

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.949 of 2017**

Arising Out of PS. Case No.-300 Year-2014 Thana- RAMPUR District- Gaya

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1. Vicky Kumar son of Kapil Paswan

2. Anchal Chaudhary @ Golu Choudhary, son of Late Vase Chaudhary, Both
resident of village- Baglati, P.S. Barachatti (Mohanpur), District-Gaya

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

=====

with

CRIMINAL APPEAL (DB) No. 1050 of 2017

Arising Out of PS. Case No.-300 Year-2014 Thana- RAMPUR District- Gaya

=====

1. Shankar Manjhi Son of Shivdhari Manjhi, Resident of Village- Baglati, P.S.-
Barachatti Mohanpur, District- Gaya.

2. Raj Kumar Manjhi, Son of Late Panchu Manjhi, Resident of Village- Baglati,
P.S.- Barachatti Mohanpur, District- Gaya.

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

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Appearance :

(In CRIMINAL APPEAL (DB) No. 949 of 2017)

For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate
Mr. Ritwaj Raman, Advocate
Mrs. Vaishnavi Singh, Advocate

For the Appellant No. 2 : Mr. Madhusudan Kumar, Advocate

For the State : Mr. Sujit Kumar Singh, APP

(In CRIMINAL APPEAL (DB) No. 1050 of 2017)

For the Appellant/s : Mr. Durganand Jha, Advocate
Ms. Arpana Jha, Advocate
Ms. Soni Kumari, Advocate

For the State : Mr. Sujit Kumar Singh, APP

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*Acts/Sections/Rules: Sections 302, 364, 120B & 34 of the Indian Penal Code
Section 27 of the Evidence Act, 1872*

Cases referred:

- *Subramanya Vs. State of Karnataka*, reported in 2022 SCC OnLine SC 1400
- *Ramanand @ Nandlal Bharti Vs. State of Uttar Pradesh*, reported in 2022 SCC OnLine SC 1400
- *Babu Sahebagouda Rudragoudar & Ors. Vs. State of Karnataka*, reported in 2024 SCC OnLine SC 561
- *Indrakunwar Vs. The State of Chhattisgarh*, reported in 2023 SCC Online SC 1364
- *Raj Kumar @ Suman Vs. State (NCT of Delhi)*, reported in 2023 SCC OnLine SC 609
- *Murli and Another v. State of Rajasthan* reported in (2009) 9 SCC 41
- *Brahmdeo Sahni Vs. The State of Bihar in Criminal Appeal (DB) No. 521 of 2015*

Appeal - filed against judgement of conviction whereby the concerned Trial Court has convicted the present appellants for the offences punishable under Sections 302, 364, 120B & 34 of the Indian Penal Code

Held - Investigating Officer gave no description at all of the conversation which had transpired between himself and the accused which was recorded in the disclosure statements. Thus, we are of the view that this type of disclosure statements cannot be read in evidence and the recovery made in furtherance thereof are bad in eyes of law. We are, therefore, of the view that neither of the disclosure memos were proved in accordance with law. (Para 22)

The object of examination under Section 313 is to enable the accused to explain any circumstances appearing against him in the evidence. The failure to put material circumstances to the accused amounts to serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused. (Para 26)

Prosecution has failed to complete the chain of circumstances from which it can be established that the appellants/convicts have committed the alleged offences and, therefore, benefit of doubt is required to be given to the appellants. (Para 28)

Appeal is allowed. (Para 32)

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- 2. Anchal Chaudhary @ Golu Choudhary, son of Late Vase Chaudhary, Both resident of village- Baglati, P.S. Barachatti (Mohanpur), District-Gaya

... .. Appellant/s

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Ms. Soni Kumari, Advocate
For the State : Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 06-05-2024



Both the appeals have been filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as 'Code') challenging the judgment of conviction dated 22.06.2017 and order of sentence dated 03.07.2017 passed by learned Ist Additional District and Sessions Judge, Gaya in Sessions Trial No. 51/2015 (S.J.)/ 35/2017, arising out of Rampur P.S. Case No. 300 of 2014 dated 19.10.2014, G.R. No. 5084 of 2014, whereby the concerned Trial Court has convicted the present appellants for the offences punishable under Sections 302 & 34 of the Indian Penal Code and sentenced them to undergo R.I. for life with fine of Rs. 10,000/- each and, in default of payment of fine, they shall further undergo R.I. for two years and they are sentenced to undergo R.I. for life with fine of Rs. 10,000/- each under Section 364 & 34 and on default of payment of fine, they shall further undergo R.I. for two years and they are sentenced to undergo R.I. for seven years with fine of Rs. 5,000/- each under Section 201 & 34 of I.P.C. and on default of payment of fine, they shall further undergo R.I. for one year and they are also sentenced to undergo R.I. for seven years with fine Rs. 5,000/- each under section 120(B) of I.P.C. and on default of payment of fine, they shall further undergo R.I. for one year. All these sentences have been awarded to run concurrently.

