2025 INSC 1382

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO(S). 305 OF 2024

SURESH SAHU & ANOTHER ....APPELLANT(S)

VERSUS

THE STATE OF BIHAR
(NOW JHARKHAND) ....RESPONDENT(S)

J U D G M E N T

Mehta, J.

1. Heard.

2. The appellants[1] herein faced trial before the 3rd Additional Judicial Commissioner, Ranchi[2] in Sessions Trial No. 128 of 1991. Vide judgment dated 30th August, 1994, the learned trial Court convicted the accused-appellants for the offences punishable

[1] Hereinafter, referred to as the "accused-appellants".
[2] Hereinafter, referred to as the "trial Court".

under Section 120B, Section 302 and Section 302/149 of the Indian Penal Code, 1860[3]. The accused-appellants were sentenced to undergo imprisonment for life for the aforesaid offences.

3. Being aggrieved by their conviction and sentence, the accused-appellants preferred Criminal Appeal (DB) No. 150 of 1994 before the High Court of Jharkhand at Ranchi[4]. During the pendency of the appeal, the sentences awarded to the accused-appellants by the trial Court were suspended and they were ordered to be released on bail. The afore-stated appeal of the accused-appellants came to be dismissed by the High Court vide judgment dated 10th February 2023, wherein the High Court modified the conviction to one under Section 302/34 IPC and imposed a fine of Rs. 2,000 on the accused-

[3] For short, "IPC".
[4] Hereinafter, referred to as the "High Court".

appellants, in addition to the life imprisonment already awarded by the trial Court. The said judgment is the subject matter of challenge in the present appeal.

4. The accused-appellants surrendered on 1st May, 2023 and currently are in custody.

Brief Facts:-

5. Briefly stated, the facts relevant and essential for disposal for the appeal are noted hereinbelow.

6. As per the initial case of prosecution, the informant, Rameshwar Sahu (PW-3), along with his son, Gajendra Prasad Gupta[5], had left his home on 11th May, 1990 at about 3:00 p.m. to sell sweets at the Jatra Mela held at village Jhinjhari. Gajendra set up his stall and commenced selling sweets. Three persons approached his stall and demanded quarter kg sweets. Gajendra provided the sweets and asked

[5] For short "Gajendra".

for payment. The said individuals allegedly refused to pay, whereupon Gajendra declined to give them the sweets. An altercation ensued, during the course of which the three persons threatened Gajendra, stating that they would accost and kill him on the way back home. The quarrel was pacified by Lalu Ahir, the watchman of Mandar Police Station, and Etwa Oraon, a resident of Sakarpada. Thereafter, the informant and his son wound up the stall and left for their home. It is alleged that when they reached Jhinjhri Dam, the same three persons intercepted them by inserting a stick into the front wheel of Gajendra's bicycle, causing him to fall. Gajendra attempted to run, but the assailants chased him down, and thereafter assaulted him with wooden sticks, chains, and hockey sticks. When the informant tried to intervene, the assailants allegedly threatened him as well, warning that he too would be

killed if he did not flee. The assailants continued beating Gajendra, causing injuries to his forehead, chest, and arms. After the assault, the accused persons fled, whereafter the informant and others proceeded to check upon Gajendra, who was first taken in an injured condition to Mandar Hospital, wherefrom the attending doctor referred him to R.M.C.H., Ranchi. Gajendra was admitted and underwent treatment at R.M.C.H., Ranchi. However, on 12th May, 1990 at about 8:00 a.m., he succumbed to his injuries. The informant alleged that he, as well as watchman Lalu Ahir and Etwa Oraon, could identify the assailant upon seeing them.

7. The aforesaid version, in the form of the *Fardbeyan* (Exh. 1) of the informant Rameshwar Sahu (PW-3), was recorded by ASI R. Paswan of Bariatu Police Station on 12th May 1990 at R.M.C.H., Ranchi. On the basis of the said *Fardbeyan* (Exh. 1),

FIR No. 1858 dated 12th May 1990 was registered and forwarded to Mandar Police Station for requisite follow up action.

