

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.875 of 2013

Arising Out of PS. Case No.-109 Year-2007 Thana- DULHIN BAZAR District- Patna

Fudan Singh, S/O Late Mahendra Singh, Resident of Village Lal Bhadsara,
Police Station Dulhin Bazar, District Patna.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :
For the Appellant : Mr. S.K. Lal, Advocate
: Mr. Shivendra Kumar Sinha
For the Respondent : Ms. Shasi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH
and
HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 23-01-2024

This appeal has been preferred by the appellant under Section 374(2) of the Code of Criminal Procedure, putting to challenge a judgment of conviction dated 07.08.2013 and an order of sentence dated 13.08.2013 passed by learned Additional Sessions Judge – IV, Danapur, in Session Trial No. 312 of 2008 arising out of Dulhin Bazar P.S. Case No. 109 of 2007, whereby the appellant has been convicted and sentenced as under:

Criminal Appeal (DB) No. 875 of 2023				
Appellant's Name	Penal Provision	Sentence		
		Imprisonment	Fine (in Rs.)	In default of fine
Fudan	Under Section 302 of the	R.I. for life	10,000/-	R.I. for one year



Singh	IPC			
	Under Section 27 of the Arms Act	R.I for three years	X	X

All the sentences have been ordered to run concurrently.

2. The son of the deceased Sanoj Kumar is the informant, whose *fardbeyan* recorded by Sub-inspector of police Basawan Ram (PW-6) on 19.10.2007 at 05:30 PM near the informant's house, is the basis for registration of the concerned Dulhin Bazar P.S. Case No. 109 of 2007. To allay any confusion, it is noted, at this juncture itself, that the informant was not examined at the trial and another witness of his namesake Sanoj Kumar (PW-2, son of Raja Ram) deposed at the trial. PW-2 is not the informant of the case.

3. The informant alleged that at about 5:00 PM, on the date when the *fardbeyan* was recorded, the informant's father Mohan Lal Mistri was busy cutting hay and the informant was sitting nearby on a *Chowki*. At 5:15 PM, the appellant came using abusive language against the informant's father. The appellant wanted the deceased to bring back his (deceased's) wife. From the contents of the FIR it appears that according to the informant, the appellant had illicit relationship with the informant's mother (wife of the deceased), who had gone to her mother's place. The appellant, because of his such relationship with the wife of the



deceased, wanted her to be brought back. An altercation had taken place between the deceased and the appellant. The appellant was said to have shot at the deceased in his chest and fled away from the place of occurrence. Accordingly, the FIR was registered disclosing the offences punishable under Section 302 of the IPC and Section 27 of the Arms Act against the appellant, as the sole named accused.

4. The police upon completion of investigation submitted charge-sheet, whereupon cognizance was taken and the case was committed to the Court of Sessions. The appellant was arrested in the month of April 2008. The appellant was charged of commission of offences punishable under Section 302 of the IPC and Section 27 of the Arms Act. As the appellant denied the charge, he was put to trial.

5. During the trial, the prosecution examined altogether seven witnesses, namely, Anuj Kumar Singh (PW-1), a minor son of the deceased, who claimed at the trial to be an eyewitness; Sanoj Kumar (PW-2, a hearsay witness), Satyanarain Mistri (PW-3), a nephew of the deceased who claimed that after hearing the sound of gunshot, he had seen the informant chasing the appellant and the appellant fleeing away from the place of occurrence. Another nephew of the deceased, namely, Pintu Kumar deposed as



PW-4, who is hearsay witness. Similarly, PW-5, Jai Prakash Vishwakarma is also a hearsay witness. The Police Officer, who had recorded the *fardbeyan* of the informant and had investigated the case, deposed as PW-6, whereas the Doctor who had conducted the postmortem of the deceased was examined at the trial as PW-7.

