

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.415 of 1994

Against judgment and order dated 16th of August, 1994 in Sessions Trial
No. 321 of 1990 passed by the learned 2nd Additional Sessions Judge,
Katihar

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Dilip Kumar Chaudhary @ Dilip Choudhary, son of Late Ram Sarup Chaudhary,
resident of Village Jagdishpur, PS Barari, District Katihar

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Rabindra Prasad
Mr. Samir Kumar Sinha

For the Respondent/s : Mr.

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 09-01-2018

Challenging his conviction ordered by the 2nd Additional
Sessions Judge, Katihar in Sessions Trial No. 321 of 1990 vide
judgment and order dated 16.08.1994 and convicting him for offence
under Section 302 of the Indian Penal Code and sentencing him to
undergo rigorous imprisonment for life, this appeal has been filed by



the appellant in the year 1994 under Section 374(2) of the Code of Criminal Procedure, 1973.

It is the case of the prosecution that Sub Inspector of Police, B N Singh of Police Station Barari, District Katihar, recorded a Fardbeyan on 13.01.1990 at 3.20 A.M. in the instance of one Md. Ismile to the following effect, that on 12.01.1990, Ismile the informant, along with his cousin brother Manjeer Alam (the deceased) had gone to Katihar in the morning for marketing. At 6 P.M. they were returning from market and both of them were on their bi-cycle. Manjeer Alam the brother of the deceased was ahead of Md. Ismile and that they reached Garua Badhua Bahiyar, three persons unknown to them all of a sudden appeared from maize field, caught hold of them and started removing 100 rupee note from the pocket of Md. Ismile, the informant. On this, his brother Manjeer Alam, tried to catch them. It is stated that one of the dacoits called by name Jaihindar and ordered to fire on the deceased. It is staid that one of the persons fired on Manjeert Alam, he fell down and succumbed to the injury. FIR was lodged against unknown persons and thereafter certain persons including the appellant were arrested. Two persons, namely, Dilip Kumar Choudhary and Mahesh Mandal were arrested and they were put on trial. In the trial, they have been convicted. Appellant Dlilip Kumar Choudhary has been convicted and co-



accused Mahesh Mandal has been acquitted.

The conviction of the appellant is based on the sole testimony of PW 5 the informant who is said to have identified Dilip Kumar Choudhary in Test Identification Parade that took place eight months thereafter. As is evident from Annexure-P/4 in the T I Parade he identified the appellant Dilip Kumar Chaudhry and the person who fired on his brother Manjeer Alam and identified is made only on the ground that the person who fired was having tilted shoulder. PW 5 having failed to identify Mahesh Mandal, Mahesh Mandal has been acquitted. Even though various witnesses have been examined the conviction is based on the sole testimony of PW 5 as indicated hereunder. Learned counsel representing the appellant took us through the proceedings held on identification parade and pointed out that the parade suffers from the following defects. The T I Parade was held more than eight months after the arrest of the accused persons, identification has been held on the basis of the specific identity mark of the appellant, i.e. he is having tilted shoulder but from the identification parade report Ext. 4, it is clear that no person like the appellant Dilip Choudhary having a tilted shoulder was put in T I Parade. It is stated that Fardbeyan and the statement of the appellant speak about one Jaihindar being the person who was asked to fire who opened fire and even the Fardbeyan does not show about the special



identity about the person.

Accordingly, it is argued that T I Parade has not been done in accordance with law, it has been held in illegal manner and therefore based on the same the conviction of the appellant when the co-accused Mahesh Mandal has been acquitted, is unsustainable.

We have coinsured the contentions of the parties and we find that in the Fardbeyand it is clearly stated that it is one Jaihindar who ordered to fire and there is nothing in the Fardbeyan to identify the person either by name or any other special sign to show that the person who fired had any special peculiar physical defect. The only material available for conviction is T I Parade which has been held. It is surprising that the incident took place 13.01.1990, the accused are said to have been arrested immediately thereafter but the T I Parade was held more than eight months after the occurrence of the incident. No person having peculiar neck-bent or tilting of the neck is put in the T I Parade as required under law. On the contrary, PW 5 in the Fardbeyan fairly states that he does not know nor can he say who was the accused persons and had not seen them earlier. The T I Parade was not held by putting in the parade any person of similar physical appearance of similar disability and the T I Parade done in our considered view suffers from various illegal infirmity and cannot be placed reliance upon for the purpose of recording the conviction.



Once the T I Parade which is the sole evidence based on which the conviction is recorded is discarded then nothing further remains on the basis of which the conviction can be upheld.

Apart from the aforesaid, we find that there is another serious lacuna in the case of the prosecution. If the statement of the accused recorded under Section 313 of the Code of Criminal Procedure, as in contained in page -46 of the paper-book is taken note of, it is seen that only two questions have been put to the appellant. We have found from the statement of witnesses wherein they have alleged that when the accused committed the offence they had taken away a sum of Rs.100/- from the pocket of the deceased. What have to say about this? Was this statement correct? The second question is what is their defence? This in our considered view does not fulfill the requirement of the statutory nature as contemplated under Section 313, Cr.P.C.. Law contemplates that all the circumstances existing against the appellant should be put to him and he given an opportunity to explain them and in the absence of this requirement being fulfilled the entire trial stands vitiated and we hold that the same causes serious prejudice to the accused persons in this regard and the principle of law as laid down by the Supreme Court in the case of *Sukhjot Singh vs State of Punjab* [(2014) 10 SCC 270] :-

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 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. The State* wherein, Bose, J. explaining the significance of the faithful and fair compliance of 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 1 (2009) 6 SCC 595 2 AIR 1951 SC 441 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*, 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* 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 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."

Accordingly, we have no hesitation in holding that on this count also the conviction of the appellant cannot be upheld.

In our considered view, in the facts and circumstances of the case, the manner in which the Test Identification Parade has been held, it is not safe to pass the conviction only on the basis of aforesaid T I Parade when there is no other scientific evidence or any other evidence like recovery etc. to corroborate the accused of the prosecution. In view of the above, it is a fit case where benefit of doubt should be accorded to the appellant.

Accordingly, we allow this appeal and set aside the order of conviction. The bail bond of the appellant be cancelled and he be



released and set free.

The appeal stands allowed.

(Rajendra Menon, CJ)

mr.l./-

(Anil Kumar Upadhyay, J)

AFR/NAFR	NAFR
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