

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CRIMINAL APPEAL (SJ) No.687 of 2004**

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Ashique Ansari @ Md. Ashique @ Tunnu Son Of Md. Hanif Ansari Resident  
Of Village Lagurao (Bilandpur) P.S. Mahua, District, Vaishali

... .. Appellant/s

Versus

STATE OF BIHAR

... .. Respondent/s

=====

with  
**CRIMINAL APPEAL (SJ) No. 700 of 2004**

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Rakesh Singh @ Rakesh Kumar Singh S/O Vishwanath Singh, Resident Of  
Village Rusulpur, P.S. Lalganj, District Muzaffarpur

... .. Appellant/s

Versus

STATE OF BIHAR

... .. Respondent/s

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**Appearance :**

(In CRIMINAL APPEAL (SJ) No. 687 of 2004)

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|---------------------|---|----------------------------------------|
| For the Appellant/s | : | Mr. Vindhya Keshri Kumar, Sr. Advocate |
|                     |   | Mr. Neeraj Kumar @ Sanidh. Advocate    |
|                     |   | Mr. Ashwani Raj Narayan, Advocate      |
|                     |   | Mr. Chitragupta, advocate              |
|                     |   | Mr. Soni Kumari, Advocate              |
|                     |   | Mr. Ranjana Sinha, Advocate            |
|                     |   | Mr. Rishabh Chaudhary, Advocate        |
| For the State       |   | Mrs. Anita Kumari Singh, APP           |

(In CRIMINAL APPEAL (SJ) No. 700 of 2004)

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| For the Appellant/s | : | Mr. Vivekanand Singh         |
| For the State       | : | Mrs. Anita Kumari Singh, APP |

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**CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY**  
**ORAL JUDGMENT**  
**Date : 18-09-2024**

1. Criminal Appeal No. 687 of 2004 is preferred

by Ashique Ansari @ Md. Ashique who is arrayed as  
accused No. 2 and Criminal Appeal No. 700 of 2004 is



preferred by Rakesh Singh @ Rakesh Kumar Singh who is arrayed as accused No. 1, in the Sessions Trial No. 433 of 2001 dated 24.09.2004 on the file of V<sup>th</sup> Additional Sessions Judge Fast Track, Vaishali, Hajipur, wherein the appellants were convicted for the offence punishable under Section 363 of the IPC and were sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs. 2000/- each, and in default of payment of fine, to undergo rigorous imprisonment for a period of one month.

2. The case of the prosecution is that on 20.03.2001 at 06:15 P.M. one white Maruti Van came near the door of the informant i.e. P.W. 1 and they stated to the informant that the car broke down and the persons inquired about the garage, for which P.W. 1 informed that the car garage was at Mahua. Thereafter, the informant went inside the house and his son, Naved aged about 3 years, who was outside the house was kidnapped by two persons in the said Maruti van. Basing on the *Fardbeyan*



of the informant an FIR was lodged against four unknown persons.

3. During the course of investigation, the Investigating Officer recorded Section 161 statements of the witnesses. Later found the victim boy at the house of his maternal grandfather, further, apprehended the accused and recorded their confessional statements. On completion of investigation, charge-sheet against both the appellants for the offence punishable under Sections 364A r/w 34 and under Section 120B of the IPC. Charges were framed and explained to both the accused, for which they denied the charges and claimed to be tried.

4. During the course of Trial, on behalf of the prosecutions P.W.s 1 to 10 were examined, C.W. 1 was examined as Court Witness. Both the accused were examined u/s 313 of CrPC and the Trial Court convicted the appellants for the offence punishable under Section 363 of IP and Section 27 of the Arms Act and sentenced them as aforesaid.



**5.** The Learned Senior Counsel Shree Vindhya Keshri Kumar urged that initially FIR was lodged against unknown persons and as to how the names of the appellants were incorporated in the charge-sheet is not at all explained by the prosecution. It is further argued by the Learned Senior Counsel that the conviction and sentence is based on the alleged confession to be made by the appellants, and that there is no discovery pursuant to the confession and, therefore, the conviction is liable to be set aside.