6. In addition to the oral evidence of the prosecution witnesses, the prosecution brought on record following documentary evidences to substantiate the charge against the appellant:-

Sl. No.	Details	Exhibit
1.	Signature on the carbon copy of Inquest Report	Exhibit-1
2.	<i>Farbeyan</i>	Exhibit-2
3.	FIR	Exhibit-3
4.	Inquest Report	Exhibit-4
5.	Dead body Challan	Exhibit-5
6.	Postmortem Report	Exhibit-6

7. After appreciating the evidence adduced at the trial, the trial court has held the appellant guilty of the charges punishable under Section 302 of the IPC and Section 27 of the Arms Act by the impugned judgment dated 07.08.2013 and sentenced him to imprisonment and fine by the order of sentence dated 13.08.2013, as noted hereinabove.

8. Mr. S.K. Lal, learned counsel appearing on behalf of the appellant, assailing the impugned judgment and order of the trial court, has submitted that the finding of conviction recorded by



the trial court is based on erroneous appreciation of evidence. He submits that it is manifest from the First Information Report that no person other than the informant can be said to have witnessed the occurrence. There is no reference in *fardbeyan* about the presence of PW-1, the son of the deceased, who, at the trial, claimed to be an eyewitness. He contends that the trial court has wrongly placed reliance on the deposition of PW-1. He submits that whereas, according to the prosecution's case, the *fardbeyan* was recorded on 19.10.2007 and the FIR was registered on the same day but the FIR was received in the Court of learned Magistrate on 23.10.2007. He contends that such unexplained delay is in teeth of Section 157 of the CrPC and gives ample scope of manipulation in the prosecution's case at the stage of registration of FIR itself. He further contends that there has been non-compliance of statutory requirement of Section 313 of the CrPC. The trial court adopted a very casual approach while questioning the appellant under the said provision by putting a vague question to him and has taken into account such aspects in the judgment of conviction, which were not brought to the appellant's notice as incriminating circumstances. He has referred to the evidence of the witnesses and has submitted that it can be easily seen that the appellant remained undefended at the trial,



because of which the witnesses examined at the trial could not be cross-examined on his behalf. He submits that failure on the part of the Court to ensure that legal aid was provided to the appellant in breach of Section 304 of the CrPC, has vitiated the entire trial. He has lastly submitted that on due appreciation of the oral evidence of the prosecution's witnesses, it can be easily seen that the prosecution miserably failed to prove beyond reasonable doubt, the charge of commission of offences punishable under Section 302 of the IPC and Section 27 of the Arms Act.

9. Ms. Shashi Bala Verma, learned Additional Public Prosecutor representing the State has submitted that the evidence of PW-1 may not be discarded only on the ground that he is a child witness. He is a witness to the occurrence who was found to be a competent witness in the opinion of the trial court. She contends that non-examination of the informant is not at all fatal to the prosecution's case in the present facts and circumstances as the informant's brother deposed at the trial as a witness and the oral evidence stands fully corroborated by the medical evidence. She has further submitted that the appellant cannot be said to have remained unrepresented at the trial as he had engaged his counsel to defend him and the arguments were advanced on behalf of the defence after closure of the prosecution's evidence. She submits



that learned counsel for the appellant had chosen not to cross-examine the witnesses and, therefore, it cannot be said there has been breach of the provision under Section 304 of the CrPC. She further contends that the appellant has not been able to make out any case of prejudice having been caused to him because of the alleged non-compliance of Section 313 of the CrPC. She, accordingly, contends that the impugned judgment of conviction suffers from no legal infirmity and does not require interference by this Court.

10. We have perused the impugned judgment and order of the trial court as well the trial court's records. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties.