2. The facts, in a nutshell, are as under:-



2.1. The informant's son, namely Sudhir Kumar, aged about 35 years, on 03.10.2014 at about 04:00 pm, proceeded from the house, but did not return. Regarding this, the informant enquired from his relatives, but did not find any trace of his son. Sudhir Kumar was a driver by profession. He was driving tempo and his mobile number is 8804659935. Before becoming traceless, on 02.10.2014, four times call came on his mobile from mobile No. 9801957349 and, on 03.10.2014, nineteen calls came from the aforesaid mobile number. The Informant had no knowledge regarding the owner of the aforesaid mobile number. Thereafter, his son's mobile became switched off from village-Kahudag.

2.2. After registration of the F.I.R., the Investigating Officer started the investigation and during the course of the investigation, he had recorded the statement of the witnesses and thereafter filed the charge-sheet against the appellant/accused before the concerned Magistrate Court. As the case was exclusively triable by the Court of Sessions, the learned Magistrate committed the same to the Sessions Court where the same was registered as Sessions Trial No. 51/2015 (S.J.)/ 35/2017.

3. Heard learned counsels Mr. Ajay Kumar Thakur assisted by Mr. Ritwaj Raman and Mrs. Vaishnavi Singh for the appellant No. 1 and Mr. Madhusudan Kumar for the appellant No. 2



in Criminal Appeal (DB) No. 949 of 2017 and Mr. Sujit Kumar Singh, learned A.P.P. for the Respondent-State.

3.1. We have also heard Mr. Durga Nand Jha assisted by Ms. Arpana Jha and Ms. Somi Kumari, learned counsels for the appellants in Criminal Appeal (DB) No. 1050 of 2017 and Mr. Sujit Kumar Singh, learned A.P.P. for the Respondent-State.

4. Learned counsels for the appellants would mainly contend that the present case is a case of circumstantial evidence and there is no eye-witness to the occurrence in question. The prosecution has failed to complete the chain of circumstances from which it can be established that the appellants herein have committed the alleged offences. It is further submitted that, on the basis of the so-called confessional statement of two accused, the Trial Court has convicted the appellants. It is also contended that such type of confession is inadmissible in evidence and though it is alleged that, on the basis of the confessional statement of one of the accused, the dead body/skeleton of the deceased was found in the jungle, no *Seizure Panchnama* was prepared and no independent witnesses have signed the other *Seizure Panchnama*. Learned counsel would thereafter contend that no question was put to accused with regard to the so called incriminating material produced by the prosecution before the Trial Court while recording the



statement under Section 313 of the Code. It is submitted that, recording the statement of the accused under Section 313 of the Code is not an empty formality. Learned counsels has placed reliance upon the following decisions:-

(i) **Subramanya Vs. State of Karnataka**, reported in **2022 SCC OnLine SC 1400**.

(ii) **Ramanand @ Nandlal Bharti Vs. State of Uttar Pradesh**, reported in **2022 SCC OnLine SC 1400**.

(iii) **Babu Sahebagouda Rudragoudar & Ors. Vs. State of Karnataka**, reported in **2024 SCC OnLine SC 561**.

(iv) **Indrakunwar Vs. The State of Chhattisgarh**, reported in **2023 SCC Online SC 1364**.

(v) **Raj Kumar @ Suman Vs. State (NCT of Delhi)**, reported in **2023 SCC OnLine SC 609**.

5. Learned counsel for the appellants, therefore, urged that when the prosecution has failed to prove the case against the accused beyond reasonable doubt, the Trial Court ought to have acquitted them. It is, therefore, urged that the present appeals be allowed.

6. Learned counsel for the respondent opposed the present appeals. It is mainly contended that though there is no eye-witness to the occurrence in question, on the basis of the confessional



statement of the accused, skeleton of the deceased was found from the jungle. Even the clothe, shoes and other related items belonging to the deceased were found near the skeleton. The said items were identified by the brother of the deceased. Thus, the discovery of the human skeleton made pursuance to the confessional statement of the accused is admissible in evidence and, therefore, when all the accused have committed the alleged offences which has been proved by the circumstantial evidence laid by the prosecution before the Trial Court, the Trial Court has rightly passed the impugned order of conviction and, therefore, no interference required in the present appeals.