8. It seems that the informant (PW-3) was not satisfied with the aforesaid report and suspected some foul play and thus, he gave a written report (Exh. 5) to the officer in Charge of Mandar Police Station on 13th May, 1990 alleging *inter alia* that he had gone to the Jatra *fete* (mela) at village Jhinjri along with his son, Gajendra, for selling sweets. After selling sweets, they left for their home in the evening at about 7:00 p.m. along with Ashok Sahu (son of Khakhandu Sahu), Khakhandu Sahu (son of Kuchu Sahu), and Jatan Sahu (son of Fuchai Sahu). When they had reached Dumphu at around 7:30 p.m., four to five men came in front of them armed with wooden sticks and hockey sticks. One of them inserted a stick into the wheel of Gajendra's bicycle, due to which he

fell down. The assailants caught hold of Gajendra and dragged him towards a nearby pit. When the informant and his companions tried to follow, the assailants threatened to kill them as well, due to which they stepped back out of fear. It is stated that the assailants then started beating Gajendra who was heard shouting “Don’t beat me, leave me Aditya, leave me Suresh.” Being old, infirm and having weak eyesight, the informant could not save his son. When Gajendra’s voice fell silent and the assailants went away, the informant and his companions went to the spot and found Gajendra lying on the pathway soaked in blood. Heavy bleeding was visible from his forehead and injuries on several other parts of his body. On being asked, Gajendra stated that Suresh and Aditya, along with five or six unknown persons, had beaten him, and he kept beseeching them in the words “don’t kill me Aditya, don’t kill me Suresh.”

Gajendra was lifted from the spot and was taken to R.M.C.H., Ranchi, where he died on 12th May, 1990. After post-mortem examination, the dead body was brought home and cremated. The informant further stated that there was a case pending between his son and his nephews, Suresh Sahu and Aditya Sahu, relating to employment in lieu of land acquisition, and that on account of this enmity, Suresh and Aditya, along with others, assaulted his son with wooden sticks and hockey sticks and he died because of the injuries received in the incident.

9. On the basis of this written report, another FIR being Case No. 43/1990 dated 13th May, 1990 came to be registered at Mandar Police Station.

10. Investigation of the case was assigned to the very same ASI R. Paswan who had recorded *Fardbeyan* (Exh. 1). After concluding the investigation, chargesheet came to be filed against

the accused-appellants and the case was committed to the trial Court. Charges were framed against the accused persons who pleaded not guilty and claimed trial. The prosecution examined six witnesses and exhibited five documents to prove its case. The statements of the accused-appellants were recorded under Section 313 of Code of Criminal Procedure, 1973[6] (Section 351 of Bharatiya Nagarik Suraksha Sanhita[7]) which make a very interesting reading and are reproduced hereinbelow verbatim for ready reference: -

> " **(A) Suresh Prasad Sahu**
> The examination of Suresh Prasad Sahu aged about 35 years, taken before me, Bal Govind Prasad 3rd Judicial Magistrate on 16th Day of December 1993, in the Hindi language.
>
> My name is Suresh Prasad Sahu, My father's/husband's name is Shri Bigal Sahu. My age is 35 years. I am by religion Hindu, My nationality is Indian and I belong to Schedule Caste/Tribe. I am by occupation salaried. My home

[6] For short, "CrPC".
[7] For short, "BNSS".

is at Mauza Kanbitha Police Station Mandar District Ranchi.

Question 1 – Witnesses against you allege that on May 11, 1990, Jhinjhari Chauraha, Jhinjhari Village police station, Mandar district Ranchi, was a member of an illegal party whose objective was to kill Gajendra Prasad Gupta. What do you have to say?
Answer – It is wrong.

Question 2 – It is also evidence that on that day and time you and your friend Aditya Prasad Sahu has killed Gajendra Prasad Gupta. What do you have to say?
Answer – It is wrong.

Question 3 – What else do you have to say?
Answer – I was on duty on the day of the incident. I have been implicated in the enmity. I will give witness in the defence.

The above examination was taken in my presence and hearing, and contents a full and true account of the statements made by the accused. It was read over to the accused or interpreted to him in the language which he understands and was admitted by him to be correct."

xxxxxxx

(B) Aditya Prasad Sahu

"The examination of Aditya Prasad Sahu aged about 35 years, taken before me, Bal Govind Prasad 3rd Judicial Magistrate, on 16th Day of December 1993, in the Hindi language.

My name is Aditya Prasad Sahu, My father's/husband's name is Shri Laxman Sahu. My age is 35 years. I am by religion Hindu, My nationality is Indian and I belong to Schedule Caste/Tribe. I am by occupation salaried. My home is at Mauza Kanbitha Police Station Mandar District Ranchi.

Question 1 – There is an evidence over you allege that on May 11, 1990, Jhinjhari Chauraha, Jhinjhari Village police station, Mandar district Ranchi, was a member of an illegal party whose aim was to kill Gajendra Prasad Gupta. What do you have to say?
Answer – It is a lie.

Question 2 – It is also evidence that on that day and time you and your friend Suresh Prasad Sahu has killed Gajendra Prasad Gupta. What do you have to say?
Answer – It is a lie.

