

IN THE HIGH COURT OF JUDICATURE AT PATNA

(Against the judgment of conviction dated 08.06.1992 and order of sentence dated 09.06.1992 passed by Sardar Bhagat Singh, 1st Additional Sessions Judge, Darbhanga in Sessions Trial No. 32 of 1985 / 69 of 1987, arising out of Bahadurpur P.S. case no. 288 of 1983)

Criminal Appeal (DB) No.203 of 1992

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1. Hari Shankar Lal Das, son of late Raghunandan Lal Das
 2. Kapildeo Lal Das, son of late Sri Kant Lal Das
 3. Buchilal Das, son of late Sri Kant Lal Das
 4. Kishori Lal Das, son of late Jaikant Lal Das
 5. Kamal Narain Lal Das, son of late Dasrath Lal Das
 6. Ratnesh Kumar Das, son of late Daneshwar Lal Das
 7. Maya Shankar Lal Das, son of Bindeshwar Lal Das
 8. Nagnath Lal Das, son of Sri Bindeshwar Lal Das
 9. Harihar Mandal, son of Bilat Mandal
 10. Kishori Mandal, son of Harihar Mandal
 11. Ram Pukar Mandal, son of late Bilat Mandal
 12. Lal Bahadur Mandal @ Lal Babu, son of Biswanath Mandal
 13. Ramu Mandal, son of Bishwanath Mandal
 14. Shyamu Mandal, son of Bishwanath Mandal
 15. Ram Bilas Mandal @ Chhanu Mandal, son of Yugal Mandal

All are resident of Village- Parhetta, Police Station- Bahadurpur, District- Darbhanga.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ansuman Singh, Amicus Curiae
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: 16-01-2018

The present appeal has been filed against the judgment of conviction and order of sentence dated 08.06.1992 and order of sentence dated 09.06.1992 passed by learned 1st Additional Sessions



Judge, Darbhanga in Sessions Trial No. 32 of 1985 / 69 of 1987, arising out of Bahadurpur P.S. case no. 288 of 1983, whereby all the appellants have been convicted under Section 302 read with Section 149 of the Indian Penal Code. The appellant nos.1, 6, 9 and 12, namely, namely, Hari Shankar Lal Das, Ratnesh Lal Das, Harihar Mandal and Lal Babu Mandal, have been further convicted under Section 148 of the Indian Penal Code and rest 11 appellants have been convicted under Section 147 of the Indian Penal Code. All the fifteen appellants have further been convicted under Sections 323 read with Section 149 of the Indian Penal Code and all the appellants have been sentenced to undergo imprisonment for life under Section 302 read with Section 149 of the Indian Penal Code. The appellant nos.1, 6, 9 and 12, namely, Hari Shankar Lal Das, Ratnesh Lal Das, Harihar Mandal and Lal Babu Mandal, have been further sentenced to undergo one year each under Section 148 of the Indian Penal Code and rest 11 appellants have been sentenced to undergo R.I. for six months under Section 147 of the Indian Penal Code. All the fifteen appellants have further been sentenced to undergo S.I. for three months each under Section 323 read with Section 149 of the Indian Penal Code. However, all the sentences have been ordered to run concurrently.

2. The prosecution case in brief is that on 21.10.1983 at



5.00 A.M. in the casualty ward of D.M.C.H., Laheria Sarai, Madhuri Ram reported to Officer-in-charge P.S. Bahadurpur that previous night, after dinner, he along with his family members was at his house. He found persons collecting at the Darwaja of Hari Shankar Lal Das and also heard abuses being hurled upon him. At about 11.00 P.M. a mob constituted by all the 15 accused persons and others armed with Lathies, Bhalas and Garasas came to his Darwaja. Madhuri and his son Shaukhi lighted electric torches, protested and asked the members of the mob to disperse from their Darwaja. Accused Hari Shankar Lal Das, who was armed with a Farsa advanced to attack and also ordered the members of the mob to destroy the house of Madhuri and to kill the members of Madhuri's family. The members of the mob surrounded the house of Madhuri. At that moment deceased Rameshwar Paswan, Bechan Mochi and Shiv Narayan Paswan, who were coming from Laheriasarai side came to the place of occurrence. They protested against the high handedness of the members of the mob. Under the order of Hari Shankar Lal Das, the members of the mob turned towards Rameshwar Paswan and two of his companion and started assault upon them with lathies, farsa and other arms. Madhuri and his son, Shaukhi, for fear and being assaulted, left their house and ran away. Udit Giri, Mahinder Yadav,



