deposition of the material eye witnesses, namely, mother, daughter and most importantly son of the informant, Upendra, who was introduced in the deposition that the appellant took away the spade from his hands and gave the blow on the head of the deceased which caused death of the deceased. The Court should draw adverse inference.

11. Mr. Rabi Bhushan Prasad further submitted that the reason attributed for commission of murder by the informant is most unnatural and improbable. No reasonable man can imagine



and approve the prosecution case that the appellant suddenly reach the place of occurrence and commit murder of his wife only for the reason that the wife left the matrimonial house and reached Naihar without any information to the husband. The other reason that there was difference between the husband and wife on account of sale of 5 katha of land also does not inspire any confidence in the story of the informant. Referring to the other deposition he submitted that the witnesses who deposed that he saw the appellant fleeing away cannot be relied upon in view of the fact that they are not eye witnesses. He also submitted that the investigation in the instant case is only perfunctory as neither spade allegedly used in the occurrence nor the soil with blood stains was sent for FSL laboratory report. In fact the Investigating Officer only completed formality of the investigation and no effort was made to complete impartial investigation in the matter.

12. Mr. Rabi Bhushan Prasad lastly submitted that the statement of the appellant under Section 313 of the Code of Criminal Procedure is indicative of the fact that the appellant was not confronted with the adverse material in the trial and only formality was completed by putting general question to the appellant which is contrary to the judgment of the Apex Court on the point.



13. Mr. Dilip Kumar Singh, APP appearing on behalf of the State submitted that the trial court has not committed any illegality in convicting the appellants as from the materials on record it is evidently clear that the appellant has committed murder. However, he has not been able to explain the reason for non-examination of the material witnesses, namely, mother, daughter and son of the informant who are most important witnesses in this case as per the story of the incident developed by the informant and his wife in their statement in the Court. He could not substantiate the motive behind murder by this appellant.

14. Mr. Singh has not been able to controvert the submission of counsel appearing for the appellant that the Court has committed illegality in not confronting the appellant with all the adverse materials in the process of examination under Section 313 Cr.P.C.

15. After hearing the parties and on perusal of the materials on record, we are of the considered view that there are contradiction in the fardbeyan and the deposition of the informant and his wife in the trial. We are also of the considered view that prosecution has not been able to explain the reason for withholding the material witnesses. Since there is no explanation for non-examination of the mother, daughter and son of the informant,



who, according to the informant and his wife, were not only present at the crime scene but most importantly the appellant took away spade from the hands of his son and has given spade blow on the head of the deceased. No reasons have been assigned for non-examination of that important witnesses by the prosecution and in view of the judgment of the Supreme Court in the case of **Bhagwan Jagannath Markad & Ors vs State Of Maharashtra (2001) 6 SCC 145**, the Court has to draw adverse inference on non-examination of the material witnesses.

16. The other points raised by the appellant also merits consideration. The object of examination of the accused under Section 313 Cr.P.C. is to confront the accused to all adverse circumstances so that he may explain his position by confronting the adverse situation. In the instant case the kind of question posed to the appellant does not satisfy the requirement of Section 313 Cr.P.C. Reference in this connection may be made to the judgment of the Apex Court in the case of **Munna Kumar Upadhyaya @ Munna Upadhyaya vs State of Andhra Pradesh Through Public Prosecutor, Hyderabad, Andhra Pradesh: (2012) 6 SCC 174:**

“73. It is a settled law that the statement under Section 313 Cr. PC is to serve a dual purpose, firstly, to afford to the accused an opportunity to explain his



conduct and secondly to use denials of established facts as incriminating evidence against him. In this regard, we may refer to some recent judgments of this Court. This Court in *Asraf Ali v. State of Assam* [(2008) 16 SCC 328] has observed as follows :

“21. Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22. The object of Section 313 of the Code is to establish a direct dialogue between the court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of



justice or prejudice. This Court also expressed a similar view in *S. Harnam Singh v. State (Delhi Admn.)* while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facts by the trial court to the accused adds to the vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise.”

74. Again, in its recent judgment in *Manu Sao v. State of Bihar* [(2010) 12 SCC 310], a Bench of this Court to which one of us, Swatanter Kumar, J., was a member, has reiterated the above-stated view as under:

“12. Let us examine the essential features of this Section 313 CrPC and the principles of law as enunciated by judgments, which are the guiding factors for proper application and consequences which shall flow from the provisions of Section 313 of the Code.

13. As already noticed, the object of recording the statement of the accused under Section 313 of the Code is to put all incriminating evidence against the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time,



also to permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the court and besides ensuring the compliance therewith the court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simpliciter denial or in the alternative to explain his version and reasons for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the court and the accused and to put to the accused every important incriminating piece of evidence and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the court is as to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the courts have explained this concept and now it



has attained, more or less, certainty in the field of criminal jurisprudence.

14. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence against the accused in any other enquiry or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution.”

In view of the judgment of the Apex Court on the issue of examination of accused under Section 313 Cr.P.C. the judgment of conviction and order of sentence passed in this case is unsustainable in law as well as on facts.

17. The suggestion of motive for commission of



murder is also difficult to be accepted and in the totality of the facts and circumstances of the case, we are of the considered view that the judgment of conviction and order of sentence passed by the trial court is unsustainable and accordingly, the same is set aside.

18. Accordingly, the appeal is allowed. The judgment of conviction dated 25th March, 2010 and order of sentence dated 29th March, 2010 passed by Additional Sessions Judge, Fast Track Court No. V, Araria in Sessions Trial No. 184 of 2008/ 64 of 2009 arising out of Araria (Tarabari P.S. Case No. 195 of 2006) are set aside and the appellant is discharged from the liability of bail bonds.

(Rajendra Menon, CJ)

S.Pandey/-

(Anil Kumar Upadhyay, J)

AFR/NAFR	NAFR
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