11. As has been noted hereinabove, at the trial the prosecution examined altogether seven witnesses. PW-1, aged about 11 years deposed in his evidence recorded on 25.08.2008 that he (PW-1), his brother, Sanoj informant (not examined) and his sister were sitting together on the *chowki* when the deceased was shot at by the appellant. The evidence of PW-1 does not appear to be in consonance with the disclosure made by the informant in his *fardbeyan* inasmuch as, he did not mention in his *fardbeyan* that along with him, PW-1 was also sitting on the



Chowki at the time of occurrence. It is also evident that PW-1 was not cross-examined. PW-2 is the witness to the Inquest Report and had not seen the occurrence. PW-3 claimed that he had seen the informant chasing the appellant, who was carrying a firearm, after having heard the gunshot. In his cross-examination, PW-3 admitted that he was deposing at the trial for the first time and his statement was not recorded by the police during the course of investigation. PW-4 and PW-5 are hearsay witnesses. Investigating Officer (PW-6) could not be cross-examined at the trial because of the appellant counsel remained unrepresented.

12. It is significant to note at this juncture that the first prosecution's witness was examined in August 2008. Till November 2008 three witnesses, PW-1 to PW-3 were examined. In February 2009, PW-4 was examined, whereas PW-5 was examined in May 2009. Nearly two and a half years thereafter on 28.09.2011, the Investigating Officer (PW-6) and the Doctor (PW-7) were examined. Both these witnesses could not be cross-examined at the trial because the appellant remained unrepresented at the trial.

13. We find force in the submission advanced on behalf of the appellant that the trial court ought to have ensured that the appellant was duly defended by a pleader, in compliance of



Section 304 of the CrPC. In the present case, we find that the trial court did not make any endeavor to know from the appellant, as to whether there was any requirement to assign a pleader for his defence at the expense of the State. Such failure on the part of the trial court, in this Court's opinion, seriously prejudiced the appellant's case, particularly, as he did not have the opportunity to cross-examine the Investigating Officer.

14. There is yet another glaring lacuna relating to compliance of the provisions under Section 313 of the CrPC, which has rightly been pointed out by the learned counsel appearing on behalf of the appellant. To address the said aspect, it would be appropriate to reproduce the only question, which was put by the trial court to the appellant under Section 313 of the CrPC, which is as under:-

"ऐसा गवाहों का कहना है कि दिनांक 19.10.2007 को आपने ग्राम लाला मदसारा में मोहन लाल मिस्री को गोली मारकर उसकी हत्या कर दिया।"

15. The near translation of the said question would read as under:

"It is said by the witnesses that you have committed murder by shooting the deceased on 19.10.2007."

16. The significance of due compliance of the requirement under Section 313 of the CrPC has been laid down in



catena of decisions of Supreme Court right from the case of ***Hate Singh v. State of Madhya Bharat*** (AIR 1953 SC 468). Section 313 of the Code of Criminal Procedure, 1974 corresponds to Section 342 of the Code of Criminal Procedure, 1898. In case of **Hate Singh** (supra) the Supreme Court laid down, in no uncertain terms, that any circumstance in respect of which an accused was not examined under Section 342 of the CrPC, cannot be used against him.

17. The said view was subsequently followed in case of ***Shamu Balu Chaugule v. State of Maharashtra*** reported in (1976) 1 SCC 438. The Supreme Court noted the fact that the appellant in that case was said to be absconding, not having been put to him under Section 342 of the CrPC, could not have been used against him.

18. In case of ***Harijan Shamu Balu Chaugule v. State of Maharashtra*** (AIR 1979 SC 1566) the Supreme Court observed as under :-

“In the first place, he stated that on the personal search of the appellant a chedi was found which was blood stained and according to the report of the serologist, it contained human blood. Unfortunately, however, as this circumstance was not put to the accused in his statement under Section 342, the prosecution cannot be permitted to



rely on this statement in order to convict the appellant....”

19. Reiterating the aforesaid view, the Supreme Court in its celebrated decision in case of ***Sharad Birdhichand Sarda v. State of Maharashtra*** reported in ***(1984) 4 SCC 116*** has conclusively held in paragraph 145 as under :

"145. It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court. In this view of the matter, the circumstances which were not put to the appellant in his examination under Section 313 of the Criminal Procedure Code, 1973 have to be completely excluded from consideration."

