

IN THE HIGH COURT OF JUDICATURE AT PATNA

(Against the judgment of conviction dated 03.10.1994 and order of sentence dated 05.10.1994 passed by Shri Bihari Pandey, learned 2nd Additional Sessions Judge, Gopalganj in Sessions Trial No. 131 of 1990, arising out of Manjhagarh P.S. case no. 216 of 1989)

Criminal Appeal (DB) No.568 of 1994

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1. Jado Sah, son of Gopal Sah
2. Bira Sah, son of Bhola Sah
3. Sri Ram Sah, son of Bira Sah
All residents of Village- Bhaisahi, P.S.- Manjha Garh, District- Gopalganj.
.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ratenesh Nandan Sinha, Advocate
Mr. Pursotam Prasad, Advocate
For the Respondent/s : Ms. S. B. Verma, 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: 03-02-2018

Three appellants have preferred the present appeal against the judgment of conviction dated 03.10.1994 and order of sentence dated 05.10.1994 passed by learned 2nd Additional Sessions Judge, Gopalganj in Sessions Trial No. 131 of 1990, arising out of Manjhagarh P.S. case no. 216 of 1989, whereby the appellant no.1, namely, Jado Sah, was convicted under Section 302 of the Indian Penal Code and he was sentenced to undergo rigorous imprisonment for life. Appellant no.2, namely, Bira Sah, was convicted for offence under section 323 Indian Penal Code and sentenced undergo Rigorous



Imprisonment for one year. Appellant no.3, namely, Sri Ram Sah, was convicted for offence under Section 324 of the Indian Penal Code and he was directed to undergo rigorous imprisonment for three years.

2. During the pendency of this appeal appellant no.2, namely, Bira Sah, has died and as such the appeal on behalf of the appellant no.2 stands abated.

3. The prosecution case in brief as per the fardbeyan reads as follows:

(i) The informant Hari Prasad, son of Raja Lal Sah has made statement before the Assistant Sub-Inspector of Manjhagarh police station on 27.12.1999 in the Sadar Hospital, Gopalganj wherein he has stated that at about 5 PM the deceased Raja Lal Sah, the father of the first informant, was in his shop, but all of a sudden Bira Sah, Jado Sah along with other co-accused, namely, Sri Ram Sah, Bhola Sah and Gopal Sah variously arm with a Lathi, Bhala and Barcha came to the place of occurrence. Gopal Sah and Bhola Sah said the other companion to assault the father of the informant. Accused Bira Sah assaulted with Lathi and Jado Sah assaulted with Bhala on his chest and Sri Ram Sah assaulted with Barchi. The father of the informant fell down and started shouting. After assault, the deceased, the informant and his brother, the accused persons fled away from the



place of occurrence. The injured was taken to the hospital, who died in the hospital. As per the Fardbeyan, the motive behind the occurrence was land dispute.

(ii)The police on the basis of Fardbeyan registered Manjha P.S. case no. 216 of 1989 for offence under Sections 147, 148, 149, 323, 324, 307 and 302 of the Indian Penal Code.

3. The police after investigation submitted charge-sheet under sections 323, 324 and 302 of the Indian Penal Code. Thereafter the learned Magistrate took cognizance and committed the case to the Court of Sessions. After framing of charge, the accused persons pleaded not guilty and they have pleaded that on account of the previous enmity they have been falsely implicated in this case.

4. On behalf of the prosecution nine witnesses were examined. P.W. 1 is Buttu Singh, P.W.2 is Mahendra Baitha, P.W.3 is Suresh Prasad, P.W.4 is Hari Prasad, P.W.5 is Satan Sah, P.W.6 is Raj Kishore Prasad, P.W.7 is Dr. B.P. Singh, P.W.8 is Jai Narain Singh and P.W.9 is Anil Kumar.