**6.** It is further contended by the Learned Senior counsel that the evidence of independent witnesses did not corroborate with the evidence of the other prosecution witness in any manner i.e. P.W. 1/informant who is the father of the victim boy aged about 3 years, P.W. 2 Javeed Ansari brother of the informant, P.W. 4-father of the informant, P.W. 5, P.W. 6 – co-villager and P.W. 10-Md. Nizamuddin/grandfather of the victim boy. It is further urged that P.Ws. 3, 7 and 8 have turned hostile and did not support the prosecution case. Further, it is contended that



there are contradictions in the evidence of P.W. 9, C.W. 1 (Court Witness) and the Exhibits of the case and therefore, prayed to set aside the conviction and judgment passed by the Trial Court and to acquit the appellants.

7. On the other hand, the Learned Additional Public Prosecutor contended that the victim boy was aged only about 3 years and was not able to identify the appellants. The sole testimony of P.W. 1 cannot be brushed away as he is the natural father of the victim boy and *Fardbeyan* corroborates the evidence of P.W. 2 and P.Ws. 4 and therefore, prayed to dismiss the appeal.

8. Heard arguments of the Learned Senior counsel for the appellants as well as the Learned Additional Public Prosecutor for the State, and perusal the records.

9. On perusal of the record, it is evident that the occurrence took place on 20.03.2001 at about 06:15 P.M. but P.W. 1 mentioned the time in the *Fardbeyan* as 06:30 P.M. However, the FIR was registered at 9:00 P.M..



**10.** Basing on the FIR, the Investigating Officer/P.W. 9 investigated the case and laid a charge-sheet against both the appellants. The record reveals that confessional statement of both the accused persons was recorded and basing on the confessional statements, a charge-sheet was filed.

**11.** The evidence of P.W. 1 Jamil Ansari/ informant disclose that he saw two persons taking away his son from his house on 20.03.2001. He could not identify all persons sitting in the Maruti van, but identified the driver. He further testified that co-villagers informed him that people in the Maruti van spoke with to Md. Ashique i.e. accused No. 2 and that the accused himself has confessed before the police that he committed the crimes.

**12.** In the cross-examination P.W. 1 admitted that he was a contractor in Surat and Md. Ashique and Rakesh i.e. appellants used to work as labourers in Surat and that he cannot state about the number of Maruti van.



**13.** The evidence of P.W. 2 who is brother of P.W. 1 disclose that the son of the informant got kidnapped. The occurrence took place on 20.03.2001 at about 6:00 P.M. Further, his evidence disclose that he witnessed the incident and four persons were sitting in the van. The accused i.e. Md. Ashique s/o Md. Haneef was also with them. His evidence further disclose that the appellant Ashique passed by his house three or four times for no reason and later, he came to know that the son of P.W. 1 got kidnapped in a Maruti van. He stated that police have recorded the confessional statement of the appellant/Aashique on 22.03.2001 who admitted his guilt of committing the offence. His evidence further disclose that kidnapping was done for demand of ransom.

**14.** In his cross-examination, P.W. 2 admitted that he did not informed anyone, that Aashique too was with the unknown persons and also admitted that the informant has not paid any amount to either of the appellants.

**15.** P.W. 3 Ram Bahadur Giri, is one of the co-villager, who was declared as hostile.



**16.** P.W. 4 is father of the informant i.e. P.W. 1, his evidence also disclose that he witnessed the incident that two people carried Naved, the victim aged about 3 years into the Maruti van and that the kidnapping was done for ransom. The cross-examination of P.W. 4 was deferred on the day and later he was not cross-examined. Later, a petition was filed under Section 311 of the Cr.P.C. to recall for the cross-examination of P.W. 4. In the cross-examination, it was deposed by P.W. 4 that he was at his house, when the van stopped and his statement was recorded at 8:00 P.M. by police on 20.03.2001 and in his statement he stated to the police that Naved who was outside the house was apprehended and was put into the vehicle by the persons sitting in the van and that he stated to the police that he does not know the names of the persons who apprehended the boy.

**17.** P.W. 5-Mahesh Singh testified in his cross-examination that he is not the eye-witness of the occurrence and could not say through whom, he came to know about the incident.



**18.** P.W. 6-Anil Kumar Singh P.C. No. 473 was examined only to mark exhibit 2 i.e. formal FIR which was recorded by ASI Md. Asgar Ali, Mahua Police Station. In the cross-examination, it is admitted by P.W. 6 that he is not author of the FIR and *Fardbeyan* was not recorded in his presence.

