

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No. 1232 of 2011

Arising Out of PS. Case No.-244 Year-2003 Thana- Mohania District- Bhabhua (Kaimur)

Mohan Gond Son of Suresh Gond Resident of Village- Rajia Bandha, P.S.-
Mohania, District- Kaimur

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s	:	Mr. Krishna Prasad Singh, Sr.Adv. Mr. Bhaskar Shankar, Adv.
For the Respondent/s	:	Mr. Ajay Mishra (APP)

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 07-09-2017

The sole appellant has approached this Court by filing the present appeal under Section 374(2) r/w Section 389(1) of the Code of Criminal Procedure, 1973 (for short “Cr.P.C.”) against the judgment of conviction and sentence dated 21st November, 2011 and 23rd November, 2011 respectively passed in Sessions Trial No. 271 of 2006/168 of 2009 (arising out of Mohania P.S. Case No. 244 of 2003) by Sri Jyotindra Kumar Sinha, learned Additional Sessions Judge, F.T.C.-III, Kaimur at Bhabhua (hereinafter referred to as ‘Trial Judge’). The appellant has been convicted under Section 302 of the Indian Penal Code and sentenced to undergo rigorous



imprisonment for life and further, he has been imposed a fine of Rs. 10,000/- (ten thousand) and in default, he has been directed to undergo rigorous imprisonment for two months.

2. Short fact of the case is that *fardbeyan* of Bansraj Gond of village Dasauti, P.S. Mohania, Distt. Kaimur was recorded by Sub-Inspector of Police Sri S. Bhushan of Mohania Police Station on 31.12.2003 at the house of Mohan Gond (appellant) in the village – Rajia Bandh, Police Station – Mohania, District - Kaimur at 10:30 A.M. The informant Banshraj Gond (P.W.-2) disclosed in his *fardbeyan* that his daughter Manju Devi @ Bechna Devi was married with the appellant (Mohan Gond) about 7-8 years back and right from the beginning of the marriage, his daughter was not treated properly by her in-laws members and always, she was being ousted. His daughter was often residing in her *Maika*, which was in the village Dasauti. He stated that his deceased daughter was always telling her mother and other family members that her husband Mohan Gond (appellant) was having illicit relation with Lakhpatia Devi, wife of elder brother of her husband and this was the reason that she was being assaulted and threatened. From the wedlock of the said marriage, his daughter was blessed with a male child and



thereafter, the informant convinced his daughter and persuaded her to live in her in-laws' house, everything will be alright. About two months back, prior to the occurrence, her in-laws had taken back the daughter of the informant with her son, even at that very time, the deceased was apprehensive. However, on 13-12-2003 i.e. on the date of *fardbeyan* in the morning, younger brother of the husband of his daughter namely Awadhesh Gond had come to the house of the informant in village – Dasauti and informed that Manju Devi (daughter of the informant) had died, since she was ailing for last four days. On being inquired about the child, the informant was informed that he was alright. Thereafter, the informant with some other persons visited the in-laws' house of his daughter and there, he found the dead-body of his daughter Manju Devi and dead body of her child lying on a bed. Thereafter, the police arrived and dead-bodies were carried. The informant claimed that due to illicit relation of the appellant with his *bhabhi*, his daughter and son of her daughter were done to death, in which, the husband Mohan Gond (appellant), his younger brother Awadhesh Gond and Lakhpattia Devi (*bhabhi*) were involved and all conspiring with each other after pressing the neck through rope, they had



killed them. After recording *fardbeyan*, the police on the same date i.e. on 13-12-2003 at about 3:00 P.M. lodged a formal F.I.R., vide Mohania P.S. Case No. 244 of 2003 under Sections 302/34 of the Indian Penal Code against three accused persons, namely; 1. Mohan Gond (appellant), 2. Awadhesh Gond (younger brother of the appellant) and 3. Lakhpata Devi (wife of Munna Gond, elder brother of the appellant).