7. We have gone through the material placed on record as well as the entire evidence laid by the prosecution before the Trial Court. It would emerge that PW-1 Nitu Devi is the wife of the deceased Sudhir Kumar. She has stated in her examination-in-chief that the incident is of 03.10.2014 at around 03:00-04:00 pm. Her father-in-law reported to the Police Station regarding the incident on 05.10.2014. Later, after fifteen days, it was found that a human skeleton was found in the jungle of Mohanpur.

7.1. In her cross-examination, she has stated that *sanha* was registered after her husband was missing for two days. She had not stated before the Police that human skeleton and some items



were found in presence of her. The human skeleton was found fifteen days later from the date from which her husband was missing. There was an ongoing land dispute between her husband and Jaishankar Bihari Rao. Her husband's mobile phone was switched off from 03.10.2014. She had called on her husband's mobile number at 11:00 in the night on 03.10.2014.

8. PW-2 Randhir Kumar is the younger brother of Sudhir Kumar. He has stated in his examination-in chief that his brother was murdered. The said incident is on 03.10.2014. On that day, he was on his duty in Delhi. He had received telephonic information that his brother was missing for two days. He received the information on 05.10.2014. Further, he has stated that he went to the Police Station and asked them to take out the call records of Sudhir. After getting the details, he had called on all the numbers from which telephonic conversations were made by the mobile phone of Sudhir. The Police went to Sharma Bazar. The Police got Sudhir's mobile phone from Arvind Paswan and prepared a seizure list. Vicky was taken to the Police Station. Vicky stated that the said mobile phone was given by his mother Babita Devi. He also stated that Anchal Chaudhary @ Golu Choudhary, Raj Kumar Manjhi and Shankar Manjhi had killed Sudhir and threw his body in the jungle. When it was pointed out by Anchal Chaudhary @ Golu Choudhary,



the human skeleton of his brother along with his belongings were identified and recovered. Golu Choudhary gave a confessional statement regarding the murder and conspiracy in front of him.

8.1. In his cross-examination, he has stated that he has been working in C.I.S.F. for 8 years. No incident happened in front of him. Further, he has stated that he and his brother had a dispute with Shankar. Anchal Choudhary's confessional statement was made on 19.10.2014 in Mohanpur Police Station. He also went with the Police during the investigation. The Police did not send him notice to call him. He further reveals that his brother was murdered due to illicit relationship with a girl. His statement was recorded before the Police twice. He had not taken the names of Raj Kumar Manjhi and Shankar Manjhi. It is also stated that Vicky told that his mother had given mobile to him and Sudhir was killed.

9. PW-3 Nitu Devi is the wife of Ranjeet Kumar and sister-in law of the deceased Sudhir Kumar. She has stated in her examination-in-chief that when she informed her husband in Delhi regarding the incident, he told them to file *sanha* and on the very next day, he came home and started searching for him. When the Police took out the call details of the deceased, it was found that his mobile was switched off in Barachatti. Further, it is stated that, a



human skeleton was found in Barachatti. Her husband went along with the Police.

9.1. In her cross-examination, she has stated that the incident did not occur in her presence. She got all the information from her husband. Her statement was recorded before the Police two days after lodging of the F.I.R.

10. PW-4 Ram Nath Prasad is the father of the deceased Sudhir Kumar. He has stated in his examination-in-chief that his son left home at 04:00 in the evening of 03.10.2014 saying that he was going to earn. He left his home after informing his wife. When he did not arrive home till 10:00 pm, then a call was made on his mobile but it was found to be switched off. In the following morning, they looked for his son. He had informed his younger son regarding this. No trace of his son was found on the next day, then a *sanha* was lodged in the Police Station on 05.10.2014.

10.1. In his cross-examination, he has stated that he did not see the murder with his own eyes. None of his belongings were recovered before his eyes. The clothes of his deceased son were recovered after 19 days.

11. PW-5 Arvind Paswan has stated that Rampur Police arrested him on 19th. He had told them that the mobile phone was given to him by his cousin. S.H.O. told him that the said mobile



phone belonged to the person who had been killed. When the phone was given to him, his friend Ranjit was also there.

12. PW-6 Ranjit Kumar has stated that he knows Vicky Kumar and Arvind Paswan. Vicky Kumar gave mobile phone to Arvind before him only. He did not know whether the Police had seized the mobile or not.

