

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.285 of 1996

Naresh Mandal, son of Bhim Mandal, resident of village Kawaldih, Police Station- Banka, District- Banka.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Advocate Mr. Sunil Kumar Mandal, Advocate
For the Respondent/s	:	Mr. Manish Kumar No. 2, APP

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 29-07-2022

The present appeal has been preferred against the judgment of conviction and order of sentence dated 09.07.1996 passed by the 1st Additional Sessions Judge, Banka in Sessions Trial No. 171 of 1988 arising out of G.R. case No.1483 of 1985, Banka P.S. case No. 378 of 1985, whereby and whereunder appellant Naresh Mandal has been convicted under Sections 364, 302/34 and 201 of the Indian Penal Code and has been sentenced to undergo life imprisonment under Section 302/34 of the Indian Penal Code and rigorous imprisonment for 10 years under Section 364 of the Indian Penal Code and both the sentences of the appellant have been directed to run concurrently. No separate



sentence has been awarded under Section 201 of the Indian Penal Code.

2. Prosecution case, in brief, is that a written report was submitted to the Banka Police Station by the informant (P.W.1) on 13.11.1985 at about 4:00 P.M. stating therein that on previous Monday, the informant's daughter Rukma Devi came and informed him that his younger daughter Manika Devi is traceless alongwith her husband accused Naresh Mandal since Friday night. Litigation was going on since long between said Manika Devi and her husband accused Naresh Mandal. The informant expressed his suspicion in the written report that the accused persons have kidnapped Manika Devi and murdered her due to long litigation and have disappeared her dead body. On receipt of the written report, Banka police drew a formal F.I.R. and registered the case and took up investigation. Thereafter charge sheet was submitted and on the basis of which, after commitment, charges have been framed as mentioned above. The appellant pleaded not guilty and claimed to be tried.

3. During trial, the prosecution examined altogether eight witnesses. P.W.1 Bisheshwar Manjhi is the informant. P.W.3 Rukma Devi is his daughter, who turned hostile. P.W.7 Amir Mandal is tendered and P.W.8 Nawal Kishore Kamti is formal in



nature, who simply proved formal F.I.R. and case diary of the case. P.W.2 Sanjay Kumar Mandal, P.W.4 Ghanshyam Mandal, P.W.5 Kisto Mandal and P.W.6 Puneshwar Mandal are witnesses on circumstantial evidence. Ext.1 is written report, Ext.3 is seizure list, Ext-4 is formal F.I.R., Ext.5 is case diary and Exts.2 and 2/1 are signatures of P.Ws.2 and 4 respectively on Ext.3. On behalf of the defence, one witness, namely, Jagdish Yadav has been examined as D.W.1. Defence has brought on record certified copies of orders passed in Cases No.114 and 296 under Bihar and Orrisa Survey Rules and Bihar Tenancy Act respectively, which have been marked Exts.A and A/1 respectively.

4. Learned Counsel for the appellant submits that the judgment of conviction and order of sentence passed by the learned trial court is untenable in the eye of law as the learned trial court has not appreciated the evidence as per law. It has further been submitted that the evidence brought on record by the prosecution with regard to the appellant accompanying the victim/deceased cannot be relied upon for the reason that in the evidence adduced by the prosecution, it has come on record that the appellant and his wife (victim/deceased) were not living in jointness, rather they were living separately in the same village. The prosecution has not examined the investigating officer which



has caused prejudiced to the appellant. The prosecution has also brought on record the seized articles as material exhibit and, therefore, the identification of the seized articles could not be made. Moreover, it has been submitted that while recording of the statement of the appellant under Section 313 of the Cr.P.C, the learned trial court has not asked any question to the appellant regarding he being last seen with the deceased, therefore, the evidence of last seen cannot be used against him. Lastly, it has been submitted that it has come in the cross-examination of P.W.7 that he has seen Manika Devi (victim/deceased) alone going out of the village and the description of her clothes is also different from what has been described by other witnesses.

5. Learned APP for the State has submitted that the judgment and order under challenge requires no interference as the prosecution has been able to prove its case beyond all reasonable doubts. The witnesses have been consistent in their depositions and there are sufficient evidence to prove the guilt of the appellant.

6. After hearing the arguments advanced by the learned counsel appearing for the parties and perusing the materials available on the record, following issues arise for consideration in this appeal:-



(i) Whether the evidence brought on record by the prosecution regarding the appellant accompanying the victim/deceased, four days prior to her missing can be relied upon, in view of the fact that the appellant and the victim/deceased were living separately?

(ii) Whether the non-examination of the Investigating Officer has caused prejudice to the defence?

(iii) Whether the failure on the part of the prosecution to produce the seized articles as material Exhibits would weigh in favour of the appellant?

(iv) Whether in absence of any specific question, regarding being last seen with the deceased, put by the learned trial court at the stage of recording of the statement of the accused under Section 313 of Cr.P.C. would be fatal to the case of prosecution?

(v) Whether the cross examination of a witness tendered by prosecution, including the court question, can be looked into or be relied upon?



