

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.177 of 2004

RAM SAH ALIAS RAM PRASAD SAH, Son of Late Jaggu Sah, resident of
Mohalla-Nathnagar, P.S.-Nath nagar, District -Bhagalpur

... .. Appellant/s

Versus

STATE OF BIHAR

... .. Respondent/s

with
CRIMINAL APPEAL (SJ) No. 292 of 2004

MAHESH SAH ALIAS MAHESH PRASAD SAH, Son of Late Jaggu Sah,
resident of Mohalla-Nathnagar, P.S.-Nath nagar, District -Bhagalpur

... .. Appellant/s

Versus

STATE OF BIHAR

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (SJ) No. 177 of 2004)

For the Appellant/s : Mr.Praveen Kumar, Advocate
: Mr. Diwakar Upadhaya, Advocate

For the Respondent/s : Ms. Anita Kumari Singh, APP

(In CRIMINAL APPEAL (SJ) No. 292 of 2004)

For the Appellant/s : Mr.Praveen Kumar, Advocate
: Mr. Diwakar Upadhaya, Advocate

For the Respondent/s : Ms. Anita Kumari Singh, APP

CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY
ORAL JUDGMENT

Date : 03-10-2024

1. Criminal Appeal (SJ) No. 177 of 2004 is filed
by the appellant Ram Sah alias Ram Prasad Sah and
Criminal Appeal (SJ) No. 292 of 2004 is filed by appellant
Mahesh Sah alias Mahesh Prasad Sah. Both the appeals
are arising out of the common judgment in Sessions Trial
No. 450 of 1989 on the file of learned Additional Sessions



Judge, (Fast Track Court No. 1), Bhagalpur dated 12.03.2004 wherein they are convicted under Section 436 read with 34 of the Indian Penal Code and have sentenced to undergo imprisonment for a period of 10 years. Both the appeals are heard together and a common judgment is being passed. It is pertinent to mention that this Court vide order dated 10.06.2004 enlarged both the appellants on bail.

2. Basing on the Fardbeyan of the informant Ravi Kumar (P.W. 6) a case was registered against one Suresh Sah (Acquitted), Ram Sah alias Ram Prasad Sah and Mahesh Sah alias Mahesh Prasad Sah. The contents of the Fardbeyan disclose that on 18.03.1986 at about 10:00 AM when the informant P.W. 6 was constructing a boundary wall on his own land at Manaskamna Nath Chauk, Kowakoli lane, P.S. Nathnagar, the appellants along with Ram Sah of the same village came to the place of occurrence and started abusing the informant/P.W. 6 in filthy language and also objected P.W. 6 in constructing the wall contending that the alleged land belongs to them.



It is further alleged that the accused Suresh Sah assaulted P.W. 6 and the appellant Mahesh Sah set fire to the house of P.W. 6. On raising alarm by P.W. 6 the neighboring persons reached the place of occurrence, mother of P.W. 6 i.e. P.W. 1 also screamed somehow they managed to get the fire extinguished, meantime several villagers reached to the place of occurrence.

3. Basing on the Fardbeyan an F.I.R. was registered by the A.S.I. vide GR No. 601 of 1986 in Nathnagar Police Station. After completion of investigation a charge-sheet was filed on 08.04.1986 against the appellants as well as against one Suresh Sah. The Chief Judicial Magistrate, Bhagalpur took cognizance for the offences punishable under Section 436 read with Section 34 of the Indian Penal Code and later it was committed to the Court of Sessions on 08.03.1989. During the course of trial, charge under Section 436 read with Section 34 was framed against the appellant and Suresh Sah, read over and explained to them for which the



appellants and Suresh Sah denied the charge and claimed to be tried.

4. During the course of trial Prosecution examined P.Ws. 1 to 11 and Exhibits 1, 1/1, 1/2 and 2 were marked. Exhibit A, B, B₁, B₂ and B₃ were marked on behalf of defence witnesses.

Details of Exhibits marked on behalf of Prosecution Witnesses:-

<u>Exhibit</u>	<u>Details</u>
Exhibit-1	Signature of Ravi Kumar on Fardbeyan
Exhibit-1/1	Signature of Sunil Kumar on Seizure list
Exhibit-1/2	Signature of Arvind Kumar Sah on seizure list
Exhibit-2	Fardebayan in the handwriting of ASI

Details of Exhibits marked on behalf of Defence Witnesses:-

<u>Exhibit</u>	<u>Details</u>
Exhibit-A	Certified copy of Sanaha no. 193/86 dated 14.03.1986
Exhibit-B	Certified copy of order dated 15.01.1979 passed in an objection case no. 146 (not final) apertaining



	to one plot no. 102 of Khata No. 113
Exhibit-B/1	Certified copy of another order dated 12.12.1989 passed in proceeding under Section 107 Cr.P.C. (Mohan Sah vs. Ram Sah)
Exhibit-B/2	Certified copy of order dated 17.03.1980 in Appeal Case No. 309 of 1979
Exhibit-B/3	Certified copy of order dated 18.09.1978 in Survey Case No. 147 (Ramprasad Sah Vs. Mohan Lal)

5. The appellants have filed the documents to prove that there is rivalry between the appellants and informant’s family members, relating to a land dispute.

6. Heard the Learned counsel for the appellants and the Learned Additional Public Prosecutor Ms. Anita Kumari Singh for the State.

7. It is specific contention of the Learned counsel for the appellant that the appellants along with Suresh Sah were charged for the offence punishable under Section 436 of the Indian Penal Code. The trial court acquitted Suresh Sah and convicted the appellants on the same set of fact and did not extended the benefit of doubt to the appellants and therefore, prayed to acquit the appellants



by extending benefit of doubt to them. It is also contended that the presence of P.W. 2 is not established as per the evidence of the informant but the trial Court considered P.W. 2 as an eye witness, even in the absence of evidence which is bad in law. It is further contended by the Learned counsel for the appellants that allegations were also made against one Suresh Sah, but the said Suresh Sah was acquitted and that there are many contradictions in the evidences of the prosecution which clearly prove the innocence of the appellants. It is further urged that prosecution has miserably failed to prove the guilt of the appellants, and therefore, prayed to set aside the judgment and conviction against the appellants. It is also contended by the Learned counsel for the appellants that proper opportunity was not given to the appellants to prove their innocence as the incriminating evidence was not questioned to them during the course of examination under Section 313 of the Code of Criminal Procedure.

