

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.223 of 2019

Arising Out of PS. Case No.-39 Year-2016 Thana- BHARGAMA District- Araria

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1. Md. Babar @ Md. Babar Ali Son Of Md. Kamrul Resident Of Bir Nagar, Tola Topra, P.S.-Bhargama, District - Araria.
2. Md Rustam Son of Md Usman Resident of Bir Nagar, Tola Topra, P.s.- Bhargama, District -Araria.

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

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Code of Criminal Procedure, 1973 – Section 374 (2) – Appeal against Conviction - - Reliability of evidence, including contradictions in witness testimonies and inconsistencies in FIR and investigation - Procedural lapses, including non-compliance with Section 313 CrPC - requirement of compliance with natural justice under Section 313 CrPC (referred to:- Sujit Biswas v. State of Assam (AIR 2013 SC 3817) (Paragraph 25) - Inadequate corroboration of the alleged place of occurrence and motive Significant discrepancies in the time and place of its recording cast doubt on its authenticity .

(Paragraph- 21, 22).

The Code of Criminal Procedure, 1973 - Section 313 - prejudice caused by non-questioning of material evidence under Section 313 CrPC (Referred to: - Naresh Kumar v. State of Delhi [2024 SCC Online SC 1641] . (Paragraphs 26-27).

Witness Testimonies: Contradictions in accounts of key prosecution witnesses regarding the incident, sequence, and place of occurrence. Witnesses were close relatives and thus scrutinized carefully - -The Doctor (PW-6) who conducted the post-mortem noted injuries but highlighted that their cause (sharp vs. blunt weapon) could not be definitively determined without corroboration from the treating doctor.

(Paragraphs 22-24).

No independent witnesses or material evidence (like blood-stained soil or weapons) were presented to corroborate the prosecution's claim.

(Paragraphs 19-23).

Prosecution failed to prove its case beyond reasonable doubt due to contradictions, procedural lapses, and lack of corroboration - Conviction quashed, and the appellant (Md. Babar) acquitted (Paragraphs 28-31).

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1. Md. Babar @ Md. Babar Ali Son Of Md. Kamrul Resident Of Bir Nagar, Tola Topra, P.S.- Bhargama, District - Araria.
2. Md Rustam Son of Md Usman Resident of Bir Nagar, Tola Topra, P.s.- Bhargama, District - Araria.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Pratik Mishra, Advocate
Mr. Vatsal Vishal, Advocate
Mr. Udbhav, Advocate

For the Informant : Mr. Pankaj Kumar Jha, Advocate

For the State : Mr. Bipin Kumar, 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 : 18-07-2024

The present appeal has been filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as ‘Code’) challenging the judgment of conviction dated 14.12.2018 and order of sentence dated 18.12.2018 passed by the learned 1st Additional Sessions Judge, Araria in Sessions Trial No. 548 of 2016 (CIS No. 489 of 2016), arising out of Bhargama P.S. Case No. 39 of 2016, whereby the concerned Trial Court has convicted the present appellants for the offences punishable under Sections 302 read with 34 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for life and fine of Rs. 50,000/- each convict for the offence under Section 302 read with 34 of the



I.P.C. and, in default of payment of fine, the convicts have to further undergo simple imprisonment for one year each.

2. At the outset, it is pertinent to note that the present appeal has been filed by two appellants namely, appellant No. 1 Md. Babar @ Md. Babar Ali and appellant No. 2 Md. Rustam. Learned counsel Mr. Pratik Mishra appearing for the appellants, under instructions, submits that the appellant No. 2 Md. Rustam passed away during the pendency of the present appeal. In fact, he was released on bail by this Court. Therefore, we have considered the present appeal *qua* appellant No. 1, who is in custody. This appeal stands abated *qua* appellant No. 2.

3. The prosecution story, in a nutshell, is as under:-

3.1. The informant, on 02.04.2016 at 07:00-08:00 a.m., along with her son Abdul Kabir went to field for harvesting wheat crop. While they were harvesting, her husband Abdul Jabbar reached at 09:00 a.m. and asked for breakfast. In the meantime, Sagir, Babar, Rustam and Bibi Sakila, armed with *farsa*, *lathi*, arrow came and encircled her husband Abdul Jabbar and then Sagir inflicted repeated *farsa* blow over the head of her husband. Babar had also assaulted with *lathi* repeatedly and then Rustam, armed with arrow, was provoking them to kill him. On account of assault, her husband sustained several injuries over different parts of the body, as a result



of which, he fell down. Subsequently, the accused persons smashed his teeth as well as jaw and Sakina was assisting them. The informant along with her son intervened and they were also assaulted, as a result of which, they also became senseless. The reason behind the occurrence was that the own brother of the deceased namely Kamrul, who happens to be the father of accused Sagir, had executed a sale deed for 17 *khatas* of land in favour of the husband of the deceased for which all the accused persons were annoyed.

