

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.85 of 1994

Against the judgment of conviction dated 02.02.1994 and order of sentence dated 04.02.1994 passed in Sessions Trial No.394 of 1992/20 of 1992 by 1st Addl. Sessions Judge, Bhagalpur.

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Mohan Sharma @ Lohar, son of late Sundar Mistry, resident of Village-
Pirpainti Bazar, P.S.-Pirpainti, District-Bhagalpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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with

Criminal Appeal (DB) No. 88 of 1994

Against the judgment of conviction dated 02.02.1994 and order of sentence dated 04.02.1994 passed in Sessions Trial No.394 of 1992/20 of 1992 by 1st Addl. Sessions Judge, Bhagalpur.

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1. Upendra Rajak, son of Shulk Rajak
 2. Ram Ekwel Mandal, son of Birju Mandal

Both residents of Village Malikpur, P.S. Pirpainti, District-Bhagalpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

(In Criminal Appeal (DB) No. 85 of 1994)

For the Appellant/s : Mr. Arun Kumar Tripathi, Amicus Curiae

For the Respondent/s : Mr. Abhimanyu Sharma, APP

(In Criminal Appeal (DB) No. 88 of 1994)

For the Appellant/s : Mr. Amitabh Kumar, Advocate

For the Respondent/s : Mr. Abhimanyu Sharma, APP



CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY
ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 11-11-2017

In these appeals filed under Section 374(2) of the Code of Criminal Procedure, the appellants herein challenged their conviction ordered by the 1st Additional Sessions Judge, Bhagalpur in Sessions Trial No.394 of 1992/20 of 1992 convicting them for offences under Sections 364, 302 and 201 of the Indian Penal Code respectively and sentencing them to undergo rigorous imprisonment for life for offence under Section 302 of the Indian Penal Code and a term of 10 years rigorous imprisonment for offence under Section 364 of the Indian Penal Code and further seven years for offence under Section 201 of the Indian Penal Code.

Case of the prosecution is that on 22.10.1991 at about 6.30 P.M. in Village Malikpur, Police Station Pirpainty, District Bhagalpur, the offence has been committed. A *ferdbeyan* was lodged by P.W.11 Arbind Kumar Sah at 9 A.M. on 23.10.1991 to the effect that he is the brother of the deceased Sanjay Kumar Sah and it was stated in the report that appellant accused Mohan Sharma @ Lohar was in jail custody in certain cases and while he



was undergoing custody, his wife had taken a loan of Rs.800/- from the deceased Sanjay Kumar Sah. When the deceased Sanjay Kumar Sah went to the house of the accused Mohan Sharma on 22.10.1991 at about 3 P.M. and demanded certain money back, accused Mohan Sharma refused to pay the amount. On this, quarrel and scuffle took place between the appellant accused Mohan Sharma and the deceased Sanjay Kumar Sah. Mohan Sharma threatened the deceased with dire consequences including threat to his life. Thereafter, on the same day about 4 P.M., another accused Bharat Singh informed the informant that deceased had taken Rs.3000/- from his men which included Mohan Sharma, he should return the same otherwise they will face dangerous consequences.

It is alleged further in the report that at about 6.30 P.M., the deceased, who was a resident of village Pirpainty Bazar, had gone to village Malikpur, the village of the accused persons, in connection with collection of dues from them. He did not return home in the night. Search was made and thereafter on the subsequent day on 23.10.1991 in the early hours of the morning when the informant reached village Malikpur, there he met P.W.1 Ayodhi Mistry alias Sharma and P.W.2 Madan Sharma, who told him that in the evening of the previous day, the deceased had come



to their house in state of fear and anguish, he fell flat on the Darwaja of their house, cried for help and requested P.W.1 and P.W.2 to save his life. Immediately it is alleged that the appellants Mohan Sharma, Ram Ekwai Mandal, Bhutal Mandal alias Ram Bhajjo Mandal and Upendra Mandal came there, assaulted the deceased. P.W.1 and P.W.2 tried to rescue him, but the accused persons threatened to kill them and took the deceased towards an orchard and while taking the deceased they were assaulting him. Thereafter, the body of the deceased was recovered from a Kutchha well near the stone quarry of accused Bharat Singh.

