

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.393 of 2014

Arising Out of PS. Case No.-213 Year-2009 Thana- KATORIYA District- Banka

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Bhim Yadav Son of late Neero Yadav resident of village- Bara, P.S.- Belhar,
District- Banka

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Advocate Mr. Malay Kumar Choudhary, Advocate Mr. Ritwik Thakur, Advocate
For the Respondent/s	:	Mrs. Vaishnavi Singh, Advocate Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE A. M. BADAR

and

HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE A. M. BADAR)

Date : 09-09-2022

By this appeal, appellant/convicted accused Bhim Yadav is challenging the Judgment and Order dated 25.04.2014 and 30.04.2014 respectively, passed by the learned Adhoc Additional Sessions Judge-I, Banka, in Sessions Trial No.148 of 2010, thereby convicting him of the offence punishable under Section 396 of the Indian Penal Code and sentencing him to imprisonment for life apart from imposition of fine of rupees ten thousand and in default directing him to undergo imprisonment for six months. For the sake of convenience, the appellant/ convicted accused shall be referred



to in his original capacity as “an accused”.

2. Facts leading to the prosecution of the accused projected from the police report can be summarized thus:

(a). According to the prosecution case, in the night intervening 16.10.2009 and 17.10.2009, the accused along with other named accused persons had committed armed dacoity in the house of Maduli Yadav situated at village Ojha Bathan, Police Station Katoriya (Suiya) in Banka District of Bihar and while committing that dacoity has committed murder of three inmates of that house, namely, Maduli Yadav and his two sons Manoj Yadav as well as Nageshwar Yadav.

(b). According to the prosecution case, deceased Maduli Yadav along with his family members was residing at village Ojha Bathan falling under jurisdiction of Police Station Katoriya (Suiya). When the inmates of the house of deceased Maduli Yadav were fast asleep in the night intervening 16.10.2009 and 17.10.2009, about 10 to 12 dacoits entered in the front-yard of their house. Thereafter, they assaulted inmates of the house of Maduli Yadav. They committed murder of Maduli Yadav, Manoj Yadav and Nageshwar Yadav by exploding bombs, firing bullets and stabbing them. In the process of committing the armed dacoity, the accused and his



associates caused injuries to the inmates of that house and had looted the ornaments and valuable documents from the house of deceased Maduli Yadav.

(c). The report of the incident of dacoity with murder at her house came to be lodged by Parwati Devi widow of Manoj Yadav at about 10:00 AM of 17.10.2009 which has resulted in registration of Crime No.217 of 2009 with Katoriya (Suiya) Police Station against the accused and his 11 associates. The routine investigation followed. Dead bodies of Maduli Yadav and his sons, namely, Manoj Yadav and Nageshwar Yadav were sent for autopsy to JLN Medical College and Hospital, Bhagalpur and Sadar Hospital, Banka, after taking inquest notes. PW 7 Dr. Sandeep Lal had conducted autopsy on dead body of Nageshwar Yadav whereas PW 8 Dr. Md. Ansar Ahmad had conducted autopsy on dead body of Maduli Yadav and his son Manoj Yadav. Statement of witnesses came to be recorded and on completion of investigation, the accused came to be charge sheeted.

(d). The learned Trial Court in a most casual manner framed the charge for the offence punishable under Section 396 of the Indian Penal Code against the accused. The same was read over and explained to him. The accused



pleaded not guilty and claimed trial.

(e). In order to bring home the guilt to the accused, the prosecution has examined in all 11 witnesses. Co-villagers Kailash Yadav and Gulabi Yadav were examined as PW 1 and PW 2. Ramesh Kumar- son of deceased Maduli Yadav was examined as PW 3. Anita Devi-daughter of deceased Maduli Yadav was examined as PW 4. Shanti Devi-widow of deceased Maduli Yadav was examined as PW 5. Parwati Devi-widow of deceased Manoj Yadav was examined as PW 6. Autopsy Surgeons Dr. Sandeep Lal and Dr. Md. Ansar Ahmad were examined as PW 7 and PW 8 respectively. Co-villagers Vidyanand Yadav, Murlidhar Yadav and Basuki Yadav were examined as PW 9, PW 10 and PW 11.

(f). The defence of the accused was that of total denial. However, he did not enter into the defence.

(g). After hearing the parties, by the impugned Judgment and Order, the learned Trial Court was pleased to convict the accused and to sentence him as indicated in the opening paragraphs of this Judgment.