8. On the other hand, the Learned Additional Public Prosecutor contended as there was no sufficient



evidence against Suresh Sah so the trial Court has acquitted him, but the evidence of the other witnesses was consistent as to appellants Mahesh Sah and Ram Sah are concerned and therefore, was no error or irregularity in the order of conviction and sentence passed by the trial court and thus, prayed to confirm the judgment of the trial court.

9. The points for determination in this case are as follows:-

(i) Whether the presence of P.W. 2 is corroborated by the evidence of P.W. 1 and P.W. 6 ?

(ii) Whether the Court can tender the evidence of the witnesses (P.W. 4, P.W. 8, P.W. 10 and P.W. 11) ?

(iii) Whether the presence of the alleged eye witnesses is proved from the evidence of P.W. 2 and 6 ?

(iv) Whether the ingredients under Section 436 of Indian Penal Code are proved by



the prosecution to sustain the conviction against appellants ?

(v) Whether the prosecution was able to prove the guilt of the appellants for the offences punishable under Section 436 of the Indian Penal Code beyond reasonable doubt ?

10. In order to answer the points, it is necessary to scrutinize the evidences of prosecution witnesses.

11. P.W. 6 is the injured and informant. P.W. 6 testified that he was constructing the broken part of the boundary wall and his mother (P.W. 1) was making mud mortar and his sister Rajni (P.W. 2) was playing with his younger brother. Meanwhile, the appellants along with Suresh Sah came to the place, abused him and tried to obstruct his work. They hit him with leg, made blows with fist and slapped him. Mahesh Sah set his house on fire. His house is of three rooms, there is also a *veranda* in front of the house which is covered with hay. He used to preserve crops in the *veranda*, which was burnt along with the crops. Several people came and extinguished the fire.



He signed on Fardbeyan which is Exhibit-1 and also identified the signatures of one Sunil Kumar and Arvind Kumar on the Seizure list which which is Exhibit 1/1 and Exhibit 1/2. In the cross-examination, it was admitted by P.W. 6 that there was case pending between them and the appellants. It is also admitted by P.W. 6 that accused are not possessing any weapons in their hand. P.W. 6 further testified that he started constructing the boundary wall at 07:00AM and the accused reached the place at 10:00AM and people were moving to and fro through the path. The appellants and Suresh Sah has set fire, after 5 to 7 minutes of reaching the place and they bet him before setting fire and that he never felt unconscious but fell down. He tried to obstruct the appellants from setting the house on fire but was unable to stop them. P.W. 6 testified that he cannot state whether Title Case No. 147/1979 has proceeded or not? between his father and the appellants and that whether the appellants have registered a case against his father or not and that he was also not aware whether case No. 309/1979 was filed by the appellants



against him, and cannot state about case No. 42/1979 which was between the appellants and him filed under Section 144 of Code of Criminal Procedure. However P.W. 6 admitted that a case was pending between them and the appellant Ram Sah vide Case No. 625/1986 proceeded under Section 107 of Code of Criminal Procedure and that there was a civil case for Khesra No. 102.

12. On perusal of the evidence of PW 6 with that of the Fardbeyan it can be noticed that there are many improvement made by P.W. 6 in his evidence. In the Fardbeyan he only stated that Suresh Sah beat him and Mahesh Sah set fire on his house. But both the appellants as well as Suresh Sah hit him with leg, fist and slapped him. Further the *veranda* was set to fire, where he used to store crops. In the Fardbeyan it was specifically mentioned by the informant that he alone put off the fire, but he testified that many people came to extinguish the fire. Admittedly, there were many cases pending between the appellants and the informant (PW 6). The Fardbeyan



also disclose that after setting fire to the house the mother of P.W. 6 i.e. P.W. 1 came out and raised alarm.

13. The evidence of P.W. 1 i.e. the mother of informant disclose that fire was set to the house at 10:00AM while she was preparing mud mortar to build the wall. The appellants as well as Suresh Sah came to their place and abused and slapped her son Ravi/P.W. 6. It is specifically testified by P.W. 1 that Ram Sah order to set fire to the house. This part of the evidence completely contradicts with that of the evidence of P.W. 6. As per the evidence of P.W. 6, it was Mahesh Sah who set fire to the house. There are major discrepancies from the evidences of P.W. 1 and P.W. 6.

14. In the cross-examination, P.W. 1 stated that at the time of the incident, except her and P.W. 6 no one were present at the place of occurrence. But in the chief examination P.W. 1 spoke about the presence of P.W. 2. The Fardbeyan of P.W. 6 is very much silent about the presence of P.W. 2. On perusal of the evidence of P.W. 1, it is evident that she tried to implicate the appellant Ram



Sah for slapping her son and improves the case stating that P.W. 6 fell unconscious and regain to consciousness only after 1 to 1½ hours. P.W. 6, the injured himself has testified that he never fell unconscious, but fell down due to the blows of fist and hands.

15. The evidence of P.W. 1 contradicts with P.W. 6 as to the manner of attack, at the place of occurrence. Further a major discrepancies/contradiction is that a thatched hut was built at the entrance of the house which was set to fire as per the evidence of P.W. 1. But as per P.W. 6 it was the house set to fire i.e. the main dwelling house. In the cross-examination, it is specifically stated by P.W. 1 that the thatched hut was used by them to sit and sleep and to watch the Brinjal plants grown in the fallow land which was on the northern side her house.

16. It is for the prosecution to prove that the thatched hut was a dwelling house of the informant in order to attract the offence punishable under Section 436 of Indian Penal Code.



