

IN THE HIGH COURT OF JUDICATURE AT PATNA

(Against the judgment of conviction dated 13.02.2003 and order of sentence dated 14.02.2003 passed by learned Additional Sessions Judge-VI, Begusarai in Sessions Trial No. 92 of 1994, arising out of Muffasil P.S. case no. 225 of 1993)

Criminal Appeal (SJ) No.112 of 2003

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Kapildeo Mahto, son of Late Jitu Mahto, resident of Village- Suja, P.S.- Muffasil,
District- Begusarai. Appellant/s

Versus

The State of Bihar Respondent/s

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Appearance :

For the Appellant/s : Mr. Rai Mukesh Sharma, Advocate
Mr. A Singh, Advocate

For the Respondent/s : Mr. S. Ashfaq Ahmad, APP

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CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

Date: 20-01-2018

The sole appellant has filed the present appeal against the judgment of conviction dated 13.02.2003 and order of sentence dated 14.02.2003 passed by learned Additional Sessions Judge-VI, Begusarai in Sessions Trial No. 92 of 1994, arising out of Muffasil P.S. case no. 225 of 1993, whereby the appellant has been convicted under Section 366A of the Indian Penal Code and sentenced to undergo RI for seven years.

2. The prosecution case, in brief, is that in the night of 24/25.08.1993 the informant (P.W.4) after taking meal had gone to his darvaja to sleep and when in the next morning he came to his house, his wife told him that the victim Lalita Devi (daughter of the informant) is missing from the house. At this, the informant made hectic search in his village and also in village Chakballi where the



victim was married but she was not found. In course of search the informant was informed by one Lola of Auodhyabari that he has seen his daughter Lalita Devi in the company of Kapildeo Mahto and Mahendra Mahto, who were going on a Rickshaw towards Khatopur Chowk from where the appellant accompanied his daughter towards eastern direction on a car. He also came to know that Mahanth Ram Bhagat Das had giving Rs.2000/- (two thousand) to this appellant to kidnap his daughter Lalita Devi, who was minor, aged about 15 years, at the relevant time.

3. On the basis of the aforesaid, Mufassil P.S. case no. 225 of 1993 dated 25.08.1993 for the offence under Sections 363, 366A and 120B of the Indian Penal Code was registered.

4. The police after submission of the charge-sheet, thereafter the learned Magistrate took cognizance and committed the case to the Court of Sessions.

5. On framing of the charges under Sections 368/34 and 366A/34 of the Indian Penal Code, all the three accused pleaded not guilty and as such they were put on trial. Accused Ram Bhagat Das died during the pendency of the trial and the trial stands abated against Ram Bhagat Das and the trial commenced against the two accused persons, namely, Kapildeo Mahto and Mahendra Mahto.

6. On behalf of the prosecution, altogether 5 witnesses



were examined. P.W.1 is Mahendra Yadav, P.W. 2 is Bishnudeo Yadav, P.W.3 is Ghanghru Paswan, P.W. 4 Ram Badan Yadav is the informant of the case and P.W.5 Dr. Mridula Sharma is the doctor, who examined the victim girl.

7. Learned counsel appearing on behalf of the appellants submits that in the present case P.W.3 was declared hostile. P.W.1 is not the F.I.R. witness. P.W.2 Bishundeo Yadav is the next door neighbour of the informant. P.W.4 is the informant of the case and P.W.5 is the doctor. Referring to the deposition of the prosecution witnesses, learned counsel for the appellants submitted that the deposition of P.W.1 cannot be relied upon for conviction of the appellant, as from his deposition, it would manifest that he has relied upon the version of P.W.3, who has been declared hostile in the present case and, as such, no reliance can be placed on the deposition of P.W.1.

8. Referring to the deposition of P.W. 2, he submitted that statement of this witness is not natural, as the manner he disclosed the presence of the appellant does not inspire any confidence for the reason that P.W. 2 claims that he has seen the accused persons standing in front of the house of the informant on the date of occurrence, but he kept mum quite for a considerable long time, such conduct of P.W. 2 indicates that he has concealed more



than disclosed. His statement as to the identification of the accused persons is unrealistic, unnatural and unacceptable, as in para. 3 of his deposition he stated that after two months of the incident he disclosed the informant of identifying the accused persons that they were seen standing in front of the house of the informant. Learned counsel for the appellant submitted that in the present case, the victim was not examined. The mother of the victim was also not examined, as she died during the pendency of the trial. He submits that neither the statement of victim was recorded under Section 164 of the Cr.P.C. nor she was examined in the court and this lacuna goes to the root of the case and in absence of examination of the victim and conclusive evidence as to the fact that the victim was recovered from the possession of the appellant, the conviction of the appellant in the instant case is unsustainable. He further submits that three persons were made accused in the present case, out of three accused persons one Ram Bhagat Das died and as such the trial against Ram Bhagat Das was abated, but similar allegation was levelled by the prosecution against Kapildeo Mahto and Mahendra Mahto and on the same strength of materials and the evidence, the trial court has acquitted Mahendra Mahto extending the benefit of doubt, but the trial court committed error in convicting the appellant against whom the same material was used by the prosecution, which was the material against



Mahendra Mahto, who has been acquitted by the trial court. He next submitted that in the present case, the trial court has committed error in not confronting the accused with all the adverse circumstance in compliance of the mandatory requirement under Section 313 of the Cr.P.C.

