

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.360 of 2019

Arising Out of PS. Case No.-100 Year-2015 Thana- KARAI PARSURAI District- Nalanda

Brijlala Yadav S/o Ayodhya Yadav, Resident of Village Madhwan, P.S.- Karai
Parsurai, District- Nalanda.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Shashank Chandra, Adv. Mr. Shashank Shekhar, Adv. Mr. Ashutosh Kumar, Adv.
For the Respondent/s	:	Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and

HONOURABLE MR. JUSTICE RUDRA PRAKASH MISHRA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RUDRA PRAKASH MISHRA)

Date : 11-09-2024

The present appeal has been filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter to be referred to as 'Cr.P.C.') challenging the judgment and order of sentence dated 02.03.2019 and 06.03.2019 respectively passed by the learned Additional Sessions Judge-1, Hilsa (Nalanda) in Sessions Trial No. 36 of 2016 arising out of Karai Parsurai P.S. Case No. 100 of 2015, whereby and whereunder, the concerned Trial Court has convicted the appellant for the offence punishable under Section 302 of the Indian Penal Code and Section 27 of the Arms Act and the appellant was sentenced to undergo Rigorous Imprisonment for life and also to pay a fine of



Rs. 10,000/- and in default of payment of fine to further suffer Simple Imprisonment of four months for offence under Section 302 of the I.P.C. and Rigorous Imprisonment for five years and also to pay a fine of Rs. 5,000/- and in default of payment of fine, to further suffer Simple Imprisonment for two months for offence under Section 27 of the Arms Act. Both the sentences were directed to run concurrently.

2. The prosecution's case, in brief, as contained in the *fardbeyan* of the Informant/Shankuntala Devi/wife of the deceased, recorded by S.I. Sanjeev Kumar, S.H.O. Karai Parsurai P.S., Dist. Nalanda on 03.09.2015 at 23.20 PM at village Medhwan at Sangam Kumar's house, is that on 03.09.2015 at about 9:30 P.M., she was talking with her husband on the matter of taking *ganja* and some altercation was going on between them. In the meantime, her father-in-law Brijlala Yadav came with a pistol in his hand and asked her husband that he would shoot him. Her *fua sas* Anita Devi intervened and separated them and, thereafter, Sangam Kumar and Brijlala came out from the house. After sometime, her husband again came in the house and went to the roof of house. In the meantime, Brijlala Yadav and Geeta Devi came in the house and went to the roof and Reeta Devi caught hold the waist of



Sangam Kumar and Brijlala Yadav fired on him and caused injury on the chest and he fell down near stairs. It is further alleged that she tried to catch her father-in-law and mother-in-law but, they fled away. On hearing the sound of firing, people nearby came and saw her husband dead near stairs where blood was spread. It is also alleged that since last six months, they were separated in mess from her in-laws and partition had taken place between them and they were living separately in the same house. In the *fardbyan*, the informant has also stated that in presence of Anita Devi, she put her R.T.I. on her *fardbeyan*.

2.1 On the basis of the *fardbeyan* of the Informant, Karai Parsurai P.S. Case No. 100 of 2015 dated 04.09.2015 was instituted for offences under Sections 302/34 of the Indian Penal Code and Section 27 of the Arms Act against the accused/appellant Brijlala Yadav and his wife Reeta Devi.

3. The police, after investigation, submitted the charge sheet only against accused Birjlala Yadav and, after cognizance on 17.12.2015, the case-record was transferred to the Judicial Magistrate, 1st Class who committed the case to the court of learned Sessions Judge on 05.01.2016. Thereafter, the charges u/s 302/34 I.P.C. and 27 Arms Act were framed against the sole accused Birjlala Yadav on 28-01-2016. The accused pleaded not



guilty and claimed to be tried. The appellant in his statement made under Section 313 Cr.P.C. has also totally denied the whole occurrence.

4. To substantiate the case, in oral evidence, the prosecution has examined altogether eleven witnesses viz. P.W.1/Mukesh Kumar, P.W.2/Anita Devi, P.W.3/Rekha Devi, P.W.4 Dharmendra Prasad, P.W.5/Rajnandan Prasad, P.W.6/Umesh Gope, P.W.7/Nand Kishore Kumar, P.W.8/Lalji Prasad, P.W.9/Shakuntala Devi/Informant, P.W.10/Dr. Pramod Kumar Singh and P.W.11/Sanjeev Kumar/I.O.