13. PW-7 Dr. Arvind Kumar conducted the Medical Examination of skeleton remains on 26.01.2015. A wooden box wrapped with a stitched cloth and labelled and sealed had been received with requisite papers. On opening the box, following body portions stained with dust and soil were found:-

- “1. Skull-one with upper jaw.
2. Hip bone with femur- 1
3. Tibia- 1
4. Fibula- 1
5. Right humerus-1

All the bones and portions are rough with prominent muscular marking. Skull was having prominent frontonasal junction; digastric root; mastoid process round and blunt, large foramen magnum and less prominent parietal and frontal eminence were present. Condylar facets long and narrow and the palate was new sepates. Orbits were squarish with round margin. The upper jaw had 6” teeth/sockets. Teeth have massive attrition. In pelvic bone the acetabulum articulation is more than 2/3rd of acetabulum. Preauricular cusp is absent. Greater sciatic notch normal is narrow and deep. Ischial tuberosity was inverted. Iliopubic line is marked. Subpubic angle is acute. Head of the femur had articular surface more than 1/3 of a sphere. Oblique neck shape angle and larger head condyles. Head occipital and



sphenoid bones had joined. Sagittal and coronal sutures have joined except at the top. Ossification and its joining had completed in all the available bones that is skull, rib and long bone available as above. No evidence of any ante mortem mechanical injuries could be found in the available bone. Available dried and decayed shack tissues were also having no evidence of any ante mortem injuries.

Opinion- (1) Bones were of a human male aged 50 + (-) 10 years.

(2) No adequate amount of blood stains available for preserving blood grouping. Two teeth and a portion of the femur had been preserved in a transparent glass contains for the DNA and other test.

(3) No opinion regarding cause of death could be given as no evidence of any ante-mortem injuries could be observed which may also be due to decomposed condition of the remains.

(4) T.D. - 2 to 6 month approximately to death.

This report is written and signed by my Mark Ext-5.”

14. PW-8 Syed Kamrul Ashan is the Investigating Officer who was posted as J.M. in Gaya Civil Court on 22.10.2014. He recorded the statements of Arvind Paswan and Ranjeet Kumar under Section 164 of the I.P.C.. He had investigated before making of their deposition as to whether they were to depose voluntarily or not. When Rampur Police took the accused in custody, it came to be known that the mobile which was given, belonged to a lost person.

15. PW-9 Gauri Shankar Gupt was posted as Police Inspector-cum-S.H.O., Rampur on 19.10.2014. He has stated that call details of the mobile of the kidnapped was received from the



company directly on e-mail of the Police Station, the copy of the same was attached in the case diary and marked it as Exhibit-8. On receiving the number 9801957349 from the email again, it was found that the mobile was being used since 07.10.2014 by the mobile holder 9572674186 whose names were registered with the SIM in the name of Channu Paswan. SIM number 98019577349 is in the name of Kiran Devi w/o Balesh Manjhi. He raided the house of mobile phone holder 9572694186 and arrested Arvind Kumar Paswan along with the mobile and the SIM. The said mobile belonged to Sudhir Kumar. When asked, Arvind told that this mobile was given to him by his cousin Vicky Kumar on 07.10.2014. He made the presentation cum seizure list of mobile and SIM. Further, it has been stated that, on 19.10.2014, Arvind's brother Guddu and other villagers caught Vicky and brought him to the Police Station where he gave his confessional statement and told him about the incident. He has said in page 10 that his mother Babita Devi called Sudhir on the phone. Golu Choudhary met Raj Kumar Choudhary Shankar Manjhi and thrashed Sudhir, strangulated him and killed him by severing his stomach. Sudhir's Samsung mobile whose SIM number was 8804659935 and Rs 700/- in cash was found, which Vicky Kumar took from his mother Babita Devi and, after removing the SIM, broke it and threw it away. The



same mobile was given to Arvind Paswan. He had asked to be shown the spot and recover the dead body, on the basis of which, Mohanpur police arrested him. All the accused and Mohanpur Police went to the forest and recovered the skeleton along with shirt, pant, towel and shoes from the place mentioned by the accused. The seizure list is in his writing and signature and marked as Exhibit-13. Goli Choudhary and Shankar Manjhi told him that, while committing the murder, they also got injured for which he got them treated. After this, the statement of witnesses Arvind Kumar and Ranjit was recorded under Section 164 of the Code. The deceased's brother Randhir Kumar identified the clothes and shoes of the deceased. Again, the statement of witness Randhir Kumar was taken who said that Badhan Prasad and Babita Devi also had a hand in the murder. F.M.T Department was granted permission from the Court for investigation of seized bone. Narayan Medical College sent shoes, clothes and recovered weapon to F.S.L., Patna for examination. He had described both the incident places which are described in para 8 as the first incident and para 30 as the second place of incident. The second incident site of is Barachatti forest under Mohanpur P.S.

15.1. In his cross-examination, he has stated that traces of blood were found on *fasuli*. The shoes and clothes of the deceased



have not been identified by anyone other than the brother of the deceased. Golu Chaudhary and Shankar Manjhi were sent for treatment on 21.10.2014. The doctor would tell what was the condition of the wounds on their body. Further, it has been stated that C.I.S.F is a paramilitary force which is a part of the Police. Randhir Kumar accompanied him in the research whose presence has been mentioned in the diary. The seizure list of the skeleton does not have Randhir's signature and there is no description of his presence at that time.