5. Out of which P.W.1 and P.W.2 claims to be the eye witness. P.W. 3, who is the son of the deceased, also claims to be the eye witness. P.W.4 is the informant of the case, P.W.5 was examined, but declared hostile because he has not supported the



prosecution case. P.W. 6 has also been declared hostile, as he has also not supported the prosecution case. P.W.7 is the doctor, who conducted the post-mortem examination of the deceased. P. W. 8 is the investigating officer of the case, who was examined in the present case but after part cross-examination he was not available for further cross-examination by the defence. P.W.9 is a formal witness.

6. On behalf of the prosecution different documents were adduced, which was marked as exhibits including the document to demonstrate that there was land dispute between the parties to indicate that there was motive behind killing the disease.

7. The trial court on scrutiny of the evidence available on the record held out that the appellants are guilty and the trial court convicted the appellant no.1 for offence section 302 of the Indian Penal Code whereas appellant no. 2, who is now no more, was held out guilty for an offence under Section 323 of the Indian Penal Code and the appellant no.3 was convicted for offence under Section 324 of the Indian Penal Code.

8. Learned counsel appearing on behalf of the appellants submits that the trial court has committed gross illegality in convicting the appellants in the present case. Relevant material was not properly construed by the trial court and in a case where there was



admitted enmity, chance of false implication cannot be ruled out. He submitted that in a case where there is previous enmity and there is no definite clue as to who has committed the crime, there is every possibility of false implication on account of previous enmity. He submitted that in the case there was no definite material to safely conclude that the appellants have committed the crime.

9. Learned counsel submitted that in the present case, the prosecution has not called the investigating officer for cross examination as a result thereof the prosecution has suffered great prejudice. He also submitted that in the present case the place of occurrence has not been established beyond reasonable doubt and in the event when the place of occurrence is not established, the prosecution case cannot be accepted and the appellants are entitled to benefit of doubt on account of suspicion, as to the place of occurrence. He submitted that the blood was not found at the place of occurrence, which creates serious doubt about the place of occurrence. He submitted that in the present case, the witnesses have not been able to establish the manner in which the crime was allegedly committed. Learned counsel submitted that the trial court has committed error in acquitting two of the accused persons on the same set of facts and circumstances, whereas convicted the appellants and as such the trial court has adopted two different yardsticks for convicting the



appellants.

10. Learned counsel for the appellants further submitted that in the present case no independent witness was examined to support the prosecution case. All the witnesses are highly interested witness and family member of the informant. In case, where there is no independent witness, the court is required to examine the evidence of the prosecution witness with utmost care and circumspection, in view of the fact that there was previous enmity between the parties on account of land dispute and no independent witness was examined in this case, the trial court was required to acquit the appellants, who were accused in the case extending the benefit of doubt.

11. Mr. Ratnesh Nandan, counsel for the appellants submits that in this case the appellant no.2 has died. Appellant no.1 served imprisonment for six years, six months and 25 days. The appellant no.3 has already served sentence of one month and 29 days when the sentence is only three years.

12. The trial in the present case commence in 1990 and on 3rd October 1994 the trial court convicted the appellants. The appeal remains pending for nearly 24 years. He submitted the in the totality of the facts situation, where the incident allegedly took place



on 27.12.1989, approximately 29 years back, this Court is required to adopt pragmatic approach and the Court should extend the same benefit of doubt, which was extended to two of the accused in the present case. Learned counsel for the appellants with reference to the deposition of the witnesses submitted that in fact in the present case witnesses are all hearsay witness. The closure scrutiny of the evidence would indicate that neither the informant is the eye witness nor the other witnesses who claimed to be the eye witness are in fact the eye witness. He submits that the independent witnesses in this case are P.W.5 and P.W.6, but they have not supported the prosecution case and as such they have been declared hostile. Referring to the entire facts and circumstances of the case, he submitted that the appellants deserve the benefit of doubt, as in the present case there is no clinching material to indicate that appellants alone could have committed the crime, in fact the appellants' case is similar to the other two accused persons, who have been granted the benefit of doubt by the trial court.

13. Ms. S. B. Verma, learned counsel for the State submitted that in the attending facts and circumstances, the trial court has committed no error in convicting the appellants. The trial court has scrutinized the evidence available on the record and thereafter



convicted the appellants.