5. The documents were also proved on behalf of the prosecution which are as hereunder; ***Exhibit 1*** is the postmortem report of the deceased, ***Exhibit 2*** is the formal F.I.R., ***Exhibit 2/1*** is the *fardbeyan* of the Informant Shakuntala Devi, ***Exhibit 3*** is the inquest report and ***Exhibit 4*** is the confessional statement of the accused Brijlala Yadav before the police.

6. Heard Mr. Shashank Chandra assisted by Mr. Shashank Shekhar and Ashutosh Kumar for the appellant and Mr. Sujit Kumar Singh, learned Additional Public Prosecutor for the Respondent-State.

7. Learned counsel for the appellant has submitted that



the evidence of the prosecution witnesses are full of inconsistencies and contradictions on major points and, thus, not fit to be relied upon. He submits that the conviction cannot be based on the basis of the evidence of P.W.9, who is the alleged sole witness of the present case. There is material improvement/suppression/contradiction in the deposition of P.W. 9 from her previous statement i.e. her *fardbeyan* and the statement recorded under Section 161 of the Cr.P.C. which renders the evidence of this witness to be wholly unreliable.

8. In the *fardbeyan*, the P.W. 9 alleges that on the date of occurrence, she had altercation with the deceased as he used to smoke weed but, no such fact has been disclosed by her in the statement recorded during the trial rather at para. 7 of cross-examination, she has denied the fact that her husband used to smoke weed though she had disclosed such fact in the FIR and in her re-statement. At para 7 of the cross-examination, P.W. 9 has stated that on the date of occurrence, except P.W. 9 and her husband, no one was there in the house but, on contrary, in the FIR, this witness has alleged that when the appellant threatened Sangam Kumar, her aunt (*bua* of the deceased) and Anita Devi intervened. Further, she at para 7, again alleges that after 10 minutes when the appellant returned, 10 members were present



in the house before whom incident occurred.

9. The P.W. 9 is also self-contradicted from the fact that at para 7, she has stated that within 10 minutes, there were 10 members of the family in the house, namely, Dharmendra (P.W. 4), Anita (P.W. 2), Rekha (P.W. 3), Ayodhya (not examined), grandmother of the deceased (not examined) etc. but, none of the said witnesses have supported the prosecution version and out of them, P.W. 2, 3 & 4 were declared hostile. Moreover, it is highly improbable that within 10 minutes so many family members will enter the house. In the F.I.R., the Informant has not alleged that she was sitting along with the deceased on the roof of the house rather in examination-in-chief, she has stated the said fact.

10. In para 8 of her cross-examination, the Informant has stated that upon hearing the sound of gunfire, she saw her husband who was shot and was lying on the floor and was dead. When the *fardbayan* of the victim is read with her statement of para 8 of cross-examination, it would manifest that the Informant was not present at the roof when the deceased was shot rather she could be at some other place and came there upon hearing the alleged sound of the gun fire.

11. The Investigation Officer (P.W.11) of the case has also



at Para- 9 of his cross-examination has proved the previous statement of P.W. 9 recorded by the I.O. wherein the said witness has not stated that she was sitting on the roof with her husband.

12. At Para-8 of the cross-examination this witness has clearly stated that blood was spread over the floor and blood marks were also there on her clothes but, the Investigating Officer (P.W. 11) at Para-8 of his cross-examination, has clearly stated that he had not found any blood marks at the place of occurrence.

13. He has further submitted that a close scrutiny of the evidence of P.W. 9 at Para 5 will reveal that she was not residing continuously at her matrimonial house rather she, on several occasions, had gone to her parental house and upon *bidai*, she used to again return to her matrimonial house and then again leave for parental house. This witness has also stated that twice her father has visited her matrimonial house. The aforesaid evidence of P.W. 9 would demonstrate that she was not in good terms with her in-laws and her husband and, as such, she used to stay at her parental house. However, the P.W. 9 at Para 7 has denied the said suggestion.

14. Learned counsel for the appellant further submits that the Hon'ble Apex Court in the case of *Lallu Manjhi and*



Another versus State of Jharkhand reported in (2003) 2 SCC 401 has clearly held that where a witness is neither wholly reliable nor wholly unreliable, the court has to look for corroboration. In the same case, the Hon'ble Apex court has doubted the evidence of sole witness to have been substantially improved during the trial from his previous statement. The Hon'ble Apex Court even doubted the investigation as no site plan of the place of occurrence was prepared, samples of the blood-stained earth were not sent for chemical examination, no effort was made to recover the seized weapon, no witness of the locality has been interrogated and taking into consideration all these things, the Hon'ble Apex Court allowed the Appeal.