3. We heard Mr. Ajay Kumar Thakur, the learned counsel appearing for the appellant at sufficient length of time. By taking us through the evidence of alleged eye witnesses he



argued that evidence of eyewitnesses is suffering from serious lacunae and it can not be said that they had actually witnessed the incident. They were hiding inside the house and came out only in the morning. It is further argued that the place of occurrence is also not proved by the prosecution. During the course of evidence it was shifted from the front-yard of the house to the cattle shed. According to the appellant, there was dispute about the partition between deceased Maduli and named accused Arjun and therefore it can not be inferred that the appellant-accused would indulge in dacoity. The accused is related to Arjun Yadav who is named as an accused in the FIR. The learned Senior Advocate further argued that the prosecution has suppressed the earliest version about the incident as evidence of the prosecution shows that PW 11 Basuki Yadav was sent to the police station for informing about the incident and that information was received at the police station at 8:45 AM of 17.10.2009. However, the FIR was registered at 16 hours of 17.10.2009. Apart from this, it is further argued by the learned Advocate that the charge itself was defective as charge for commission of murder was not framed nor name of the person who were allegedly murdered is mentioned in the charge. He further argued that the accused



was not examined in terms of object of Section 313 of the Cr.P.C. and this has caused serious prejudice to the accused. In a cryptically framed one question, the circumstances appearing in evidence against the accused are showing to have been explained to the accused and, therefore, the conviction and resultant in sentence imposed on the accused is required to be set aside.

4. The learned Additional Public Prosecutor fairly conceded to the position that the accused was not properly examined by the learned Trial Court under Section 313 of the Cr.P.C. and has submitted that suitable orders may be passed by this Court in that regard.

5. We have considered the submissions so advanced and we have also perused record and proceedings including oral as well as documentary evidence adduced by the prosecution.

6. The case in hand is a case of serious offence of commission of murder of three persons, namely, Maduli Yadav, Manoj Yadav and Nageshwar Yadav in the course of the armed dacoity. In order to prove homicidal deaths, the prosecution has examined PW 7 Dr. Sandeep Lal and PW 8 Dr. Md. Ansar Ahmad who had conducted autopsies on dead bodies



of those three persons. It is case of the prosecution that these three persons are done to death by exploding bombs, firing bullets and stabbing them. PW 7 Dr. Sandeep Lal has stated in his evidence that on 18.10.2009 he conducted autopsy on dead body of Nageshwar Yadav in J.L.N.M.C. Hospital, Bhagalpur. As per version of this witness, dead body of Nageshwar Yadav was having three wounds caused by explosion and Nageshwar Yadav died because of haemorrhage and shock. His evidence shows that because of explosion of bomb deceased Nageshwar Yadav had suffered fracture injuries apart from other injuries. Evidence of Dr. Mukhtar Ahmad shows that Maduli Yadav died because of hemorrhagic shock caused by incised wounds and those wounds were caused by sharp object and were grievous in nature. It is seen from the evidence of this autopsy surgeon deceased Maduli Yadav had suffered incised wounds on his head as well as scapular region. Similarly, evidence of PW 8 Dr. Md. Ansar Ahmad further shows that he conducted autopsy on dead body of Manoj Yadav and found that the death was caused because of hemorrhagic shock caused by bullet wounds. Evidence of this autopsy surgeon shows that deceased Manoj Yadav apart from bullet wounds had also suffered lacerated wounds. Thus, evidence of both autopsy surgeon



shows that three persons had suffered homicidal death in the incident in question. His evidence shows that deaths were caused by bombs, bullets and sharp edged weapons.

7. The prosecution has examined four witnesses, namely, PW 3 Ramesh Kumar, PW 4 Anita Devi, PW 5 Shanti Devi and PW 6 Parwati Devi who was inmates of house of deceased persons. The incident took place in the mid night and as such all the inmates of the house, where the incident in question took place, were natural witnesses to the incident of armed dacoity with three murders. PW 5 Shanti Devi, who is widow of deceased Maduri Yadav, has even claimed to have sustained wound by knife on her forehead at the hands of the accused. She is claiming to be an injured witness. All four inmates of the house, namely, PW 3 Ramesh Kumar, PW 4 Anita Devi, PW 5 Shanti Devi and PW 6 Parwati Devi have adduced evidence in detail by explaining as to how the incident of dacoity with murder took place at their house in the night intervening 16.10.2009 and 17.10.2009. They have spoken about the relationship with the appellant-accused. These witnesses have also explained the motive behind commission of this dacoity with murder by stating that the original documents in respect of the landed property apart from



ornaments were looted in the incident by the accused. They have attributed specific roles to the appellant-accused and his associates in the incident.

