

IN THE HIGH COURT OF JUDICATURE AT PATNA

(Against the judgment of conviction and order of sentence dated 14.09.1994 passed by Shri Damodar Prasad, learned 3rd Additional Sessions Judge, Arrah in Sessions Trial No. 94 of 1991, arising out of Krishngarh P.S. Case No. 56 of 1990)

Criminal Appeal (DB) No.478 of 1994

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1. Shahid Sabjifarosa, son of Manu Mian	
2. Noor Hoda Sabjifaros @ Nurul Hoda, son of Manu Mian	
3. Jumrati Sabjifaros, son of Ainul Haque	
All residents of Village- Gundi, P.S.- Barhara (Krishnagarh), District- Bhojpur.	 Appellant/s
	Versus
The State of Bihar	 Respondent/s
	With

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Criminal Appeal (DB) No. 495 of 1994

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Sahid Sai, son of Wahid Sai, resident of Village- Gundi, P.S.- Krishnagarh (Barhara), in the District of Bhojpur.	 Appellant/s
	Versus
The State of Bihar	 Respondent/s

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Appearance :

(In CR. APP (DB) No.478 of 1994)

For the Appellant/s : Mr. Vidya Sagar, Advocate

For the Respondent/s : Ms. S. B. Verma, APP

(In CR. APP (DB) No.495 of 1994)

For the Appellant/s : Mr. Akhileshwar Prasad Singh, Sr. Advocate

Mr. Gopal Prasad Roy, 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: 09-01-2018

Both the Appeals have been filed against the judgment of conviction and order of sentence dated 14.09.1994 passed by learned 3rd Additional Sessions Judge, Arrah in Sessions Trial No. 94 of 1991, arising out of Krishngarh P.S. Case No. 56 of 1990, whereby all the



appellants have been convicted under Sections 302/34 of the Indian Penal Code and they have been awarded to undergo imprisonment for life.

2. In Cr. Appeal (DB) No. 478 of 1994 there are three appellants, namely, Shahid Sabjifarosa, Noor Hoda Sabjifaros @ Nurul Hoda and Jumrati Sabjifaros, whereas in Cr. Appeal (DB) No. 495 of 1994 the sole appellant is Sahid Sai.

3. The prosecution case in nutshell is that the informant Md. Jamaluddin Ansari went to Arrah on 8.6.1990 for purchasing materials for the construction of the house and he returned home at about 7 P.M in the evening on the same day. He met his son Nisar Ansari aged about 16 years at the Darwaja and he took cycle of the informant and was keeping the same inside the house. At that very time all the accused persons came to his house and took away his son Nisar Ansari to village Paiga to see dance. His son did not return till 7 A.M in the next morning. Thereafter, the informant went to the house of the accused persons and enquired from their guardians about his son. But, they asked him that accused persons did not return. At 8 A.M. he heard rumour that a dead body was lying in between the village Gundi and village – Ramai Rai ke tola near phadka, In the meantime a young boy namely Md. Barik of his village told him that some body killed Nisar Ansari. The informant rushed to Phadka and



saw the dead body of his son Nisar Ansari lying in the field of one Butan Singh and his neck was cut with sharp weapon. There was a napkin of Kathai colour on the dead body of his sons which was drenched in blood and the said napkin was usually seen on the shoulder of accused Sahid Sai. Sahid Sai was also keeping the said napkin on his shoulder when he came to the informant to night. Accused Sahid Sabjifaros and Noorhoda Sabjifaros were also sent to jail previously in connection with another case of the same village and they were also convicted. All the accused persons are young and of criminal nature. It has been alleged that all the accused persons took away the son of the informant at the pretext of seeing dance to village-Paiga and killed him near Phadka.

4. On the basis of the fardbayan of the informant was Krishngarh P.S. Case No. 56 of 1990 was registered for the offence under Sections 302/34 of the Indian Penal Code.

5. The police after investigation submitted charge-sheet against four accused persons under Sections 302/34 of the Indian Penal Code for committing murder of Nisar Ansari, thereafter, the learned Magistrate took cognizance of the offence and committed the case to the Court of Sessions for trial. On framing of charge, the accused persons totally denied the allegation and claimed that they have been falsely implicated due to previous enmity. There is also



plea taken by the defence that the deceased has illicit relation with the daughter of Guhari Mian and he was killed by some other persons for his bad character.

