

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.90 of 2004

DILKESHWAR TIWARY son of Late Mukhi Tiwary, resident of village
Tiwariachak, P.S. Fatehpur, District Gaya

... .. Appellant/s

Versus

STATE OF BIHAR

... .. Respondent/s

with
CRIMINAL APPEAL (SJ) No. 213 of 2004

ARJUN TIWARY, son of Dilkeshwar Tiwary, resident of village Tiwariachak,
P.S. Fatehpur, District Gaya

... .. Appellant/s

Versus

STATE OF BIHAR

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (SJ) No. 90 of 2004)

For the Appellant/s : Mr.Dineshwar Mishra, Advocate
: Mr. Anurag Kumar, Advocate
: Ms. Ruchi Arya, Advocate
For the Respondent/s : Ms. Anita Kumari Singh, A.P.P.

(In CRIMINAL APPEAL (SJ) No. 213 of 2004)

For the Appellant/s : Mr.Dineshwar Mishra, Advocate
: Mr. Anurag Kumar, Advocate
: Ms. Ruchi Arya, Advocate
For the Respondent/s : Ms. Anita Kumari Singh, A.P.P.

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

Date : 08-01-2025

1. Criminal Appeal (SJ) No. 213 of 2004 is preferred by Arjun Tiwary and Criminal Appeal (SJ) No. 90 of 2004 is preferred by Dilkeshwar Tiwary. Arjun Tiwary is the son of Dilkeshwar Tiwary. Both the



appeals arise out of the judgment dated 07.02.2004 on the file of First Additional Sessions Judge, Gaya in Sessions Trial No. 12 of 1998/120 of 1998, whereby Arjun Tiwary was convicted under Section 307 of the Indian Penal Code and Dilkeshwar Tiwary was convicted for the offences punishable under Section 307 r/w 34 of the Indian Penal Code and both were sentenced to undergo rigorous imprisonment for a period of seven years.

2. The case of the prosecution, as per the fardbeyan of the injured, Tejeshwar Tiwary, dated 02.10.1997, is that at about 09:00 AM on the same day while he was irrigating his field situated in Saidpur village, P.S. Mohanpur, Gaya District, the appellants Dilkeshwar Tiwary and his son Arjun Tiwary came with pistol and informed him that they will irrigate the fields. The informant objected, stating that he would irrigate the field. On this, Dilkeshwar Tiwary abused him and ordered to shoot firearm, whereupon Arjun Tiwary fired a gunshot at the informant, for which the informant/P.W. 1 sustained gun shot injury in his chest and fell down.



Upon hearing the commotion, many people gathered and took the injured P.W. 1 to State Dispensary, Fatehpur for treatment. The informant further stated that appellant Arjun Tiwary shot him with intention to kill.

3. Basing on the fardbeyan, a case was registered at Mohanpur Police Station vide Case No. 110 of 1997 for the offences punishable under Section 324, 307, 504 r/w Section 34 of the Indian Penal Code and under Section 27 of the Arms Act. After investigation, the police submitted a charge-sheet against both the appellants for the above mentioned offences.

4. The Learned Chief Judicial Magistrate, took cognizance and committed the case to the Court of Sessions, and in turn the case was transferred to First Additional Sessions Court, Gaya. The trial Court framed charges against the appellant Arjun Tiwary for the offence punishable under Section 307 of the Indian Penal Code and against the appellant Dilkeshwar Tiwary for the offence punishable under Section 307 r/w Section 34 of the



Indian Penal Code. The charges were read and explained to them in Hindi, and both the appellants pleaded not guilty and claimed to be tried.

5. It is pertinent to mention that on 04.07.1998, the trial Court passed a detailed order stating that charges should also be framed under Section 27 of the Arms Act along with offences triable under Indian Penal Code. However, it is found that the trial Court did not frame any charge against the appellants under Section 27 of the Arms Act, though fardbeyan clearly disclose that the injured P.W. 1 sustained injury due to a country made pistol.