8. On this factual backdrop, we are sorry to note the manner in which the learned Trial Court had conducted trial of this serious offence. We reproduce hereunder the charge framed by the learned Trial Court against the appellant-accused and it reads thus:

“I S.C. Srivastava, Additional Sessions Judge (Fast Track Court-V), Banka, hereby charge you 1. Bhim Yadav along with others on 16th day of October, 2009 at vill. Ojha Bathan, P.S. Katoriya(Suiya), District-Banka, you committed dacoity and in the commission of dacoity murder was committed by you and thereby committed an offence punishable under Section 396 of the Indian Penal Code and within my cognizance and thereby direct that you be tried by me on the said charge. Charge read over and explained to accused in Hindi to which he pleaded not guilty and claimed to be tried.”

9. Obviously the charge so framed by the learned Trial Court is not even mentioning the names of three persons who were murdered during the course of incident of dacoity



with murder leave apart the fact that the charge for commission of murder of these three persons was not even framed by it.

10. Be that as it may, the learned Trial Court has committed serious illegality in not recording statement of the appellant-accused under Section 313 of the Cr.P.C. with due seriousness in the light of object of examination of the accused under Section 313 of the Cr.P.C. We feel it necessary to reproduce the statement of the accused recorded by the learned Trial Court which in our opinion is recorded in a most casual manner showing total disregard to the settled legal position on this aspect. Following questions put to the accused with the answers found to be given by the accused to those questions are comprising of entire record of examination of the accused under Section 313 of the Cr.P.C.

Question No.1. Have you heard evidence of witnesses?

Ans.1. Yes.

Question No.2. It is a charge against you and it is inevidence that you along with other accused persons, on 10th October 2009 at Village Ojha Bathan, Police Station Katoriya (Suiya) District Banka had committed dacoity at the house of Parwati Devi wife of deceased Manoj Yadav and in the course



of dacoity had committed murders of Maduli Yadav, Manoj Yadav and Nageshwar Yadav. What are you to say?

Ans.2. No.

Question No.3. Do you want to say anything in your defence?

Ans.3. I am innocent.

11. From bare perusal of this casual examination of the accused under Section 313 of the Cr.P.C. conducted by the learned Trial Court it is seen that the learned trial court had not put the incriminative circumstances appearing against the accused in the evidence adduced by the prosecution to him in order to enable him to offer his explanation in respect of those statements. He was to asked as to whether he wants to lead evidence in his defence.

12. It would be apposite to quote provision of Section 313 Cr.P.C. for better understanding of the issue. It reads thus:-

“313. Power to examine the accused.-

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously



warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons- case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under subsection (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.”

13. Legislative provision enshrined in Section 313 of the Cr.P.C. is based on the principle of natural justice described in maxim ‘*audi alteram partem*’ - meaning thereby that nobody



should be condemned unheard. Principle of fair trial requires that all incriminating circumstances appearing against the accused must be put to him in order to afford him an opportunity of explaining those circumstance. The trial Court is duty bound to question the accused on the evidences and circumstances appearing against him in order to enable the accused to understand the exact case which he is required to meet and whether or not to adduce any evidence in his defence. The material which is not put to the accused is required to be eschewed from consideration. At this stage, we may quote the law laid down by the Hon'ble Apex Court in **Sharad Birdhi Chand Sarda Vs. State of Maharashtra (AIR 1984 SC 1662)** wherein it is held thus:

“As these circumstances were not put to the Appellants in their statement under Section 313 of the Code of Criminal Procedure they must be completely excluded from consideration because the Appellants did not have any chance to explain them. This has been consistently held by this Court as far back as 1953, wherein the case of Hata Singh Bhagat Vs. State of Madhya Bharat MANU/SC/0073/1951; AIR 1953 SC 468 this Court held that any



circumstances in respect of which an accused was not examined under Section 342 of the Code of Criminal Procedure cannot be used against him. Ever since this decision there is a catena of authorities of this Court uniformly taking the view that unless the circumstances appearing against an accused is put to him in his examination under Section 342 of Section 313 of the Criminal Procedure Code, the same cannot be used against him... It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court in this view of the matter the circumstances, which were not put to the Appellant in his examination under Section 313 of the Code of Criminal Procedure have to be completely excluded from consideration.”