3.2. 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. 548 of 2016 (CIS No. 489 of 2016).

4. Heard learned counsel Mr. Pratik Mishra for the appellant assisted by Mr. Vatsal Vishal and Mr. Udbhav, learned counsel Mr. Pankaj Kumar Jha for the informant and Mr. Bipin Kumar, learned A.P.P. for the Respondent-State.



5. Learned counsel Mr. Pratik Mishra appearing for the appellant submits that, as per the case of the prosecution, the *fardbeyan* of the informant came to be recorded at 14:30 hours on 02.04.2016 at Emergency Ward of Sadar Hospital, Purnea. The said *fardbeyan* was recorded by A.S.I. Shree Bhagwan Pandey. However, the said Officer, who has recorded the *fardbeyan*, has not been examined by the prosecution. The informant is examined as PW-4 by the prosecution and, in her deposition, the informant did not identify her right thumb impression put in the so-called *fardbeyan*. On the contrary, the informant has stated that her statement was recorded at her house when she returned from Purnea with the dead body. Learned counsel, therefore, urged that the *fardbeyan*/F.I.R. is not duly proved and the same has not been exhibited. At this stage, it is contended that PW-3, who is the son of the informant, has deposed before the Court that the statement of the informant was recorded at the place of occurrence and the informant had put her thumb impression on the statement at the place of occurrence.

6. Learned counsel would further submit that it is a case of the informant, in the *fardbeyan*, that she along with her son (PW-3) was cutting the wheat crops in the field at around 07:00-08:00 a.m. The deceased came at the said place at around 09:00 a.m. and, it is alleged that at that time the accused persons came at the place and



assaulted the deceased. However, during the course of her deposition before the Court, the informant has not stated about the presence of her son. It is also contended that PW-2, who is the daughter of the deceased and the informant, deposed before the Court that she went to the place of occurrence after hearing *hulla* and the deceased was lying on the ground, blood was oozing out, his teeth was broken and, due to insertion of rod, the mouth of the deceased was ruptured. She has also deposed that her mother had also reached there after hearing *hulla*. Learned counsel for the appellant, therefore, submitted that the informant and her son are, in fact, not the eye-witness to the incident in question and they reached at the place of occurrence after hearing *hulla* while the deceased was already assaulted. At this stage, it is also contended that the prosecution has examined only interested/related witnesses and no independent witness has been examined. It is also submitted that the deposition given by the so-called eye-witnesses is not trustworthy and, therefore, the same may not be relied upon.

7. Learned counsel Mr. Pratik Mishra thereafter submitted that, as per the case of the prosecution, the place of occurrence is the field of the informant which is situated in the east of the village. However, PW-5, the Investigating Officer, has deposed that he inspected the place of occurrence and found it to be the field of Md.



Rustam. At this stage, learned counsel has also referred the deposition of PW-1, the daughter of the informant, who has deposed that, after hearing *hulla*, she reached at *bandh* where the deceased was present. However, PW-2, another daughter of the informant, has deposed that there was blood at the place of occurrence and the ground was totally wet by the blood and there was no *bandh* at the place of occurrence. It is submitted that even PW-3 also stated about the presence of blood-stains at the place of occurrence for two days. However, PW-5 (Investigating Officer) has deposed that he reached at the place of occurrence on the date of occurrence at around 12:15 p.m. and he found that the wheat crop was not trampled but was in a natural condition. He did not find any incriminating material at the place of incident. Learned counsel, therefore, urged that the prosecution has miserably failed to prove the place of occurrence.

8. Learned counsel Mr. Pratik Mishra would further contend that the prosecution has also failed to prove the genesis of the occurrence. The informant has stated in the *fardbeyan* that, because of the dispute with regard to 17 *katthas* of land between the parties, the incident took place. In fact, the informant has stated, in the *fardbeyan*, that the accused are the co-villagers/neighbours. However, from the deposition of the other prosecution witnesses, it is revealed that the appellant is the cousin of PW-1 to PW-3.