20. The law relating to due compliance of Section 313 of the CrPC has been consistently followed by the Supreme Court in subsequent decisions. In case of ***Kalicharan vs. State of Uttar Pradesh*** reported in ***(2023)2 SCC 583*** the Supreme Court noted failure on the part of the trial court to put questions under Section 313 of the CrPC statement about the postmortem of the body of the deceased. The Supreme Court reiterated in the said case that questioning an accused under Section 313 of the CrPC is not an empty formality and requirement of Section 313 of the CrPC is that an accused must be explained the circumstances appearing in



the evidence against him so that an accused can offer an explanation.

21. Relying on the Supreme Court's decision in case of **Jai Dev v. State of Punjab** reported in **(1963) 3 SCR 489** the Supreme Court has held in case of **Kalicharan** (supra) that if the accused is not explained the important circumstances appearing against him in the evidence on which his conviction is sought to be passed, the accused will not be in a position to explain the said circumstances brought on record against him.

22. In case of **Premchand vs. State of Maharashtra** reported in **(2023) 5 SCC 522** the Supreme Court summarized the requirements of the provision under Section 313 of the CrPC, considering it to be a valuable safeguard in the trial process for accused to establish his innocence, referring to plethora of judicial pronouncements in that regard, paragraph 15 of which reads as under :-

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

15.1. Section 313CrPC [clause (b) of sub-section (1)] is a valuable safeguard in the trial process for the accused to establish his innocence.

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



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

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

15.5. An accused can make a statement without fear of being cross-examined by the prosecution or the latter having any right to cross-examine him.

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

15.8. 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.

15.7. 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.

15.9. 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."

23. The Supreme Court further laid down in paragraphs

16 & 17 in case of **Premchand** (supra) as under :



"16. Bearing the above well-settled principles in mind, every criminal court proceeding under clause (b) of sub-section (1) of Section 313 has to shoulder the onerous responsibility of scanning the evidence after the prosecution closes its case, to trace the incriminating circumstances in the evidence against the accused and to prepare relevant questions to extend opportunity to the accused to explain any such circumstance in the evidence that could be used against him. Prior to the amendment of Section 313 in 2009, the courts alone had to perform this task. Instances of interference with convictions by courts of appeal on the ground of failure of the trial court to frame relevant questions and to put the same to the accused were not rare.

17. For toning up the criminal justice system and ensuring a fair and speedy trial, with emphasis on cutting down delays, Parliament amended Section 313 in 2009 and inserted sub-section (5), thereby enabling the court to take the assistance of the Public Prosecutor and defence counsel in preparing such questions [the first part of sub-section (5)]. Ideally, with such assistance (which has to be real and not sham to make the effort effective and meaningful), one would tend to believe that the courts probably are now better equipped to diligently prepare the relevant questions, lest there be any infirmity. However, judicial experience has shown that more often than not, the time and effort behind such an exercise put in by the trial court does not achieve the desired result. This is because either the accused elects to come forward with evasive denials or answers questions with stereotypes like "false", "I don't know", "incorrect", etc. Many a time, this does more harm than good to the cause of the accused.

24. The Supreme Court, in case of **Premchand** (supra), has clearly laid down that any failure to consider the accused's explanation of incriminating circumstances in a given case, may vitiate the trial and/ or endanger the conviction. Here is a case where no question was put to the appellant under Section 313 of



the CrPC with reference to any circumstance emerging from the prosecution's evidence adduced at the trial and a-one sentence question was put as has been quoted hereinabove, in the name of completing the formality of the requirement under Section 313 of the CrPC.

25. In case of *Indrakunwar vs. State of Chhattisgarh* reported in *2023 SCC OnLine SC 1364* the Supreme Court, reiterating the law laid down earlier on the requirements of Section 313 of the CrPC has held that the Court is obligated to put, in the form of questions, all incriminating circumstances to the accused so as to give him an opportunity to articulate his defence. The Supreme Court further held that non-compliance with the section may cause prejudice to the accused and may impede the process of arriving at a fair decision.