3. The police, after drawing formal F.I.R., investigated the case and after finding accusation true against all the three F.I.R. named accused persons, on 06-08-2004 submitted chargesheet under Section 302/34 of the Indian Penal Code and thereafter, on 10-08-2004, the learned Magistrate took cognizance of the offences. After completing formalities regarding supply of police paper, the case was committed to the court of sessions on 21-12-2006 and as such, the case was numbered as Sessions Trial No. 271 of 2006. Charges were framed against all the three accused persons including the appellant on 22-03-2007 under Sections 302/34 of the Indian Penal Code. Since the accused persons denied the charges, the prosecution, to prove the case, examined altogether six witnesses.



4. P.W.-1 Munna Ram was examined as formal witness. This witness was an Advocate's clerk, however; he proved *fardbeyan* as well as formal F.I.R., which were marked as **Ext. 1** and **Ext. 2** respectively.

5. P.W.-2 Bansraj Gond is the informant and father of the deceased (Manju Devi), whereas; P.W.-3 Shyam Devi is the wife of the informant and mother of the deceased.

6. Changur Gond and Dharmraj Gond though were neither charge-sheeted witness nor their statement was recorded under Section 161 of the Cr.P.C. during the investigation were examined as P.W.-4 & P.W.5 and P.W.-6 is Ram Kumar Sharma, who was a pharmacist-cum-compounder and he has proved the *post-mortem* examination report, which was conducted on the dead-body of two deceased namely Manju Devi @ Bechna Devi and Jitendra Kumar (son of Bechna Devi). Those *post-mortem* examination reports were got exhibited and marked as **Ext. 4/1** and **4** respectively.

7. After conclusion of the prosecution evidence, the statement of accused persons under Section 313 of the Cr.P.C. was got recorded and thereafter, the defence also, to disapprove the charges, got examined three witnesses, namely; Munna Singh (D.W.-1), Triloki Nath Pandey (D.W.-2) &



Shobhnath Ram (D.W.-3) and defence witnesses asserted that the wife of the appellant had committed suicide with her child, who was aged about one & half year. Defence also took the pleas that after the death, the brother of the appellant and accused Awadhesh Gond had informed the police as well as prosecution side for giving information regarding the occurrence. In sum and substance, a plea was taken that it was not a case of under Section 302 of the Indian Penal Code, but it was a case of suicide. The learned Trial Judge, after examining the evidence while holding the appellant Mohan Gond guilty, had passed order of sentence, acquitted other two accused persons namely Awadhesh Gond and Lakhpatia Devi. The appellant Mohan Gond was the husband of the deceased (Manju Devi @ Bechna Devi).

8. Sri Krishna Prasad Singh, learned senior counsel assisted by Sri Bhaskar Shankar, learned counsel for the appellant, after placing entire evidences, has argued that the prosecution has miserably failed to establish the charges beyond all reasonable doubt. He submits that the prosecution case is not believable, in view of the fact that in the *fardbeyan* i.e. **Ext. 1**, the informant (P.W.-2) had made categorical statement that on the date of occurrence in the morning,



Awadhesh Gond (younger brother of the appellant) visited the house of the informant and narrated regarding the death of daughter of the informant, but during trial, this witness alongwith other prosecution witnesses have taken U-turn and stated that information regarding the death of the deceased was not provided from the family member of the appellant, rather they got information from some *Charwaha* (Shepherd). He submits that repeatedly, on being asked, none of the prosecution witnesses had disclosed the name of the *Charwaha*, who had given information regarding the death of the deceased.

9. Sri Singh, learned senior counsel has further argued that prosecution witnesses, though they were not believable or reliable, have stated that in their presence inquest reports of two dead-bodies were prepared, but none of the witnesses have said as to whether they stood as witness to the inquest report or not, whereas, it is a case of the prosecution that while informant side arrived at the place of occurrence i.e. house of the appellant, none of the in-laws members were present in the house. He submits that in such situation, it was essential to get the signature of either of the witnesses from informant side on the inquest report. Since, none of the



witnesses have claimed that they put signature on the inquest report, this fact also creates doubt on the credibility of the prosecution case.