15. Learned counsel for the appellant has thus submitted that in the present case also there is substantial improvement in the statement of P.W. 9, statement of co-villagers, who could have been present at the P.O., was not recorded, prosecution witnesses, who would have been naturally present when the occurrence had taken place, have not supported the prosecution case, the weapon was never recovered, the I.O. of the case did not find any blood stain marks, no site plan was prepared and, as such, the prosecution has miserably failed to prove the charge against the sole



appellant specially when the P.W. 9, the sole eye-witness, is a wholly unreliable witness.

16. Learned counsel for the appellant further submits that the statement of the appellant under Section 313 of the Cr.P.C. is defective as the incriminating material, which have come during the trial against the appellant, has not been put to him. The prosecution in the present case has heavily relied upon the testimony of P.W. 9, which according to the prosecution, is an eye witness to occurrence. In the evidence of P.W. 9, the most crucial incriminating material which has come against the appellant, is that P.W. 9 has seen the appellant shooting the deceased on the roof top of the house. However, on perusal of the section 313 Cr.P.C. statement of the Appellant, it appears that the said incriminating material that P.W 9 is the eye witness has not been put to the appellant to explain the said incriminating substance. It is the settled law that the circumstance which are not put to the accused in his examination under section 313 Cr.P.C. cannot be used against him and must be excluded from consideration. Thus, the material/evidence that P.W. 9 is an eye witness to the occurrence having not been put to the appellant has to be excluded from consideration. In support of his submission, he has placed



reliance in the case of *Md. Babar @ Md. Babar Ali versus The State of Bihar, Criminal Appeal (DB) No. 223 of 2019* in which after relying upon the decision of the Hon'ble Apex Court in the case of *Sujit Biswas vs. The State of Assam reported in AIR 2013 SC3817* and also the recent judgment of *Naresh Kumar Vs. State of Delhi reported in 2024 SC online SC1641*, the Hon'ble Apex Court has upheld the aforesaid settled proposition of law.

17. Learned counsel for the appellant further submits that the place of occurrence has not been proved beyond all reasonable doubt as the P.W. 9 at para 8 of her cross-examination has deposed that blood was spread upon the floor at the place of occurrence and the same statement has also been given by P.W. 7 at para 6 of the cross-examination but, the I.O. of the case at para 8 of his cross-examination has clearly deposed that no blood was found at the place of occurrence. Even at Para 10, the I.O. has deposed that no empty cartridge was also found at the place of occurrence and even the sketch map of the P.O was not prepared.

18. He has again submitted that the hearsay evidence of P.W. 1, 7 and 8 are also neither trustworthy nor it is admissible. The aforesaid witnesses are close relatives of the



Informant. The said witnesses have unambiguously deposed that upon receiving telephonic information they reached at P.O. All the three witnesses have given their own version regarding as to who had given the information received by them regarding the occurrence. Thus, P.Ws. 1, 7 and 8 are hearsay witnesses and, as such, their evidence are inadmissible. Moreover, these witnesses, being close relatives of the Informant, are also interested witnesses, especially considering the fact that the relationship of P.W. 9 was not cordial with her in-laws.

19. Learned counsel for the appellant further points out that the evidence of PW-5 supports the case of defence that the appellant had not shot the deceased. He is the brother of the appellant and one of the Inquest Witnesses and has clearly deposed that it remained unknown as to who had killed the Appellant and this witness has not been declared hostile by the prosecution. The Inquest Report also does not disclose that the appellant has shot the deceased even though the Inquest was prepared at 11 PM, soon before the recording of *fardbyan* of the Informant.

20. He again points out that there is neither any recovery of weapon from the appellant nor the I.O. has made any endeavor to recover the same which creates a severe doubt



in the prosecution version.

21. Learned counsel for the appellant lastly submits that no motive has been attributed against the appellant to commit the offence. He submits that although in the FIR, the PW-9 has alleged that altercation between the Informant and the deceased had taken place for the use to smoke weed but, in course of trial, the PW-9 or any other prosecution witness has not levelled any allegation of motive. The appellant is the father of the deceased and, as such, it is highly improbable that he could have committed the present offence without there being any strong motive.

22. *Per contra*, learned A.P.P. appearing on behalf of the Respondent-State supported the impugned judgment and order passed by the Trial Court and contended that the court below has rightly perceived and assessed the evidence on record. The prosecution has proved the case beyond all reasonable doubt. He submits that in the present case, there is neither any inordinate delay in recording of the *fardbeyan*, lodging of the F.I.R. or preparation of the inquest report nor there is any unexplained delay in recording of the statement of P.W.9/the Informant.