Sukkan Paswan and others saw the occurrence, but kept mum for fear of being assaulted. After the members of the mob had gone Madhuri and Shauki returned to their Darwaja and found Rameshwar Paswan, Bechan Mochi and Shiv Narayan Paswan injured and brought them to D.M.C.H., Laheria Sarai. Rameshwar Paswan died of the injuries there. It was stated by Madhuri that the accused persons in their attempt to destroy his house and turned him out of the village committed the offence.

3. On the basis of the Fardbeyan, formal F.I.R. was registered, being Bahadurpur P.S. Case no. 288 of 1983 against all the appellants.

4. The police after investigation submitted charge-sheet and after taking cognizance, the case was committed to the Court of Sessions for trial. The Sessions Court framed charges against the appellants and all the appellants have pleaded not guilty and pleaded that they have falsely implicated in this case. They also pleaded that the place of occurrence is not exhibited, as indicated by the prosecution in the Fardbeyan. They submitted that no crime was committed in the manner, the prosecution has pleaded. It was stated by informant Madhuri Ram that the accused persons in their attempt to destroy his house and turned him out of the village committed the



offence.

5. On behalf of the prosecution 14 witnesses were examined. P.W.1 is Harish Chandra Jha, P.W.2 Dev Sharan Paswan, P.W.3 is Lalan Choudhary, P.W.4 is Mahendra Yadav, P.W. 5 is Madhuri Ram, P.W.6 is Jugeshwar Amat, P.W. 7 is Udeswar Giri, P.W.8 is Shankar Ram, P.W. 9 is Bechan Ram, P.W.10 is Saukhi Rami, P.W.11 is Kewal Paswan, P.W.12 is Dr. V.C.S. Verma, P.W.13 is Awadh Bihari Sharan and P.W.14 is Aazad Hind Prasad. On behalf of the defence one witnesses, namely, Sadanand Thakur was examined.

6. The trial court on the basis of scrutiny of evidence on record held out that the appellants are guilty for the commission of offence and, accordingly, convicted them and passed the order of sentence, as indicated herein above.

7. This case was listed for regular hearing on different dates and noticing the fact that no one was appearing on behalf of the appellants to assist the Court, this Court was constrained to appoint Mr. Anshuman Singh, learned Advocate, as Amicus Curiae vide order dated 04.01.2018.

8. Mr. Anshuman Singh, learned Amicus Curiae appearing on behalf of appellants submitted that in the present case,



the trial court convicted the appellants in breach of the mandatory procedural requirement of conduct of fair trial. Mr. Singh referring to the fardbeyan submitted that from perusal of the fardbeyan, it would manifest that the occurrence took place at 11.00 P.M. and the appellant Hari Shankar Lal Das led allegedly the mob variously armed with Lathi, Bhala and Farsa to the house of the informant and on the order of appellant Hari Shankar Lal Das to assault the informant and his family and to demolish the house, the miscreants surrounded the house and it is said that when Rameshwar Paswan, Bechan Mochi and Shiv Narayan Paswan were coming from the side of Laheria Sarai protested the appellants from committing any mischief, were assaulted and in the meanwhile the informant and his son fled away. However, his wife remained inside the house. Mr. Singh submitted that as per the informant, motive behind such crime was to assault the informant and his family and to demolish his house in order to oust his family from village, but the attending facts and circumstances renders the informant's case most unnatural, improbable and false. He submitted that according to the informant, the appellants joined the mob variously armed with weapon surrounded the house of the informant, but neither the informant nor the family members of the informant sustained any injury, although his house was surrounded by the



miscreants, there is no damage to the house of the informant.