10. Sri Krishna Prasad Singh, learned senior counsel has also argued that the impugned judgment of conviction and sentence is liable to be set aside on the ground that no reliable evidences were brought on record. During the trial, neither any witness to the inquest report had come forward, nor investigating officer was examined and even the doctor, who had conducted autopsy on the dead body of two deceased, was not examined. Sri Singh has argued that non-examination of the investigating officer as well as doctor, who conducted autopsy, has seriously prejudiced the case of the prosecution. Sri Singh, relying on a Division Bench judgment of this Court, reported in **1986 P.L.J.R. 604 (Shiva Balak Rai vs. State of Bihar)**, has argued that if in a case when in absence of the doctor conducting *post-mortem* examination report, *post-mortem* report was got exhibited, such *post-mortem* examination report may not be looked into. It has lastly been argued that though, it was consistent case of the prosecution that the reason for committing murder of wife as well as infant child of the appellant by the appellant was his



illicit relation with Lakhpatia Devi, wife of his elder brother, such circumstance was not placed to the appellant at the time of his examination under Section 313 of the Cr.P.C. and as such, those circumstances, which had come during the investigation i.e. the reason for committing murder may not be taken note of. On this very point, he has placed reliance on a judgment of the Apex Court, reported in **AIR 1984 SUPREME COURT 1622 (Sharad Birdhichand Sarda vs. State of Maharashtra)**. Accordingly, it has been argued that even though, it may not be case of clean acquittal, the appellant deserves to be acquitted, by way of extending benefit of doubt, since, the prosecution has not proved its case beyond all reasonable doubt.

11. At the very outset, the Court, after noticing the fact that during the trial neither investigating officer was examined nor the doctor who conducted *post-mortem* examination on dead-body of two deceased was examined as well as the fact that the inquest report was not got exhibited and the fact that certified copy of *post-mortem* examination report was only exhibited, wanted to remit back the matter to the court below for examining the case afresh, but Sri Krishna Prasad Singh, learned senior counsel for the appellant has



argued that this may not be feasible in the facts and circumstances of the present case. He has argued that it is not a case that prosecution was not given opportunity to produce such witnesses, but record suggests that prosecution was given full opportunity and adequate time to produce inquest report, original *post-mortem* examination report as well as for securing attendance of the investigating officer as well as the doctor, who conducted *post-mortem* examination, and even thereafter, prosecution failed to produce the same. He submits that it would not be appropriate at this stage to pass an order of remand or direct for leading further evidence in the present appeal. On this very point, he has placed reliance on a Division Bench Judgment of this Court, reported in **2007 (1) P.L.J.R. 705 (Sallo Singh vs. State of Bihar)** as well as **1986 P.L.J.R. 604 (Shiva Balak Rai vs. State of Bihar)**.

12. Sri Ajay Mishra, learned Addl. Public Prosecutor opposing the appeal has argued that it is consistent case of the prosecution that dead-body of Manju Devi @ Bechna Devi as well as her kid Jitendra Kumar was found lying in the house of the appellant and while informant visited the place of occurrence, all the family members, including the appellant, were not present. He submits that recovery of the



dead-body, having mark on the neck of person of both the deceased from the house of the appellant, was sufficient to draw an inference that they were done to death by the appellant, against whom, witnesses have categorically stated that right from the marriage, the deceased (Manju Devi) was mentally and physically harassed by the appellant and his family members. He has also argued that mother of the deceased, who has been examined as P.W.-3 Shyam Devi, has deposed during the trial that immediately after the marriage when the deceased returned back from her in-laws' house, had disclosed that the appellant was having illicit relation with Lakhpattia Devi, wife of elder brother of the appellant and this was the reason for her harassment by the appellant. In sum & substance, he has argued that the circumstance, if taken into totality, suggests that it was none than the appellant, who committed the crime, and as such, the learned Trial Judge has rightly passed the judgment of conviction and sentence.

13. Besides hearing learned counsel for the parties, we have minutely perused the evidence on record. Before proceeding, it would be appropriate to discuss the evidences.