23. Learned Additional Public Prosecutor further



submits that the contention of the learned Counsel for the appellant that P.W.9 is wholly unreliable witness is not correct. The testimony of P.W.9 may be kept in the category of neither wholly reliable nor wholly unreliable and in case it is found that her evidence is being corroborated in material particulars by reliable testimony direct or circumstantial and is also corroborated from the postmortem report, this Court would not have any difficulty in accepting the evidence of PW-9 to that extent.

24. In order to appreciate the arguments advanced by the learned counsel for the rival parties and to determine the correctness of the conclusions recorded in the judgment passed by the learned Trial Court, it would be necessary to discuss the evidence adduced by the witnesses examined by the prosecution as well as defence.

25. **P.W.1- Mukesh Kumar** is the cousin brother of the Informant. This witness is not the eye-witness to the occurrence rather is the hearsay witness. He has stated in his evidence that upon receipt of call, he went to Medhawan village along with his family members and saw the dead body of his brother-in-law lying on the roof of his sister's house, sustaining fire-arm injury. In course of cross-examination, he has stated that the dead body



was lying on the roof beside the stairs, corroborating the inquest report and the place of occurrence alleged in the F.I.R.

26. **P.W.2 Anita Devi** who is the sister of the accused though has been declared hostile by the prosecution but, in her examination-in-chief, she has stated that she had seen the dead body of the deceased at the roof of the house of her father.

27. **P.W.3 Rekha Devi** has also been declared hostile by the prosecution but, in her examination-in-chief, she did not say anything about the occurrence or relevant to the occurrence.

28. **P.W.4 Dharmendra Prasad** who is the own full brother of the appellant has also been declared hostile by the prosecution. In his examination-in-chief, he has stated that he had heard about the murder of the deceased and admitted that the deceased was his nephew.

29. **P.W.5 Rajnandan Prasad** is the brother of the appellant and is also not an eye-witness to the occurrence rather is an inquest witness. In his evidence, he has stated that at the time of occurrence, he was gossiping at the house of Rajendra Pandey. He heard about the murder of the deceased and after twenty minutes, he went to the deceased's house and saw his dead body lying on the roof of the house and, after that, he returned to his home. He also stated that the deceased was his



nephew and he saw the fire arm injury on his chest. He has also stated that it remained unknown as to who had killed the deceased.

30. **P.W.6. Umesh Gope** is the nephew of the deceased and has been declared hostile by the prosecution.

31. **P.W.7 Nandkishore Kumar** is the cousin of the Informant Shakuntala. He is not an eye-witness to the occurrence. He has stated that his cousin sister Shakuntala had informed him on phone that her father-in-law and mother-in-law had shot her husband and when he arrived at the place village and went to the house of the deceased and saw the dead body of the deceased lying on the roof and the blood was spread there.

32. **P.W.8 Laljee Prasad** is the father of the Informant. He is also not an eye-witness to the occurrence rather he got information from his daughter Shakuntala Devi that Sangam (deceased) was shot dead by the appellant and, on information, he reached at the village and saw the dead body of Sangam Kumar with fire arm injury on his chest and the dead body was lying on the roof of the house besides the stairs. He has also stated that the police were also present there and the dead body was sent for postmortem.

33. **P.W.9 Shakuntala Devi** is the Informant of the



case and is also the wife of the deceased and is the sole alleged eye witness of the occurrence. In her examination-in-chief, she has stated that on 03.09.2015 at about 9.30 P.M., she was talking with her husband in the house when Brijlala Yadav stepped down from the roof of the house armed with pistol and stated that he would shoot Sangam. Anita Devi separated them and Brijlala and Sangam went out of the house. After sometime, Sangam came in the house and she was sitting with Sangam at the roof of the house where Brijlala and Reeta Devi came and Reeta Devi caught hold the waist of Sangam and Brijlala fired on Sangam and caused injury on the right chest and he fell down.

34. **P.W.10 Dr. Pramod Kumar Singh** is the doctor who had conducted postmortem upon the deceased. He has stated in his evidence that he was posted at Sadar Hospital, Biharsharif as a Medical Officer and, on that day, he conducted autopsy on the dead body of Sangam Kumar at 6:50 A.M. and given the description of the observation made during autopsy which is as follows;

***On external examination** Rigor mortis present in all four limbs. There was a lacerated wound of size 1 inch x 1½ inch x thoracic cavity deep. Inverted margin. Skin charged around the wound, present at right side of chest 1.5 inch above right nipple. Wound of Entry.*



On dissection- Skull - All cranial bones intact. Brain and its meninges intact and pale.