Investigation was taken and after enquiry, the charge-sheet was filed and on committal to the Sessions Court, the trial concluded and the conviction ordered.

In support of the case, the prosecution had examined 14 witnesses and exhibited the inquest report and the postmortem report of the deceased. Apart from examining P.W.1 and P.W.2 Ayodhi Mistry @ Sharma and Madan Sharma, respectively, and the informant Arbind Kumar Sah as P.W.11, the prosecution had examined the doctor, who had conducted the autopsy as P.W.9 Dr. N. N. Bhagat, P.W.3 Rita Devi alias Ritiya Devi, P.W.4 Boudhu Mandal, P.W.5 Ramdeo Mandal, P.W.6 Ashok Kumar Mahaldar, P.W.7 Ashok Prasad Sah, P.W.8 Dinesh Prasad Sah, P.W.10 Raj



Kishore Mandal, P.W.12 Kisto Prasad Sah, P.W.13 Sunita Devi and P.W.14 Bhuwaneshwar Sharma as witnesses to the prosecution.

The defence examined Bhola Mandal and Brahmdeo Rajak as D.W.1 and D.W.2 respectively.

Amongst the witnesses examined, P.W.7 Ashok Prasad Sah is a witness to the inquest report, P.W.9 Dr. N. N. Bhagat conducted the postmortem, P.W.14 Bhuwaneshwar Sharma is the investigating officer, P.W.6 Ashok Kumar Mahaldar, P.W.10 Raj Kishore Mandal and P.W.12 Kisto Prasad Sah are witnesses to the facts about various procedural matter being followed in the matter. P.W.8 Dinesh Prasad Sah is also a witness to the inquest report regarding recovery of the dead body of the deceased from a well near the stone quarry of the accused Bharat Singh. One witness P.W.5 Ramdeo Mandal was only tendered for cross-examination and P.W.3 Rita Devi alias Ritiya Devi pleaded total ignorance about the incident. She has been declared hostile. Even though, initially in statement under Section 161 of the Code of Criminal Procedure, she had testified to the effect that after coming from the field at 7.30 P.M. in the evening, when she had gone to attend the call of nature, she had seen the accused persons dragging and taking away the deceased to the orchard. There are no eye witnesses to the prosecution and the entire case of the prosecution



is based on circumstantial evidence and ,primarily, the evidence of P.W.1, P.W.2 and P.W.4 with regard to the deceased being last seen with the appellants around 7.00 -7.30 P.M. in the evening of 22.10.1991. Even though in the *ferdbeyan* P.W.11 Arvind Kumar Sah speaks about his brother rushing to the house of P.W.1 and P.W.2 and they having told him about assault on his brother and thereafter taking of his brother to the orchard by the accused persons, the story as narrated by the informant in the *ferdbeyan* is not the same as have been testified by these two witnesses in the Court.

P.W.1 Ayodhi Mistry @ Sharma testifies before the Court that on the date of the incident, he along with his father were sitting in their house in the evening and having Nasta, when all of a sudden, the deceased came running to their Darwaja, fell down and stated as under, “*Madan Bhaiya Jan Bachao*”. On this both P.W.1 and his father P.W.2 went to save the deceased. They found accused Mohan Mistry @ Lohar, Ram Ekbal Mandal and Upendra Rajak quarreling with the deceased. They pacified them, separated them and it is stated that each of them went away in different direction. P.W.2 Madan Sharma also narrates the same story. However, in cross-examination, these witnesses speak about the deceased being slapped by Mohan Sharma. Surprisingly, the fact about the