17. Furthermore, the evidence of P.W. 2 i.e. the daughter of P.W. 1 and sister of P.W. 6 disclose that appellant Ram Sah ordered to set fire on the house and on that Suresh Sah had set the house on fire which completely contradicts the evidences of P.W. 1 and P.W. 6. The presence of P.W. 2 was not mentioned in the Fardbeyan. Her evidence further disclose that all three accused i.e. Suresh Sah, Ram Sah and Mahesh Sah slapped her brother (P.W. 6) and when that P.W. 1 tried to rescue P.W. 6 from the clutches of the appellants and Suresh Sah, they abused P.W. 1, On raising alarm, many people came to the place of occurrence and they helped in extinguishing the fire. In the cross examination P.W. 2 stated that P.W. 6 fell unconscious and regained consciousness after eight to nine minutes.

18. As stated supra P.W. 6 the informant never admitted that he fell unconscious. Contrary to it, P.W. 1 & P.W. 6 who are alleged to have witnesses the incident stated that P.W. 6 fell unconscious and regained to consciousness at different span of timings. The evidence



of P.W. 2 further disclose that there was a *veranda* to the north of the house where she and her mother used to sit and watch the brinjal field and said *veranda* was set on fire. The evidence of P.W. 1 as to which part of the house which was set on fire, also contradicts with the evidence of P.W. 2 and P.W. 6.

19. The evidence of P.W. 3 disclose that he saw the house on fire and also saw the appellants and Suresh Sah running away and that he was informed by P.W. 1 and P.W. 6 that the appellants and Suresh Sah has set the house on fire and they were assaulted.

20. In the cross-examination P.W. 3 admitted that he stated to the police that Ram Sah and Suresh Sah set the house on fire which is stated to him by P.Ws. 1 and 6. His evidence is nowhere helpful for the prosecution to prove about the alleged incidents of assaulting P.W. 6 or of setting fire to the house. On perusal of the record, it is evident that contradictions were not marked by the Trial Court.



21. The evidence of P.W. 4 Ajay Kumar Sah disclose that he went to coaching centre to study and while returning home he saw the fire on the *veranda* of P.W. 6 and was not aware as to who, set fire to the house or who assaulted P.W. 6. P.W. 4 declared hostile as he did not support the case of the prosecution. However the 161 Cr.P.C. statement of PW 4 was not marked before the Court.

22. The evidence of P.W. 5 Pirthvi Raj Mandal disclose that on the date of occurrence at about 10:00 AM he was working at his field and saw an altercation which took place at the house of P.W. 6, rushed to the place of occurrence and saw the appellants and Suresh Sah hitting P.W. 6 with sharp stick. His evidence cannot be considered as P.W. 6 the injured himself stated that he was only slapped by Suresh Sah. Therefore, the presence of P.W. 5 at the place of occurrence cannot be believed.

23. The evidence of P.W. 7, K.K.P. Singh disclose that on 8.03.1986 at about 10:30AM, P.W. 6 came to police station and gave his oral statement which was



reduced to writing by him and he took the signature of P.W. 6 on the statement. It is specifically testified by P.W. 7 that on his directions ASI-R.K. Yadav, he wrote the Fardbeyan which is Exhibit-2. Further R.K. Yadav investigated the case. It is specifically admitted by P.W. 7 that he has not investigated the case. The best reasons are known to the prosecution as to why ASI-R.K. Yadav was not examined as a witness in this case who investigated the entire case.

24. P.W. 8 is Umanandan Prasad Singh. He is alleged to be one of the eye witnesses was declared hostile as he did not support the case of the prosecution. In the cross-examination, it was stated by P.W. 8 that he did not state to the police that he saw the accused setting fire to the house of P.W. 6 and that the appellants and Suresh Sah were running away from the place of occurrence and that he was informed by P.W. 1 and P.W. 6 that Mahesh Sah set fire to the house and Suresh Sah and Ram Sah assaulted P.W. 6. The 161 Cr.P.C. statement of P.W. 8 is also not marked before the Court. Further, it is testified by P.W. 8



that he saw fire to the west of the house and there is Ram Sah's fallow land to the north there was hut of P.W. 6 and the fire was broken out of the house towards south.

25. P.W. 9 Rakesh Prasad deposed that there was a land dispute between P.W. 6 and the appellants and that he heard about the altercation between both the parties and saw that the appellants and Suresh Sah assaulting P.W. 6 and his family members. Further appellant Ram Sah ordered to set the house on fire upon which set Mahesh Sah set the house on fire.

26. The presence of P.W. 9 at the place of occurrence is neither stated by P.W. 1 or by P.W. 6 who alleged to be present at the place of occurrence. Furthermore, the evidence of P.W. 9 exaggerated by stating that not only P.W. 6 but his family members were also assaulted by appellants and Suresh Sah. In his cross-examination P.W. 9 admitted that he stated to the police that when he reached to the place of occurrence, he saw the appellants and Suresh Sah slapping the family members of P.W. 6 and Ram Sah ordered to set the house



on fire, upon which Mahesh Sah set the house on fire and after that all the three accused ran away towards their house.

27. The evidence of P.W. 10 Arvind Kumar Sah and P.W. 11 Sunil Kumar are tendered. The word “tendered” which was used during the course of examination is new to the criminal law. The word “tender” is only used under Section 306 of Cr.P.C. which reads as “Tender of pardon to accomplice”. It is every surprising how the Trial Court has recorded the word “tendered” in the chief examination for both of the witnesses.

28. On perusal of the entire record, it is evident that the Investigating Officer who investigated the case was not examined before the Court. To prove whether the place of occurrence was a dwelling house or not? It is necessary to reiterate Section 436 of I.P.C. :-

436. Mischief by fire or explosive substance with intent to destroy house, etc. -
Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship or as a



human dwelling or as a place for the custody of property, shall be punished with [imprisonment for life], or with imprisonment of either description for a terms which may extend to ten years, and shall also be liable to fine.