26. In case of **Indrakunwar** (supra) also the Supreme Court reiterated the law that the circumstances not put to an accused while rendering his statement under Section 313 CrPC are to be excluded from consideration, as no opportunity can be said to be afforded to him to explain them. For quick reference, we consider it apt to reproduce the relevant paragraph 35 of the Supreme Court's decision in case of **Indrakunwar** (supra), which reads as under :-



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

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

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

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

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

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

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

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

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

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



may be used to lend credence to the case of the prosecution.

35.10 The circumstances not put to the accused while rendering his statement under the Section are to be excluded from consideration as no opportunity has been afforded to him to explain them.

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

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

27. The decision in case of **Premchand** (supra) has also been noticed by the Supreme Court in case of **Indrakunwar** (supra).

28. We are of the considered view that in the present case the trial court has not fulfilled the requirements of the provision under Section 313 of the CrPC. In our considered view, it was obligatory on the part of the trial court to have explained to the appellant, while questioning him under Section 313 of the CrPC, all the incriminating circumstances which emerged against him based on the evidence of the prosecution's witnesses which could be the basis for his conviction.

29. Even on merits, we find that the prosecution cannot be said to have proved the charge against the appellant beyond all reasonable doubt based on the evidence adduced at the trial. This



is for the reason that the First Information Report, which is the foremost version of the prosecution's case, did not disclose presence of PW-1 at the place of occurrence when the occurrence had taken place. There is no justification forthcoming as to why the informant was withheld from being examined at the trial. The rest of the witnesses have not claimed to be eye-witnesses except PW-3 who is said to have seen the appellant fleeing with a pistol from the place of occurrence and the informant chasing him. The statement of PW-3 was not recorded by the police during the course of investigation under Section 161 of the CrPC as is evident from his cross-examination. He deposed as witness for the first time at the trial.

30. In the aforesaid background, in our considered opinion, the conviction based on the evidence of PW-1 cannot be safely uphold.

31. For the reasons noted above, the impugned judgment of conviction requires interference. Accordingly, the impugned judgment of conviction and order of sentence dated 07.08.2013/ 13.08.2013 passed by the learned Additional Sessions Judge-IV, Danapur, Patna in S.T. No. 312 of 2008, arising out of Dulhin Bazar P.S. Case No. 109 of 2007 are set aside. The appellant



stands acquitted of the charge of offences punishable under Section 302 of the IPC and Section 27 of the Arms Act.

32. This appeal is allowed accordingly.

33. The appellant is in jail custody. Let him be released forthwith, if he is not required in any other case.

34. Before we part with the present judgment, we are constrained to notice a shockingly glaring aspect as regards the period of incarceration the appellant who had to suffer right from his arrest in April 2008 till date. This appeal has remained pending before this Court for more than ten years. The appellant's prayer for suspension of sentence was rejected on 05.11.2014. From the records it appears that no serious effort was made for expediting final hearing of the appeal, considering long period of the appellant's incarceration.

35. In October 2023, an application was filed for suspension of sentence of the appellant's release on bail. This Court, having taken into account the appellant's period of incarceration, deemed it fit to expedite final hearing of the appeal. The record suggests that the appellant was not duly pursued for early disposal. Had the fact been brought to the Court's notice, the appellant would have been, possibly, provided legal aid.



36. We consider it fit, in the aforesaid background to direct the Member Secretary, Bihar State Legal Services Authority, Patna to get conducted a survey through the Secretaries of the respective District Legal Services Authorities regarding the convicts who are in custody for long period in time from the perspective of providing them legal aid, if required. The Member Secretary, based on the outcome of the survey, shall take necessary steps to provide legal aid as and when required.

(Chakradhari Sharan Singh, J)

(G. Anupama Chakravarthy, J)

Rajesh/Shanu

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	31.01.2024
Transmission Date	31.01.2024