6. On behalf of the prosecution, P.Ws. 1 to 4 were examined and Exhibit 1 to Exhibits 4 were marked.

7. After considering the entire evidence on record, the trial Court convicted the appellants as stated above.

8. The points for determination in this appeal are (i) whether the trial Court is rightly convicted both the appellants for the offences punishable under Section 307 and 307 r/w Section



34 of the Indian Penal Code? (ii) whether the prosecution was able to prove the guilt of the accused for the charged offences beyond reasonable doubt?

9. Heard Mr. Dineshwar Mishra, the Learned counsel for the appellants and Ms. Anita Kumari Singh, the Additional Public Prosecutor, for the State. Perused the entire record.

10. It is necessary to re-appreciate the entire evidence on record to determine the points of determination in this appeal. On perusal of the fardbeyan i.e. Exhibit 2, it is evident that the informant gave a statement to Pubhendra Kumar Suman, S.I. of Police Station at 12:30 hours on 02.01.1997, while he was undergoing treatment at State Dispensary, Fatehpur. The contents of the fardbeyan disclose that an oral altercation took place between P.W. 1 and the appellants regarding irrigation of field. At the time Dilleshwar Tiwary ordered his son (Arjun Tiwary) to shoot P.W. 1. Upon which Arjun Tiwary fired the pistol hitting P.W. 1 in the his chest. The fardbeyan further states that upon



hearing the sound of gunshot, people gathered, at the spot and took P.W. 1 to the Government Hospital for treatment.

11. The evidence of P.W. 1 i.e. the injured is consistent with the fardbeyan. It is specific evidence of P.W. 1 that Arjun Tiwary shot him with a firearm for causing a bullet injury in his left chest. His signature on the Fardbeyan was marked as Exhibit 1, and the signature of Muneshwar Tiwary was marked as Exhibit 1/1. During the cross-examination P.W. 1 specifically stated that three bullets were fired at him from a distance of 5 to 6 feet. However, this contradicts the fardbeyan, where he mentioned only one gunshot.

12. P.W. 2, the uncle of P.W. 1. stated that Arjun Tiwary shot a bullet in the chest of P.W. 1 and later, fired another bullet while leaving. However, the evidence of P.W. 2 contradicts the evidence of P.W. 1., as P.W. 1 mentioned three gunshots, while P.W. 2 mentioned only two gunshots. The fardbeyan mentions only one gunshot.



13. The evidence of P.W. 3 i.e. the Investigating Officer disclose that P.W. 1's statement was recorded by a constable of Fatehpur Police Station. The Fardbeyan was marked as Exhibit 2, although it was not in handwriting of P.W. 3. The evidence of P.W. 3 also refers to the investigation done by him and marking of the other exhibits i.e. the F.I.R. as Exhibit 3 and injury report of P.W. 1 as Exhibit 4. He admitted that the injury report was in the handwriting and signature of Dr. Ashok Kumar Singh. It is admitted by P.W. 3 that the injury report was received by him on 25.01.1998 after charge-sheet was filed on 02.12.1997, raising doubts about the investigation's credibility. Further the evidence of P.W. 4, contradicts the evidence of P.W. 1 as to the blood stain marks at the place of offence. The evidence of P.W. 1 clearly disclose that blood spilled over at place of occurrence and his cloths were soaked with blood. However, the evidence of P.W. 4 disclose that he did not found blood stains at the place of incident and he had not seized any blood stained cloth of the injured.



14. The evidence of P.W. 4 (Dr. Ashok Kumar Singh) disclose that on 02.10.1997, he examined the injured and found two lacerated wounds i.e. one on the left side of the chest, 1" lateral to the left nipple and one on the left arm, measuring 1"x1/4" and the time of each of the injuries was noted as six hours. He opined that injury no. 1 was caused by a firearm and injury no. 2 is caused by a hard blunt object. However, the medical evidence in this case does not corroborate the prosecution case. On one hand, P.W. 1 and 2 stated that P.W. 1 sustained a gunshot wound, yet P.W. 4 (the doctor) did not find either any bullet or pellet in his body or at the place of occurrence. It is the specific evidence of P.W. 1 that the fire arm was shot at a distance of 4-5 feet. If at all the fire arm is shot at a short distance there should be a charring injury found on the body of the injured. But the injury report (Exhibit-4) do not disclose about any charring wound over the body of the injured. In conclusion, this Court finds that the prosecution has miserably failed to prove the guilt of the appellants for the offences punishable under