29. As per the ingredients of the Section 436 of Indian Penal Code, mischief should be committed fire or explosive substance, intending to cause destruction to a place of worship, or a dwelling house or any place used for the custody of property. In the present case, there is no evidence on record that to establish that the property set on fire is a human dwelling or the place of custody of the property. On one hand, the evidence of P.W. 2 and 6 disclose, it was the part of *veranda* of the house from where P.W. 1 and 2 used to sit and watch the Brinjal field and on the other hand it was stated that separate thatched hut built on pillars from where P.W. 1 used to sit and watch the brinjal field. Except the sole testimony of P.W. 6, there is no material on record to prove that cereals and rice crops stored were destroyed due to fire.

30. It is apt to refer the judgment of the Hon'ble Apex Court in **Sukhwant Singh Vs. State of Punjab**



reported in (1995) 3 SCC 367 wherein the lordships have interpreted Section 138 of Indian Evidence Act and held as follows:-

“9. - It would, thus be seen that Section 138 (supra) envisages 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. There is, in our opinion, no meaning in tendering a witness for cross-examination only. Tendering of a witness for cross-examination, as a matter of fact, amounts to giving up of the witness by the prosecution as it does not choose to examine him in chief. However, the practice of tendering witnesses for cross-examination in session trials had been frequently resorted to since the enactment of the Code of Criminal Procedure, 1898. The reason behind taking recourse to such a practice, which undoubtedly is inconsistent with Section 138 (supra), is not far to seek. Under that Code as it stood prior to its amendment by Act 26 of 1955 a full-fledged magisterial enquiry was to be held, in a case which was triable exclusively by the court of session or the High Court, in accordance with the



procedure laid down in Chapter XVIII thereof and in that enquiry prosecution was required to examine all its witnesses. Under Section 288 of that Code the evidence of the witnesses so recorded by the Committing Magistrate could be treated, at the discretion of the Sessions Judge, as substantive evidence at the trial. More often than not, the prosecution taking advantage of the above provision, used to ask for and obtain leave of the Sessions Court to treat the depositions of those 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. In other words, the prosecution brought on record of the trial court and relied upon the testimonies of some of the witnesses recorded at its instance before the Committing Magistrate as its evidence during trial and then tendered them for cross-examination by the defence. It will be pertinent to mention here that Act 26 of 1955 which amended the Code of 1898 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.



10.- *The question as to whether such a practice was legal and valid in view of Section 138 (supra) and, if so, to what extent and in what manner it could be adopted came up for consideration by different High Courts.*

11. *In Veera Koravan v. Emperor [AIR 1929 Mad 906 : ILR 53 Mad 69] a Division Bench of the Madras High Court opined that merely tendering of a prosecution witness for cross-examination is not a practice which should be encouraged specially in a murder case as the procedure would be unfair to an accused*

12. *In Sadeppa Gireppa Mutgi v. Emperor [AIR 1942 Bom 37 : ILR 1942 Bom 115] Beaumont, C.J. speaking for the Division Bench of the Bombay High Court opined:*

“The other Kakeri witness is Shambu, (Ex. 34) and a very irregular course was adopted with regard to him. He was tendered for cross-examination. The practice of tendering witnesses for cross-examination, which is no doubt often adopted, is inconsistent with Section 138, Evidence Act, which says that witnesses shall be first



examined-in-chief, and then, if the adverse party so desires, cross-examined, and, if the party calling him so desires, re-examined. It is obvious that if a witness is examined by the defence without having given any evidence-in-chief, he is not being cross-examined, by whatever name the process may be described. The practice of tendering for cross-examination should only be adopted in cases of witnesses of secondary importance. Where the prosecution have already got sufficient evidence on a particular point, and do not want to waste time by examining a witness who was examined in the lower court, but at the same time do not want to deprive the accused of the right of cross-examining such witness, they tender him for cross-examination. But, I think, strictly speaking, the witness ought to be asked by the prosecution, with the consent, of course, of the pleader for the accused, and the leave of the Judge, whether his evidence in the



lower court is true. If he gives a general answer as to the truth of his evidence in the lower court, he can be cross-examined on that. But he must in some way be examined-in-chief before he can be cross-examined. However, the practice of tendering a witness for cross-examination certainly should not be employed in the case of an important eyewitness.”

13. A Full Bench of the Bombay High Court in Emperor v. Kasamalli Mirzalli [AIR 1942 Bom 71 : ILR 1942 Bom 384] approved the opinion of Beaumont, C.J. (supra) and ‘condemned’ the practice of tendering a witness for cross-examination in no uncertain terms.

14. A Division Bench of the Punjab High Court in Kesar Singh v. State [AIR 1954 Punj 286 : 56 Cri LJ 86] after analysing the provisions of Sections 137 and 138 of the Evidence Act, followed the law laid down by the Full Bench of the Bombay High Court in Kasamalli case [AIR 1942 Bom 71 : ILR 1942 Bom 384] and observed:

“The other witness of this fact is Jai Ram PW 21 who was tendered for cross-examination, but he was not



cross-examined. That again in my opinion is no evidence. The law in regard to examination of witnesses is contained in Sections 137 and 138, Evidence Act. There is no provision in that Act for permitting a witness to be tendered for cross-examination without his being examined-in-chief and this practice is opposed to Section 138 of the Act.”

15. *In Dhirendra Nath v. State [AIR 1952 Cal 621 : 53 Cri LJ 1427] a Division Bench of the Calcutta High Court held:*

“There is a type of case where witnesses of a secondary importance who have been examined before the Committing Magistrate are not called before the Sessions Court, because the prosecution considers that it has already had a sufficient body of evidence on the point concerned and then in fairness to the defence, it tenders those witnesses for cross-examination. But the fact that the witness is tendered for cross-examination means and



implies that there has been some examination-in-chief. As far as I can see, the only practical way in which a witness can be tendered for cross-examination is by asking him generally, may be by a single question, in the Sessions Court as to whether the statements made by him before the Committing Magistrate were true and on his answering in the affirmative, tendering the evidence given in the Committing Magistrate's court which would then serve as the examination-in-chief. Unless the examination-in-chief is brought on the record in that fashion, I cannot understand on what the defence will cross-examine the witness tendered for cross-examination. It does not appear from the record in this case that the evidence of the witness before the Committing Magistrate was brought on the record at all. In those circumstances, tendering for cross-examination seems to me to have been almost meaningless."