9. Mr. Singh further submitted that if the motive was to oust the informant from the village and miscreants in large number who assembled and surrounded the house, then they have every opportunity to ransack the house of the informant, but it does not appeal the reason as to why the appellants have not caused any damage to the house of the informant. He submitted that from the fardbeyan itself it is evident that the appellants have assembled at the door of the informant variously armed with Lathi, Bhala, Garasa etc., but neither the informant nor his family members even sustained scratch mark, which belies the story of the prosecution. Mr. Singh submitted that in the present case, the informant took the investigating officer to the place of occurrence presumably to show the place of occurrence and collect the material at the crime scene, but unfortunately, the informant has not shown any material to establish the place of occurrence. Referring to the deposition of investigating officer, Mr. Singh submitted that from the deposition of the investigating officer of the case, it is established beyond doubt that no material was found at the place of occurrence to indicate that any crime was committed at the alleged place of occurrence.

10. Mr. Singh next submitted that in the present case



neither the clothe of the deceased with blood stain was sent for FSL report nor blood stain was found at the place of occurrence, nor any incriminating material was collected and sent for scientific examination. Mr. Singh next submitted that in the present case, the occurrence took place in the dead night and at 11.00 P.M. in the village it is impossible for the prosecution witnesses to identify by name such large number of alleged assailant against whom there is allegation of commission of crime. Referring to the alleged disclosure of Rameshwar Paswan (deceased), Mr. Singh submitted that as per the version of the prosecution that Rameshwar Paswan disclosed that he was assaulted by Hari Shankar Lal Das, Kapildeo Lal Das, Lal Bahadur Mandal by lathi, Bhala and Farsa. This disclosure of deceased does not stand on the line of the prosecution case. Mr. Singh submitted that there was case and counter case and Sadar P.S. Case No. 395 of 1983 dated 20.10.1983 was registered against the informant and two of his sons, however, the trial court has miserably failed to consider the case of false implication on account of litigating terms of the informant and his son with the appellants and as such the conviction of the appellants is based on mere conjecture and surmises and not on proper scrutiny of the materials available on record.

11. Mr. Singh next submitted that the trial court has



disbelieved the deposition of Investigating officer. The deposition of the doctor and investigating officer are clinching on the point that nothing was found at the place of occurrence and the injury of Bechan was not supported. Mr. Singh in the aforesaid circumstances submitted that the trial court has committed gross error in admitting the statement of the informant that Rameshwar Paswan (deceased) has made a dying declaration before him, who disclosed the name of the accused persons, who assaulted him, which caused his death. Mr. Singh submitted that the statement recorded by the police under Section 161 of the Cr.P.C. is only relevant for contradictions and corroboration and it is not substantive piece of evidence, but the trial court while convicting the appellants has relied upon the case diary, as substantive evidence, which is against all norms of criminal jurisprudence and the principles of admissibility of the evidence.

12. Mr. Singh also referred to the deposition of the prosecution witnesses to highlight that there are contradictions and improvement in the version of the P.Ws. referring to various circumstances including non-examination of the wife of the informant. Mr. Singh submitted that withholding of material witness goes against the prosecution case. In the present case, the wife of the informant was not examined on the pretext that she is mad, but



curiously enough in another case she deposed before the court and such deposition of wife of the informant was placed on record vide Exhibit -B dated 02.08.1988, but the trial court has not appreciated the fact of withholding of the most material witness, who could have unfolded the true narrative of the case. Mr. Singh submitted that it is most unnatural that when the appellants-accused assembled to assault the informant and his family they escaped from the place of occurrence without even sustaining any scratch injury, although the house was totally surrounded by the accused persons. Mr. Singh submitted that in addition to non-examination of the wife of the informant there is no explanation for non-examination of Tunna and Sukhan Paswan notwithstanding the fact that they are most natural and material witness of the alleged occurrence and mentioned in the fardbeyan.

13. Mr. Singh has also highlighted that the trial court has noted that the informant and his son on account of involvement in various cases used to be arrested and sent to jail and referring to the discussion of the trial court judgment submitted that in the present case, it is seen that the informant could not be examined by the police, as he was behind the bar at the relevant time and in view of the aforesaid he submitted that no reliance can be placed on the version of



the informant.

14. Ms. S. B. Verma, learned APP appearing on behalf of the State submitted that the prosecution story is most natural and Rameshwar Paswan died on the assault of the appellants and as such their conviction does not warrant any interference.