14. The informant Bansraj Gond, who has been examined as P.W.-2, is the father of the deceased Manju Devi



@ Benchna Devi and maternal grand father (nana) of the deceased Jitendra Kumar. In his deposition in paragraph – 1, he had stated that his daughter was married with the appellant about 6 years prior to the occurrence. After the marriage, the accused persons started demanding she-buffalo. His daughter was not being treated properly in her in-laws' house, since the appellant (Mohan Gond) was having illicit relation with Lakhpattia Devi. He stated that the appellant, Lakhpattia Devi and Awadhesh Gond were regularly using to beat his daughter. He stated that he alongwith Dharmraj Gond (P.W.-5), Changur Gond (P.W.-4) and one Birendra (not examined) had tried to convince his daughter and thereafter, he dropped her to her in-laws' house. About 5 or 6 months earlier, while his daughter had come, she had come with her kid Jitendra. In paragraph – 5, P.W.-2 further stated that about two months prior to the occurrence, his daughter had again gone to her in-laws' house, but she was not interested to go, however; after persuasion by the informant, she went to her in-law's house, where he noticed that his daughter was lying dead on a bed and beside her, her son was also lying dead. He stated that he had noticed mark on the neck of both the deceased, which had blacken. He stated that it was a mark of rope. Thereafter, at the same place,



his *fardbeyan* was got recorded by the police, which was read over to him and he put his thumb impression and on the *fardbeyan*, one Sanjay Gond (not examined) put his signature and said signature was got marked as **Ext. 3**. In cross-examination, he reiterated that the accused persons had demanded she-buffalo about one year after the *Gauna*. In paragraph – 15 of his cross-examination, he asserted that the appellant was having illicit relation with Lakhpattia and this fact was disclosed by his daughter to her mother (wife of the informant, P.W.-3). In paragraph 18 of his cross-examination, he stated that he was not knowing the *Charwaha*, who had given information regarding the death. In paragraph – 19, he further stated that the information regarding death of his daughter was not given by Awadhesh Gond, brother of the appellant.

15. On examination of the evidence of P.W.-2, it is very much clear that regarding information of death of his daughter, this witness has made incorrect statement. In the *fardbeyan*, this witness has made categorical statement that on the date of occurrence, Awadhesh Gond, brother of the appellant had gone to the house of P.W.-2 and informed regarding the death of his daughter, who was ailing since 3-4



days. On examination of evidence of P.W.-2, it is further evident that he appears to be not truthful, particularly; on the point of information regarding the death of the deceased.

16. So far as evidence of P.W.-3 Shyam Devi, wife of the informant is concerned, in her examination-in-chief, she has made categorical statement that appellant was having illicit relation with Lakhpata Devi and further stated that the deceased was being assaulted by the accused persons, since the appellant was having illicit relation with Lakhpata Devi and one another fact was introduced that accused persons were demanding she-buffalo. This witness has also stated in the similar manner like P.W.-2. In cross-examination in paragraph – 4, on being asked, she stated that she had stated before the police that her in-laws were always beating her in respect of demand of she-buffalo. She further stated that in paragraph – 5 that her daughter was opposing regarding illicit relation. In paragraph – 7, she accepts that about 10 years back from the date of death of her daughter, deceased was married and one year thereafter, *Gauna* had taken place. She further stated that due to non-fulfillment of demand of providing she-buffalo and T.V., the accused persons were regularly ousting her daughter and after persuasion, she was being dropped by the informant



side. She also states that regarding the death, information was given by *Charwaha*, but she did not name any of such person. She denied the suggestion in paragraph – 20 that her daughter, after killing her son, had committed suicide.

17. P.W.-4 Changur Gond and P.W.-5 Dharmraj Gond, though were neither charge-sheeted witness nor their statement was recorded under Section 161 of the Cr.P.C. during investigation, but both of them had deposed almost in similar manner like the informant.

18. P.W.-4 in paragraph – 1 of his deposition has stated that deceased Manju Devi @ Benchna Devi was married with the appellant about 8 years prior from the date of occurrence and after the marriage, the accused persons started demanding colour T.V. and she-buffalo. He has also stated that the deceased Manju Devi was raising objection of illicit relation of the appellant with Lakhpatia Devi and this was the reason that she was being regularly assaulted and ousted. In paragraph – 1 itself, he has stated that in his presence, police arrived and prepared inquest report. This witnesses is the nephew of the informant, which fact has come in paragraph – 2 of his evidence. He also reiterates that information regarding death was given by the *charwahas*. In paragraph – 8, he has



made specific statement that after 15 minutes of their arrival at the place of occurrence, the Dy.S.P. with Daroga Ji had arrived, whereas, chowkidar had already earlier informed the police and chowkidar was present since before. In the same line, he stated that he was not in a position to say as to whether chowkidar had given information or some other. In paragraph – 11, he denied the suggestion that his statement was not recorded by the police and only on being asked by his uncle, he had made incorrect disclosure.