**19.** P.Ws. 7 and 8 did not support the case of the prosecution in any manner and they were declared as hostile.

**20.** P.W. 9-Mani Lal Rana is the Investigating Officer in this case. His evidence disclose that he took the charge of investigation, inspected the place of occurrence and recorded the statement of the witnesses.

**21.** It is specifically testified by P.W. 9, that confessional statement of accused was recorded by Police Station In-charge and after conducting the investigation as ordered by the Senior officials, he laid the charge-sheet against the accused. His evidence clearly disclose that the at place of occurrence, where informant's house is situated, there lies an empty land to its west four unknown



offenders have kidnapped Naved and carried him in a Maruti van in direction towards Mahua, Hajipur Road. He further deposed that the statement of Md. Jamil Ansari i.e. P.W. 1 was recorded by the I/c of Mahua Police Station i.e. Manoj Kumar and the said statement is Exhibit 3. In the cross-examination, P.W. 9 desposed that he recorded the statement of P.W. 2 Javed Ansari, but P.W. 2 did not state that the appellant Ashique was amongst the four persons, however, P.W. 2 stated that he saw four persons talking with Ashique. Further, P.W. 2 did not state to him that he informed the said fact to P.W. 1. P.W. 9 further testified that he did not found any criminal antecedents against the appellants. Later, he was informed by police station I/c that the victim has been recovered from the house of Nizam Ansari i.e. Mama (Mother's Brother) of Javed Ansari, the kid was left by the criminals near his house and that the said fact was informed to him by one Nizam Ansari. The Investigating Officer further testified that he did not recorded the statements of people living in Noon Wala Road.



**22.** P.W. 10/ Md. Nizamudin testified that Md. Naved was his grand son and he found Naved one month after the occurrence at about 01:00 A.M. in the midnight weeping in front of his house. On the preceding day in the morning, he informed Mahua Police Station about the victim. In the cross-examination, it was testified by P.W. 10 that he was sleeping in his house, when the child was found and he did not saw anyone, except the child.

**23.** On perusal of entire prosecution evidence, it is evident that initially, the FIR was registered against the unknown offenders. Except the confessional statement of the appellants there was nothing incriminating on record against the appellants. Further the victim boy was not recovered from the custody of the appellants, rather he was found at the house of P.W. 10 who in turn informed the police about the victim boy. Moreover, none of the appellants have demanded for any ransom for kidnapping of the victim boy.

**24.** It is relevant to mention that the Trial Court has recorded the evidence of one Mithlesh Kumar as C.W.



1. His evidence disclose that the S.I. Mani Lal Rana / P.W. 9 was posted at Mahua police Station on 22.03.2001 and P.W. 9 recorded the confessional statement of the accused Md. Aashique which is Exhibit 4. Further, the confessional statement of the accused Rakesh Kumar Singh was also recorded by P.W. 9 on 08.06.2001 which is Exhibit 4/1. The Court witness is neither the police official nor the listed witness of the prosecution.

**25.** C.W. 1 is an advocate clerk of Assistant Public Prosecutor Shree Shatrudhan Babu. In the cross-examination C.W. 1 testified that P.W. 9 is alive and is working in another police station and he had no chance to work along with him and never studied with him. He further deposed that the confessional statement of the appellants were not recorded in his presence and he had no personal information about the incident. C.W. 1 also admitted that confessional statements were in different writings and the signature of P.W. 9 was not on the confessional statement of accused Rakesh Kumar Singh.



**26.** This Court is unable to understand as to how the confessional statement of accused were marked as Exhibit 4 and Exhibit 4/1 through an unknown person /C.W. 1. What is the necessity for the Trial Court to examine an advocate clerk as a Court witness? There is no satisfactory reason assigned by the Trial Court as to why the necessity arose for recording the evidence of, an advocate clerk as a Court Witness.

**27.** It is very much necessary to reiterate the provisions of Section 25 of the Indian Evidence Act which reads as follows:-

**Confession to Police Officer not to be proved –**  
No confession made to a Police Officer shall be proved as against a person accused of any offence.

**28.** There is no legal proposition that the evidence of police officials unless supported by independent witnesses is unworthy of acceptance. C.W. 1 is not the witness to the confessional statements of both



the accused. The evidence of P.W. 9 contradicts the evidence of C.W. 1.

