

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.269 of 1993

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Sahabuddin Sain, son of Jhabar Sain, resident of Village- Harpur, Police
Station- Mashrakh, District- Chapra

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Raghav Prasad, Advocate

For the Respondent/s : Mr. Shiwesh Ch. Mishra, A.P.P.

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 14-11-2017

The sole appellant herein namely Sahabuddin Sain challenges his conviction in this appeal under Section 374 (2) Cr.P.C. whereby vide judgment dated 20th of May, 1993 passed by the 5th Additional Sessions Judge, Siwan in Sessions Trial No. 148 of 1989/ 80 of 1989 he has been convicted for the offence under Section 395 I.P.C. and sentenced to undergo R.I. for life. Even though he was charged with an offence under Section 412 I.P.C., he has not been convicted on the aforesaid count.

The appellant Sahabuddin Sain along with co-accused Sanjay Kumar Singh, Bharat Singh and Suresh Rai were prosecuted. However, Sanjay Singh, Suresh Rai and Bhagat Singh have been acquitted of the charges by holding that



they are being falsely implicated by the informant. Their identification is not properly established and, therefore, they are acquitted. However, on the same set of evidence only because it is alleged that some recovery has been made from the appellant he has been convicted inspite of the fact that there is no witness to the seizure of the recovery and only on the basis of the seizure-report produced by the Investigating Officer without seizure of the articles being established in accordance with law the appellant has been convicted.

It is the case of the prosecution that on 10th of December, 1988 at 10:30 A.M. the informant Vijay Kumar Singh gave a *fardbeyan* to Sub Inspector Sagar Das of Basantpur Police Station in Village Kaperipur, District- Siwan to the effect that on the previous night when he was sleeping after supper in his Dalan and other members of his family were sleeping inside the house at about 1:00 A.M. he woke up on hearing some sound. Someone uttered to break open the door and were enquiring who were available inside. The informant requested not to break open the door. He said that he would open the door and, accordingly, he opened the door when five miscreants entered the house, broke the boxes in front of the main gate and they loaded the material from his house and ran



away. It is said that they inflicted danda blows on him and some of his family members. On the alarm raised, many villagers came and the dacoits ran away. An F.I.R. was lodged and in the fardbeyan it was specifically stated that Suresh Rai and Sanjay Kumar Singh were the persons who have committed the offence. They were identified and allegations were also made that Sanjay Kumar Singh tried to assault. However, in the F.I.R. or the fardbeyan the appellant Sahabuddin Sain was not named. However, he was identified after his arrest and recovery of certain so-called stolen property from his house by P.W. 2 Rajendra Singh, P.W. 5 Krishna Singh, P.W. 6 the informant Vijay Kumar Singh and P.W. 9 Parsuram Tiwary and based on the recovery made and the test identification parade he has been convicted. However, in the trial the prosecution examined the following witnesses:-

Kedar Singh as P.W. 1, Rajendra Singh as P.W. 2, Suresh Kumar Singh as P.W. 3, Kameshwar Singh as P.W. 4, Krishna Singh as P.W. 5, Vijay Kumar Singh informant as P.W. 6, Parvati Devi his wife as P.W. 7, Phoolwanti Devi as P.W. 8, Parsuram Tiwary as P.W. 9 Dr. Akhtar Hussain as P.W. 10, Ramnath Tiwary Sub Inspector of Police as P.W. 11, Anand Bihari Constable as P.W. 12, Sri H.K. Chand Munsif as P.W. 13



and Sri Chandresh Kumar Judicial Magistrate as P.W. 14, witnesses to the Test Identification Parade.

Having heard learned counsel for the parties at length, we find that the appellant Sahabuddin Sain has been convicted on two counts. One, his identification in the Test Identification Parade by P.W.2, P.W. 5, P.W. 6 and P.W. 9 and recovery of certain stolen material from his house.

As far as identification of this appellant is concerned, like co-accused Sanjay Kumar Singh and Suresh Rai who have been accused he has been identified by these witnesses apart from the fact that P.W. 6, the informant has named the other co-accused Sureah Rai and Sanjay Kumar Singh as persons responsible and who had entered the house many other witnesses apart from P.W. 6 have also identified these two persons. They are P.W. 1, P.W. 2 and P.W. 5. Inspite of that, on account of the fact that they are residents of the village and the appellant has falsely implicated them, they have been let out. However, this appellant Sahabuddin Sain has been convicted only because there is recovery of some stolen property from his house. However, surprisingly neither the property which was recovered from him has been identified nor the witness to the seizure of this property from his house has



been examined. In spite of the fact that there is identification of Suresh Rai and Sanjay Kumar Singh, as has been done in the case of this appellant, the benefit granted to Suresh Rai and Sanjay Kumar Singh has not been granted to this appellant. The reason being that in his case there is recovery of the stolen material. However, as indicated hereinabove, the recovery has not been properly proved. No independent witness to the recovery who were present have been examined.

That apart it is seen that even the requirement of Section 313 Cr.P.C. has not been followed in the present case. The statement of appellant Sahabuddin Sain is available at Page 65 of the Paper Book and if we go through the same, we find that only two questions are put to him. Question No. 1 is that it is alleged against you that you have committed the dacoity in the house of Vijay Singh what you have to say and the second question is you have heard the statement of witnesses, what have you to say.

Thus, we find that in the statement of the accused recorded under Section 313 Cr.P.C. the requirement of law as laid down in the case of **Sukhjot Singh Vs. State of Punjab- (2014) 10 SCC 270** and the judgments relied upon in the aforesaid case- **Tara Singh Vs. State-A.I.R. 1951 SC 441**,



Hate Singh Bhagat Singh Vs. State of Madhya Bharat- AIR 1953 SC 468, Ajay Singh Vs. State of Maharashtra- (2007) 12 SCC 341 and Ranvir Yadav Vs. State of Bihar- (2009) 6 SCC 595 have not been fulfilled.

In the aforesaid cases it has been held by the Supreme Court that examination of an accused under Section 313 Cr.P.C. is not an empty formality. It is a statutory and mandatory requirement which has to be complied with in its letter and spirit. All the circumstances existing against the accused and all exonerating circumstances based on the evidence are required to be put to them and they granted an opportunity to explain the same. It is held by the Supreme Court in the aforesaid cases that non-compliance with the aforesaid statutory requirement vitiates the entire trial, it causes serious prejudice to the accused person and their conviction based on such a compliance of Section 313 Cr.P.C. is unsustainable.

Apart from the fact that in this case the evidence appearing against the appellant are not sufficient enough, even there is non-compliance with the mandatory requirement of Section 313 Cr.P.C. The circumstances appearing against the appellant and the exonerating factors have not been put to the appellant and he has not been granted any opportunity to explain



the same.

That being the position as to how the conviction is ordered after total non-compliance with the provisions of Section 313 Cr.P.C., we are of the considered view that this appeal has to be allowed. Accordingly, taking note of all these circumstances, the appeal is allowed, the impugned judgment of conviction and order of sentence are set aside, the appellant is acquitted of the charge levelled against him and he is discharged from the liability of his bail bond.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

P.K.P.

AFR/NAFR	N.A.F.R.
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