Thorax- Thoracic cavity filled with blood and blood clots. Left lung was lacerated. Metallic pellet of size 1.5 inch x ½ inch resembling bullet was found near the left shoulder joint.

Heart Heart empty.

Abdomen- Stomach contained 4 oz of semi digested food material.

Bladder- Half filled.

Cause of Death- Death occurred due to hemorrhage and shock produced by above mentioned injuries caused by fire arm. Metallic pellet was sealed and labeled and handed over to police constable.

Time elapsed since Death- Within 24 Hrs.

34.1 In the cross-examination, this witness has stated that rigor mortis start to appear 3-4 hrs since death and fully grow up in 16-17 hrs.

35. **P.W.11 Sanjeev Kumar** is the Investigating Officer and then Officer-in-charge of Karai Parsurai police station. During examination-in-chief, he has proved the formal F.I.R., *ferdbeyan* of the Informant, carbon copy of the inquest report and confessional statement of accused Brijlala Yadav and has also adduced in his evidence about the place of occurrence and recording of evidences of prosecution witnesses.

36. In this case, there are total eleven (11) prosecution witnesses and out of which P.Ws. 2, 3, 4 & 6 have been



declared hostile by the prosecution and rest of the P.Ws. 1, 5, 7 & 8 are not the eye-witnesses rather they are hearsay witnesses and, as per prosecution, the so-called eye-witness in this case is the P.W.9/the Informant.

37. On re-appreciation of evidence of the prosecution witnesses particularly the P.W.9/the Informant, there were vital contradictions and inconsistencies in the examination-in-chief and the cross-examination. This Court finds that the P.W. 9 is self-contradicted as at para 7, she has stated that within 10 minutes, there were 10 members of the family in the house, namely, Dharmendra (P.W. 4), Anita (P.W. 2), Rekha (P.W. 3), Ayodhya (not examined), grandmother of the deceased (not examined) etc. but, none of the said witnesses have supported the prosecution version as out of them, P.Ws. 2, 3 & 4 were declared hostile and two of them were not examined by the prosecution. Moreover, it is highly improbable that within 10 minutes so many family members will enter the house. In the F.I.R., the Informant has not alleged that she was sitting along with the deceased on the roof of the house rather in examination-in-chief, she has stated the said fact. Further, in para 8 of her cross-examination, the Informant has stated that upon hearing the sound of gunfire, she saw her husband who



was shot and was lying on the floor and was dead. When the *fardbayan* of the victim is read with her statement of para 8 of cross-examination, it would manifest that the Informant was not present at the roof when the deceased was shot rather she could be at some other place and came there upon hearing the alleged sound of the gun fire. Again, the Investigation Officer (P.W.11) of the case has also at Para- 9 of his cross-examination has proved the previous statement of P.W. 9 recorded by the I.O. wherein the said witness has not stated that she was sitting on the roof with her husband. This Court also finds that at Para-8 of the cross-examination, P.W.9 has clearly stated that blood was spread over the floor and blood marks were also there on her clothes but, the Investigating Officer (P.W. 11) at Para-8 of his cross-examination, has clearly stated that he had not found any blood marks at the place of occurrence.

38. Thus, from overall analysis, it appears that there are material discrepancies between the prosecution case and the prime witnesses in this case being the P.W.9/the Informant and, hence, the prosecution story is not reliable and is demolished in its totality.

39. Conviction on basis of a solitary eye witness is undoubtedly sustainable, if there is reliable, cogent and



convincing evidence in nature along with surrounding circumstances. The evidence of a solitary witness will therefore call for heightened scrutiny. But in the nature of materials available against the appellant on the sole testimony of PW-9, this Court does not consider it safe to accept her statement as a gospel truth in the facts and circumstances of the present case. The possibility of false implication cannot be ruled out completely in the facts of the case.

40. It is a settled proposition of law of evidence that it is not the number of witnesses that matters but, it is the substance. It is also not necessary to examine a large number of witnesses if the prosecution can bring home the guilt of the accused even with a limited number of witnesses. In the case of ***Lallu Manjhi*** (supra), this Court had classified the oral testimony of the witnesses into three categories:-

- a. Wholly reliable;
- b. Wholly unreliable; and
- c. Neither wholly reliable nor wholly unreliable.

