

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.82 of 2004

Against the judgment, dated 04.12.2003, and order, dated 05.12.2003, passed by Mr. S. Ahmad, Additional District & Sessions Judge, Fast Track Court, III, Munger, in Sessions Case No. 105 of 1985

1. Shankar Das, son of late Narain Das resident of village Chhoti Keshopur,
P.S. Jamalpur, district Munger
2. Hemlata Devi, wife of Rajendra Tanti, resident of village Chhoti Keshopur,
P.S. Jamalpur, district Munger ... Appellants

Versus

1. The State of Bihar ... Respondent

Appearance :

For the Appellants : Mr. Ajit Kumar Singh, Adv.

For the Respondent : Mr. Syed Ashfaque Ahmad, APP 64

**CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA
ORAL JUDGMENT**

Date : 17-03-2018

Heard the parties.

2. Both the appellants stand convicted under Sections 363 and 365 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for three years, on both counts, and also fined Rs.5,000/- with default clause. Further, appellant, Shankar Das, has also been convicted under Section 366 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for five years and fined of Rs.1000/- with default clause.

3. Prosecution case, as stand on the written report of Reshma Mosmat, P.W. 5, in short, is that on 24.12.1984 at 08.00 P.M. her grand-daughter, Gauri Kumari, called by wife of Ranejdra Tanti, Hemlata, when Gauri became free after baking brerad and since then her grand-daughter is traceless. Later, she



came to know, on enquiry, that Cleaner (Khalasi) of Rajendra Tanti, Shankar Das had kidnapped her grand-daughter. Further case is that wife of Rajendra Tanti refused to have any knowledge about the occurrence and at the time of calling her grand-daughter, she (wife of Rajendra Tanti) said that mother of Shankar Das is calling her. It is also stated that mother of Shankar Das, on enquiry, refused to acknowledge the same that she had called her.

4. On the basis of the written report, Jamalpur P.S. Case No. 176 of 1984 was registered and police, after investigation, submitted charge sheet against Shankar Das, Ajab Lal Das and Hemlata Devi. Cognizance of the offence has been taken and case was committed to the Court of Sessions. It appears that accused Ajab Lal Das died and, as such, proceeding against him has been dropped. Ultimately, case travels to the file of Mr. S. Ahmad, Additional District & Sessions Judge, Fast Track Court, III, Munger, for trial and disposal. Both the appellants and Ajab Lal Das stand charge sheeted under Sections 363 and 366 of the Indian Penal Code.

5. Prosecution, in order to substantiate its case, examined altogether six witnesses. They are P.W. 1, Hira Lal Tanti, P.W. 2, Basanti Devi, P.W. 3, Geeta Devi, P.W. 4, Most Reshma Devi, P.W. 5, Dr. Kushum Prasad, P.W. 6, Gauri Devi, the victim. The investigating officer has not been examined in this case. Apart from the above oral evidence, medical report has been brought on record as Exhibit 1.



6. Neither ocular nor documentary evidence has been adduced on behalf of the defence and the defence as per cross examination and statement under Section 313 of the Criminal Procedure Code is denial of occurrence and false implication and also of innocence.

7. Learned trial Court, on conclusion of the trial, convicted the appellants, Hemlata Devi and Shankar Das, under Sections 363 and 365 of the Indian Penal Code and Shankar Das has further been convicted under Section 366 of the Indian Penal Code and sentenced, as stated above.

8. Learned counsel for the appellants assailed the above judgment on the ground that there is delay of more than about 22 hours in lodging the first information report and, further, contention is that evidence of prosecution witnesses is of full of contradiction and does not inspire confidence but learned trial Court has not considered the contradiction in evidence of prosecution witnesses and delay in lodging the first information report and convicted the appellants. The learned counsel for the appellants has also submitted that in this case there is no proper compliance of Section 313 of the Criminal Procedure Code, as no specific question has been put to either of the appellants on the circumstances which has come against them and on that ground also the conviction can not be maintained.

9. On the other hand, the contention of the learned counsel for the appellants is that the girl has stated in her



evidence that she was forcibly taken by the appellants and other co-accused persons to the house of Shankar Das in the village near Abhaypur and there she was subjected to rape and she was brought back to Jamalpur by the mother of Shankar Das from where she was recovered and aforesaid evidence has been corroborated by her statement under Section 164 of the Criminal Procedure Code. In such a situation, the conviction of the appellants is just and proper and does not require interference by this Court.