16. *In Chhota Singh Hira Singh v. State [AIR 1964 Punj 120 : (1964) 1 Cri LJ 350] the Punjab High Court held:*

“Tendering a witness for cross-examination is almost tantamount to giving up a witness. There is nothing in law that justifies such a course. The trial courts adopt this manner of examining witnesses simply to lighten their burden, but it is not realised that in a serious case like the present murder case when the learned trial Judge failed to examine Wazira PW 5, he was very seriously remiss in his duty.”

17. *A Division Bench of the Kerala High Court in Thazhathethil Hamsa v. State of Kerala [AIR 1967 Ker 16 : 1967 Cri LJ 73] observed:*

“In this connection we wish to clarify the mistaken impression which the learned Judge seems to have entertained about the propriety of the procedure adopted by the prosecution in tendering eyewitnesses for cross-examination. PW 10 who had given evidence in the Committing Court as an



eyewitness was tendered for cross-examination in the Sessions Court after he made a bald statement that he has correctly stated all he knew about the incident in the enquiry court. The learned Judge has evidently relied on an observation made by the Patna High Court in Manzurul Haque v. State of Bihar [AIR 1958 Pat 422 : 1958 Cri LJ 931] , to find that such a procedure is proper. But it is really not. The very decision relied on by the learned Judge started by enunciating the principle thus:

‘The practice of tendering witnesses leads to considerable confusion and is to be deprecated. A material witness should not be merely tendered but should be sworn and asked to give evidence by the prosecution. Tendering if at all should be confined to witnesses of secondary importance.’ ”

18. *Thus, it is seen that the Bombay, Kerala, Calcutta, Madras and*



Punjab High Courts have notwithstanding the provisions of Section 288 of the Code of 1898 consistently taken the view that there is no procedure whereby the prosecution is permitted to tender a witness for cross-examination only, without there being any examination-in-chief in relation to which, such a witness can be cross-examined. The practice of tendering a witness for cross-examination has been consistently discouraged and even condemned by these High Courts and in our opinion rightly. Our attention has not been drawn to any judgment of any other High Court which may have taken the contrary view.

19. In State of U.P. v. Jaggo [(1971) 2 SCC 42 : 1971 SCC (Cri) 401 : AIR 1971 SC 1586] which has been referred to and relied upon by the prosecution and the trial court for adopting the procedure of tendering PW 4 and PW 5 for cross-examination only in our opinion, has not been properly appreciated and has been misapplied. That judgment cannot be read to lay down, as a matter of legal proposition, that a witness can be 'tendered' for cross-examination even without there being any examination-in-chief. If there is some earlier statement of the witness recorded by a



competent court or an affidavit filed in the trial court and the witness testifies to the correctness of that earlier statement at the trial, it may (in certain cases of witnesses of a formal nature) as noticed earlier be permissible to tender him for cross-examination after he is sworn to the correctness of the earlier statement, because in that event that earlier statement is treated as the examination-in-chief of the witness but that is not the same thing as tendering a witness for cross-examination only, without there being any examination-in-chief on the record. In Jaggo case [(1971) 2 SCC 42 : 1971 SCC (Cri) 401 : AIR 1971 SC 1586] a Bench of this Court was considering the question whether the mere presentation of an application by the prosecution to the effect that a certain witness had been “won over” was conclusive of the allegation that he had been so “won over” and the prosecution was therefore relieved of its obligation to examine him at the trial. The proposition was negated and it was in that context, that this Court observed:

“On behalf of the appellant it was said that Ramesh Chand was won over and therefore the prosecution could not call Ramesh. The



High Court rightly said that the mere presentation of an application to the effect that a witness had been won over was not conclusive of the question that the witness has been won over. In such a case Ramesh could have been produced for cross-examination by the accused. That would have elicited the correct facts. If Ramesh were an eyewitness the accused were entitled to test his evidence particularly when Lalu was alleged to be talking with Ramesh at the time of the occurrence.”

20. *The Division Bench, therefore, was considering a peculiar fact situation in that case and even in that context it was observed that the witness “could have been produced for cross-examination by the accused” and that “the accused were entitled to test his evidence”. The observations of the Division Bench in Jaggo case [(1971) 2 SCC 42 : 1971 SCC (Cri) 401 : AIR 1971 SC 1586] , therefore, do not support the view that a material witness can be ‘tendered’ for cross-examination only. The observations from a judgment of this Court cannot be read in isolation and divorced from*



the context in which the same were made and it is improper for any court to take out a sentence from the judgment of this Court, divorced from the context in which it was given, and treat such an isolated sentence as the complete enunciation of law by this Court. The judgment in Jaggo case [(1971) 2 SCC 42 : 1971 SCC (Cri) 401 : AIR 1971 SC 1586] has in our opinion been misappreciated and that judgment cannot be interpreted as a sanction from the Supreme Court to the prosecution to adopt the practice of tendering a witness for cross-examination only, without there being any examination-in-chief, in relation to which the witness has to be cross-examined. All that the judgment in Jaggo case [(1971) 2 SCC 42 : 1971 SCC (Cri) 401 : AIR 1971 SC 1586] emphasises is that the mere ipse dixit of the prosecutor that a particular witness has been won over is not conclusive of that allegation and the Court should not accept the same mechanically and relieve the prosecutor of his obligation to examine such a witness. It was for this reason suggested by the Bench that where the prosecution makes such an allegation, it must keep the witness in attendance and produce him to enable the defence to cross-examine such a witness to test



his evidence as well as the allegations of the prosecution and bring out the truth on the record. After the coming into force of the Criminal Procedure Code, 1973, which replaced the Code of 1898, recording of evidence in commitment proceedings has 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 case [(1971) 2 SCC 42 : 1971 SCC (Cri) 401 : AIR 1971 SC 1586] , 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 PW 4 and PW 5 for cross-examination only. Both PW 4 and PW 5 were, according to the prosecution case itself, eyewitnesses 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.”