In the third category of witnesses, the Court has to be cautious and see if the statement of such witness is corroborated, either by the other witnesses or by other documentary or expert evidence. Equally well settled is the proposition of law that where there is a sole witness to the



incident, his evidence has to be accepted with caution and after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should be cogent, reliable and must essentially fit into the chain of events that have been stated by the prosecution. When the prosecution relies upon the testimony of a sole eye-witness, then such evidence has to be wholly reliable and trustworthy. Presence of such witness at the occurrence should not be doubtful. If the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a foundation of the conviction of the accused.

41. From perusal of the evidences of the prosecution witnesses particularly the P.W.9/the Informant, there were vital contradictions and inconsistencies in the examination-in-chief and the cross-examination. Thus, it appears that there is material discrepancies between the prosecution case and the prime witnesses in this case being the P.W.9/the Informant and, hence, the prosecution story is not reliable and is demolished in its totality. This Court also finds that the Trial Court has failed to differentiate between the minor and material discrepancies in the evidence of the prosecution witnesses and therefore, the Trial Court is not justified in passing the impugned order. The



discrepancies which are not expected on the part of normal person are regarded as material discrepancies. Thus, the Court has to categorize whether the discrepancy, in question, is a material one or of a minor nature. Reliance in this connection may be made to the judgment passed by the Hon'ble Apex Court in the case of ***Sunil Rai alias Pauya & Ors. Vs. Union Territory, Chandigarh, (2011) 12 SCC 258***, Paragraph no.18, being relevant, is quoted herein below:-

“18. To our mind the vacillations in the deposition of PW 9 cannot be brushed aside as “minor discrepancy” especially when it is to form the basis of life sentences to three persons.”

42. Thereafter, the Hon'ble Apex Court has considered the same issue in catena of judgments and the latest one is the judgment passed in the case of ***Md. Jabbar Ali & Ors. Vs. The State of Assam (Cr. Appeal No. 1105 of 2010)*** along with ***Md. Ajmot Ali Vs. The State of Assam (Cr. Appeal No. 1128 of 2010)*** decided on 17.10.2022 wherein the Hon'ble Apex Court, placing reliance on the case of ***State of Rajasthan Vs. Kalki & Anr.*** reported in ***(1981) 2 SCC 752***, has held as follows:-

“52. Further as already stated above, all the witnesses have given contradictory versions as to who gave the fatal blow to deceased Ekkabar Ali and the same amounts to material contradictions. It is reiterated that



the testimony of PW-6 is inconsistent with the testimonies of PW-1, PW-2 and PW-5 This Court in the case of State of Rajasthan v. Kalki & Anr. (1981) 2 SCC 752, distinguished between the normal discrepancies and material discrepancies. This Court held that the Courts have to label as to which category a discrepancy can be categorized. The material discrepancies corrode the credibility of the prosecution's case while insignificant discrepancies do not do so."

43. When the version given by the witness in the Court is different in material particulars from that disclosed in earlier statements, the case of the prosecution become doubtful and not otherwise. The Hon'ble Apex Court in the case of ***Sampath Kumar Vs. Inspector of Police, Krishnagiri*** reported in **(2012) 4 SCC 124**, has also considered the same issue, paragraph nos. 23, 24, 26 and 27 being relevant, reads as follows:-

"23. This Court in Gurdial Singh [(1974) 4 SCC 494 : 1974 SCC (Cri) 530 : AIR 1974 SC 1871] observed: (SCC p. 500, para 21)

"21. The present is a case wherein the prosecution witnesses have come out with two inconsistent versions of the occurrence. One version of the occurrence is contained in the evidence of the witnesses in court, while the other version is contained in their statements made before the police. ... In view of these contradictory versions, the High Court, in our opinion, rightly came to the conclusion that



the conviction of the accused could not be sustained.”

24. Reference may also be made to the decision of this Court in Kehar Singh v. State (Delhi Admn.) [(1988) 3 SCC 609 : 1988 SCC (Cri) 711 : AIR 1988 SC 1883] . This Court held that if the discrepancies between the first version and the evidence in court were material, it was safer to err in acquitting than in convicting the accused.