10. In the background, of above submission, on perusal of evidence, it appears that P.W. 4, who is the informant of this case, has disclosed that Geeta Devi is her daughter and Gauri Kumari is grand-daughter and P.W. 4 was living in a rented house. Her evidence also disclosed that while Gauri Kumari was preparing food, Hemlata Devi came and told her grand-mother is suffering from abdominal pain and calling Gauri Kumari and, thereafter, Gauri Kumari went along with her and she had not called Gauri Kumari, thereafter, she did not return and they searched Gauri Kumari but she was not found. Her evidence also discloses that she was not suffering from pain and Gauri Kumari had not come to her house. Her evidence also discloses that Gauri Kumari was recovered after four days. She shows suspicion against Shankar Das, who might got Gauri Kumari disappeared. However, her evidence appears to be contrary to the earliest version lodged by her, as in the earlier version in first information report she has not stated that



Hemlata Devi has called Gauri Kumari on the ground that P.W. 4 is suffering from abdominal pain. P.W. 3 is Geeta Devi, the mother of the victim, and she has also supported the occurrence as stated by P.W. 4 and she has further stated that the girl was recovered from the house of Shankar Das after two weeks whereas P.W. 4 stated that she was recovered after four days. Evidence of P.W. 1 discloses that he claims to have seen the girl going along with Ajab Lal Das, Shankar Das and Hemlata Devi and he claimed that later on he came to know that the girl is traceless. However, his evidence did not show that they were taking her by force.

11. P.W. 2 is Basanti Devi and she has also supported the prosecution case and stated that later on they came to know that Shankar Das and Ajab Lal Das had taken Gauri Kumari. This witness is the aunt of the victim.

12. P.W. 6 is the victim and she has stated that while she was baking bread, Hemlata Devi came and told her that her grand-mother had abdominal pain and she is calling her, as such, she went along with her to her house where five boys were standing there. One of them, Dhaneshwar Das put vermilion on her head and when she tried to raise hulla Ajab Lal Das pressed her mouth and he and Shankar Das had taken her to Abhayapur and from there to the house of Sankar Das where she was kept and subjected to rape, thereafter, mother of Shankar Das brought her to Jamalpur from where she was recovered. She has also admitted that her statement was recorded by the



Magistrate under Section 164 of the Criminal Procedure Code after sixteen days and in that statement she has not taken the name of five boys, but, she has stated in her statement that Shankar Das has committed rape with her. She has also denied the suggestion that she was aged about 18-19 years.

13. From the prosecution evidence, as discussed above, it appears that all the witnesses have supported the prosecution story of kidnapping of the victim girl by Hemlata Devi in collusion with Shankar Das and other accused. However, P.W. 4, who is grand-mother, has stated that she was recovered after four days whereas the other witnesses have stated that she was recovered after two weeks. Further more, the victim-girl claims that she was abducted by four accused persons who have taken her to Abhaypur to the house of Shankar Das whereas in her evidence Hiralal Tanti disclosed that he had seen her going along with Shankar Das, Ajab Lal Das and Hemlata Devi. He had not named other persons. She has further admitted that Gauri Kumari was forcibly taken by the accused persons whereas the evidence of Harilal Tanti does not disclose that she was compelled to accompany them. Evidence of P.W. 6 also shows that she was subjected to rape, but, the evidence of P.W. 5 the doctor does not show any sign of recent rape on her. Further more, learned trial Court has also not convicted the appellants under Section 376 of the Indian Penal Code and there is no appeal preferred by the State against them, as such, that has become final.



14. It, further, appears that all the witnesses tried to show that she was minor and the evidence of victim shows that she was aged about 15 years, but, the evidence of the doctor also show that her age was assessed in between 14-15 years, but, evidence of doctor does not show what are the basis for coming to such conclusion and, perhaps, due to that reason, the learned trial Court has not convicted the appellants either under Sections 364A or under Sections 366A of the Indian Penal Code rather the appellants were convicted under Sections 363 and 365 of the Indian Penal Code and appellant Shankar Das has, further, been convicted under Section 366 of the Indian Penal Code.