31. On perusal of the contents of the aforesaid citation in **Sukhwant Singh Vs. State of Punjab** tendering of witness is not at all permissible by Trial Court after the amendment of Criminal Procedure Code , 1973. The Trial Court ought not have permitted the prosecution to tender the evidence of P.W. 10 and 11 and permitted the defence for cross-examination. P.W. 10 and 11 are said to be the witnesses of the Seizure list. Admittedly, P.Ws. 10 and 11 appeared for the first time before the trial court and Magistrate has not recorded the evidence of P.W. 10 and 11 i.e. the Committal Court has not recorded the statement of P.Ws. 10 and 11. Furthermore 161 Cr.P.C. statement of the P.Ws. 10 & 11 are also not on record.



32. The evidences of witnesses including the informant and the alleged eye the witnesses are inconsistent with each other and there are major discrepancies in their evidences which goes to the root of the case of the prosecution and as such the conviction imposed by the Trial Court cannot be sustained.

33. Furthermore, it is noticed that there is a rivalry between the appellants and the informant family members and as such there is every possibility for the informant to implicate false case against the appellants and one Suresh Sah. However, the Trial Court has acquitted Suresh Sah with an observation that there is no material evidence on record against him.

34. On perusal of examination of the accused under Section 313 of Cr.P.C., it is evident that only three common questions were put to the accused which reads as follows:-

Question (1) Have you heard the statement of witnesses?

Answer - No.



Question (2) The allegation against you and the statement of the witnesses that on 18.03.1986 at about 10:00 AM in the morning when the informant Ravi Kumar was building a wall on his land located at Konakori Lane, Champanagar then you surrounded the informant and assaulted him and set the informant's house on fire. What do you say?

Answer – No, it's false.

Question (3) What do you say in your defense?

Answer – I am innocent. I will give evidence in my defense.

35. It is clear from the perusal of record that evidence of the witnesses are inconsistent and contradicting with the each other. The incriminating material against each of the accused was put to them separately to enable them to answer properly.

36. In this context, it is necessary to rely upon the judgment of the Apex Court in **Indrakunwar Vs. State of Chhattisgarh reported in 2023 SCC OnLine SC 1364** wherein their Lordships held that:-



35. A perusal of various judgments rendered by this Court reveals the following principles, as evolved over time when considering such statements.

35.1 The object, evident from the Section itself, is to enable the accused to themselves explain any circumstances appearing in the evidence against them.

35.2 The intent is to establish a dialogue between the Court and the accused. This process benefits the accused and aids the Court in arriving at the final verdict.

35.3 The process enshrined is not a matter of procedural formality but is based on the cardinal principle of natural justice, i.e., audi alterum partem.

35.4 The ultimate test when concerned with the compliance of the Section is to enquire and ensure whether the accused got the opportunity to say his piece.

35.5 In such a statement, the accused may or may not admit involvement or any incriminating circumstance or may even offer an alternative version of events or interpretation. The accused may not be put to prejudice by any



omission or inadequate questioning.

35.6 The right to remain silent or any answer to a question which may be false shall not be used to his detriment, being the sole reason.

35.7 This statement cannot form the sole basis of conviction and is neither a substantive nor a substitute piece of evidence. It does not discharge but reduces the prosecution's burden of leading evidence to prove its case. They are to be used to examine the veracity of the prosecution's case.

35.8 This statement is to be read as a whole. One part cannot be read in isolation.

35.9 Such a statement, as not on oath, does not qualify as a piece of evidence under Section 3 of the Indian Evidence Act, 1872; however, the inculpatory aspect as may be borne from the statement may be used to lend credence to the case of the prosecution.

35.10 The circumstances not put to the accused while rendering his statement under the Section are to be excluded from consideration as no opportunity



has been afforded to him to explain them.

35.11 The Court is obligated to put, in the form of questions, all incriminating circumstances to the accused so as to give him an opportunity to articulate his defence. The defence so articulated must be carefully scrutinized and considered.

35.12 Non-compliance with the Section may cause prejudice to the accused and may impede the process of arriving at a fair decision.

37. In Kalicharan & Ors. Vs. State of Uttar Pradesh reported in (2023) 2 SCC 583 the Hon'ble Apex Court held as follows:-

24. At this stage, we must refer to the requirement of the examination of the accused under Section 313 of CrPC. Section 313 of CrPC 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 sub-section (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.

[(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the



accused as sufficient compliance of this section.]

25. The questions in separate statements of Accused 1 to 4 recorded by the trial court are almost identical. Question 5 is the only question put to them about the evidence adduced against them on the charge of murder of Harpal Singh. Question 5 put to Accused 3 reads thus:

“Question 5 — That it has come up in prosecution evidence that on being exhorted by accused Kalicharan, accused Yaad Prakash fired 4-5 shots at complainant Atar Singh and his family members with his countrymade pistol with intention to kill, that hit complainant's cousin Harpal Singh and he died on the spot. What do you have to say in this regard?”



26. Such a case was not at all made out by the prosecution in the evidence before the court. The material brought on record by the prosecution witnesses (PW 1 and PW 2) is to the effect that Harpal Singh died due to injuries sustained as a result of an attack made by Accused 1, 3 and 4 on him by sharp weapons. These material circumstances brought on record against the accused on which their conviction is based were never put to the accused. What was put to the accused was not the case made out by the prosecution in the evidence. No questions are asked in the Section 313 statement about the post-mortem of the body of Harpal Singh. It is not put to the witness that the cause of death of Harpal Singh was due to haemorrhage and shock as a result of injuries caused by sharp weapons.

27. Questioning an accused under Section 313CrPC is not an empty formality. The requirement of Section 313CrPC is that the accused must be



explained the circumstances appearing in the evidence against him so that accused can offer an explanation. After an accused is questioned under Section 313CrPC, he is entitled to take a call on the question of examining defence witnesses and leading other evidence. If the accused is not explained the important circumstances appearing against him in the evidence on which his conviction is sought to be based, the accused will not be in a position to explain the said circumstances brought on record against him. He will not be able to properly defend himself.