7. In order to deal with the first issue, we have perused the depositions of P.W.2 and P.W.6. From perusal of the deposition of P.W. 2 it appears that in his examination-in-chief he has categorically stated that there was litigation relating to Section 107 of Cr.P.C between the appellant and his wife Manika Devi. Both the appellant and his wife used to reside separately. The wife of the appellant used to live at a *Basa* which was situated towards west of the house of the appellant. Further, from perusal of the deposition of P.W.6, it is apparent that he has also supported the fact that a proceeding under Section 107 of Cr.P.C existed between the appellant and his wife. He has further stated that the father of Manika Devi had sold her ornament which was the root cause of the dispute between the appellant and his wife. We have given our anxious consideration to both the depositions and from perusal of the same, it leaves no doubt that there was strained relationship between the appellant and his wife Manika Devi (victim/deceased). The appellant and his wife (victim/deceased) were not living in jointness, rather they were living separately. Therefore, the evidence in support of the fact that the appellant accompanied the deceased, four days prior to her missing, cannot be relied upon.



8. So far the second issue is concerned, the prosecution has chosen not to examine the Investigating Officer in this case. From the record, it is clear that there is no eye-witness in this case and hence the case lacks any direct evidence. There is also no recovery of any incriminating article from the appellant. In such circumstances, the examination of the Investigating Officer becomes important. However, the prosecution has without any explanation opted for non-examination of the Investigating Officer of this case. This has caused prejudice to the case of the defence. The Investigating Officer would be the most competent witness to throw light on the manner in which the investigation was carried out and to explain the entire gamut of evidence brought on record. The defence has also been deprived of the opportunity to bring on record the contradictions and improvement made by the witnesses in their depositions.

9. As far as the third issue is concerned, it appears from the record that in this case the dead body of Manika Devi, who was missing, has not been recovered. However, some articles like a white saree with blue border, red bangles and a bunch of hair has been recovered from the bank of river. These articles, so seized, have not been produced during the trial as material exhibits. On account of the failure of the prosecution to bring on



record these articles by way of material exhibits has caused prejudice to the defence. There is no evidence on record to indicate that the articles seized were of the deceased. Thus, we are of the considered opinion that the failure of the prosecution to bring on record the seized articles by way of material exhibits has caused prejudice to the defence as no identification of the same has been made to ascertain that whether the seized articles belonged to the victim/deceased or not. This failure on the part of the prosecution would weigh in favour of the appellant.

10. While advertng to the fourth issue, as formulated above, we have minutely perused the questions put by the learned trial court, at the time of recording of the statement of the appellant under Section 313 of the Cr.P.C. From the record, it is apparent that there is no eye witness in the present case. The vital incriminating material available against the appellant is the fact that his wife was last seen with the appellant four days prior to her missing. A bare perusal of the question put to the appellant at the stage of recording his statement under Section 313 of Cr.P.C. would manifest that the learned trial court has not asked any question to the appellant with regard to the fact that the appellant was accompanying his wife four days prior to her missing. Thus, the appellant had got no opportunity to explain and defend himself



with regard to the incriminating material related to the deceased being last seen with him. At this juncture, we would rely on the judgment rendered by the Hon'ble Apex Court in the case of ***Paramjeet Singh vs. State of Uttarakhand***, wherein in paragraph 22, it has been held that:-

“22. An accused can be questioned under Section 313 Cr.P.C. only for the purpose of enabling him personally to explain any circumstance appearing in the evidence against him. No matter how weak or scanty the prosecution evidence is in regard to certain incriminating material, it is the duty of the Court to examine the accused and seek his explanation on incriminating material which has surfaced against him.

*Section 313 Cr.P.C. is based on the fundamental principle of fairness. The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Therefore, the Court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the Court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminating material appearing against him. **Circumstances which were not put to the accused in his examination under Section 313 Cr.P.C cannot be***



used against him and have to be excluded from consideration. (*Vide Sharad Birdhichand (Supra); and State of Maharashtra v. Sukhdev Singh and Anr. AIR 1992 SC 2100.*)”

(emphasis supplied)

Therefore, in view of the factual matrix of this case as well as the law laid down by Hon’ble Supreme Court in the case of ***Paramjeet Singh (supra)***, the evidence of last seen cannot be used against the appellant as no question has been put to him by the court with regard to the fact that he accompanied his wife four days prior to her missing.

11. In order to answer the fifth issue, we would first like to deal with the legality of the practice adopted by the learned trial courts to allow the prosecution to tender a witness for cross-examination only. It has been seen that the trial courts invariably allow the request of the prosecution to tender a witness for cross-examination only. At this juncture, we pause to say, that such a practice is impermissible in the eye of law. It will be relevant, at this stage, to refer to Section 138 of the Indian Evidence Act, 1872 which reads as follows:

138. Order of examinations.-Witnesses shall be first examined -in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.



The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in chief.