(Emphasis is supplied by me)

Even in the case of State of Maharashtra Vs. Sukdeo Singh and Another (AIR 1992 SC 2100), their Lordship have observed as follows-

“The trial Judge is not expected, before he examined the



accused under Section 313 of the Code, to sift the evidence regarding any incriminating material to determine whether or not to examine the accused as that material. To do so, would be to prejudice the evidence without hearing the prosecution under Section 314 of the Code. Therefore, no matter how weak or scanty prosecution evidence is in regard to certain incriminating material, it is the duty of the Court to examine the accused and seek his explanation thereon.”

14. In Samsul Haque Vs. State of Assam (AIR 2019 SC 922), it is held thus in para-22 of their Lordships:-

“22. It is trite to say that, in view of the judgments referred to by the learned Senior Counsel, aforesaid, the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem. Apart from the judgments referred to aforesaid by the learned Senior Counsel, we may usefully refer to the judgment of this Court in Asraf Ali V. State of Assam reported in 2008 AIR SCW 5608, Para 13. The



relevant observations are in the following paragraphs:

“21. Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22. The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial Court on an inculpatory material in the prosecution



evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed similar view in S. Harnam Singh V. The State (AIR 1976 SC 2140), while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facets by the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise.”

15. In the matter of Jagat Prasad vs. State of Bihar and another reported in **2022 (1) PLJR 568**, the Hon’ble Division Bench of this Court has taken a brief review of the law on Section 313 of the Code of Criminal Procedure and has held that the circumstances which were never put to the accused in his examination under Section 313 Cr.P.C could not have been used for his conviction and by giving benefit of doubt, the accused came to be acquitted. It is necessary to quote relevant paragraph Nos.68, 69, 70, 71, 74 and 75 which



reads thus:-

“68. The plain reading of Section 313 of the Cr.P.C. would demonstrate that the question under clause (1)(a) is discretionary. It empowers the court to put such questions to the accused as the court considers necessary for the purposes of enabling him personally to explain any circumstances appearing in the evidence against him at any stage without previously warning. However, clause (1) (b) empowers the court to question the accused generally on the day after the witnesses for the prosecution have been examined and before he is called upon for his defence. It casts a duty on court to give an opportunity to the accused to explain the incriminating material against him.

69. In State of U.P. Vs. Mohd. Iqram & Anr, since reported in **AIR 2011 SC 2296**, the Supreme Court held :

“Attention of the accused must specifically be drawn to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Court is under legal



obligation to put all incriminating circumstances before accused to 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. Circumstances not put to the accused in his examination under section 313, cannot be used against him.”

70. In ***Naval Kishore Vs. State of Bihar***, since reported in **(2004) 7 SCC 502**, the Supreme Court observed that the opportunity of examination under section 313 given to the accused is part of a fair trial and if it is done in a slipshod manner, it may result in imperfect appreciation of evidence. In the said case, the Supreme Court further observed that the practice of putting the entire evidence against the accused in a single question and giving an opportunity to explain the same is improper as the accused may not be in a position to give a rational and intelligent explanation.

71. It is well settled that the object of Section 313 of the Code is to enable the accused to explain the circumstances against him in the evidence personally except where the statute



provides otherwise.

74. In my view, since no question was asked from the appellant on the circumstances referred to in the aforesaid paragraph, he did not have any chance to explain those circumstances. The circumstances which were never put to the appellant while examining him under Section 313 of the Cr.P.C. could not have been used for his conviction. Though there was no evidence that the appellant was transporting the narcotic substance in connivance with the drug peddlers from Indo-Nepal border which was being financed by Raj Kumar, the Trial Court put the said question to the appellant. Surprisingly, the circumstances put forth by the witnesses in their testimonies were not brought to the notice of the appellant and the circumstances which have not been led in evidence were put to him while examining him under Section 313 of the Cr.P.C.

75. Thus, on appreciation of the entire evidence, I am of the opinion that there are serious infirmities in the prosecution evidence. Hence, the judgment of conviction and the consequent order of sentence passed by



the Trial Court cannot be sustained.”