9. Learned counsel lastly contended that while recording further statement of the appellant/accused under Section 313 of the Code, incriminating materials/circumstances against the appellant were not put to him and thereby a serious prejudice has been caused to the appellant/accused.

10. Learned counsel for the appellant, therefore, submitted that though the prosecution has failed to prove the case against the appellant beyond reasonable doubt, the Trial Court has passed the impugned judgment and order and, therefore, the same be quashed and set aside.

11. On the other hand, learned A.P.P. as well as the learned counsel Mr. Pankaj Kumar Jha for the informant have opposed the present appeal. Learned counsels for the respondents submit that there are eye-witnesses to the incident in question and they have supported the case of the prosecution. Merely because they are near relatives of the deceased their version cannot be discarded. It is further submitted that the medical evidence also supports the case of the prosecution. Thus, when the prosecution has proved the case against the appellant beyond reasonable doubt, no error is committed by the Trial Court while passing the impugned judgment and order. Learned counsels, therefore, urged that the present appeal be dismissed.



12. We have considered the submissions canvassed by the learned counsels for the parties. We have also perused the evidence of prosecution witnesses and also perused the documentary evidence exhibited.

13. At this stage, we would like to appreciate the relevant extract of entire evidence led by the prosecution before the Trial Court.

14. Before the Trial Court, the prosecution had examined 6 witnesses.

15. PW-1 Tankila has stated, in her examination-in-chief, that on the day of incident, at about 08:00 a.m., she headed towards her father on hearing noise from her home and found that he was in the *bandh*. Sagir hit her father on the head with *farsa* causing severe injuries on his head and he died during the course of treatment. Rustam, Babar, Sakila were also involved in the incident. Rustam was assaulting her father with bows-arrows while Sakila thrust a rod into his mouth and Babar hit 50 blows of stick (*lathi*) on his stomach.

15.1. In her cross-examination, she has stated that when she reached the *bandh*, she found her father lying unconscious on the ground. The accused persons were assaulting him. She went there and implored them to leave her father and kill her instead. Further,



she has stated that Babar was hitting her father with *lathi*. There were injuries on her father's body parts, including head, nose, mouth, eye, abdomen. She did not count the injuries. By the time she reached the spot, her father was alive. He died in the hospital at Purnea. There was a land related dispute which was the bone of contention. Further, she has stated that 3-4 people had gathered when the occurrence was going on.

16. PW-2 Sahnara Khatoon has stated, in her examination-in-chief, that on the day of incident, Jabbar had gone to the *bandh* to harvest the wheat crop. Sameer, Rustam, Babar came with *farsa*, *lathi*, surrounded her father and then Sameer hit him with *farsa* while Rustam hit him with arrows and Shakila pushed the rod into his mouth. Her father died in the hospital.

16.1. In her cross-examination, she has stated that Babar is her cousin while Rustam is her brother-in-law. She reached at the place of occurrence at 08:00 a.m. She reached after hearing the uproar. Her father was lying on the ground. He was bleeding and his teeth were broken. His buccal cavity was grievously injured due to the rod being inserted into his mouth. Her mother also came there on hearing the uproar. She, along with her mother, took her father to her home. It was the time of *namaz* in the afternoon when he was brought. The soil where he died was handed over to the Police on



Sunday. He was treated in the hospital at Purnea where he died. She has further stated that there was blood spilled at the place of occurrence and there was no field there. The Police registered the statement on the day of the incident itself. There was already a dispute with Babar and Rustam and they were not on talking terms with them. It is also stated that the bone of contention between them was the land dispute.

17. PW-3 Abdul Kabir is the son of the informant. He has stated, in his examination-in-chief, that Babar was carrying *lathi*, Shakila had a rod in her hand while Rustam was holding arrows in his hand and Sameer was holding a *farsa*. Sameer assaulted his father 8-10 times with *farsa*. His father died during the treatment. He was also present there at that time. It is also stated that the Police had visited the place of occurrence. He and his mother's statements were recorded at Purnea Hospital. The *post mortem* was conducted in Araria.