28. In para 21 of the decision of this Court in Jai Dev v. State of Punjab [Jai Dev v. State of Punjab, (1963) 3 SCR 489 : AIR 1963 SC 612] , it was held thus : (SCC pp. 620-21, para 21)

“21. In support of his contention that the failure to put the relevant point against the appellant Hari Singh would affect the final conclusion of the High Court, Mr Anthony has



relied on a decision of this Court in Hate Singh v. State of Madhya Bharat [Hate Singh v. State of Madhya Bharat, 1951 SCC 1060 : AIR 1953 SC 468] . In that case, this Court has no doubt referred to the fact that it was important to put to the accused each material fact which is intended to be used against him and to afford him a chance of explaining it if he can. But these observations must be read in the light of the other conclusions reached by this Court in that case. It would, we think, be incorrect to suggest that these observations are intended to lay down a general and inexorable rule that wherever it is found that one of the points used against the accused person has not been put to him, either the trial is vitiated or his conviction is rendered bad. The examination of the accused person under Section 342 is undoubtedly intended to give him an opportunity to explain any circumstances appearing in the evidence



against him. In exercising its powers under Section 342, the court must take care to put all relevant circumstances appearing in the evidence to the accused person. It would not be enough to put a few general and broad questions to the accused, for by adopting such a course the accused may not get opportunity of explaining all the relevant circumstances. On the other hand, it would not be fair or right that the court should put to the accused person detailed questions which may amount to his cross-examination. The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been



caused to him, that would no doubt be a serious infirmity. It is obvious that no general rule can be laid down in regard to the manner in which the accused person should be examined under Section 342. Broadly stated, however, the true position appears to be that passion for brevity which may be content with asking a few omnibus general questions is as much inconsistent with the requirements of Section 342 as anxiety for thoroughness which may dictate an unduly detailed and large number of questions which may amount to the cross-examination of the accused person. Besides, in the present case, as we have already shown, failure to put the specific point of distance is really not very material.”

29. *In para 145 of the well-known decision of this Court in Sharad Birdhichand Sarda v. State of Maharashtra [Sharad Birdhichand Sarda v. State of*



Maharashtra, (1984) 4 SCC 116 : 1984 SCC (Cri) 487] , it was held thus : (SCC p. 182, para 145)

“145. 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 Criminal Procedure Code, 1973 have to be completely excluded from consideration.”

38. In Naval Kishore Singh Vs. State of Bihar reported in (2004) 7 SCC 502 their Lordships have held as follows:-

5. Counsel for the appellant pointed out that the Sessions Court committed serious error in not properly examining the accused under Section 313 CrPC. Our attention was drawn to the statement taken from the present appellant. Only three questions were put to the appellant. The first question was whether he heard the statement of the



witnesses and the second question was that the evidence given by the witnesses showed that he committed the murder of the deceased and whether he had to say anything in defence. The questioning of the accused under Section 313 CrPC was done in the most unsatisfactory manner. Under Section 313 CrPC the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been produced by the prosecution, should have been put to the accused in the form of questions and he should have been given opportunity to give his explanation. No such opportunity was given to the accused in the instant case. We deprecate the practice of putting the entire evidence against the accused put together in a single question and giving an opportunity to explain the same, as the accused may not be in a position to give a rational and intelligent explanation. The trial Judge should have kept in mind the importance of



giving an opportunity to the accused to explain the adverse circumstances in the evidence and the Section 313 examination shall not be carried out as an empty formality. It is only after the entire evidence is unfurled the accused would be in a position to articulate his defence and to give explanation to the circumstances appearing in evidence against him. Such an opportunity being 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 various decisions of this Court, the importance of questioning the accused under Section 313 CrPC was given due emphasis, e.g. Rama Shankar Singh v. State of W.B. [AIR 1962 SC 1239 : (1962) 2 Cri LJ 296] , Bhalinder Singh v. State of Punjab [(1994) 1 SCC 726 : 1994 SCC (Cri) 462] , State of Maharashtra v. Sukhdev Singh [(1992) 3 SCC 700 : 1992 SCC (Cri) 705] and Lallu Manjhi v. State of Jharkhand [(2003) 2 SCC 401 : 2003 SCC (Cri) 544] .



6. In the present case, the appellant had not raised any contention in the High Court that he was seriously prejudiced by the way in which the Section 313 questioning was done. If this defect in procedure under Section 313 CrPC had been pointed out, the High Court could have very well remitted the case to the Sessions Court for a proper examination. At this stage, we are not inclined to accept this contention of the appellant especially when the accused was not able to show that he was in any way prejudiced by such irregular procedure.

39. In case of Sanatan Naskar and Another Vs. State of West Bengal reported in (2010) 8 SCC 249, the Lordships of Apex Court have held:-

21. The answers by an accused under Section 313 CrPC are of relevance for finding out the truth and examining the veracity of the case of the prosecution. The scope of Section 313 CrPC is wide and is not a mere formality. Let us examine the essential features of this section and the principles



of law as enunciated by the judgments which are the guiding factors for proper application and consequences which shall flow from the provisions of Section 313 CrPC.

22. As already noticed, the object of recording the statement of the accused under Section 313 CrPC is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the court and, besides ensuring the compliance therewith, the court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence



coupled with simpliciter denial or, in the alternative, to explain his version and reasons for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the court is entitled to draw adverse inferences and pass consequential orders as may be called for in accordance with law. The primary purpose is to establish a direct dialogue between the court and the accused and to put every important incriminating piece of evidence to the accused and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.



23. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) CrPC explicitly provide that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence for or against the accused in any other enquiry into or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution.



24. Another important caution that Courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 CrPC as it cannot be regarded as a substantive piece of evidence.

40. In Premchand Vs. State of Maharashtra reported in (2023) 5 SCC 522 the Lordships of Apex Court held as under:-

“13. There is a plethora of judicial pronouncements on consideration of Section 313CrPC, a few of which need to be noted at this stage.