Direction for re-examination - *The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.*

From perusal of the above-referred section it is apparent that it has been envisaged in the statute itself that a witness would first be examined-in-chief, and then subjected to cross-examination and for seeking any clarification, the witness may be re-examined by the prosecution. The trial court cannot allow the prosecution to deviate from the order in which the witnesses have to be examined, as the same has been enunciated in the Evidence Act itself. The practice of tendering a witness only for cross-examination is an old practice which has lost its relevance after the amendment by Act 26 of 1955. The old Code of Criminal Procedure of 1898, as it stood before the amendment by Act 26 of 1955, provided for a full fledged magisterial enquiry, in cases exclusively triable by the Court of Sessions or the High Court and in that enquiry, prosecution had to examine all its witnesses. As per Section 288 of the old Code, it was the discretion of the Sessions Judge to treat the evidence of the witnesses recorded by



the Committing Magistrate as substantive evidence at the trial. Quite often, the prosecution used to take advantage of the above provision. The prosecution used to ask for leave of the Sessions Court to treat the depositions of these witnesses whom they did not intend to examine afresh, recorded in the committal enquiry as its evidence in the trial and then tender them for cross-examination. It will be pertinent to mention here that Act 26 of 1955 which amended the Code of 1898 has restricted the examination of prosecution witnesses in the committal enquiry in respect of cases instituted on police report only to those who were to give an ocular version of the incident only. Therefore, in our considered opinion, when the legislature has brought a new Code in the year 1973 and has totally done away with the practice of recording of evidence before Committing Magistrate, the practice of tendering a witness only for cross-examination cannot be allowed. At this stage, we would like to refer to the judgment of the Hon'ble Supreme Court in the case of ***Sukhwant Singh vs State of Punjab reported in (1995) 3 SCC 367*** wherein the Hon'ble Supreme Court in para 19 has held as follows:

" 19...After the coming into force of the Criminal Procedure Code, 1973, which replaced the Code of 1898, recording of evidence in commitment proceedings have been totally dispensed with and Section 288 of that Code has been omitted.



Consequently, the course suggested by some of the High Courts in the earlier quoted judgments regarding tendering of a witness for cross-examination who had been examined in the committal court, is also no more relevant or available. The Jaggo's case, which was decided when the Code of 1898 was operating in the field could not, therefore, be pressed into service by the trial court while dealing with the instant case tried according to the Code of 1973. Thus, considered it is obvious that the trial court, wrongly permitted the prosecution to tender PW4 and PW5 for cross-examination only. Both PW4 and PW5 were, according to the prosecution case itself, eye witnesses of the occurrence and had removed the deceased to the hospital. Their evidence was, of a material nature which was necessary for the unfolding of the prosecution story. The effect of their being tendered only for cross examination amounts to the failure of the prosecution to examine them at the trial. Their non-examination, in our opinion, seriously affects the credibility of the prosecution case and detracts materially from its reliability.

12. Further, in the case of **Tej Prakash v. State of Haryana** reported in (1996) 7 SCC 322, this Court, following its earlier judgment in **Sukhwant Singh (supra)**, held as follows:

"18. As far as Dr. O.P. Poddar is concerned, he was only tendered for cross-examination without his being examined-in-chief. Though, Dr. O.P. Poddar was not examined-in-chief, this procedure of tendering a witness for cross-examination is not warranted by law. This Court in Sukhwant Singh v. State of Punjab : (1995) 3 SCC 367 held that permitting the prosecution to tender a witness for cross-



examination only would be wrong and "the effect of their being tendered only for cross-examination amounts to the failure of the prosecution to examine them at the trial..."

13. Lastly, this view has also been relied recently in the case of ***Ashok Debbarma Vs. Respondent: State of Tripura*** reported in **(2014) 4 SCC 747**. Therefore, after giving anxious consideration to the facts of the present case and applying the law as laid down in the above-referred judgments, we are of the considered opinion that the evidence which has come in the cross-examination of the P.W.7 cannot be looked into or relied upon by this court as there is no examination-in-chief of P.W.7 available on record.

14. In view of the findings arrived at on the issues formulated above, we find that the prosecution has failed to prove the guilt of the appellant beyond reasonable doubt. The conviction of the appellant cannot be sustained.

15. Therefore, the appeal is allowed. The judgment of conviction and order of sentence dated 09.07.1996 passed by the 1st Additional Sessions Judge, Banka in Sessions Trial No.171 of 1988, arising out of Banka P.S. Case No. 378 of 1985, G.R. case No.1483 of 1985, is set aside. Since the appellant is on bail, he is discharged from the liabilities of bail bonds.



16. We have observed that the Trial Court even today allows the practice of the prosecution to tender a witness only for cross-examination. However, as discussed above, the same is impermissible. Therefore, in our opinion, we deem it appropriate to direct the Registrar General of this Court to forward a copy of this judgment to all the District and Sessions Judges of the respective judgship across the State of Bihar for circulation after seeking necessary approval of Hon’ble the Chief Justice in the administrative side, if required, so that the practice of the prosecution to tender a witness only for cross-examination can be stopped.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Pankaj/-

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