**29.** It is specific evidence of Court witness No. 1 that the confessional statements of both the accused were recorded by P.W. 9. On the other hand, P.W. 9 testified that the confessional statements of the accused/appellants were recorded by the Incharge of the Police Station.

**30.** There are five criteria for marking a document:

In order to have a documents marked by the Court as an Exhibit, a party must satisfy the Court that there is sufficient material in order for the Court to arrive at a prima facie view that:-

*(a) The "contents" of the document are proved (i.e. the document exists).*

*(b) The signature or handwriting on the document, if any, are proved (i.e. the document is genuine).*

*(c) In some cases, the witness who seeks to tender the document in evidence has personal knowledge*



*of the document (i.e. that the witness is in a position to prove the accuracy or truth of the contents of the document);*

*(d) The document is not inherently or ab initio inadmissible on some other legal ground (e.g. irrelevance, privilege, non-registration); and*

*(e) The document has been appropriately stamped, if so required by law.*

**31. (a)** In order to prove contents of a document, the witness through whom the document is sought to be tendered must produce the document in court. The Evidence Act provides, in essence, that the "contents" of documents must ordinarily be proved by "primary" evidence

(b). As a second step in getting a document marked, the witness who introduces the document must identify the signature or handwriting on the document, if there is any. The mere production of a document is not sufficient for the document to be marked as an exhibit. Likewise, the proof of signature of a document does not



automatically result in the proof of its contents. The signature/execution of a document can be proved by someone in whose presence the document was signed/executed, or by a person who identifies the signature/handwriting of the person by whom the signature/execution was done with the help of expert witness.

(c). Thirdly, in order to lay a foundation for marking a document, if the document contains any statement(s) of fact, and the party propounding the document relies on the truth or accuracy of those statements, then the witness, who tenders the document must demonstrate personal knowledge and the familiarity of the document. On such cases, the witness tendering the document must ordinarily be the author of the document.

(d). Fourthly, in some cases, irrespective of a party's ability to satisfy the criteria set out above, a law might prohibit some documents from being considered admissible in evidence. Such documents cannot be marked in evidence. Once a document is marked, it



becomes a part of the record and can be considered by the Court. However, the mere marking of a document as evidence does not mean that the document is thereafter to be considered the gospel truth. Marking of document alone will not give any right to read the contents of the documents or about the admissibility of the documents.

**32.** Admittedly, the confessional statement were brought on record through an Advocate clerk/ CW 1 who has no personal knowledge about the officer in charge of Police Station, who recorded it or of that appellants and further the confessional statements were not recorded in the presence of C.W. 1 and no reasons are assigned in the judgment, as to how they have been brought on to record.

**33.** The evidence of P.W. 9 reveal that he investigated the case but he has not recorded the confessional statements of the accused.

**34.** On the other hand, one Manilal Rana, S.I. has recorded the *Fardbeyan* as well as the confessional statements of the accused. Exhibit 4 and 4/1 were not brought on record through P.W. 9. Further a 3<sup>rd</sup> party, an



Advocate Clerk, who was examined as C.W. 1 brought the confession statements of the accused on record.

**35.** Section 25 of the Indian Evidence Act envisages that no confession made to a Police Officer shall be proved against a person accused of any offence. The confessional statement of the accused cannot be made as part of evidence and conviction cannot be sole basis of it. In the present case, basing on the confessional statement made by the accused to Police Officer, the trial Court has convicted the appellants. As stated supra, the confession is hit by Section 25 of Indian Evidence Act. If any information received from the accused leads to any discovery of fact or of discovery of weapon, such discovery may be proved u/s 27 of the Indian Evidence Act. In the instant case, there is no recovery made pursuant to the confession of the accused.

**36.** Admittedly, the victim boy was recovered from the house of the P.W. 10 who is the grandfather of the victim boy. There is no other incriminating material available against the appellants on record, except the



confessional statements, so as to convict the appellant for the offence punishable under Section 366 of IPC. Trial Court has erred in marking the confessional statements of the appellants as Exhibit 4 and Exhibit 4/1. In the landmark case of *Pulukuri Kottaya Vs King Emperor* reported in *1946 SCC Online PC47*, the Privy Counsel has categorically held that how much of the information given by the accused, as to the discovery of any material object can only be taken into consideration and not the entire confession.