19. Similarly, P.W.-5 Dharmraj Gond, who is the brother of the informant, has stated that marriage of deceased was solemnised 7 years prior to the date of occurrence. He also stated that the appellant was having illicit relation with *bhabhi* Lakhpatia Devi, which was opposed by the deceased. In his examination-in-chief, he has further stated that two months after the deceased had gone to her in-laws' house, he got information regarding the ailment of deceased and thereafter, he alongwith others went to in-laws' house of deceased on a jeep where he noticed that none of the in-laws member of deceased were present. In a room on a bed, he found dead-body of Manju Devi and her son Jitendra. In paragraph – 8 of his cross-examination, he stated that only



after 6 months of the marriage, accused persons started demanding colour T.V. and she-buffalo and also started beating her. In paragraph – 13 of his cross-examination, he stated that on the neck of both deceased, there was mark of rope and rope was lying on the bed. It was plastic rope.

20. On examination of evidence of both the witnesses (P.W.-4 & 5), it is evident that marriage of deceased was solemnised prior to 7 years from the date of occurrence and both the witnesses accept that while they reached the place of occurrence, chowkidar was already present and immediately thereafter, police arrived. Both have also stated that they got information regarding the death from *Charwaha*, but name of *Charwaha* was not disclosed by either of the witnesses. They have also accepted that in their presence, inquest reports in respect of dead-bodies were prepared , but they have not stated as to whether they had put signature on the inquest report or not. In normal course, if according to prosecution, while inquest report was being prepared and no in-laws member was present, it was expected that at least family member of informant would have come forward to witness the inquest report. This also creates doubt on the prosecution case. Besides the fact that manner of information



that in the F.I.R., the informant had stated that regarding death of deceased, information was given by one of the accused Awadhesh Gond (brother of the appellant), but to the reasons best known to the prosecution (informant side), they changed the stand at the time of their deposition and developed a story that they got information regarding the death of the deceased from unknown source i.e. *charwaha* (shepherd).

21. P.W.-6 Ram Kumar Sharma, who was Pharmacist-cum-Compounder, Sadar Hospital had proved certified two copy of *post-mortem* examination report in respect of two deceased, which were prepared by Dr. A.K.Manjhi and he proved signature of the doctor, who certified the *post-mortem* examination report. He proved *post-mortem* examination report in respect of Manju Devi @ Benchna Devi, which was got marked as **Ext. 4/1** and he also proved *post-mortem* examination report in respect of dead body of Jitendra Kumar, as **Ext. 4**.

22. The prosecution had not examined either investigating officer or any of the witnesses to the inquest report. After completion of the prosecution evidence, statement of accused persons was got recorded under Section 313 of the Cr.P.C. Since only the appellant has been held



guilty and convicted, at the moment, there is no need to refer to statement of other two accused persons, who were already acquitted by the learned court below. However, the statement of the appellant, which was recorded under Section 313 of the Cr.P.C., is not only required to be examined, rather it is necessary to incorporate the same, since argument was advanced by Sri Krishna Prasad Singh, learned senior counsel for the appellant that all the circumstances, which had come during the trial against the appellant, was not placed before the appellant and as such, there was no reason to reply or deny to such allegation. The statement of the appellant recorded under Section 313 of the Cr.P.C. is as follows:-

“प्रश्न/— क्या आपने गवाहों का गवाही सुना है ?

उत्तर/— नहीं

प्रश्न/— आपके विरुद्ध आरोप एवं साक्ष्य है कि दिनांक 13.12.2003 को ग्राम— रजियाबाध, थाना— मोहनियाँ, जिला— कैमूर में सूचक बंशराज गोड़ की लड़की मंजू देबी उर्फ बेचना देबी एवं उन का लड़का जितेन्द्र को एक साजिस करके गला दबा कर हत्या कर दिये हैं। आपको क्या कहना है ?

उत्तर/— जी नहीं।

प्रश्न/— आपको सफाई में क्या कहना है ?