16. PW-10 Dineshwar Singh was on the post of A.S.I.-cum-literate constable at Rampur Police Station on 19.10.2014. He had exhibited the F.S.L. of this case and sent the seized items to Patna.

17. We have re-appreciated the entire evidence laid by the prosecution before the Trial Court. It emerges from the record that written complaint was given by Ram Nath Prasad (PW-4) on 19.10.2014 in which he had stated that his son Sudhir Kumar is missing from 03.10.2014 after 05:00 pm and, on the said date, his son, who was working as a driver and was driving a tempo, received a call on his mobile phone. On 02.10.2014 also, phone calls were received by him from a particular mobile number which is mentioned in the said written complaint. It appears that, thereafter,



on the basis of the said mobile number given by the informant, the Investigating Agency has traced the mobile phone of Sudhir Kumar. The said mobile phone was found from one Arvind Paswan. Therefore, the said Arvind Paswan was arrested. While Arvind Paswan was in Police custody, his statement was recorded wherein he has disclosed that the said mobile phone was given by his cousin Vicky and, therefore, he has put SIM card which was in the name of his father Chunnu Paswan in the mobile phone. Thereafter, on the basis of the said statement of Arvind Paswan, Vicky (appellant) was arrested and his confessional statement was recorded on 19.10.2014. On the basis of his confessional statement, other accused Anchal Chaudhary @ Golu Choudhary was arrested on 20th October, 2014. His confessional statement was also recorded by the Police and it is alleged that thereafter the other two accused were also arrested on the very same day. All the accused had shown the jungle where three accused namely Golu Choudhary, Raj Kumar Manjhi and Shankar Manjhi with the help of the mother of Vicky i.e. Babita Devi killed the deceased Sudhir Kumar. It is a case of the prosecution that Vicky, in his confessional statement, stated that his mother Babita Devi informed him that she with the help of three other accused killed Sudhir Kumar and took the mobile phone of the deceased and Rs. 700/- and thereafter mobile of Sudhir Kumar was



given by Babita Devi to Vicky and, in turn, Vicky gave the said mobile phone to Arvind Paswan. Thus, on the basis of the aforesaid theory, the prosecution has alleged that the accused have committed the alleged offences. However, from the evidence laid by the prosecution, it is revealed that there is no eye-witness to the occurrence in question and the case of the prosecution rests on the circumstantial evidence. From the evidence laid by the prosecution, it would reveal that the prosecution has failed to prove the motive on the part of the accused to kill the deceased Sudhir Kumar by leading cogent evidence. The motive assumes importance in case of circumstantial evidence. Further, the human skeleton was found after a period of 16 days from the date Sudhir Kumar was missing.

18. Now, it is a case of the prosecution that, on the basis of confessional statement, the human skeleton was discovered. Further, the clothe and the shoes of the deceased were also recovered from the said place and, therefore, the said discovery is admissible in evidence.

19. At this stage, we would like to refer the decision rendered by the Hon'ble Supreme Court in the case of **Subramanya (supra)**, has held in **Para 76 to 79** as under:-

“76. Keeping in mind the aforesaid evidence, we proceed to consider whether the prosecution has been able to prove and establish the discoveries in accordance with law. Section 27 of the Evidence Act reads thus:



“27. How much of information received from accused may be proved.-

Provided that, when any fact is deposed to as discovered in consequence of information, received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

77. The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the discovery of a fact relevant under Section 27 of the Evidence Act.

78. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the accused while in custody makes such statement before the two independent witnesses (panch-witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in



the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch-witnesses) would proceed to the particular place as he may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter.

79. In the aforesaid context, we may refer to and rely upon the decision of this Court in the case of **Murli and Another v. State of Rajasthan** reported in (2009) 9 SCC 41, held as under:

“34. The contents of the panchnama are not the substantive evidence. The law is settled on that issue. What is substantive evidence is what has been stated by the panchas or the person concerned in the witness box....”