Section 307 or under Section 307 r/w Section 34 of the Indian Penal Code beyond reasonable doubt. As per the evidence of P.W. 4 and Exhibit-4, the opinion regarding injury no. 1 was reserved for x-ray report, and injury no. 2 was found to be simple in nature. However, the X-ray or X-ray report were not produced for the reason best known to the prosecution. In the cross-examination, it was specifically admitted by P.W. 4 that no bullet or pellet was found at the time of examination and that injury report was not handed over to him, by the Investigating Officer. In the cross-examination, it is also admitted by P.W. 4 that he has prepared the OP slips and noted the injuries on them but the same was not produced before the Court to corroborate with Exhibit 4 (the injury report). In this case also injury report was marked through P.W. 3, i.e. the Investigating Officer. The Investigating Officer never collected Exhibit 4, during the course of investigation or at the time of filing the charge-sheet. He had no knowledge of the contents of the documents, and as to how the document was marked through



Investigating Officer has not been explained by the trial Court.

15. Admittedly, P.W. 4 is the author of Exhibit P-4, and the trial Court ought to have marked Exhibit 4 through the doctor who examined P.W. 1 and prepared it.

16. It is evident that in order to have the documents marked by the Court as Exhibits, a party must satisfy the Court that there is sufficient material 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.

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.

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

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 with the document.

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 the part of the record, but has to be considered by the Court about its admissibility and relevancy of such document. Marking of document alone will not give any right to read the contents of the documents or about the admissibility of the documents.

17. The procedure of the trial Court has to be in accordance with law as far as marking of documents is concerned and it cannot mark documents through any witnesses it chooses. Furthermore, the 313 examination of the appellants was also not conducted properly as envisaged under Section 313 of Cr.P.C. and as per the guidelines laid down by the Apex Court in catena of judgment.



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

“34. Keeping in view the understanding of the principles of privacy and the propositions of law in regard thereto, we now travel to what, by law, may be required of the convict-appellant in her statement under Section 313 Cr.P.C.

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.”

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

“5. Counsel for the appellant pointed out that the Sessions Court committed serious error in not properly examining the



accused under Section 313 CrPC. Our attention was drawn to the statement taken from the present appellant. Only three questions were put to the appellant. The first question was whether he heard the statement of the witnesses and the second question was that the evidence given by the witnesses showed that he committed the murder of the deceased and whether he had to say anything in defence. The questioning of the accused under Section 313 CrPC was done in the most unsatisfactory manner. Under Section 313 CrPC the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been



produced by the prosecution, should have been put to the accused in the form of questions and he should have been given opportunity to give his explanation. No such opportunity was given to the accused in the instant case. We deprecate the practice of putting the entire evidence against the accused put together in a single question and giving an opportunity to explain the same, as the accused may not be in a position to give a rational and intelligent explanation. The trial Judge should have kept in mind the importance of giving an opportunity to the accused to explain the adverse circumstances in the evidence and the Section 313 examination shall not be carried out as an empty formality. It is only after the entire evidence is



unfurl the accused would be in a position to articulate his defence and to give explanation to the circumstances appearing in evidence against him. Such an opportunity being given to the accused is part of a fair trial and if it is done in a slipshod manner, it may result in imperfect appreciation of evidence. In various decisions of this Court, the importance of questioning the accused under Section 313 CrPC was given due emphasis, e.g. Rama Shankar Singh v. State of W.B. [AIR 1962 SC 1239 : (1962) 2 Cri LJ 296] , Bhalinder Singh v. State of Punjab [(1994) 1 SCC 726 : 1994 SCC (Cri) 462] , State of Maharashtra v. Sukhdev Singh [(1992) 3 SCC 700 : 1992 SCC (Cri) 705] and Lallu Manjhi v. State of