6. On behalf of the prosecution, altogether 9 witnesses were examined. P.W. 1 Murat Ram is the clerk of Public Prosecutor. He has proved the fardbeyan and formal F.I.R. P.W.2 Liyakat Hussain is the witness on the point that accused Sahid Sai came to his house and told the deceased to go with him to see dance and it is alleged that on request of Sahid Sai, the deceased accompanied him and this witness has deposed that the deceased was last seen along with Sahid Sai and the other three accused in this case. On the next day, the dead body of deceased was found and his neck was found cut with sharp weapon. P.W.3 Khurshid Ansari is of village Gundi, who claimed that he saw the accused Sahid with the deceased at his Darwaja and also claimed that other appellants were also standing near the turning of the road. P.W.4 Nasima Khatoon is the sister of the deceased. She has stated that she saw the deceased going along with accused persons. P.W.5 Nuresha Khatoon is the mother of the deceased. She stated that the accused Sahid Sai took away the deceased and the accused persons were accompanying them. P.W. 6 Md. Jamaluddin Ansari is the informant. He has deposed that the accused persons came to his Darwaja and accused Sahid Sai called



his son to accompany to village Paiga to see dance and the deceased accompanied them, but did not return in the night and in the next morning he learned from Barik that Nasir was killed and his dead body was thrown in a ditch, thereafter he reached the place where the dead body was thrown and found one napkin (Gamchha) stained with blood. P.W.7 Surendra Prasad Srivastava is the doctor, who conducted the post-mortem. P.W. 8 Ram Swarath Prasad is the officer-in-charge of Krishngarh police station, who started investigation on 13.06.1990 and he submitted charge-sheet after completion of investigation. P.W.9 Tarkeshwar Prasad is a formal witness, who has proved the case diary.

7. Mr. Akhileshwar Prasad Singh, learned senior counsel appearing on behalf appellant of Cr. Appeal (DB) No. 495 of 1994, led the argument on behalf of the appellants. Mr. Singh submitted that the instant case is based on circumstantial evidence. The accused persons have been convicted in the present case only on the basis of the alleged claim of the prosecution witnesses that they have last seen the accused persons and the victim. However, he submitted that in the matter of circumstantial evidence, the law, is well settled that the circumstances must be conclusive and ruled out any other hypothesis of commission of crime and the involvement of the accused. If any other manner of occurrence and commission of



crime by any other persons is equally probable, then conviction on the basis of circumstantial evidence is not sustainable. Mr. Singh submitted that apart from the alleged claim of last seen, there is no chain of circumstance, which leads to only one conclusion that the victim was killed by other accused persons.

8. Referring to the various circumstances of the case, he submitted that the motive behind the killing as per the prosecution is that the deceased was killed by the accused persons, as the informant has deposed four years back in case against them. The alleged motive is too remote to bring home the charges. He referred to the facts and circumstances of the case to demonstrate that the appellants have been made accused in this case only on the basis of suspicion and suspicion howsoever strong cannot be taken as a proof to convict the appellants. Mr. Singh submitted that in a case of circumstantial evidence, the prosecution is required to co-relate the circumstances by scientific evidence, so that the chain of circumstances should be made conclusive to suggest that the crime was committed only in the manner suggested by prosecution and any other proposition of commission of crime is ruled out. Mr. Singh next submitted that in the present case, the conduct of the parties is most unnatural. In cases where the conduct of the parties are artificial and unnatural, the court has to consider their deposition with a pinch of



salt. He submitted that in the present case, the prosecution witnesses have deposed that the informant has deposed against the accused persons four years back and that is why there was motive behind killing the deceased.

9. Mr. Singh next submitted that in such a circumstance, the prosecution is required to establish the case by completing the chain of events from the time of alleged taking the boy for watching dance in village Paiga. It is most unnatural on the part of the informant to allow his son to accompany the accused persons, if there was previous enmity on account of giving evidence against the accused persons. At the same time, it is most unnatural on the part of the deceased to accompany such persons with whom they stand on inimical term.

10. Mr. Singh lastly submitted that in the present case, the trial court has only completed the formality while examining the accused under Section 313 of the Cr.P.C.

11. Mr. Vdya Sagar, learned counsel appearing on behalf of the appellants of Cr. Appeal (DB) No. 478 of 1994, has adopted the arguments advanced by Mr. Akhileshwar Prasad Singh, learned senior counsel. In addition thereto he has referred to the case of the defence that the deceased was a man of bad character and he has illicit relation with the daughter of Guhari Mian and as such the



possibility of his elimination by other person than accused persons cannot be ruled out on account of bad character of the deceased.

12. Ms. S. B. Verma, learned APP appearing on behalf of the State has not disputed the fact that apart from the suspicious circumstance, there is no complete chain, which leads to only one conclusion that the appellants alone could have committed the crime.

13. We have gone through the materials available on record. From the evidence of the witnesses examined on behalf of the prosecution, it transpires that they suspected the commission of crime by the appellants on the ground: (a) that the father of the deposed has deposed against them in a case four years back and (b) the appellants has accompanied the deceased on the previous day. The law in the matter of conviction on circumstantial evidence is well settled. The Apex Court has reiterated the principle to be followed in the matter of circumstantial evidence. Reference in this connection may be made to the judgment of the Apex Court in the case of **Satish Nirankari Vs. State of Rajasthan**, reported in **(2017) 8 SCC 497**. The relevant paragraphs of the judgment is quoted herein below for ready reference:

“29. It is now well established, by a catena of judgments of this court, that circumstantial evidence of the following character needs to be



fully established:

- (i) Circumstances should be fully proved.
- (ii) Circumstances should be conclusive in nature.
- (iii) All the facts established should be consistent only with the hypothesis of guilt.
- (iv) The circumstances should, to a moral certainty, exclude the possibility of guilt of any person other than the accused (State of U.P. v. Ravindra Prakash Mittal: (1992) 3 SCC 300, Chandrakant Chimanlal Desai v. State of Gujarat: (1992) 1 SCC 473). It also needs to be emphasised that what is required is not the quantitative, but qualitative, reliable and probable circumstances to complete the claim connecting the accused with the crime. Suspicion, however grave, cannot take place of legal proof. In the case of circumstantial evidence, the influence of guilt can be justified only when all the incriminating facts and circumstances are found to be not compatible with the innocence of the accused or the guilt of any other persons.