(Emphasis supplied)”

20. In the case of **Ramanand(supra)**, the Hon’ble Supreme Court has held in **Para 51 to 53** as under:-

“51. It is the case of the prosecution that on 24.01.2010 the accused appellant was picked up by the investigating officer from nearby a bus stand and was arrested in connection with the alleged crime. After the arrest of the accused appellant and while he being in the custody at the police station, he is said to have on his own free will and volition made a statement that he would like to point out the place where he had hidden the weapon of



offence (*Banka*) and his blood-stained clothes after the commission of the alleged crime. According to him, after such statement was made by the accused appellant, he along with his subordinates set forth for the place as led by the accused. There is something very unusual, that we have noticed in the oral evidence of the investigating officer. According to him while the police party along with the accused were on their way, all of a sudden, the investigating officer realized that he should have two independent witnesses with him for the purpose of drawing the panchnama of discovery. In such circumstances, while on the way the investigating officer picked up PW-2, Chhatarpal Raidas and Pratap to act as the panch witnesses. According to the investigating officer the accused led them to a coriander field and from a bush he took out the weapon of offence (*Banka*) and the blood-stained clothes. The weapon of offence and the blood-stained clothes were collected in the presence of the two panch witnesses and the panchnama Exh. 5 was accordingly drawn. The weapon of offence and the blood stained clothes thereafter were sent for the Serological Test to the Forensic Science laboratory. We are of the view that the Courts below committed a serious error in relying upon this piece of evidence of discovery of a fact, i.e., the weapon & clothes at the instance of the accused as one of the incriminating circumstances in the chain of other circumstances. We shall explain here below why we are saying so.

52. Section 27 of the Evidence Act, 1872 reads thus:



“27. How much of information received from accused may be proved.— Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

53. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence along with his blood stained clothes then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence. When the accused while in custody makes such statement before the two independent witnesses (panch witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood



stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter.”

21. In the case of **Babu Sahebagouda Rudragoudar(supra)**, the Hon’ble Supreme Court has held in **Para 60 & 64** as under:-

“**60.** Thus, when the Investigating Officer steps into the witness box for proving such disclosure statement, he would be required to narrate what the accused stated to him. The Investigating Officer essentially testifies about the conversation held between himself and the accused which has been taken down into writing leading to the discovery of incriminating fact(s).

64. Further, in the case of *Subramanya v. State of Karnataka*, it was held as under:—

“**82.** Keeping in mind the aforesaid evidence, we proceed to consider whether the prosecution has been able to prove and establish the discoveries in accordance with law. Section 27 of the Evidence Act reads thus:

“**27. How much of information received from accused may be proved. —**

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

22. Thus, from the aforesaid decisions rendered by the Hon’ble Supreme Court, it can be said that when the Investigating



Officer steps into the witness box for proving such disclosure statement, he would be required to narrate what the accused stated to him. The Investigating Officer essentially testifies about the conversation held between himself and the accused which has been taken down into writing leading to the discovery of the incriminating facts.

22.1. In the present case, from the evidence of the prosecution witnesses including the Investigating Officer, it is clear that the Investigating Officer gave no description at all of the conversation which had transpired between himself and the accused which was recorded in the disclosure statements. Thus, we are of the view that this type of disclosure statements cannot be read in evidence and the recovery made in furtherance thereof are *non est* in the eyes of law. We are, therefore, of the view that neither of the disclosure memos were proved in accordance with law.

23. At this stage, it is also pertinent to note that, so far as the appellant Vicky is concerned, even as per the case of the prosecution, he was not present with his mother and the three other co-accused when it is alleged that they have killed Sudhir Kumar in the jungle, the only allegation levelled against him is that his mother informed about the incident of killing of Sudhir Kumar by the other accused and thereafter, his mother gave mobile phone of the



deceased to Vicky which, in turn, he gave to his cousin Arvind Paswan. We are of the view that even assuming that the said story of the prosecution is correct, even then no offence has been committed by Vicky by giving the mobile phone of the deceased given by his mother to him to Arvind Paswan.

24. In the case of **Raj Kumar(supra)**, the Hon'ble Supreme Court has held in **Para 16** as under:-

“16. The law consistently laid down by this Court can be summarized as under:

(i) It is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction;

(ii) The object of examination of the accused under Section 313 is to enable the accused to explain any circumstance appearing against him in the evidence;

(iii) The Court must ordinarily eschew material circumstances not put to the accused from consideration while dealing with the case of the particular accused;

(iv) The failure to put material circumstances to the accused amounts to a serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused;

(v) If any irregularity in putting the material circumstance to the accused does not result in failure of justice, it becomes a curable defect. However, while deciding whether the defect can be cured, one of the considerations will be the passage of time from the date of the incident;



(vi) In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him; and

(vii) In a given case, the case can be remanded to the Trial Court from the stage of recording the supplementary statement of the concerned accused under Section 313 of CrPC.

(viii) While deciding the question whether prejudice has been caused to the accused because of the omission, the delay in raising the contention is only one of the several factors to be considered.”

