

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.705 of 2004

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1. Maheshwar Mandal, S/o Late Madho Mandal
 2. Nitu Mandal, S/o Maheshwar Mandal
 3. Brajesh Kumar Mandal, S/o Sri Maheshwar Mandal
- All are resident of Village-Bahalirpur, P.S.-Bariyarpur, District-Munger.

... .. Appellants

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s	:	Mr. Y.V. Giri, Senior Advocate Mr. Rakesh Kumar Sinha, Advocate
For the Respondent/s	:	Mr. A.M.P. Mehta, APP

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
CAV JUDGMENT

Date : 19-04-2024

This appeal has been preferred by the appellants/convict under Section 374(2) of the Code of Criminal Procedure (hereinafter referred to as 'the Code') challenging the judgment of conviction and order of sentence dated 28.09.2004 passed by learned 7th Additional Sessions Judge, Munger in Case No.377 of 1997, whereby the concerned Trial Court has convicted the appellants/convict for the offence punishable under Section 436 and 447 of the Indian Penal Code (for short 'IPC') and sentenced to undergo rigorous imprisonment for seven years and fine of Rs.2,000/- and in default of payment of fine, to further undergo rigorous imprisonment for one year under Section



436 of the IPC and they have also sentenced to fine of Rs.500/- for the offence under Section 447 of the IPC and in default of payment of fine, to further undergo simple imprisonment for one month.

2. The case of prosecution is based on written report of informant (PW-9), namely, Dharmendra Kumar Sharma filed before S.H.O., Bariarpur Police Station in which it is alleged that on 21.04.1996 at 8.45 am, the appellants/accused, namely, Maheshwar Mandal, Brajesh Mandal and Nitu Mandal came to his house and started to barricade the land of informant by bamboos and wire. Upon information given by Ashish, informant rushed there and saw that the appellants/accused were barricading his land. He along with his family members objected it. The appellants/accused were threatened to set his house on fire. Thereafter, the appellant Nitu Mandal went to house and come back with kerosene oil in bottle with match box. Thereafter, the appellants Maheshwar Mandal and Brajesh Mandal put fire in the outer part of the house and fled away from the place of occurrence. Pandit Mistry and Anil Sharma



have seen the appellants when they ran away from the place of occurrence.

3. On the basis of aforesaid written information, Muffasil (Bariyarpur) P.S. Case No.102 of 1996 has been registered for the offence punishable under Sections 447 and 436 read with 34 of the IPC. After completion of investigation, the charge-sheet bearing No.87 of 1996 dated 26.06.1996 was submitted by the Investigating Officer under Sections 447 and 436 read with 34 of the IPC against the appellants/accused, whereafter, the learned Jurisdictional Magistrate took cognizance of the offence on the basis of materials available on record and after making compliance of Section 207 of the Code, committed the case to the Court of Sessions in view of provision as available under Section 209 of the Code for its trial and disposal on 14.02.1997.

4. The learned trial court on the basis of materials collected during investigation, framed charges under Sections 447 and 436 of the IPC against the appellants/convict, which they pleaded "not guilty" and claimed trial.



5. To substantiate its case, the prosecution has examined altogether eleven witnesses. They are:- (i) PW-1 Ashok Sharma; PW-2 Umesh Sharma; PW-3 Rajkumar Sharma; PW-4 Bindu Devi; PW-5 Rani Devi, PW-5(wrongly numbered) Shakuntala Devi; PW-6 Ashish Kumar, PW-7 Kapildeo Yadav; PW-8 Anil Sharma; PW-9 Dharmendra Kumar; PW-10 Suresh Sah.

6. The defence has examined only one witness, namely, Satya Narain Yadav as DW.

7. Apart from the oral evidence, the prosecution has also relied upon following documents/exhibits in order to prove the charges:-

Exhibit No(s).	List of documents
Exhibit-1	Seizure list.
Exhibit-2	FIR
Exhibit-3	Signature on formal FIR

8. The defence has also relied upon following documents/exhibits on their behalf in order to prove their innocence:-

Exhibit Nos.	List of documents
Exhibit-A	Original <i>kebala</i> dated



	10.07.1959
Exhibit-B	Certified copy of judgment of G.R. No.172 of 1992
Exhibit-C	Certified copy of order dated 27.08.1994 of T.S. No.20 of 1992
Exhibit-D	Certified copy of order dated 20.07.89 of Anchal Adhikari
Exhibit-E	Certified copy of order dated 12.07.90 of 816M/90.