14. We have gone through the evidence available on the record. From the closure scrutiny of the evidence available on the record, it appears that no one is the eye witness of the occurrence. The witnesses, who have claimed that they are eye witness, but the attending facts of the case indicate that they reached the place of occurrence after the actual occurrence. We also find substance in the submission of the learned counsel for the appellants that when the trial court on the basis of the same evidence has disbelieved the prosecution case and acquitted the two accused persons, the trial court was required to adopt the same yardstick for the purpose of deciding the case of these appellants. We also find substance in the submission of the learned counsel for the appellants that in a case where there is previous enmity, the court is required to examine the deposition of the prosecution witnesses with utmost care and caution. Enmity cuts both ways but when there is no definite place of the occurrence, there is chance of false implication on account of previous enmity. The witnesses examined on behalf of the prosecution are not only highly interested witness, but they are inimical to the appellants and as such the trial court was required to examine the case of the prosecution with care and caution. We have also examined the record of this case. From perusal thereof it appears that the accused while examining



under Section 313 of the Cr.P.C. were not confronted with all the adverse circumstances, which has surfaced during the trial. Contrary to the mandatory provisions of Section 313 of the Cr.P.C. the trial court only formulated some general questions and completed the formality. The requirement under Section 313 of the Cr.P.C. is not to complete the formality, but it has a purpose of ensuring fair trial and in order to ensure fair trial, the court is under obligation to confront the accused persons with all the adverse material that has surfaced during the trial, so that the accused may be in a position to explain their position with reference to material surfaced during trial. The trial court has committed error in discharge of obligation under Section 313 Cr.P.C. The law in this regard is well settled. Reference in this connection be made to the judgment of the Apex Court in the case of **Sukhjit Singh Vs. The State of Punjab**, reported in (2014) 10 SCC 270, para 11 to 14. Para. 11 to 14 of the judgment is quoted herein below for ready reference:

“11. In this context, we may profitably refer to a four-Judge Bench decision in *Tara Singh v. The State*, reported in AIR 1951 SC 441, wherein, Bose, J. explaining the significance of the faithful and fair compliance with Section 342 of the Code as it stood then, opined thus:

"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 Madhaya Bharat*, reported in AIR 1953 SC 468, Bose, J. speaking for a three-Judge Bench highlighting the importance of recording of the statement of the accused under the code expressed thus:-

"8. Now the statements of an accused person recorded under Sections 208, 209 and 342, Criminal P.C. are among the most important matters 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 India 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*, reported in (2007) 12 SCC 341, in following terms:

"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."

14. In view of the aforesaid enunciation of law, there can be no scintilla of doubt that the when the



requisite questions have not been put to the accused it has caused immense prejudice to him, more so, when there is no evidence to establish his complicity in the alleged abduction.”

15. Having regard to the fact that similarly circumstanced other accused persons have been granted benefit of doubt, notwithstanding the same materials were used against these appellants, they have been convicted by the trial court, whereas the two accused persons have been granted benefit of doubt and they have been acquitted. We also find that the trial court has not scrutinized the evidence in proper perspective. Materials available on the record indicate that there are dispute as to the place of occurrence, manner of occurrence and the fact that only highly interested witnesses have supported the prosecution case and the independent witnesses have not supported the prosecution case and they have been declared hostile renders the prosecution case under serious doubts.

16. In addition thereto the investigating officer of this case was partly cross examined and he was not available for further cross-examination has also caused prejudice to the appellants. Failure to examine the accused persons in accordance with the mandatory provisions of section 313 Cr.P.C. also goes against the prosecution.

17. Thus in the totality of the facts situation, we are of



the view that the conviction of the appellants by the trial court is unsustainable and, accordingly, the appeal is allowed. The judgment of conviction passed by the trial court is set aside and the appellants are acquitted from the charges. Since the appellants are on bail they are discharging the liability of their bail bonds.

18. In the result, the appeal stands allowed.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

Uday/-

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