25. Now, it is relevant to note that, while recording the statement of the accused under Section 313 of the Code, no question was put to the accused pointing out the incriminating material produced by the prosecution before the Trial Court and, therefore, it is a specific case of the defence that prejudice has been caused to the accused by not putting the question pointing out the incriminating material against the accused. Therefore, at this stage, we would like to refer the decision rendered by the Division Bench of this Court in the case of **Brahmdeo Sahni Vs. The State of Bihar** in **Criminal Appeal (DB) No. 521 of 2015**. The Division Bench of this Court has considered the decisions rendered by the Hon’ble Supreme Court and thereafter observed in **Paragraph 23 to 26** as under:-

“23. In the case of **Raj Kumar @ Suman (supra)**, the Hon’ble Supreme Court has observed in **paragraph 13 to 16** as under:



“13. Then we come to the decision of this Court in the case of **S. Harnam Singh v. State (Delhi Admn.)**. In **paragraph 22**, this Court held thus :

“22. Section 342 of the Code of Criminal Procedure, 1898, casts a duty on the court to put, at any enquiry or trial, questions to the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in evidence against the accused is required to be put to him specifically, distinctly and separately. Failure to do so amounts to a serious irregularity vitiating the trial if it is shown to have prejudiced the accused. If the irregularity does not, in fact, occasion a failure of justice, it is curable under Section 537, of the Code.”

(emphasis added)

14. Then we come to a decision in the case of Samsul Haque relied upon by the learned counsel for the appellant. In paragraphs 21 to 23, this Court held thus : “21. The most vital aspect, in our view, and what drives the nail in the coffin in the case of the prosecution is the manner in which the court put the case to Accused 9, and the statement recorded under Section 313 CrPC. To say the least it is perfunctory. 22. It is trite to say that, in view of the judgments referred to by the learned Senior Counsel, aforesaid, the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem. Apart from the judgments referred to aforesaid by the learned Senior Counsel, we may usefully refer to the judgment of this Court in Asraf Ali v. State of Assam [Asraf Ali v. State of Assam, (2008) 16 SCC 328 : (2010) 4 SCC (Cri) 278]. The relevant observations are in the following paragraphs : (SCC p. 334, paras 21-22)

“ 21. Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances



appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced. 22. The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed a similar view in *S. Harnam Singh v. State (Delhi Admn.)* [*S. Harnam Singh v. State (Delhi Admn.)*, (1976) 2 SCC 819 : 1976 SCC (Cri) 324] while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facets by the trial court to the accused adds to the vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise.”

23. While making the aforesaid observations, this Court also referred to its earlier judgment of the three-judge Bench in *Shivaji Sahabrao Bobade v. State of Maharashtra* [*Shivaji Sahabrao Bobade v. State of Maharashtra*, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033], which considered the fallout of the omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence, and the requirement that the accused's attention should be drawn to every inculpatory material so as to enable him to explain it. Ordinarily, in such a situation, such material as not put to the accused must be eschewed. No doubt, it is recognised, that where there is a perfunctory examination under Section 313



CrPC, the matter is capable of being remitted to the trial court, with the direction to retry from the stage at which the prosecution was closed [Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033].”

(emphasis added)

15. Learned counsel for the respondent also relied upon a decision of this Court in the case of Vahitha v. State of Tamil Nadu. This case does not deal with the consequences of the omission made while questioning the accused under Section 313 of CrPC. This deals only with a contingency where evidence of the prosecution witnesses goes unchallenged. Now we come to the decision of this Court in the case of Satyavir Singh relied upon by the learned counsel for the respondent. The decision holds that the challenge to the conviction based on non-compliance with Section 313 of CrPC for the first time in the appeal cannot be entertained unless the accused demonstrates that prejudice has been caused to him. If an objection is raised at the earliest, the defect can be cured by recording an additional statement of the concerned accused. The sum and substance of the said decision is that such a long delay can be a factor in deciding whether the trial is vitiated. Moreover, what is binding is the decision of the larger Bench in the case of Shivaji Sahabrao Bobade, which lays down that if there is prejudice caused to the accused resulting in failure of justice, the trial will vitiate.

16. The law consistently laid down by this Court can be summarized as under:

(i) It is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction;

(ii) The object of examination of the accused under Section 313 is to enable the accused to explain any circumstance appearing against him in the evidence;



(iii) The Court must ordinarily eschew material circumstances not put to the accused from consideration while dealing with the case of the particular accused;

(iv) The failure to put material circumstances to the accused amounts to a serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused;

(v) If any irregularity in putting the material circumstance to the accused does not result in failure of justice, it becomes a curable defect. However, while deciding whether the defect can be cured, one of the considerations will be the passage of time from the date of the incident;

(vi) In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him; and

(vii) In a given case, the case can be remanded to the Trial Court from the stage of recording the supplementary statement of the concerned accused under Section 313 of CrPC.