9. The statement of the appellants/accused was recorded under Section 313 of the Code after stating them incriminating evidences/circumstances, as surfaced during the trial, which they denied and shown their complete innocence.

10. After conclusion of trial, the Trial Court has convicted and sentenced the appellants/accused in the manner as stated aforesaid. Being aggrieved with the aforesaid judgment and order, the appellants/convict has preferred the present appeal.

11. Hence, the present appeal.

12. Mr. Y.V. Giri, learned senior counsel while appearing on behalf of the appellants/convict submitted that



with available set of evidence, it cannot be said beyond reasonable doubt that prosecution has established its case for the charges as framed during the trial. In support of his submission, learned senior counsel submitted that informant of this case not appears to be an eye-witness of the occurrence, as he was called on place of occurrence by Ashish Kumar (PW-6) and by that time, alleged occurrence has already taken place. It is further submitted that seizure list was not proved during the trial. Learned senior counsel further submitted that Investigating Officer of this case did not examined and, therefore, the place of occurrence could not established in this case. It is also submitted that due to non-examination of Investigating Officer, the appellants/accused have failed to exercise his valuable right of defence, as they could not contradict the version of prosecution witnesses, which was drawn as attention regarding manners and relevant facts *qua* occurrence. It is further submitted that version of eye-witnesses are appearing contradictory, which altogether suggest that no such occurrence took place and out of property dispute, the



present false implication was made. While concluding argument, it is submitted by learned senior counsel that most importantly prosecution has failed during the trial as dwelling house in issue was not established as **"ordinarily used"** for the purpose of dwelling unit within the meaning of Section 436 of the IPC and moreover examination of accused/appellants under Section 313 of the CrPC was done in most cryptic and mechanical manners.

13. In view of aforesaid factual submissions, it is submitted that impugned judgment of conviction and order of sentence are liable to quashed and set aside.

14. Mr. A.M.P. Mehta, learned APP for the State while opposing the present appeal submitted that several prosecution witnesses have supported the occurrence as an eye-witness, where they categorically stated that who brought the match box and kerosene oil and by whom the dwelling house was put on fire. It is submitted that such a detailed description of occurrence makes version of eye witness reliable and trustworthy, without making any room of doubt. It is further submitted by learned APP that place of



occurrence is not disputed by appellants/accused during the trial and, as such, it cannot be raised at appellate stage but, he fairly conceded that Investigating Officer of this case could not be examined during the trial.

15. It appears apposite to discuss the prosecution witnesses for the purpose of re-appreciation of evidence, which requires for the just and proper disposal of the present appeal.

16. At the outset, it is pertinent to mention that the Trial Court has recorded the numbering of witnesses in incorrect sequence onward PW-5 as Shakuntala Devi was also numbered as PW-5. Therefore, onward Shakuntala Devi, it is to be read as PW-6, like so other witnesses, Ashish Kumar be read as PW-7, Kapildeo Yadav as PW-8, Anil Sharma as PW-9, Dharmendra Kumar as PW-10 (informant) and Suresh Sah as PW-11.

17. From the Exhibit-2 and testimony of prosecution witnesses including the informant (PW-10), it appears that present occurrence took place in the background of land dispute for which title suit was pending



before the learned trial court, bearing Title Suit No.20/92, pending before the learned court of Munsif, District-Munger.

18. From the deposition of PW-10 through examination-in-chief itself, it appears that occurrence is of 21.07.1996, which took place at about 8:45 am, where as per FIR, the date of occurrence is 21.04.1996 and almost all prosecution witnesses supported that occurrence is of 21.04.1996. This material contradiction creates a doubt regarding entire occurrence at its first instance. It further appears from the deposition of informant that by the time of occurrence, he was in police station for lodging of '*sanha*' (informatory petition under Section 39 of the CrPC) but, from the face of FIR, it appears that occurrence is of 21.04.1996 at 9:00 am when PW-10/informant was in nearby village at the residence of one Mantu Mandal in connection with a work-contract, where he was informed by his nephew, namely, Ashish Kumar (PW-7) regarding the occurrence. This version of FIR also appears contradicted in view of deposition as made by PW-10 before the trial court. PW-10 also affirmed that a Title Suit No.20 of 1992 is