17.1. In his cross-examination, he has stated that the Police had recorded the statement of his mother on the day of occurrence at the spot of incident itself who had put her thumb impression as well. There was blood spilled at the spot of incident. His father suffered severe injuries on his head, nose and lips. There was a cut on his tongue as well. He was the witness to the fight. He



has stated that the blood-stains remained at the spot of incident for two days. The Police directly sent his father to Purnea Hospital. He was brought to Araria after his death. He has further stated that the accused persons are his cousins and they had used bows and arrows. All the accused persons fled with their weapons after committing the offence. Seven arrows were lying there at the place of incident and no one was hit by the arrow. He has also stated that the wheat crop was trampled at the crime scene.

18. PW-4 Mariam is the informant of this case. On the day of incident, her husband had come with her to cut wheat. Sameer, Babar, Rustam and Shakila came there and started assaulting him. Sameer hit her husband on his head with *farsa*, Babar hit him with *lathi*, Rustam hit him with bows and arrows while Shakila hit him with a rod. Her husband died during treatment in the hospital. The Police recorded her statement. She had affixed her thumb impression on the same.

18.1. In her cross-examination, she has stated that the buccal cavity of her husband was grievously injured on being assaulted by the accused persons. They disfigured his face. The S.I. recorded her statement at her home when they returned with the dead body from Purnea. She has also stated that there was blood spilled at the place of incident. Her husband was wounded in the eyes by an



arrow and two arrows were found lying on the place of incident. She did not give the statement to the Police again. Further, she has stated that Sameer, Babar and Rustam are not her relatives but they are just co-villagers.

19. PW-5 King Kundan is the Investigating Officer who was posted as Officer-in-charge at Bhargama P.S. on 02.04.2016. He took the charge of investigation after registering the case of Bhargama P.S. Case No. 39/2016. He inspected the spot of incident and recorded the statement of the informant again. He received the Inquest Report of Md. Jabbar from K. Hat and mentioned the same in the diary. Thereafter, he inspected the spot of incident which is the Md. Rustam's field. He then recorded the statement of the witnesses namely, Ayub Kheer, Sahnara, Tankila. The formal F.I.R. was marked as Exhibit-1.

19.1. In his cross-examination, he has stated that he did not go to Purnea during the course of the investigation. He found that the wheat crop were sown in the field but he did not see the harvested wheat. He did not find any incriminating material at the spot of incident. He has not mentioned about the distance between the place of occurrence and the informant's house. He has mentioned about the date when he visited the place of occurrence. He reached at the place of incident at 12:15 hours which he has mentioned in Para-



4. He arrested the accused persons from their homes respectively. They themselves gave their names and addresses. He had stated about the reason behind their arrest but did not mention it in the diary. Further, he has stated that he did not investigate the place where the deceased was treated because he did not consider it necessary after receiving the *post mortem* report. The *post mortem* of the body of the deceased was conducted in Purnea itself. The blood-stained clothe was not received so he did not mention it nor registered the statement of any independent witnesses.

20. PW-6 Dr. Abdul Ahad has stated in his deposition that he was posted as Medical Officer at Sadar Hospital, Purnea on 02.04.2016. He conducted the *post mortem* of the deceased on the instruction of the Civil Surgeon, Purnea and found following *ante-mortem* injuries:-

“(i) Rigor mortis found on both upper and lower limbs.

(ii) Multiple bruises over right thigh, right leg, right forearm and also around right eye.

(iii) Stitch wound over right eyebrow about two inch in length.

(iv) Stitch wound on dorsum of nose about one inch in length.

(v) Three stitch wounds over mid skull one inch and one and a half and four inch.

(vi) Stitched wound over lower lip about one inch in size.

On dissection:-

(i) Blood and clot found in and under line tissues of above mentioned injuries.



(ii) There was fracture of left parietal skull bone.

(iii) Blood and clots found in the cranial cavity.

3. All the viscera-

(i) lungs, liver, spleen, kidney etc. found pale.

(ii) Left side of heart found empty and right side heart full of blood.

(iii) Stomach found empty.

(iv) Intestines contained gases and fecal matter.

Opinion:-

(i) In my opinion death is due to hemorrhage and shock due to above mentioned head injury caused by hard blunt substances.

(ii) Time elapsed within 24 hours of *post mortem*.”

20.1. In his cross-examination, he has stated that multiple stitch wounds were seen on the body parts of the deceased while performing the *post mortem* but after looking at it, it was not known whether the injury was caused by hard blunt substance or by a sharp weapon. It is said to be something that can be only revealed by the one who had previously given the first aid to the deceased. His opinion is that the wounds are caused by the hard blunt substance.