deceased being assaulted continuously and thereafter dragged away into the orchard is not testified by these witnesses in the evidence tendered in the Court. This is a major omission and the story being developed as an after-thought to complete the chain of circumstances cannot be ruled out. If the aforesaid omission is analyzed in the backdrop of the fact that if P.W.1 and P.W.2 were known to the deceased and if the deceased had come to their house in the state as indicated by the informant in the *ferdbeyan* and even by the witnesses in the evidence tendered by them, it is surprising that they do not inform the family members of the deceased about such a happening. They keep quite not only after the events happened on the evening of 22nd October, 1991, but even on the next day in the morning they do not inform anybody about the incident and it is only after the dead body of the deceased is recovered that such a story comes out for the first time in the *ferdbeyan*. This is a major lacuna in the case of the prosecution and if this part of the circumstances is taken out from the story as narrated by the prosecution, then the only evidence available on record would be the fact about certain transactions that had taken place between the parties and the quarrel for refund of the amount that also which had taken place on the previous evening on 22.10.1991. That apart, from the statement of P.W.11 himself, his



brother deceased had gone to the village Malikpur for recovery of loans granted by him and it is the case of the defence that he had been done to death by somebody else and only on account of prolonged family dispute between the parties, they have been falsely implicated.

Death of Sanjay Kumar Sah is an admitted position and the testimony of P.W.9 Dr. N. N. Bhagat indicates that he had found four lacerations on the left jaw, chin, left side of forehead and right side of forehead on the body of the deceased, one incised wound was found on the angle of mouth right side, six bruises and fractures on the ribs were also found. Lastly, he speaks about a fire arm wound of entry on the left side of his face resulting in fracture of bone of eye, and on the skull. Bullets were recovered and the postmortem does indicate that the deceased was tortured and a fire arm was also used for killing him.

However, surprisingly, if the statements of P.W.1 and P.W.2 are analyzed, they categorically say and admit in the cross-examination that when the so-called event happened in their Darwaja, none of the appellants were carrying any arms or any other equipment, like lathi, farsa etc. They speak about the appellants assaulting the deceased by fists and blow. Even the story of the deceased coming to their Darwaja becomes suspicious



taking note of the discrepancies and the major omissions in the story as narrated by them in the Court and the *ferdbeyan* recorded and as already indicated hereinabove if this part of the evidence adduced by the prosecution and the circumstances narrated becomes doubtful, then the chain of events and circumstances necessary for completing the links in the circumstantial evidence to record an order of conviction becomes non available and if the principle governing conviction on the basis of circumstantial evidence are analyzed after considering the law laid down by Hon'ble Supreme Court, particularly in the case of **Raja alias Rajinder v. State of Haryana, (2015) 11 SCC 43**; in the case of **Daulat Ram Vs. State of Haryana, (2015) 11 SCC 378**; and in the case of **Vijay Shankar Vs. State of Haryana, (2015) 12 SCC 644**, it is clear that to record an order of conviction based on circumstantial evidence, it is absolutely necessary that each and every fact which forms a link to conclude the circumstances available should be complete in itself and even if one of the links is missing, the circumstances are not complete and in such a case, a conviction should not be recorded as it becomes dangerous to convict a person on the basis of such a feeble evidence.

As indicated hereinabove, if the circumstantial evidence put forth before the Court by the Prosecution is analyzed in the



backdrop of the aforesaid principle, except for the circumstances indicated, a motive for commission of the offence, the circumstance of last seen together on the date of the incident and the circumstances with regard to taking away the deceased by the accused persons and the subsequent remotest possibility of the accused having committed the offence or circumstances to prove this is not available. There is no recovery of any fire arm from the possession of the appellants, blood stained cloths or any other equipment or weapon used for assault etc. have not been recovered from them, no incriminating material is available, based on which the appellant can be linked with any of the circumstances indicated by the prosecution to commit the offence. Except for some circumstances showing a motive, i.e. loan transaction and dispute with regard to recovery of the same, no evidence is available to link the appellants with the commission of the offence.