उत्तर/— निर्दोष हूँ।”

23. After the statement of the appellant under Section 313 of the Cr.P.C. was recorded, the defence also produced three witnesses to demolish the prosecution case. All



the three defence witnesses have primarily stated that the deceased had committed suicide by hanging and it has also been stated that after noticing the death, Awadhesh Gond (brother of the appellant) had given information to the parents of the deceased and thereafter, the informant side had arrived. D.W.-1 in paragraph – 2 of his deposition has stated that in the morning of the date of occurrence, he had seen number of person outside the house of the appellant. He stated that the room of Mohan was closed from inside and thereafter, it could be open and they found that the dead-body hanging through the rope. In paragraph-15, he stated that the appellant had given information to the police. Almost similar statement were made by other two defence witnesses that the daughter of the informant, after killing her son, had committed suicide.

24. On examination of the entire evidence, it is evident that prosecution had not proved the case beyond all reasonable doubt. Right from the very beginning i.e. from the F.I.R., the informant had taken stand that regarding death of his daughter, information was given by Awadhesh Gond, brother of the appellant and thereafter, he alongwith others visited the place of occurrence. However, during evidence, the prosecution has changed its version regarding information and



they developed a story that rumour regarding the death they got from *charwaha* (shepherd), however; none of the witnesses had disclosed the name of such *charwaha*. The change in the stand of the prosecution regarding information has got very much relevance, particularly; considering the defence evidence. In normal course, in criminal trial not much importance is required to be placed on the defence evidence, but since in the present case, it was the informant, who stated in *fardbeyan* that he got information regarding the death from the brother of the appellant, changing the stand by the prosecution that they got information from the *charwaha*, suggests that the prosecution subsequently changed the stand to strengthen the prosecution case. Certainly, such change creates serious doubt on the prosecution case. Moreover, though prosecution witnesses have stated that in their presence, inquest report in respect of two dead-bodies was prepared and it is also a case of the prosecution that none of the in-laws member were present, in normal course, it was expected that either of the member from the prosecution side would have come forward to witness the inquest report. Moreover, during the trial, inquest report was not proved properly, however; it appears that from the extract of case



diary, the inquest report has been brought on record. The prosecution had further miserably failed to establish the reason for non-examination of the doctor, who had conducted *post-mortem* examination on the dead-bodies of two deceased. Certainly, in absence of doctor, the appellant's case was prejudiced. In absence of doctor, they were prevented to ask from him any specific question regarding the death whether the injury on the neck was suggesting suicide or strangulation. Even the original *post-mortem* examination report was not brought on record, however; the *post-mortem* reports, which were certified to be true, were brought on record and got exhibited as **Ext. 4** and **4/1**.

25. The prosecution has also not given any plausible explanation regarding non-examination of the investigating officer and in absence of investigating officer, the defence were prohibited from asking any question or drawing attention to previous statement of the witnesses recorded during investigation under Section 161 of the Cr.P.C. Ofcourse, at the time of examination of prosecution witnesses, their attention was drawn to the previous statement, but in absence of investigating officer, who was the competent person to give reply after perusal of the case diary, the defence



was prevented from extracting any such material during the trial and as such, non-examination of the investigating officer has seriously prejudiced the defence case.

26. On examination of the evidence, it is evident that it was consistent case of the prosecution that deceased was being harassed and tortured, since the appellant was having illicit relation with Lakhpattia Devi, wife of elder brother of the appellant, however; at the time of examination of the appellant under Section 313 of the Cr.P.C., such circumstance was not placed before the appellant and as such, it was non-compliance of the provision under Section 313 of the Cr.P.C. At this juncture, it would be appropriate to quote paragraph 142 and 144 of the judgment of the Apex Court, reported in **AIR 1984 SUPREME COURT 1622 (Sharad Birdhichand Sarda vs. State of Maharashtra)**, which is as follows:-

“142. Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court, viz., circumstances Nos. 4, 5, 6, 8, 9, 11, 12, 13, 16 and 17. As these circumstances were not put to the appellant in his statement under Section 313 of the Criminal Procedure Code they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of Hate Singh Bhagat Singh v. State of Madhya Bharat AIR 1953 SC 468 this Court held that any circumstance in respect of which an accused was



not examined under Section 342 of the Criminal Procedure Code cannot be used against him. Ever since this decision, there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under Section 342 or Section 313 of the Criminal Procedure Code, the same cannot be used against him. In Shamu Balu Chaugule v. State of Maharashtra, (1976) 1 SCC 438 : (AIR 1976 SC 557) this Court held thus:

The fact that the appellant was said to be absconding, not having been put to him under Section 342, Criminal Procedure Code, could not be used against him.