21. From the evidence produced by the prosecution before the Trial Court, it emerges that, for the incident which took place at about 09:00 a.m. on 02.04.2016, the *fardbeyan* of the informant was recorded at 14:30 hours. The said *fardbeyan* was recorded in the Emergency Ward at Sadar Hospital at Purnea. It is relevant to note that the formal F.I.R. was registered only on the next date i.e. on 03.04.2016 at 11:00 a.m. It further transpires from the record that, as per the case of the prosecution, the informant put her right thumb



impression on the said *fardbeyan*. However, it is revealed from the record that A.S.I. Shree Bhagwan Pandey had recorded the said *fardbeyan*. However, the prosecution has failed to examine the said Police Officer. It would further reveal from the deposition given by PW-4 (Informant) that her statement was recorded by the Police Officer at her house when she returned to Purnea with the dead body of the deceased. Further, from the deposition given by PW-3, son of the informant, the statement of the informant was taken by the Police at the place of occurrence and, at that place, her thumb impression was obtained on the statement of the informant. At this stage, we would also like to refer the deposition given by PW-5, Investigating Officer, who has specifically stated in Para-6 of his cross-examination that, on the date of incident, at 12:15 hours, he reached at the place of occurrence. Thus, from the said deposition, it can be said that, even before recording of the *fardbeyan* of the informant at 14:30 hours (02:30 p.m.), the Investigating Officer reached at the place of occurrence. It is further revealed from the record that the F.I.R. is not duly proved. Thus, from the aforesaid evidence led by the prosecution, doubt has been raised with regard to the recording of the *fardbeyan* at Emergency Ward of Sadar Hospital, Purnea. What was the first version of the informant at the place of occurrence is not produced by the prosecution.



22. From the deposition given by the PW-4 (Informant), it is revealed that the said witness has projected herself as an eye-witness to the incident in question. As observed hereinabove, her *fardbeyan* was recorded in the Emergency Ward of Sadar Hospital, Purnea. However, from the deposition of PW-2, daughter of the informant, it would reveal that she went to the place of occurrence after hearing *hulla* and the deceased was lying on the ground and the blood was oozing out. The said witness further stated that her mother had also reached there after hearing *hulla*. It is also revealed from the deposition given by PW-1, daughter of the informant, that she also reached at the place of occurrence after hearing *hulla* and she reached at *bandh* where the deceased was present.

22.1. As per *fardbeyan*, the informant and her son (PW-3) were cutting the wheat crop in the field at around 07:00-08:00 a.m. and the deceased came at the said place at around 09:00 a.m. and, at that time, the accused came at the place and assaulted with deadly weapons like *farsa*, *lathi* and arrows on the deceased. However, PW-4 (Informant) has not stated about the presence of her son while giving the deposition before the Court. On the contrary, she has stated that she along with the deceased had gone to the field for cutting wheat crop where the accused persons assembled and assaulted the deceased.



23. At this stage, it is also relevant to note that there is major discrepancy with regard to the place of occurrence in the deposition given by the prosecution witnesses. As per the case of the prosecution, the place of occurrence is the field of the informant which is situated in the east of the village. However, if we examine the deposition given by PW-5, Investigating Officer, he has specifically stated that he inspected the place of occurrence and found it to be the field of Md. Rustam. Further, PW-1, daughter of the informant, has deposed that, after hearing *hulla*, she reached at *bandh* where the deceased was present whereas PW-2, another daughter of the informant, has deposed that there was blood at the place of occurrence and the ground was totally wet by blood but there was no *bandh* at the place of occurrence. Similarly, PW-3, son of the informant, has deposed that there was blood at the place of occurrence and the blood-stains remained at the said place for two days. He further deposed that 7 arrows were there at the place of occurrence. He further deposed that the wheat crop was trampled. However, at this stage, if we examine the deposition given by the informant PW-4, she has stated that there was blood at the place of occurrence and 2 arrows were lying at the said place. Further, wheat crop of $\frac{1}{4}$ *katthas* was cut when the occurrence took place. However, if the deposition of PW-5 (Investigating Officer) is carefully