16. After perusing the entire evidence adduced by the prosecution, we are of the considered opinion that the circumstances which were appearing in oral as well documentary evidence against the accused which can be pressed in service to record conviction and resultant sentence were not put to the accused by the learned Trial Court by framing simple questions regarding each and every individual circumstance for seeking his explanation on such evidence appearing against him. As the circumstances appearing in evidence against the accused and more particularly in evidence of PW 3 to PW 8 were not put to the accused, he did not have any chance to explain those circumstances and to understand case of the prosecution put forth during the course of the trial against him. Perusal of the questions put up to the accused in his examination under Section 313 Cr.P.C. by the learned Trial Court makes it clear that the learned Trial Court had deprived the accused of the fair trial by abdicating its duty to put every incriminating circumstance separately to the accused for giving him fair opportunity to tender his explanation regarding the same. Rather wrapping up the entire prosecution case in a



cryptic question No. 2 the learned Trial Court had made a farce of examining the accused under Section 313 of the Cr.P.C., without putting incriminating circumstances appearing in evidence of every witnesses examined by the prosecution during the course of trial. Thus, the learned Trial Court has failed to comply its statutory duty as envisaged by mandate of Section 313 Cr.P.C. by indulging in examining the accused in most casual and careless manner and thereby depriving him of an opportunity to explain the circumstances against him appearing in evidence, personally. It is seen that the accused as such could not understood the case of the prosecution and the oral evidence adduced by the prosecution witnesses so also the documentary evidence. The accused as such can not be said to be in a position to give rational and intelligent explanation to the circumstances appearing in evidence adduced by the prosecution and as such prejudice caused to the accused is writ large from the record.

17. To crown this all, the learned Trial Court had not even cared to see that the date and time of the alleged incident is properly put to the accused in his statement under Section 313 of the Cr.P.C. Though according to the prosecution case so also from evidence of prosecution it is revealed that the



incident of dacoity with murder allegedly took place in the night intervening 16.10.2009 and 17.10.2009, the learned Trial Court had mentioned in question No. 2 that the incident took place on 10th October 2009. Thus, it is crystal clear that the learned Trial Court was harbouring an opinion that examination of the accuse under Section 313 of the Cr.P.C. is an empty formality which can be done in the most casual manner. We have serious doubt in our mind that the learned Trial Court must not have formulated the question under Section 313 Cr.P.C. of his own and might not have even cared to see whether those were properly framed giving correct particulars. Nothing further is required to be shown in order to demonstrate prejudice caused to the accused in not properly recording his statement under Section 313 of the Cr.P.C. by the learned Trial Court.

18. Whenever material circumstances are not put to the accused in order to enable him to explain the incriminating evidence appearing against him, the following course of action is available to the appellate Court:

(A). Whenever a plea of non-compliance of Section 313 Code of Criminal Procedure is raised, it is within the powers of the appellate



court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate Court any reasonable explanation of such circumstance, the Court may assume that the accused has no acceptable explanation to offer.

(B). In the facts and circumstances of the case, if the appellate Court comes to the condition that no prejudice was caused or no failure of justice was occasioned, the appellate Court can hear and decide the matter upon merits.

(C). If the appellate Court is of the opinion that non-compliance with the provisions of Section 313 of the Code of Criminal Procedure has occasioned or is likely to have occasioned prejudice to the accused, the appellate Court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under



Section 313 of the Code of Criminal Procedure and the trial Judge can be directed to examine the accused afresh and defence witness if any and dispose of the matter afresh.

(D). The appellate Court may decline to remit the matter to the Trial Court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case may decide the appeal on its own merits, keeping in view the prejudice caused to the accused.

19. In the case in hand, we are of the considered opinion that as prejudice to the accused had occasion because of non-compliance with the provisions of Section 313 of the Cr.P.C., the matter needs to be remanded to the learned Trial Court with a direction for retrial of the accused from the stage of recording of his statement under Section 313 of the Cr.P.C. that is from the point of where the irregularity has occurred and the learned Trial Court needs to be directed to examine the accused afresh and defence witnesses, if any, and then to dispose of the matter afresh.



20. In the result we proceed to pass the following order:

I. The appeal is partly allowed.

II. The impugned judgment and order of conviction and resultant sentence imposed on the appellant-accused is quashed and set aside. The subject sessions case is remanded to the learned Trial Court for retrial from the stage of recording of statement of the accused under Section 313 of the Cr.P.C. The learned Trial Judge is further directed to expeditiously examine the accused afresh under Section 313 of the Cr.P.C. in the light of foregoing observations and to record evidence of defence witnesses, if any, and then to dispose of the sessions case afresh within a period of six months from the date of communication of this judgment.

(A. M. Badar, J)

(Rajesh Kumar Verma, J)

Mkr./-

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