pending about disputed piece of land. He denied the suggestion that on disputed piece of land, there is a house of co-accused Maheshwar Mandal as per pending civil suit. In terms of FIR (Exhibit-2), it appears that it was appellant/accused Nitu Mandal, who came with bottle of kerosene oil and match-box at place of occurrence, Maheshwar Mandal sprinkled kerosene oil to outcorner of the cottage/house and Brajesh Mandal put it on fire, whereas from the deposition of informant/PW-10, who claims to be an eye-witness of the occurrence, it appears that Mahesh asked to bring kerosene and match-box, Nitu Mandal brought match-box, Maheshwar Mandal sprinkled kerosene oil and Brajesh put it on fire. These contradictory versions creates a doubt also regarding the manner in which the occurrence alleged to be taken place.

19. PW-1, namely, Ashok Sharma, who is the brother of informant, came to the place of occurrence when the house in issue already put on fire. He came to know about the occurrence in details from his wife and, as such, he is a hearsay witness of the occurrence.



20. Similarly, PW-2, Umesh Sharma, also came to know regarding occurrence from one unknown boy of the village and when he came to the place of occurrence, by that time, the house in issue was already put on fire and he also came to know about the details of occurrence from his wife. He is also a hearsay witness.

21. Same is also about PW-3, namely, Raj Kumar Sharma. PW-3 admitted that he was a witness in a criminal case, where accused/appellant Maheshwar Mandal was the accused. All three witnesses are not the eye-witness of the real occurrence attributing specific overt act through FIR authored by PW-10.

22. PW-4, namely, Bindu Devi, who is the wife of PW-2 Umesh Sharma. She claimed to be present at the time of occurrence in her house. She specifically stated that Nitu Mandal brought kerosene oil and match-box, Maheshwar Mandal sprinkled it on the out-corner of the house and Mithilesh took match-box from Nitu Mandal and put the house on fire. It is important to note that there is no such accusation available against Mithilesh as per FIR, rather



same appears about accused/appellant, Brajesh Mandal specifically to put house on fire, making a serious contradiction over the entire occurrence. She stated to have made her statement before Investigating Officer and affirmed that she made statement before police that Nitu brought kerosene oil and match-box, Maheshwar Mandal sprinkled kerosene oil to the outer corner of the house and Brajesh put it on fire. She shows her ignorance about any criminal case lodged against her by accused/appellant Maheshwar Mandal.

23. PW-5 is Rina Devi, who is the wife of PW-1, stated that occurrence is of about 21.04.1996, which took place at about 20:30 Hrs. She also stated that Nitu Mandal brought oil without specifying that said oil was kerosene oil and match-box from the house, Maheshwar Mandal sprinkled kerosene oil and Brajesh put it on fire. It was stated by her that within 30 minutes, the entire house was burnt. She failed to disclose about the persons who came to spot for fire-fighting.

24. PW-6 is Shakuntala Devi, who is wife of PW-5



Rajkumar Sharma. She also claims to be an eye-witness of the occurrence and was remained present when occurrence took place. She specifically stated in her examination-in-chief that Nitu brought kerosene oil only, Maheshwar Mandal brought match-box and Brajesh Mandal put the house on fire. It was specifically stated by her that in occurrence, three rooms and veramdah were burnt. She stated that fencing wire and pole were not seized by the police.

25. PW-7 is Ashish Kumar, who is the son of PW-1, namely, Ashok Sharma and nephew of informant/PW-10, who informed about the fencing work by appellants/accused over disputed land. He also claimed to be an eye-witness of the occurrence and stated that Nitu brought kerosene oil, Maheshwar Mandal sprinkled oil and Brajesh put it on fire. He stated to narrate the occurrence in same manner before the police.

26. PW-8 is Kapildeo Yadav, who is a seizure list witness, stated that his signature was obtained on seizure list and arrived at place of occurrence when fire was extinguished. On cross-examination, he stated that the



signature was taken by police and he came to depose before the court at the instance of Ashok Sharma (PW-1).

27. PW-9 is Anil Sharma, who declared hostile by the prosecution. He saw fire in the house of Ashok Sharma (PW-1) but, did not saw anyone to put it on fire.