9. Learned counsel appearing on behalf of the State submits that in the present case allegation was against the appellant that he was instrumental in kidnapping the minor girl and referring to the deposition of the doctor he submits that the opinion of the doctor is very clear that on the date of incident the age of the girl was assessed as 16-18 years. He also submits that the offence is serious in nature and as such no interference in the judgment of the trial court is called for.

10. After hearing the parties and on deeper scrutiny of the evidence on record, this Court finds that the trial court has adopted two yardsticks for acquitting the accused Mahendra Mahto and convicting the appellant Kapildeo Mahto. There is lapse on the part of the prosecution in not examining the victim, as non-examination of the material witness like the victim in the present case goes against the prosecution case. Reference in this connection to the judgment of the Apex Court in the case of **Takhaji Hiraji vs Thakore Kubersing Chamansing & Ors.**, reported in (2001) 6 SCC 145, para 19 is



clinging on the point, which is quoted for ready reference:

“19. So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the Court ought to scrutinize the worth of the evidence adduced. The court of facts must ask itself -whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive



then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the Court can safely act upon it uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein. The injuries sustained by these witnesses are not just minor and certainly not self-inflicted. None of the witnesses had a previous enmity with any of the accused persons and there is apparently no reason why they would tell a lie. The genesis of the incident is brought out by these witnesses. In fact, the presence of the prosecution party and the accused persons in the chowk of the village is not disputed. How the vanity of Thakores was hurt leading to a heated verbal exchange is also not in dispute. Then followed the assault. If the place of the incident was the chowk then it was a sudden and not premeditated fight between the two parties. If the accused persons had reached their houses and the members of the prosecution party had followed them and opened the assault near the house of the accused persons then it could probably be held to be a case of self-



defence of the accused persons in which case non- explanation of the injuries sustained by the accused persons would have assumed significance. The learned Sessions Judge has on appreciation of oral and circumstantial evidence inferred that the place of the incident was the chowk and not a place near the houses of the accused persons. Nothing more could have been revealed by other village people or the party of tight rope dance performers. The evidence available on record shows and that appears to be very natural, that as soon as the melee ensued all the village people and tight rope dance performers took to their heels. They could not have seen the entire incident. The learned Sessions Judge has minutely scrutinized the statements of all the eye-witnesses and found them consistent and reliable. The High Court made no effort at scrutinizing and analyzing the ocular testimony so as to doubt, if at all, the correctness of the several findings arrived at by the Sessions Court. With the assistance of the learned counsel for the parties we have gone through the evidence adduced and on our independent appreciation we find the eye-witnesses consistent and reliable in their narration of the incident. In our opinion non-examination of other witnesses does not cast any infirmity in the prosecution case.”

11. On scrutiny of the record, the Court finds that the



trial court has not confronted the appellant with all adverse circumstance, which is mandatory requirement to ensure fair trial. The examination of the accused under Section 313 Cr.P.C. is not empty formality, it is mandatory requirement to ensure fair trial. There are series of judgment of the Apex Court on this point. Reliance in this connection to the judgment reported in the case of **Sukhjot Singh Vs. The State of Punjab**, reported in **(2014) 10 SCC 270**, para 11 to 14 is settler on the point. 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."

12. In the totality of the fact situation when the material witness was not examined on behalf of the prosecution. The non-examination of the victim in the present case and while examining the



accused under Section 313 Cr.P.C., the trial court has failed to confront the appellant with the adverse circumstance, which has surfaced during the trial is another lacuna in the trial in addition thereto the contradiction is the version of the witnesses and lack of consistency and the facts and circumstance suggesting the version of the prosecution witness to be unrealistic and artificial, the Court is of the view that in the totality of the facts situation, and dual standard adopted by the trial court while convicting the appellant and acquitting co-accused Mahendra Mahto, conviction of the appellant in the present case is not free from ambiguity and in the totality of the facts situation indicated hereinabove, the judgment of the trial court is unsustainable and as such the judgment of trial court is set aside and the appellant is acquitted from the charges levelled against him. As the appellant is on bail, he is discharged from the liabilities of his bail bonds.

13. In the result, the appeal is allowed.

(Anil Kumar Upadhyay, J)

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