(viii) While deciding the question whether prejudice has been caused to the accused because of the omission, the delay in raising the contention is only one of the several factors to be considered.”

24. At this stage, we would also like to refer and rely upon the decision rendered by the Hon’ble Supreme Court in the case of **Maheshwar Tigga Vs. State of Jharkhand**, reported in **(2020) 10 SCC 108**, wherein the Hon’ble Supreme Court has observed in **paragraphs 7 and 8** as under:

“7. A bare perusal of the examination of the accused under Section 313 CrPC reveals it to be extremely casual and perfunctory in nature. Three capsuled questions only were asked to the appellant as follows which he denied:

“Question 1. There is a witness against you that when the informant V. Anshumala Tigga was going to school you were hiding near Tomra canal and after finding the informant in isolation you forced her to strip naked on knifepoint and raped her.



Question 2. After the rape when the informant ran to her home crying to inform her parents about the incident and when the parents of the informant came to you to inquire about the incident, you told them that “if I have committed rape then I will keep her as my wife”.

Question 3. On your instruction, the informant's parents performed the “Lota Paani” ceremony of the informant, in which the informant as well as your parents were present, also in the said ceremony your parents had gifted the informant a saree and a blouse and the informant's parents had also gifted you some clothes.”

8. It stands well settled that circumstances not put to an accused under Section 313 CrPC cannot be used against him, and must be excluded from consideration. In a criminal trial, the importance of the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity not only to furnish his defence, but also to explain the incriminating circumstances against him. A probable defence raised by an accused is sufficient to rebut the accusation without the requirement of proof beyond reasonable doubt.”

25. From the aforesaid decision rendered by the Hon’ble Supreme Court, it can be said that it is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctly and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction. The object of examination of the accused under Section 313 of the Code is to enable the accused to explain any circumstances appearing against them in the evidence. The failure to put material circumstances to the accused amounts to a serious irregularity and it will vitiate the trial if it is shown to have prejudiced the accused.

26. Keeping in view the aforesaid decision, once again, if the statement of the accused recorded under Section 313 of the Code is examined, we are of the view that the court



has not put the incriminating circumstances to the accused as a result of which prejudice has been caused to the appellants-accused as contended by learned counsel appearing for the appellant and Amicus Curiae.”

26. Thus, from the aforesaid decisions rendered by the Hon’ble Supreme Court as well as this Court, it is clear that it is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstances means the circumstance of the material on the basis of which the prosecution is seeking his conviction. The object of examination under Section 313 is to enable the accused to explain any circumstances appearing against him in the evidence. The failure to put material circumstances to the accused amounts to serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused.

27. Keeping in view the aforesaid decisions, if the facts of the present case are examined, it is a specific defence taken by the accused that, because of not putting the said material evidence against the accused while recording the statement under Section 313 of the Code serious prejudice has been caused to them. Thus, we are of the view that, in the present case, when the prosecution has sought conviction on the basis of the confessional statement made by the accused upon which the so called discovery of the human skeleton and the other material was made was required to be put to



the accused while recording the statement under Section 313 of the Code. Thus, the aforesaid was a serious irregularity committed by the Trial Court. Thus, the Trial Court has failed to put such material circumstances to the accused and, therefore, on this ground also, the benefit is required to be given to the accused.

28. In view of the aforesaid discussion, we are of the view that the prosecution has failed to complete the chain of circumstances from which it can be established that the appellants/convicts have committed the alleged offences and, therefore, benefit of doubt is required to be given to the appellants.

29. The impugned judgment of conviction dated 22.06.2017 and order of sentence dated 03.07.2017 passed by learned Ist Additional District and Sessions Judge, Gaya in Sessions Trial No. 51/2015 (S.J.)/ 35/2017, arising out of Rampur P.S. Case No. 300 of 2014 dated 19.10.2014, G.R. No. 5084 of 2014 are quashed and set aside. The appellants are acquitted of the charges levelled against them by the learned Trial Court.

30. The appellant, namely Anchal Chaudhary @ Golu Choudhary, in Criminal Appeal (DB) No. 949 of 2017 and the appellants, namely Shankar Manjhi and Raj Kumar Manjhi, in Criminal Appeal (DB) No. 1050 of 2017 are on bail. They are discharged from the liabilities of their bail bonds.



31. The appellant, namely Vicky Kumar, Criminal Appeal (DB) No. 949 of 2017 is in custody. He is directed to be released forthwith, if not required in any other case.

32. Accordingly, both these appeals are allowed.

(Vipul M. Pancholi, J)

(Ramesh Chand Malviya, J)

Sachin/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	13.05.2024
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