*Jharkhand [(2003) 2 SCC 401 : 2003
SCC (Cri) 544] .*

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

In *Premchand Vs. State of Maharashtra* reported in (2023) 5



SCC 522 the Lordships of Apex Court have held as under:-

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

14. A Bench of three Hon'ble Judges of this Court in State of U.P. v. Lakhmi [State of U.P. v. Lakhmi, (1998) 4 SCC 336 : 1998 SCC (Cri) 929] has extensively dealt with the aspect of value or utility of a statement under Section 313CrPC. The object of Section 313CrPC was explained by this Court in Sanatan Naskar v. State of W.B., (2010) 8 SCC 249 : (2010) 3 SCC (Cri) 814] The rationale behind the requirement to comply with Section 313CrPC was adverted to by this Court in Reena Hazarika v.



State of Assam [(2019) 13 SCC 289 : (2019) 4 SCC (Cri) 546] . Close on the heels thereof, in Parminder Kaur v. State of Punjab [(2020) 8 SCC 811 : (2020) 3 SCC (Cri) 914] , this Court restated the importance of Section 313CrPC upon noticing the view taken in Reena Hazarika [(2019) 13 SCC 289 : (2019) 4 SCC (Cri) 546] and M. Abbas v. State of Kerala [(2001) 10 SCC 103 : 2002 SCC (Cri) 1270] .

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

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

15.2. *Section 313, which is intended to ensure a*



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

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

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

15.5. An accused can make a statement without fear



of being cross-examined by the prosecution or the latter having any right to cross-examine him.

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

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



and examining the veracity of the prosecution case.

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

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

15.10. *Any failure to consider the accused's explanation of incriminating circumstances, in a given case,*



*may vitiate the trial and/or
endanger the conviction.*

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



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



accused elects to come forward with evasive denials or answers questions with stereotypes like “false”, “I don't know”, “incorrect”, etc. Many a time, this does more harm than good to the cause of the accused.”

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

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



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

22. *As already noticed, the object of recording the statement of the accused under Section 313 CrPC is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The court has been empowered to*



examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the court and, besides ensuring the compliance therewith, the court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simpliciter denial or, in the alternative, to explain his version and reasons for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the court is entitled to draw



adverse inferences and pass consequential orders as may be called for in accordance with law. The primary purpose is to establish a direct dialogue between the court and the accused and to put every important incriminating piece of evidence to the accused and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the courts have explained this concept and now it has attained, more or less,



certainty in the field of criminal jurisprudence.

23. *The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) CrPC explicitly provide that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence for or against the accused in any other enquiry into or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as*



per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution.

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



of evidence. In Vijendrajit Ayodhya Prasad Goel v. State of Bombay the Court held as under: (AIR p. 248, para 3)

“3.As the appellant admitted that he was in charge of the godown, further evidence was not led on the point. The Magistrate was in this situation fully justified in referring to the statement of the accused under Section 342 as supporting the prosecution case concerning the possession of the godown. The contention that the Magistrate made use of the inculpatory part of the accused's statement and excluded the exculpatory. It concerned itself with two facts. The accused admitted that he was in charge of the godown,



he denied that the rectified spirit was found in that godown. He alleged that the rectified spirit was found outside it. This part of his statement was proved untrue by the prosecution evidence and had no intimate connection with the statement concerning the possession of the godown."

25. *In the light of the abovestated principles it was expected of the accused to provide some reasonable explanation in regard to various circumstances leading to the commission of the crime. He was known to the family along with other accused and by giving just a bare denial or lack of knowledge he cannot tilt the case in his favour. Rather their*



answers either support the case of the prosecution or reflect the element of falsehood in the statement recorded under Section 313 CrPC. In both these circumstances the Court would be entitled to draw adverse inference against the accused.