Apart from the aforesaid lacuna in the case of the prosecution, the case of the prosecution further suffers from another procedural illegality and breach. This is in the matter of recording the statement of the accused persons under Section 313 of the Code of Criminal Procedure. If the statement of the accused persons recorded under Section 313 of the Code of Criminal Procedure are taken note of, it would be seen that identical



stereotype questions which are nothing but the charges levelled against the appellants are put to the accused persons by the trial Court while complying with the statutory requirement of Section 313 of the Code of the Criminal Procedure. The questions put to the appellant Mohan Sharma are: (i) Have you heard the statement given by the witnesses? (ii) while you were in jail, did Sanjay Kumar Sah give loan of Rs.800/- to your wife? (iii) After coming out of the jail, when, Sanjah Sah, the deceased, came to your house and asked you to return back money, you quarreled with him and threatened to kill him and the fourth question is put to him about demanding 3000 rupees on 22.10.1991 in the evening from P.W.11, the informant, and the last question is what have you to say in the defence?

Similar questions are put to the other accused persons also which identical in nature. The first question is the same, i.e. have you heard the statement of the witnesses. The second question to the other accused is the fourth question about demanding of Rs.3000/- in the evening of 22.10.1991 from the informant and the last question what you have to say in defence.

If the aforesaid procedure followed for complying with the mandatory requirement of Section 313 of the Code of Criminal Procedure is analyzed in the backdrop of the law laid down by the



Hon'ble Supreme Court in the case of **Sukhjit Singh v State of Punjab** [(2014) 10 SCC 270] and the judgments relied upon in the said case, namely **Ranvir Yadav v. State of Bihar** [(2009) 6 SCC 595]; **Tara Singh v State** [AIR 1951 SC 441]; and **Hate Singh Bhagat Singh v. State of Madhya Bharat** [AIR 1953 SC 468] and **Ajay Singh v. State of Maharashtra** [(2007) 12 SCC 341], it would be seen that the law laid down by the Supreme Court in the aforesaid cases mandates that the requirement of Section 313 of the Code of Criminal Procedure is not an empty formality. It is a mandatory requirement which mandates that each and every incriminating circumstances that has come on record should be put to the accused and he be given an opportunity to explain the circumstances appearing against him. It has been held by the Hon'ble Supreme Court in the aforesaid case that the requirement of Section 313 of the Code of Criminal Procedure is not an empty formality. Its compliance has to be strictly followed and every accused is entitled to be informed about all the circumstances that have come on record and an opportunity given to him to understand the circumstances and explain it. Non-compliance of the aforesaid provision is said to be fatal to the case of the prosecution causing prejudice to the accused persons and consequently vitiating the entire trial and the conviction itself.



If that is the principle governing compliance to be required under Section 313 Cr.P.C. while recording the statement of the accused and if the procedure followed in the present case, as indicated hereinabove, is scrutinized in the backdrop of the aforesaid requirement of law, I have no iota of doubt in our mind that this mandatory requirement has not at all been complied with in the present case. None of the circumstances incriminating in nature available against the appellants were put to them. It was not properly brought to their notice and they were not given any opportunity to explain these circumstances which has been utilized and taken into consideration by the trial Court for recording the order of conviction based on the circumstantial evidence that has come on record.

That being the position, in totality this is a case where neither the circumstantial evidence available against the appellants are sufficient enough to record their conviction nor is the statutory and mandatory requirement of Section 313 Cr.P.C. followed and therefore, it is a fit case where the appellants are entitled to the benefit of these lacunas in the case of the prosecution and the procedure conducting at the time of trial and their conviction has to be and is, accordingly, liable to be set aside on these grounds.



Accordingly, both the appeals are allowed, the judgment of conviction and order of sentence passed by the Court below is quashed, the appellants are acquitted of the charges levelled against them. Their bail bonds be discharged and they be set free in case they are not required in any other case.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

Sunil/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	14.11.2017
Transmission Date	14.11.2017