30. The following test laid down in Pudala Veera Reddy v. State of A.P., reported in 1989 Supp (2) SCC 706, also needs to be kept in mind: (SCC pp.710,para 10)

- “10. (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (2) those circumstances should be of a definite tendency unerringly pointing towards



guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

31. Sir Alfred Wills in his book Wills' Circumstantial Evidence (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence:

“(1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;

(2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;

(3) in all cases, whether of direct or circumstantial evidence, the best evidence must be adduced which the nature of the case admits;

(4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable explanation, upon



any other reasonable hypothesis than that of his guilt; and

(5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.”

14. In addition thereto the Apex Court time and again echoed the importance of examination of the accused under Section 313 of the Cr.P.C. and it has been held out that the examination of the accused under Section 313 Cr.P.C. is not an empty formality, but it is a mandatory requirement and in case of departure the entire trial stands vitiated. The judgment in this regard in the case of **Anup Lal Yadav and Another Vs. The State of Bihar**, reported in (2014) 10 SCC 275, 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 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 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. In the present case from perusal of record, it appears that the minimum requirement under Section 313 of the



Cr.P.C. was not called out instead of confronting the accused persons with adverse circumstance, which was the basis for conviction of the appellants. The empty formality in the nature of examination of accused persons under Section 313 of the Cr.P.C. was completed. The question posed to the accused under Section 313 read as follows:

शहीद साई

प्रश्न :- क्या आप अन्य अभियुक्तों के साथ एकमत होकर
निसार अंसारी की हत्या किये ?

उत्तर :- जी नहीं ।

प्रश्न :- आपने गवाहों की गवाही सुनी है आप को इस सम्बन्ध
में और क्या कहना है ?

उत्तर :- मैं बेकसूर हूँ ।

शहीद सब्जीफरोश

प्रश्न :- क्या आप अन्य अभियुक्तों के साथ एकमत होकर
निसार अंसारी की हत्या किये ?

उत्तर :- जी नहीं ।

प्रश्न :- आपने गवाहों की गवाही सुनी है आप को इस सम्बन्ध
में और क्या कहना है ?

उत्तर :- मुझे झूठा फंसाया गया है ।

नूरहोदा सब्जीफरोश

प्रश्न :- क्या आप अन्य अभियुक्तों के साथ एकमत होकर
निसार अंसारी की हत्या किये ?



उत्तर :- जी नहीं ।

प्रश्न :- आपने गवाहों की गवाही सुनी है आप को इस सम्बन्ध में और क्या कहना है ?

उत्तर :- मुझे झूठा फंसाया गया है ।

जुमराती मियाँ सब्जीफरोश

प्रश्न :- क्या आप अन्य अभियुक्तों के साथ एकमत होकर निसार अंसारी की हत्या किये ?

उत्तर :- जी नहीं ।

प्रश्न :- आपने गवाहों की गवाही सुनी है आप को इस सम्बन्ध में और क्या कहना है ?

उत्तर :- मुझे झूठा फंसाया गया है ।

16. From perusal of the statement recorded under Section 313 of Cr.P.C. we find no manner of doubt that the trial court has violated the mandatory requirement of Section 313 Cr.P.C., which goes to the root of the fair trial, which is *sine qua non* of criminal justice system.

17. Considering the totality of the facts situation, we find that in the present case, the conviction of the appellants are based on suspicion and it is well settled that suspicion howsoever cannot be partake the character of proof, the chain of events are not conclusive and in view of the judgment of the Apex Court in the case of **Satish Nirankari Vs. State of Rajasthan** (supra). We find that the



conviction of the appellants based on circumstantial evidence is not safe in addition thereto the departure from the mandatory requirement under Section 313 of Cr.P.C. also vitiates the trial. The cumulative effect of the aforesaid leads to only one conclusion that conviction based on circumstantial evidence, which is not full proof, rather is based on suspicion, which is not corroborated by any further evidence including the scientific investigation, as no attempt was made by the investigating officer for sending the alleged material collected at the time of occurrence for scientific laboratory test.

18. Considering the aforesaid, we are constrained to hold that conviction of the appellants in such circumstances is unsustainable and, accordingly, we set aside the judgment of conviction and sentence passed by the trial court and allow both the appeals. Since all the appellants are on bail, they are discharged from the liabilities of their bail bonds.

19. In the result, both the appeals are allowed.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

Uday/-

AFR/NAFR	NAFR
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