29. *So, the first and the foremost question that this Court has to examine in the present case is, whether the prosecution has been able to establish the chain of event and circumstances which certainly points out towards the involvement and guilt of the accused. Even, before we enter upon adjudicating this aspect of the case, it will be appropriate to narrow down the controversy*



keeping in view the admissions, if any, made by the appellants. The accused, after having known the entire case of the prosecution, is required to be examined under Section 313 CrPC. All the material evidence has to be put to the accused and he has to be awarded the fair opportunity of answering the case of the prosecution, as well as to explain his version to the court without being subjected to any cross-examination. As already noticed, the answers given by the accused can be used against him in the trial insofar as they support the case of the prosecution.”

In Kalicharan & Ors. Vs. State of Uttar Pradesh reported in



(2023) 2 SCC 583 the Hon'ble Apex Court held as follows:-

“24. At this stage, we must refer to the requirement of the examination of the accused under Section 313 of CrPC. Section 313 of CrPC reads thus:-

“313. Power to examine the accused. -

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;



(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub-section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such



questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

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



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

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



spot. What do you have to say in this regard?"

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



haemorrhage and shock as a result of injuries caused by sharp weapons.

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



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

“21. In support of his contention that the failure to put the relevant point against the appellant Hari Singh would affect the final conclusion of the High Court, Mr Anthony has relied on a decision of this Court in Hate Singh v. State of Madhya Bharat [1951 SCC 1060 : AIR 1953 SC 468] . In that case, this Court has no doubt referred to the fact that it was important to put to the accused each material fact which is intended to be used against him and to afford him a chance of explaining it if he can. But



these observations must be read in the light of the other conclusions reached by this Court in that case. It would, we think, be incorrect to suggest that these observations are intended to lay down a general and inexorable rule that wherever it is found that one of the points used against the accused person has not been put to him, either the trial is vitiated or his conviction is rendered bad. The examination of the accused person under Section 342 is undoubtedly intended to give him an opportunity to explain any circumstances appearing in the evidence against him. In exercising its powers under Section 342, the court must



take care to put all relevant circumstances appearing in the evidence to the accused person. It would not be enough to put a few general and broad questions to the accused, for by adopting such a course the accused may not get opportunity of explaining all the relevant circumstances. On the other hand, it would not be fair or right that the court should put to the accused person detailed questions which may amount to his cross-examination. The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to enquire whether, having regard to all the questions put to him, he did get



an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity. It is obvious that no general rule can be laid down in regard to the manner in which the accused person should be examined under Section 342. Broadly stated, however, the true position appears to be that passion for brevity which may be content with asking a few omnibus general questions is as much inconsistent with the requirements of Section 342 as anxiety for thoroughness which



may dictate an unduly detailed and large number of questions which may amount to the cross-examination of the accused person. Besides, in the present case, as we have already shown, failure to put the specific point of distance is really not very material."

29. *In para 145 of the well-known decision of this Court in Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116 : 1984 SCC (Cri) 487] , it was held thus : (SCC p. 182, para 145)*

"145. It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court. In this view of the matter, the circumstances



which were not put to the appellant in his examination under Section 313 of the Criminal Procedure Code, 1973 have to be completely excluded from consideration.”

The above citations squarely applies to the facts and circumstances of the case. The appellants have lost the opportunity of explaining the circumstances.

18. On an entire appreciation of the evidence, it is evident that P.W. 1 did not receive any firearm injury on his body so as to prove the contents of the fardbeyan or his evidence. Therefore, this Court is of the considered view that the prosecution has miserably failed to prove that the appellants had the intention to kill the injured, attracting the provisions under Section 307 or under Section 307 r/w Section 34 of the Indian Penal Code.

19. In view of the above said discussion, the trial Court's judgment is liable to be set aside.



20. In result both the criminal appeals are allowed, setting aside the judgment of the trial court dated 07.02.2004, on the file of 1st Additional Sessions Judge, Gaya, in Sessions Trial No. 12 of 1998/120 of 1998.

21. The record reveals that the appellants Dilkeshwar Tiwary was granted bail on 19.03.2004, and appellant Arjun Tiwary was granted bail on 16.05.2005 by this Court. Therefore, the bail bond of the appellants shall stand canceled.

22. In result the appeal is allowed.

(G. Anupama Chakravarthy, J)

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