144. It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court. In this view of the matter, the circumstances which were not put to the appellant in his examination under Section 313 of the Criminal Procedure Code have to be completely excluded from consideration.”

27. In view of proposition of law settled by the Apex Court, certainly non-providing of circumstance regarding illicit relation of the appellant with Lakhpatia Devi, which was the main reason, as alleged by the prosecution for the murder, the appellant has been prejudiced and as such, those evidence may not be used against the appellant. So far as non-examination of the investigating officer as well as the doctor, who conducted *post-mortem* examination on the dead-body, the learned senior counsel for the appellant has rightly placed reliance on paragraph 9 and 10 of a judgment of the



Division Bench of this Court, reported in **1986 PLJR 604**
(Shiva Balak Rai vs. The State of Bihar), which are quoted
hereinbelow:-

“9. According to the prosecution evidence, deceased Sanaullah Mian was assaulted in the field of the informant. His injuries were bleeding when he was dragged from the said field to the Darwaja of accused Ram Chandra Rai. According to defence suggestion, Sanaullah Mian died as a result of injury sustained by him when he dashed against a pole at the Darwaja of the appellants in drunken state. So, there are two versions of the occurrence before the Court. Some of the witnesses admitted that a counter case was also filed with regard to the same occurrence. The correctness or otherwise of the two versions would have been easily ascertained by looking to the objective evidence found at the place of occurrence. The Police Officer, who made investigation into the case, was not examined in the trial Court and in absence of his evidence it is difficult to hold as to which of the two versions is correct. There is nothing on the record to indicate that marks of struggle or stains of blood were found in the ploughed field of the informant where Sanaullah Mian was assaulted. There is also no evidence that sign of dragging and blood stains were found from the said field to the Darwaja of accused Ram Chandra Rai. If the ocular evidence adduced by the prosecution is accepted in absence of the evidence of the Police Investigating Officer, it is likely to cause prejudice to the defence of the accused persons.

10. True it is that the post-mortem report is available on the record of the trial Court. The post-mortem report has not been legally brought on the record as the doctor, who performed autopsy, was not examined. It, therefore, follows that there is no evidence before the Court to hold that Sanaullah Mian died as a result of the injuries caused to him by lathi, farsa and spade.



It further shows that there is no corroborative medical evidence in support of the oral allegations made against the appellants that they caused injuries to the deceased.”

28. On examination of the evidences, on certainty, it may not be said that deceased were done to death by the appellant himself and possibility of committing suicide by Manju Devi after killing her son may not be ruled out. If in a criminal case, there is two possibility, one indicating regarding guilt of an accused and another suggesting his/her innocence, certainly benefit of innocence is required to be extended to the accused.

29. On examination of entire evidence and the fact that during trial the provision under Section 313 of the Cr.P.C. was violated, non-examination of investigating officer and the doctor, who conducted *post-mortem* examination and non-exhibiting inquest report or non-examination of any witness to the inquest report has seriously prejudiced the appellant and such absence creates doubt on the prosecution case. Accordingly, by way of extending the benefit of doubt, the appellant can be acquitted.

30. Accordingly, the judgment of conviction and sentence dated 21st November, 2011 and 23rd November, 2011



respectively passed in Sessions Trial No. 271 of 2006/168 of 2009 (arising out of Mohania P.S. Case No. 244 of 2003) by Sri Jyotindra Kumar Sinha, learned Additional Sessions Judge, F.T.C.-III, Kaimur at Bhabhua is, hereby, set aside.

31. The appeal is allowed.

32. Since, the appellant has been acquitted, it is directed to release him forthwith, if not required in any other case.

(Rakesh Kumar, J.)

(Mohit Kumar Shah, J.)

Anay

AFR/NAFR	NAFR
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