15. We have heard the learned counsel for the appellants and the learned APP and after giving over anxious consideration to the entire materials available on record, we find substance in the submission of the learned Amicus Curiae that the prosecution has failed to bring home the charges against the appellants beyond all reasonable doubt. We find substance in the submission that the investigation was perfunctory, which is also admitted by the trial court. We also find various infirmities in the prosecution case. From the materials available on the record and closure scrutiny of the evidence, we are of the considered view that nothing was recovered by the investigating officer at the crime scene, the alleged clothe of the victim containing blood stain was neither sent for FSL report nor it was exhibited in this case. On scrutiny, we also find that the investigating officer has admitted that no material was available at the crime scene to establish the place of occurrence. We also find that the alleged incident took place at 11.00 P.M. i.e. dead night and in the



dead night, as indicated by the prosecution identification of such a large number of accused persons with minute details of their role in the occurrence is most improbable. We also find that in the present case, the prosecution has made a pick and choose and without furnishing any explanation for non-examination of material witnesses, namely, Tunna, Sukhan Paswan and the wife of the informant withheld them, and the reason furnished for non-examination of the wife of the informant stands falsified by Ext.-B, which is clinching on the point that she was of sound state of mind and she deposed as witness in another case and as such non-examination of such witness goes against the prosecution, as withholding of material witness and pick and choose in the examination of the witness without any cogent reason renders the prosecution case under serious doubt. 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 clinching 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.”

16. The trial court has committed error in ignoring the counter case and various other circumstances, which suggest false implication of the appellants herein. The trial court has although noted the injury of P.W.9 as simple and the testimony of P.W.14 was found to be valueless, yet the appellants have been convicted in the case ignoring the well settled principle of admissibility of the evidence.

17. On scrutiny of the trial court discussion, it is seen that the trial court has committed error in relying on the case diary as substantive evidence, which is against the basic principles of Evidence Act. In addition thereto, we find that the trial court has noted that the parties in this case appears to be a regular visitor of the jail. The discussion of the trial court as to the probability and circumstance in the present case is not based on sound principle of



law. In the present case, the trial court in addition to the aforesaid infirmity has committed error in making a departure from the mandatory procedural safeguard contained in Section 313 of Cr.P.C. The examination of the accused under Section 313 Cr.P.C. is mandatory requirement of fair trial and the trial court is required to confront the accused persons with all adverse material, which has surfaced during the trial, but in the present case only formality was completed by the trial court and the accused were not confronted with the adverse circumstances on which the trial court has based its judgment. The violation of the mandatory requirement under Section 313 of Cr.P.C. vitiates the entire trial.

18. Thus, in the totality of the facts situation, we are of the considered view that the investigation was perfunctory and no conclusive material was placed by the investigating officer or the prosecution to establish the place of occurrence. No attempt was made to collect the material at the crime scene and to send the same for scientific examination and its report. The trial court has also committed serious illegality in conduct of the trial. The reliance of the trial court on case diary indicate that basic role of evidence was given a complete go bye and case diary was taken as substantive piece of evidence for the present case and while examining the accused, the



mandatory provision under Section 313 of Cr.P.C. was not followed. The Apex Court has time and again reiterated that examination of the accused under Section 313 Cr.P.C. is not an empty formality. Reference in this connection made to the case of **Sukhjit 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."

19. Thus, in the totality of the facts situation discussed herein above, we are of the considered view that the conviction of the appellants in the present case is not beyond all reasonable doubt and as such it would not be safe to approve the conviction of the trial



court, which suffers from so many vices indicated herein above. Accordingly, we set aside the judgment of conviction passed by the trial court and acquit the appellant from the charges levelled against them, allow the appeal. Since the appellants are on bail, they are discharged from the liabilities of their bail bonds.

20. Before we part with, we record our sincere appreciation for the assistance rendered by Mr. Anshuman Singh, learned Amicus Curiae.

21. Let a copy of the judgment be handed over to Mr. Anshuman Singh, learned Amicus Curiae to raise bill for payment for rendering the assistance in the present appeal from the Patna High Court Legal Services Authority.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

Uday/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	30.01.2018
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