26. This Court in Vadivelu Thevar v. State of Madras [AIR 1957 SC 614 : 1957 Cri LJ 1000] classified witnesses into three categories, namely, (i) those that are wholly reliable, (ii) those that are wholly unreliable, and (iii) who are neither wholly reliable nor wholly unreliable. In the case of the first category the courts have no difficulty in coming to the conclusion either way. It can convict or acquit the accused on the deposition of a single witness if it is found to be fully reliable. In the second category also there is no difficulty in arriving at an appropriate conclusion for there is no question of placing any reliance upon the deposition of a wholly unreliable witness. It is only in the case of witnesses who are neither wholly reliable nor wholly unreliable that the courts have to be circumspect and have to look for corroboration in material particulars by reliable testimony direct or circumstantial.

27. To the same effect is the decision of this Court in Lallu Manjhi v. State of Jharkhand [(2003) 2 SCC 401 : 2003 SCC (Cri) 544 : AIR



2003 SC 854] , where this Court felt that the testimony of the witness, Mannu (PW 9) could neither be totally discarded nor implicitly accepted. Mannu was a witness who could have been naturally present with his brother while ploughing the field. However, his testimony was found to have been improved substantially at the trial. He was considered neither wholly reliable nor wholly unreliable.”

44. Thus, in view of the observations of the Hon’ble Apex Court, this Court is of the view that the material discrepancies were found in the deposition of the prime witness being P.W.9. Thus, the testimony of the P.W.9/Informant cannot be relied upon and cannot be regarded as trustworthy.

45. Section 313 of Cr.P.C. is one of the beneficial provisions from the perspective of the accused which provides an opportunity to an accused to put his defence against the incriminating circumstances posed by the prosecution against the accused. The general position is that if any incriminating circumstance, appearing against an accused in the prosecution evidence, is not put to him, it should not be used against him and must be excluded from consideration.

46. In the present case, the non-questioning of an accused on the incriminating circumstances by the trial court didn't provide a fair chance for the accused to submit an



explanation against such incriminating circumstances posed against the accused. The error committed by a trial court in not abiding by the provisions of Section 313 of CrPC resulted in a miscarriage of justice for the accused as he was sentenced to life imprisonment after finding him guilty of offence of murder.

47. At this stage, we would like to refer the decision rendered by the Hon'ble Supreme Court in the case of ***Sujit Biswas Vs. State of Assam, reported in AIR 2013 SC 3817***, wherein it has been stated in Para-12 as under:-

“12. It is a settled legal proposition that in a criminal trial, the purpose of examining the accused person under Section 313 CrPC, is to meet the requirement of the principles of natural justice i.e. audi alteram partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination under Section 313 CrPC, cannot be used against him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the



Evidence Act, as the accused cannot be cross-examined with reference to such statement.”

48. We would also like to refer the decision rendered by the Hon’ble Supreme Court in the case of ***Naresh Kumar Vs. State of Delhi, reported in 2024 SCC OnLine SC 1641***, wherein it has been stated in Para-21, 22 & 23 as under:-

“21. We have already held that whether non-questioning or inadequate questioning on incriminating circumstances to an accused by itself would not vitiate the trial qua the accused concerned and to hold the trial qua him is vitiated it is to be established further that it resulted in material prejudice to the accused. True that the onus to establish the prejudice or miscarriage on account of non-questioning or inadequate questioning on any incriminating circumstance(s), during the examination under Section 313, Cr. P.C., is on the convict concerned. We say so, because if an accused is ultimately acquitted, he could not have a case that he was prejudiced or miscarriage of justice had occurred owing to such non-questioning or inadequate questioning.

22. In the light of the above view of the matter, we are inclined to consider the further question whether the non- questioning on the aforesaid twin incriminating circumstances to the appellant during his examination under Section 313, Cr. P.C., had caused material prejudice to him. The decision of this Court in State of Punjab v. Swaran Singh, constrain us to consider one another factor while considering the question of



prejudice. In Swaran Singh's case (supra), this Court held that where the evidence of the witnesses is recorded in the presence of the accused who had the opportunity to cross examine them but did not cross examine them in respect of facts deposed, then, omission to put question to the accused regarding the evidence of such witnesses would not cause prejudice to such an accused and, therefore, could not be held as grounds vitiating the trial qua the convict concerned. We have already found that Anil Kumar (PW-7), Smt. Prem Devi (PW-8), Mrs. Madhu (PW-19) and Anand Kumar (PW-22) have deposed about the said circumstances. A scanning of their oral testimonies, available on record, would undoubtedly reveal that on both the points, on behalf of the appellants they were cross examined.

