

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.595 of 2002

(Against the Judgment of conviction and order of sentence dated passed by Shri L.P. Singh dated 10.10.2002 in Sessions Trial No.551 of 1989 arising out of Muffasil P.S. Case No. 205 of 1987.)

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Md. Israil, S/o Late Kalim, R/o Village-Bardha, P.S.- Muffassil, District- Munger.
..... Appellant/s

Versus

State of Bihar

..... Respondent/s

with

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Criminal Appeal (SJ) No. 608 of 2002

Arising Out of PS.Case No. -null Year- null Thana -null District- MUNGER

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Md. Azlim, S/o Late Md. Kalim, R/o Village- Bardha, P.S.- Muffassil, District- Munger.

..... Appellant/s

Versus

State of Bihar

..... Respondent/s

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Appearance :

(In CR. APP (SJ) No.595 of 2002)

For the Appellant/s : Mr.

For the Respondent/s : Mrs. Abha Singh, APP

(In CR. APP (SJ) No.608 of 2002)

For the Appellant/s : Mr. Ranbir Singh, Amicus Curiea

For the Respondent/s : Mr. Md.Abu Haider, Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY
ORAL JUDGMENT
Date: 25-11-2017

Heard learned counsel for the petitioners and the counsel
appearing on behalf of the State.

2. Both these appeals arises out of the common judgment of conviction dated 10.10.2002 and order of sentence dated 11.10.2002 passed by the Fast Track Court, Munger in Sessions Case No. 551 of 1989 , whereby appellants have been convicted for the



offence under Section 307/149 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of five years and fine of Rs. 2,000/- and in default of payment of fine R.I. for six months. No separate sentence has been passed under Section 27 of the Arms Act.

3. The prosecution story in brief is that on 31.05.1987 he went on the land for measurement and handing over to the purchaser Najim who was also present there. It is alleged that at 9 A.M. when the informant Md. Muslim (P.W.3) was showing land to Md. Najim, all of a sudden accused Israil alias Chedi, Ajlim both armed with gun Salim @ Sallu, Omar, Julfikar, Faruque and Ainul all armed with country made pistol came there alongwith 20 to 25 other persons and started abusing the informant. It is further alleged that accused Israil ordered Ajlim and Salim to kill the informant Muslim on which accused Ajlim fired from his gun which hit the informant Md. Muslim causing him injuries on different parts of his body. One rickshaw puller Asgar was then passing when the shot was fired and he told them as to why they are doing such act? On this, Accused Salim fired from country made pistol causing injuries to Asgar (Rickshaw Wala). The other accused persons are alleged to have also fired on the informant Md. Muslim. But it could not hit him. Hearing the sound of firing, the witnesses namely Israil, Kudus(P.W.2) Akhtar, Rajim,



Sattar, Kalam and others came there and the accused persons fled away. Both the injured Md. Muslim and Asgar were brought to Sadar Hospital, Munger for treatment where Dr. R.K. Sinha, C.W.1 examined the injured. Fardbeyan of Md. Muslim was recorded by S.I. A.K. Karn, the then O.C. Muffassil P.S. on the same day i.e. 31.05.87 at 3 p.m. in Sadar Hospital, Munger, Muffassil P.S. Case No. 205/87 dt. 31.5.87 was registered against the accused persons and the I.O. took up the investigation. He examined the witnesses, visited the P.O. and submitted charge-sheet after completing the investigation and receipt of the injury report from the Doctor.”

4. After investigation the police submitted charge-sheet against five persons for offences under Sections 307,348,307/149 and under Section 27 of the Arms Act. After taking cognizance the case was committed to the court of Sessions and on framing charges against accused persons, the appellants on being pleaded not guilty, have been subjected to trial.

5. On behalf of the prosecution, altogether four witnesses were examined in support of the case. One Dr. R.K. Sinha, who had examined the injured, has been examined as court witness. Barun Kumar (p.w. 1) is a formal witness who has proved the formal FIR ext. 1. p.ws. 2 to 4 are the eye-witnesses of the alleged occurrence.

6. The trial court on scrutinizing the evidence held out that



the appellant Md. Israil in Cr. Appeal no. 595 of 2002 and appellant Md. Azlim in Cr. Appeal No. 608 of 2002 are guilty for the offence under Section 307 of the IPC and 27 of the Arms Act as well as the appellant Md. Israil found guilty for offence under Section 307 of the IPC whereas Md. Azlim found guilty for offence under Section 307 and 307/149 of the IPC.