28. PW-11 is Suresh Sah, who is a formal witness. He stated that he identified the hand-writing of the author of FIR, which on his identification, exhibited as **Exhibit-3**. Upon cross-examination, he stated that the FIR was not written before him.

29. The only defence witness is Satya Narain Yadav, who is silent for entire occurrence rather he appears to support the sale deed, which was executed in favour of appellant/accused Maheshwar Mandal.

30. It would be apposite to quote the provision of Section 436 of the IPC, which is a major offence in the present case, which reads as under:-

"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 term which may extend to ten years, and shall also be liable to fine”.*

(emphasis supplied)

31. From the aforesaid discussion, it appears that PW-1, 2, 3 and informant/PW-10, are own brother, who were in litigating terms for civil and criminal disputes as discussed aforesaid with appellants/accused persons. PW-4, 5 and 6 are the wife of PW-1, 2 and 3. PW-7 is the nephew of PW-10 and also the son of PW-1. All these material witnesses, who supported the occurrence appears highly interested witnesses in terms of pending civil litigation and criminal prosecution. Therefore, their statements are required to be scrutinized strictly.

32. It would be apposite to refer the legal report of Hon'ble Supreme Court in the matter of **Nand Lal v. State of Chhattisgarh, (2023) 10 SCC 470**, which reads as under:-



"32. *Undisputedly, the present case rests on the evidence of interested witnesses. No doubt that two of them are injured witnesses. This Court, in Vadivelu Thevar v. State of Madras [1957 SCC OnLine SC 13], has observed thus:*

"11. ... Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way — it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be



circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial."

33. *It could thus be seen that in the category of "wholly reliable" witness, there is no difficulty for the prosecution to press for conviction on the basis of the testimony of such a witness. In case of "wholly unreliable" witness, again, there is no difficulty, inasmuch as no conviction could be made on the basis of oral testimony provided by a "wholly unreliable" witness. The real difficulty comes in case of the third category of evidence which is partly reliable and partly unreliable. In such cases, the court is required to be circumspect and separate the chaff from the grain, and seek further corroboration from reliable testimony, direct or circumstantial."*

33. In present case, the manner, date and time of occurrence also appears disputed. PW-4 said that house was put on fire by one Mithilesh though, on attention said that it was accused/appellant Brajesh, who put house on fire. As per seizure list witnesses (PW-8) Kapildeo Yadav, it appears that his signature was obtained over seizure list and who came to the court on instance of PW-1. Admittedly, Investigating Officer of this case was not examined during



trial and, therefore, all such contradictions regarding time, manner and date of occurrence could not be tested during the trial and, therefore, non-examination of Investigating Officer in this case is fatal for the prosecution.

34. It would be apposite to reproduce **Para-38** and **39** of the legal report of Hon'ble Supreme Court, as reported in the matter of **Munna Lal v. State of Uttar Pradesh [2023 SCC OnLine SC 80]**, which are as under:-

"38. First, statement of PW-3 under Section 161, Cr.P.C. was recorded nearly 24 days after the incident. Since the Investigating Officer did not enter the witness box, the appellants did not have the occasion to cross-examine him and thereby elicit the reason for such delay. Consequently, the delay in recording the statement of PW-3 in course of investigation, is not referred to and, therefore, remains unjustified. The possibility of PW-3, being fixed up as an eye-witness later during the process of investigation, cannot be ruled out.

39. Secondly, though PW-4 is said to have reached the place of occurrence at 1:30 p.m. on 5th September, 1985 and recovered a bullet in the blood oozing out from the injury at the hip of the dead body, no effort worthy of consideration appears to have been made to



seize the weapons by which the murderous attack was launched. It is true that mere failure/neglect to effect seizure of the weapon(s) cannot be the sole reason for discarding the prosecution case but the same assumes importance on the face of the oral testimony of the so-called eyewitnesses, i.e., PW-2 and PW-3, not being found by this Court to be wholly reliable. The missing links could have been provided by the Investigating Officer who, again, did not enter the witness box. Whether or not non-examination of a witness has caused prejudiced to the defence is essentially a question of fact and an inference is required to be drawn having regard to the facts and circumstances obtaining in each case. The reason why the Investigating Officer could not depose as a witness, as told by PW-4, is that he had been sent for training. It was not shown that the Investigating Officer under no circumstances could have left the course for recording of his deposition in the trial court. It is worthy of being noted that neither the trial court nor the High Court considered the issue of non-examination of the Investigating Officer. In the facts of the present case, particularly conspicuous gaps in the prosecution case and the evidence of PW-2 and PW-3 not being wholly reliable, this Court holds the present



case as one where examination of the Investigating Officer was vital since he could have adduced the expected evidence. His non-examination creates a material lacuna in the effort of the prosecution to nail the appellants, thereby creating reasonable doubt in the prosecution case."