37. On perusal of the examination of the accused persons u/s 313 CrPC, it is evident that only two questions were asked to the appellants, and both the questions were common question of the accused persons, though recorded on separate sheet. The questions which that were asked to the appellants are as follows:-

Question 1: It is stated by the witnesses that you, upon hatching a criminal conspiracy in connivance with other accused, kidnapped informant's three year old son namely, Naved from the door of the informant, r/o



Village- Lagurao, P.S. Mahua, District- Vaishali, on 20.03.2001 at around 06:30 P.M. and carried the child with you by a Maruti van for making demand of ransom? Is this statement true ?

Answer- No, it is not true.

(2). What do you have to pray in your defense?

Ans- I am innocent.

Except the abovesaid two questions, there is no other incriminating questions put to the accused in the 313 examination.

**38.** In this context, it is necessary to reiterate the guidelines given by the Hon'ble Apex Court in **Indrakunwar Vs. State of Chhattishgarh** reported in **2023 SCC OnLine SC 1364**, wherein the lordship have held about the importance of Section 313 examination at Para No. 35 and held as below:-

*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. The process benefits of the accused and aids the Court in arriving at a final verdict.*

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

*35.4- The ultimate test when concern with the complaints of the section is to inquire 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 interpretations. The accused may not be put to prejudice to any omission or inadequate questioning.*

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

*35.7- This statement cannot found the sole basis of conviction and is neither*



*a substance to or a substitute peace of evidence. It does not discharge but reduces the prosecution 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 peace of evidence under Section 3 of 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 Section R to be excluded from consideration as no opportunity has been offered 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 defense. The defense so articulated must be carefully scrutinized and considered.*

*35.12- Non-compliance with the section may cause to the prejudice to the accused and may impede the*



*process of arriving at a fair consideration.*

**39. In Prem Chand Vs. State of Maharashtra reported in 2023 5 SCC 522** there lordships of the Hon'ble Apex Court have also reiterated the importance of Section 313 of the Cr.P.C. at Para No. 15, which reads as follows:

*15.1. Section 313 CrPC [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 recognized 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.*

**40.** The citation of the Hon'ble Apex Court Supra, squarely applies to the present case for the facts and circumstances of the case. Bearing the above well-settled principles in mind, every criminal court proceedings under Clause (b) of Sub-Section (1) of Section 313 of Cr.P.C. 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 have to prepare relevant questions to extend opportunity to the accused to explain any such circumstances in the evidence that could be used against him and for the facts that are in the specific knowledge of the accused. If the accused has not satisfactorily explained, then also it cannot be a conclusive guilt against him, but it becomes relevant, while considering the totality of the circumstances.



**41.** In the present case the prosecution has miserably failed to prove the guilt of the accused beyond reasonable doubt for the offence punishable under Section 363 of Cr.P.C. If the alleged confessional statements of the appellants are brushed away, nothing incriminating evidences was to be found against the accused persons.

**42.** Admittedly, incriminating evidence of the prosecution witness is not put the accused u/s 313 examination of the accused. Questioning an accused/appellant under Section 313 of the Cr.P.C. is not an empty formality, the requirement under Section 313 of Cr.P.C. is that the accused must be explained the circumstances appearing from the evidence of the prosecution against him so as to offer an explanation, he must be in a position to defend his case. Furthermore, there is no evidence before the trial Court to prove the guilt of the accused.

**43.** In view of the above discussion, this Court is of the considerable view, that there is no incriminating material against the appellants so as to convict them for



the offence punishable under Section 363 of the IPC and the judgment of the trial Court is liable to be set aside.

44. In result, both the appeals are allowed setting aside the conviction and sentence for the offence punishable under Section 363 of the IPC and further the appellants are acquitted for the offence punishable under Section 363 of IPC.

45. Both the appellants namely Ashique Ansari @ Md. Ashique and Rakesh Singh @ Rakesh Kumar Singh were enlarged on bail by this Court on 14.10.2004 and the bail bonds of the appellants shall stand cancelled.

46. In result, both the appeal are allowed.

(G. Anupama Chakravarthy, J)

Manishkr/-

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