7. Learned counsel appearing on behalf of the appellants submitted that the trial court has not considered various aspects which indicate fallacy in the investigation of the present case. He highlighted that the trial court has failed to appreciate the non-explaintion of the injury sustained by the accused person. Admittedly, the present case arises out of land dispute between the informant and the appellants and there is a case and counter case and the informant's side was accused in the counter case for offence under Section 302 of the IPC. He submitted that there are major contradiction in the version of the prosecution witnesses as to the manner of commission of the offence and the role attributed to the appellants. From the materials on record it would be evident that out of three of the witnesses p.w. 2,3 and 4, p.w. 2, who claims to be the eye-witness of the occurrence has stated that Md. Azlim is the main assailant as he has fired on Asgar, whereas, P.W. 3 and 4, the other two eye-witnesses claims that the assailant was Md. Salim (now dead). This major contradiction in the



prosecution case renders the prosecution case doubtful. Particularly, in the fact situation that there is a land dispute and previous enmity leading to case and counter case.

8. Counsel for the appellant further submitted that in a case of land dispute where the parties have exercised right of private defence, conviction of the appellants is not sustainable, in view of the fact that the appellants side have also sustained injury and one of the members of the appellants family died and the informant side were made accused for offence under Section 302 of the I.P.C.

9. He has further submitted that in the present case, prosecution suffered immense prejudice on account of non-examination of the I.O. There is no explanation as to why I.O. was not examined in this case. It is submitted that there is contradiction in the case of the prosecution and in the absence of examination of the I.O. the appellant suffered prejudice as they could have cross-examined the I.O. confronting with the contradictions in the prosecution case. He submitted that mandatory requirement under Section 313 Cr.P.C. has also not been complied with.

10. Counsel for the State has not been able to explain the inconsistency, particularly, about the version of the eye-witness to the occurrence. Especially, the manner of occurrence and the main assailant in the instant case. Whether Md. Azlim fired on Asgar or



Md. Salim.

11. After hearing the parties and on consideration of the entire materials on record, I find substance in the submission of the appellants that the contradiction which was noticed by the trial court in paragraph-11 falsify the entire prosecution case when the eye-witnesses are at variance of identifying the main assailant and the other materials which are indicates that Salim was the assailant, in that situation convicting these appellants are not safe, particularly, when the trial court on the basis of material available on record acquitted three other accused persons. In fact, these appellants also deserve the benefit of doubt in the instant case. In addition thereto on going through the records of this case and on perusal of the question raised by the trial under section 313 of the Cr.P.C. the court is of the considered view that the trial court has not acted in accordance with mandate of law while examining the accused under Section 313 Cr. P.C.

12. The crucial questions and adverse material surfaced during trial were not confronted to the accused by the trial court. It has been held out by the Apex Court in (2014) 10 SCC 270, that examination of accused under Section 313 Cr.P.C. is not formality but mandatory to ensure fair trial. Paragraph 11 to 13 of the judgment is quoted below for ready reference.



11. In this context, we may profitably refer to a four-Judge Bench decision in *Tara Singh v. State* wherein, Bose, J. explaining the significance of the faithful and fair compliance with Section 342 of the Code as it stood then, opined thus: (AIR pp. 445-46, para 30)

“30. I cannot stress too strongly the importance of observing faithfully and fairly the provisions of Section 342 of the Criminal Procedure Code. It is not a proper compliance to read out a long string of questions and answers made in the committal court and ask whether the statement is correct. A question of that kind is misleading. It may mean either that the questioner wants to know whether the recording is correct, or whether the answers given are true, or whether there is some mistake or misunderstanding despite the accurate recording. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and must be couched in



a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand. I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned. In my opinion, the disregard of the provisions of Section 342 of the Criminal Procedure Code, is so gross in this case that I feel there is grave likelihood of prejudice.”

12. In *Hate Singh Bhagat Singh v. State of Madhya Bharat*, Bose, J. speaking for a three-Judge Bench highlighting the importance of recording of the statement of the accused under the Code expressed



thus: (AIR pp. 469-70, para 8)

“8. Now the statements of an accused person recorded under Sections 208, 209 and 342, Criminal Procedure Code are among the most important matter to be considered at the trial. It has to be remembered that in this country an accused person is not allowed to enter the box and speak on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in Indian to take the place of what in England and in America he would be free to state in his own way in the witness box.”

13. The aforesaid principle has been reiterated in *Ajay Singh v. State of Maharashtra* in following terms: (SCC pp. 347-48, para 14)

“14. The word ‘generally’ in sub-section (1) (b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case



generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give."

12. In view of the discussions made above, I find that the prosecution has not been able to establish the guilt of the appellants beyond all reasonable doubt and it must suffer on account of lapse of the trial court in making departure from the mandatory requirement



under Section 313 of the Cr. P.C.

13. Accordingly, the appeal is allowed.

14. The judgment of conviction and order of sentence passed by the Trial Court is set aside. Since the appellants are on bail, they are discharged from the liability of the trial court.

(Anil Kumar Upadhyay, J)

khushbu/-

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