35. From the deposition of prosecution witnesses, those who came over place of occurrence immediately after the occurrence or those who are claiming to be an eye-witness of the occurrence, it nowhere appeared *prima facie* that house, which was put on fire was '**ordinarily used**' as a dwelling unit. The word "**ordinarily used**" means '**normally**' but, version of witnesses failed to satisfy that house constructed over disputed land was normally used as dwelling unit.

36. It would be further apposite to discuss the manner in which the statement of appellants/accused was recorded under Section 313 of the CrPC. From the statement, it nowhere appears that specific evidence as to brought match-box and putting dwelling unit on fire were asked to accused/appellants. It appears to be recorded in



very cryptic and mechanical manner, which is not acceptable under the law.

37. In this context, it would be apposite to reproduce the legal report of Hon'ble Supreme Court as passed in the matter of **Sukhjit Singh v. State of Punjab [(2014) 10 SCC 270]** which is under:-

"10. On a studied scrutiny of the questions put under Section 313 CrPC in entirety, we find that no incriminating material has been brought to the notice of the accused while putting questions. Mr Talwar has submitted that the requirement as engrafted under Section 313 CrPC is not an empty formality. To buttress the aforesaid submission, he has drawn inspiration from the authority in Ranvir Yadav v. State of Bihar [(2009) 6 SCC 595]. Relying upon the same, he would contend that when the incriminating materials have not been put to the accused under Section 313 CrPC it tantamounts to serious lapse on the part of the trial court making the conviction vitiated in law.

11. In this context, we may profitably refer to a four-Judge Bench decision in Tara Singh v. State [1951 SCC 903] wherein, Bose, J. explaining the significance of the faithful and fair compliance with Section 342 of the Code



as it stood then, opined thus:

"30. I cannot stress too strongly the importance of observing faithfully and fairly the provisions of Section 342 of the Criminal Procedure Code. It is not a proper compliance to read out a long string of questions and answers made in the committal court and ask whether the statement is correct. A question of that kind is misleading. It may mean either that the questioner wants to know whether the recording is correct, or whether the answers given are true, or whether there is some mistake or misunderstanding despite the accurate recording. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore



be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand. I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned. In my opinion, the disregard of the provisions of Section 342 of the Criminal



Procedure Code, is so gross in this case that I feel there is grave likelihood of prejudice."

12. *In Hate Singh Bhagat Singh v. State of Madhya Bharat [1951 SCC 1060], Bose, J. speaking for a three-Judge Bench highlighting the importance of recording of the statement of the accused under the Code expressed thus:*

"8. Now the statements of an accused person recorded under Sections 208, 209 and 342, Criminal Procedure Code are among the most important matters to be considered at the trial. It has to be remembered that in this country an accused person is not allowed to enter the box and speak on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would



be free to state in his own way in the witness box."

13. *The aforesaid principle has been reiterated in Ajay Singh v. State of Maharashtra [(2007) 12 SCC 341] in following terms:*

"14. The word 'generally' in subsection (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never



asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give."

38. In view of aforesaid re-appreciation of evidences and settled legal issues, there are several questions, which could not answered by the prosecution during the trial as to establish its case beyond reasonable doubt, the benefit of which must be given to the accused/appellants.

39. Accordingly, the appeal stands allowed.

40. The impugned judgment of conviction and order of sentence dated 28.09.2004 passed by learned 7th Additional Sessions Judge, Munger in Case No.377 of 1997 is, hereby, set aside. The appellants, above-named, are acquitted from the charges levelled against them.

41. Fine, if any, paid by appellants/accused be



returned back immediately.

42. Office is directed to send back the Trial Court
Records along with a copy of the judgment to the learned
Trial Court.

(Chandra Shekhar Jha, J.)

Sanjeet/-

AFR/NAFR	AFR
CAV DATE	18.03.2024
Uploading Date	19.04.2024
Transmission Date	19.04.2024