15. It, further, appears that learned trial Court has not considered the evidence of party with regard to the recovery of the girl and also number of the accused persons as claimed by the witnesses. Apart from that as submitted by the learned counsel for the appellants in this case that the appellants were examined under Section 313 of the Criminal Procedure Code, but, it appears that general question has been asked from the appellants. From appellant, Hemlata Devi, it is asked that it is she who called the victim-girl from her house on the plea that her grand-mother is suffering from abdominal pain. Further, no question was asked from both the appellants that the victim-girl was taken to Abhaypur and kept at the house of Shankar Das and there she was subjected to rape. No question was asked to who brought back to Jamalpur and from where the victim-girl has been recovered. The purpose for examination under Section



313 of the Criminal Procedure Code is as to put all the evidence as trial Court desires to rely upon to convict the accused persons so that they could explain the same and failure to put all the questions separately amounts to failure to justice and the non-compliance of provisions of Section 313 of the Criminal Procedure Code.

16. On above discussions, it appears that the learned trial Court has not considered the discrepancy in the prosecution evidence, meanwhile the evidence of victim-girl as she has not stated the name of all the five persons in her statement before the Magistrate though she has stated that Shankar Das has committed rape upon her, but, that story has found no support from the medical evidence as no sign of recent rape was found and, further, the evidence of the informant is also suffering from discrepancy from her earlier statement.

17. Apart from that it appears that there is no compliance of provisions of Section 313 of the Criminal Procedure Code in the matter of examination of the accused persons and the learned counsel for the appellants has cited a judgment of the Supreme Court in the case of **Sukhjit Singh Vrs. State of Punjab [2014) 10 SCC 270]** and submitted that the principle laid down in the above judgment has not been followed in the present case.

18. On consideration of the judgment of the Supreme Court, paragraphs 10 to 13, it appears that the Supreme Court has held as follows :



“10. On a studied scrutiny of the questions put under Section 313 CrPC in entirety, we find that no incriminating material has been brought to the notice of the accused while putting questions. Mr. Talwar has submitted that the requirement as engrafted under Section 313 CrPC is not an empty formality. To buttress the aforesaid submission, he has drawn inspiration from the authority in *Ranvir Yadav v. State of Bihar*. Relying upon the same, he would contend that when the incriminating materials have not been put to the accused under Section 313 CrPC it tantamounts to serious lapse on the part of the trial court making the conviction vitiated in law.

11. In this context, we may profitably refer to a four-judge Bench decision in *Tara Singh v. State* wherein, Bose, J. explaining the significant 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 than 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*

n. *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 00.469-70, para 8]

“8. Now the statements of an accused person recorded under Sections 208, 209 and 342
cedure Code are among the most



important matters to be considered at the trial. It has to be remembered that in this country as 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 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* in following terms (SCC pp.347-38, para 14)

“14. The word “generally” in sub-section (1)(b) does not limit the nature of the questioning tone or move 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

ion 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.”

19. Considering the statement of the accused in the background of the above judgment it appears that the accused appellant, Hemlata Devi, along with other accused has kidnapped the girl and what she has to say in his defence this witness has not been asked that she called her on the plea that her grand-mother is suffering from abdominal pain or mother of Shankar Das is calling her and she had also not been asked that she was seen along with the victim. Similarly, appellant, Shankar Das, has been asked the general question that she had kidnapped a minor girl from Jamalpur, but, the circumstances which had been believed by the learned trial Court that he in collusion with Hemlata Devi has called her and he had taken her to Abhaypur, from there to his village house and he has committed rape upon her there and, thereafter, she came along with her grand mother to Jamalpur. Those were the circumstances and the evidence available against both the appellants, but, they have not been put to them with a view to provide an opportunity to them to explain the materials or circumstances that being so apart from the discrepancies in the prosecution evidence requirement of law as provided under Section 313 of the Criminal Procedure Code, hence, the conviction is vitiated and that being so it is a fit



case where the benefit of doubt has to be granted to the appellants.

20. Accordingly, the judgment and order passed against the appellants are **set aside** and this appeal is **allowed**. As both the appellants are on bail, they are discharged from the liability of their bail bonds.

(Vinod Kumar Sinha, J)

Shamshad/-

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