scrutinized, it is revealed that the said witness has stated that he reached at the place of occurrence on the date of occurrence at around 12:15 p.m. He found that the wheat crop was not trampled but was in a natural condition. He did not find any harvested wheat crop at the said place. He did not find any incriminating material at the place of incident. Thus, from the aforesaid discussion, it can be said that the prosecution has miserably failed to prove the place of occurrence and there are major contradictions and inconsistencies in the depositions given by the prosecution witnesses who are the near relatives/interested witnesses. It is true that merely because witnesses are the interested/related witnesses, their deposition cannot be discarded simply on the said ground. However, their deposition is required to be scrutinized carefully. From the aforesaid discussion and evidence of the prosecution witnesses, we are of the view that there are major contradictions, inconsistencies and discrepancies in the deposition of the relatives/interested witnesses and, therefore, their deposition cannot be said to be trustworthy. The aforesaid witnesses are, in fact, chance witnesses and their presence at the place of occurrence raises doubt. At this stage, it is also relevant to observe that the incident in question which took place at 09:00 a.m. in the agricultural field and, therefore, presence of the independent witnesses in the nearby agricultural field was natural. However, the



prosecution has not examined any independent witnesses. Further, the Inquest Report of the deceased was also not produced before the Court and the same has not been exhibited. Even the inquest witnesses and the author of the Inquest Report have not been examined by the prosecution and thereby there is a deliberate suppression of the Inquest Report which caused prejudice to the appellant/accused. It has also come on record, in the evidence of PW-6 (Doctor), who had conducted the *post mortem* of the dead body of the deceased, that the dead body was brought to the hospital by Constable Sudhir Prasad and Md. Sahabuddin. However, the aforesaid witnesses are also not examined by the prosecution.

24. Further, from the deposition given by PW-6 (Doctor), it is revealed that there were multiple wounds on the body of the deceased and the weapons used to inflict such wounds can be deposed/stated by the Doctor who had treated the deceased. At this stage, it is pertinent to note that the prosecution has failed to examine the Doctor, who had given the treatment to the deceased. Thus, the prosecution has failed to prove the manner of occurrence.

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



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

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

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



prejudiced or miscarriage of justice had occurred owing to such non-questioning or inadequate questioning.

22. In the light of the above view of the matter, we are inclined to consider the further question whether the non-questioning on the aforesaid twin incriminating circumstances to the appellant during his examination under Section 313, Cr. P.C., had caused material prejudice to him. The decision of this Court in *State of Punjab v. Swaran Singh*, constrain us to consider one another factor while considering the question of prejudice. In *Swaran Singh's case* (supra), this Court held that where the evidence of the witnesses is recorded in the presence of the accused who had the opportunity to cross examine them but did not cross examine them in respect of facts deposed, then, omission to put question to the accused regarding the evidence of such witnesses would not cause prejudice to such an accused and, therefore, could not be held as grounds vitiating the trial *qua* the convict concerned. We have already found that Anil Kumar (PW-7), Smt. Prem Devi (PW-8), Mrs. Madhu (PW-19) and Anand Kumar (PW-22) have deposed about the said circumstances. A scanning of their oral testimonies, available on record, would undoubtedly reveal that on both the points, on behalf of the appellants they were cross examined.

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

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



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

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

28. In view of the aforesaid facts and circumstances of the present case, we are of the view that the prosecution has failed to prove the case against the appellant/accused beyond reasonable doubt despite which, the Trial Court has recorded the judgment of conviction and order of sentence against the appellant. Hence, the impugned judgment and order are required to be quashed and set aside.

29. Accordingly, the impugned judgment of conviction dated 14.12.2018 and order of sentence dated 18.12.2018 passed by



learned 1st Additional Sessions Judge, Araria in Sessions Trial No. 548 of 2016 (CIS No. 489 of 2016), arising out of Bhargama P.S. Case No. 39 of 2016, are quashed and set aside.

30. The appeal stands allowed.

31. The appellant, namely Md. Babar @ Md. Babar Ali, is acquitted of the charges levelled against him by the learned Trial Court. He is directed to be released from custody forthwith, if his custody is not required in any other case.

32. Learned counsel for the appellant submits that appellant No. 2 Md. Rustam has died during the pendency of the present appeal.

33. As such, the appeal stands abated with regard to appellant No. 2 Md. Rustam.

(Vipul M. Pancholi, J)

(Ramesh Chand Malviya, J)

Sachin/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
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