14. A Bench of three Hon'ble Judges of this Court in State of U.P. v. Lakhmi [State of U.P. v. Lakhmi, (1998) 4 SCC 336 : 1998 SCC (Cri) 929] has extensively dealt with the aspect of value or utility of a statement under Section 313CrPC. The object of Section 313CrPC was explained by this Court in Sanatan Naskar v. State of W.B. [Sanatan



Naskar v. State of W.B., (2010) 8 SCC 249 : (2010) 3 SCC (Cri) 814] The rationale behind the requirement to comply with Section 313CrPC was adverted to by this Court in *Reena Hazarika v. State of Assam [Reena Hazarika v. State of Assam, (2019) 13 SCC 289 : (2019) 4 SCC (Cri) 546]* . Close on the heels thereof, in *Parminder Kaur v. State of Punjab [Parminder Kaur v. State of Punjab, (2020) 8 SCC 811 : (2020) 3 SCC (Cri) 914]* , this Court restated the importance of Section 313CrPC upon noticing the view taken in *Reena Hazarika [Reena Hazarika v. State of Assam, (2019) 13 SCC 289 : (2019) 4 SCC (Cri) 546]* and *M. Abbas v. State of Kerala [M. Abbas v. State of Kerala, (2001) 10 SCC 103 : 2002 SCC (Cri) 1270]* .

15. *What follows from these authorities may briefly be summarised thus:*

15.1. *Section 313CrPC [clause (b) of sub-section (1)] is a valuable safeguard in the*



trial process for the accused to establish his innocence.

15.2. Section 313, which is intended to ensure a direct dialogue between the court and the accused, casts a mandatory duty on the court to question the accused generally on the case for the purpose of enabling him to personally explain any circumstances appearing in the evidence against him.

15.3. When questioned, the accused may not admit his involvement at all and choose to flatly deny or outrightly repudiate whatever is put to him by the court.

15.4. The accused may even admit or own incriminating circumstances adduced against him to adopt legally recognised defences.

15.5. An accused can make a statement without fear of being cross-examined by the



prosecution or the latter having any right to cross-examine him.

15.6. The explanations that an accused may furnish cannot be considered in isolation but have to be considered in conjunction with the evidence adduced by the prosecution and, therefore, no conviction can be premised solely on the basis of the Section 313 statement(s).

15.7. Statements of the accused in course of examination under Section 313, since not on oath, do not constitute evidence under Section 3 of the Evidence Act, yet, the answers given are relevant for finding the truth and examining the veracity of the prosecution case.

15.8. Statement(s) of the accused cannot be dissected to rely on the inculpatory part and ignore the exculpatory part and has/have to be read in the whole, inter alia, to test the authenticity of the exculpatory nature of admission.



15.9. If the accused takes a defence and proffers any alternate version of events or interpretation, the court has to carefully analyse and consider his statements.

15.10. Any failure to consider the accused's explanation of incriminating circumstances, in a given case, may vitiate the trial and/or endanger the conviction.

16. Bearing the above well-settled principles in mind, every criminal court proceeding under clause (b) of sub-section (1) of Section 313 has to shoulder the onerous responsibility of scanning the evidence after the prosecution closes its case, to trace the incriminating circumstances in the evidence against the accused and to prepare relevant questions to extend opportunity to the accused to explain any such circumstance in the evidence that could be used against him. Prior to the amendment of Section 313 in 2009, the



courts alone had to perform this task. Instances of interference with convictions by courts of appeal on the ground of failure of the trial court to frame relevant questions and to put the same to the accused were not rare.

17. For toning up the criminal justice system and ensuring a fair and speedy trial, with emphasis on cutting down delays, Parliament amended Section 313 in 2009 and inserted sub-section (5), thereby enabling the court to take the assistance of the Public Prosecutor and defence counsel in preparing such questions [the first part of sub-section (5)]. Ideally, with such assistance (which has to be real and not sham to make the effort effective and meaningful), one would tend to believe that the courts probably are now better equipped to diligently prepare the relevant questions, lest there be any infirmity. However, judicial experience has shown that more often than not,



the time and effort behind such an exercise put in by the trial court does not achieve the desired result. This is because either the accused elects to come forward with evasive denials or answers questions with stereotypes like “false”, “I don't know”, “incorrect”, etc. Many a time, this does more harm than good to the cause of the accused.

41. On perusal of all the above citation, it is evident that the object of examination of the accused under Section 313 of Cr.P.C. is to give him a fair opportunity to enable him to explain the circumstances and the explanation furnished by the accused cannot be the sole basis for conviction.

42. In light of the above principles, all the accused persons should have a fair opportunity to answer the incriminating evidence and circumstances.

43. Admittedly, in the present case only three common question were asked to appellants and Suresh Sah contending that the prosecution witnesses have stated



that the appellants have committed the offence under Section 436 of I.P.C. On appreciation of entire oral and documentary evidence, it is evident that the appellants have also brought on record Ext. A/1, B/1, B/2 and B/3 which disclose that there was rivalry between the informant family members and the appellants, pertaining to land disputes. Further the evidence of P.W. 1, 2 and 6 is inconsistent with each other, as to the manner in which the incident took place, and the presence of other alleged witnesses i.e. P.Ws. 4, 8, 10 & 11 is not believable. Furthermore, prosecution has miserably failed to prove the guilt of the appellants for the offences punishable under Section 436 of Indian Penal Code beyond reasonable doubt. In the absence of proper evidence, the conviction against the appellants shall not hold good and it is liable to be set aside.

44. As discussed supra, the appellants were not given fair opportunity to deny the incriminating evidence of the prosecution as Section 313 examination.



45. In view of the above, the conviction of the appellants Ram Sah and Mahesh Sah in Sessions Trial No. 450 of 1989 and the conviction and sentence imposed by the Trial Court dated 12.03.2004 on the file of Learned Additional Sessions Judge, (Fast Track Court No. 1), Bhagalpur is hereby set aside and the appellants are hereby acquitted from the above said offence. The bail bond of the appellants shall stand cancelled.

46. In result both the appeals are hereby allowed.

(G. Anupama Chakravarthy, J)

amitkr/-

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