23. The position, as above, would take us to the last question whether material prejudice was caused to the appellant on account of non-questioning him on the aforesaid incriminating circumstances and thereby depriving him an opportunity to explain. This question can better be considered by referring to paragraph 31 of the judgment of the Trial Court, which virtually got confirmance from the High Court under the impugned judgment. It reads thus:—

“31. As far the part played by accused Naresh is concerned, this has come in the evidence of PWs that he (Naresh) is the man, who called his brother Mahinder and exhorted “Mahender came out and kill them today” and thereafter his taking part in the incident, by catching hold of deceased Arun



Kumar, clearly goes to show the common' intention of the two, i.e. Naresh and Mahinder and even the Learned Defence Counsel, cannot be benefited from the above noted authorities."

49. We have also examined the statement of the accused recorded under Section 313 of the Code. From the said statement, it would reveal that all the incriminating materials/circumstances against the appellant were not put to him and it is a specific case of the appellant/accused that, because of the same, great prejudice has been caused to him. Now, it is well settled that recording of the statement of the accused under Section 313 of the Code is not mere formality and if the prejudice has been caused to the defence by not putting all the incriminating material to him, on this ground also, case of the convict can be considered.

50. Learned counsel for the appellant lastly has drawn the attention of this Court towards the fact that no motive has been attributed against the appellant to commit the alleged offence. The appellant is the father of the deceased and, as such, it is highly improbable that he could have committed the present offence without there being any strong motive.

51. Upon perusal of the entire records, this Court also finds that in this case, no motive has been attributed against the



appellant to commit the offence and, thus, the prosecution has not been able to prove the motive behind the crime. If motive in a case is attributed to an accused and thereafter proved, the probability of the crime being committed by the said accused is intensified. It is for this reason, that in cases of overwhelming circumstantial evidence, proof of motive will be an important piece of corroborative evidence, as well as, form a vital link in the chain of evidence.

52. Section 8 of the Indian Evidence Act, 1872 lays down motive, preparation and previous or subsequent conduct. Any fact is relevant which shows or constitutes a motive for any fact in issue or relevant fact.

53. As per Section 8 of the Indian Evidence Act, evidence may be given of the aforesaid aspect in order to prove/disprove either the existence/non-existence of any “fact in issue” or a “relevant fact”. The law of crimes is built upon the existence of two elements; *Actus reus* (a guilty act); and *Mens rea* (a guilty mind).

54. Under the criminal law, ordinarily motive is irrelevant but once crime is committed, motive becomes important particularly in the case of circumstantial evidence. It means that motive is important to disclose person's mind.



Motive is the moving power which impels one to do the act. It is the inducement for doing the act. Motive by itself is no crime however heinous it may be.

55. In this case, from perusal of the evidence of the prosecution as well as the evidence of the prime witness P.W.9, it appears that the prosecution has not established its case with regard to the motive of the appellant with regard to the murder of the deceased. Although motive is a relevant factor but, it is not the “only” determinative factor.

56. The Hon’ble Apex Court has explained the legal position in the case of ***Sunil Rai*** (supra) which reads as follows:-

“31. In any event, motive alone can hardly be a ground for conviction.

32. On the materials on record, there may be some suspicion against the accused but as is often said suspicion, howsoever, strong cannot take the place of proof.”

57. In this case, it is highly improbable that a father will commit murder of his own son without there being any strong motive for the same. The prosecution has totally failed to prove the case beyond all reasonable doubt and the learned trial court has passed the impugned judgment relying solely on the evidence of a sole witness P.W.9, who is the wife of the



deceased.

58. It is fundamental principle of criminal jurisprudence that it is the duty of the prosecution to prove any criminal case by conclusive proof i.e. “beyond reasonable doubt”. If the prosecution fails to prove its case beyond all reasonable doubt then the benefit of doubt will be given in favour of the accused person. This Court is of the view that since the prosecution has failed to prove its case beyond all reasonable doubt despite which the learned Trial Court has passed the impugned judgment of conviction against the appellant and, thus, the impugned judgment and order passed by the learned Trial Court is liable to be quashed and set aside.

59. In the result, the appeal filed by the appellant is allowed and the impugned judgment and order of sentence dated 02.03.2019 and 06.03.2019 respectively passed by the learned Additional Sessions Judge-1, Hilsa (Nalanda) in Sessions Trial No. 36 of 2016 arising out of Karai Parsurai P.S. Case No. 100 of 2015 is hereby quashed and set aside. The appellant is acquitted of all the charges levelled against him in the instant case.

60. Since, the appellant, named above, is in custody, he is directed to be released from jail forthwith, unless his



detention is required in any other case.

(Vipul M. Pancholi, J)

(Rudra Prakash Mishra, J)

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