Question 3 – What else do you have to say in defence?
Answer – I was on my duty on the day of the incident. My family had enmity with the family of the deceased, so I have been wrognly implicated. I will give witness in the defence.

The above examination was taken in my presence and hearing, and contents a full and true account of the statements made by the accused. It was read over to the accused or interpreted to him in the language which he understands and was admitted by him to be correct."

(Emphasis Supplied)

11. Seven witnesses were examined in defence, two of whom, as per the written report (Exh. 5), namely, Jatan Sahu (DW-1) and Khakhandu Sahu (DW-2), were accompanying the informant and the deceased Gajendra, at the time when the latter was allegedly assaulted. Both these witnesses (DW-1 & DW-2) did not implicate the accused-appellants in the crime and rather stated that there was a fight between Gajendra and some tribal people over selling of sweets. Gajendra was beaten up and became unconscious, but the witnesses could not identify the assailants. They also stated that Aditya Sahu and Suresh Sahu were not seen in the Jatra fair.

12. At this stage, a very important fact that needs to be noted is that the Investigating Officer ASI R. Paswan who recorded the *Fardbeyan* (Exh. 1) and investigated the case was not examined by the prosecution.

13. Be that as it may, the accused-appellants stand convicted and their appeals have been rejected in the manner stated above, upon which the instant appeal by special leave has been laid before us for consideration.

Submissions on behalf of the accused-appellants:-

14. Learned Counsel representing the accused-appellants advanced the following submissions for assailing the impugned judgment and seeking acquittal for the accused-appellants:-

a) That the *Fardbeyan* (Exh. 1) of the informant, Rameshwar Sahu (PW-3), was the actual first information report recorded by ASI R. Paswan (the Investigating Officer) and the High Court committed grave error in discarding the said report and treating the subsequent written report (Exh. 5) dated 13th May, 1990 to be the actual first information report of the incident. As per learned counsel, the said report

would be hit by Section 161 CrPC (Section 180 BNSS).

b) That the evidence of PW-3, the first informant is highly unnatural and full of embellishments, and he falls in the category of a totally unreliable witness. The witness failed to identify the accused at the time of the incident even though he claims to be an eye witness to the incident.

c) That the version of the informant (PW-3), that his son, Gajendra, shouted out the names of the assailants to be Aditya and Suresh while he was being assaulted is absolutely unbelievable. Had the witness observed anything of that sort, he would have immediately disclosed the same to the ASI R. Paswan, who recorded the *Fardbeyan* (Exh. 1) at the R.M.C.H., Ranchi on 12th May, 1990.

d) That the prosecution theory that Tapeshwari Kumari (PW-1) and Saroj Kumari (PW-2), being the

sisters of the deceased, heard the deceased making an oral dying declaration when he was brought home after being assaulted is cooked up and unbelievable. The statements of these witnesses under Section 161 CrPC (Section 180 BNSS) were admittedly recorded after more than one and a half month of the incident. The rank silence of these witnesses being the close relatives, in disclosing this important fact to the police at the earliest possible opportunity completely demolishes their credibility.

e) That grave prejudice has been caused to the accused owing to the perfunctory manner in which their statements under Section 313 CrPC (Section 351 BNSS) were recorded. The High Court failed to consider this vital aspect of the matter and hence the impugned judgment is vitiated as having been passed in ignorance of this crucial issue which goes to the root of the matter.

f) That the material witness ASI R. Paswan who recorded the *Fardbeyan* (Exh. 1) and conducted the investigation of the case was not examined at the trial, and no explanation is forthcoming for his non-examination. He would have been the best person to throw light on the inconsistency between the *Fardbeyan* (Exh. 1) and the written report (Exh.5). The non-examination of the said police officer has caused grave prejudice to the defence and as such, adverse inference deserves to be drawn against the prosecution.

g) That Jatan Sahu (DW-1) and Khakandu Sahu (DW-2) who were named in the written report (Exh.5) as being the witnesses present at the crime scene along with the informant (PW-3) and the deceased, were not examined by the prosecution. Both these witnesses were examined by the defence as DW-1 and DW-2 and they have categorically stated that the

accused-appellants were not the assailants. Neither the trial Court nor the High Court duly considered the effect of the evidence of these two eye-witnesses on the veracity of the prosecution case. If at all, the prosecution was desirous to seek corroboration for the wavering testimony of the first informant (PW-3), these two witnesses (DW-1 and DW-2) would have been the best placed persons to provide such corroboration.

15. On these grounds, learned Counsel for the accused-appellants, implored the Court to set aside the impugned judgment, acquit the accused-appellants of the charges while accepting the appeal.

Submissions on behalf of respondent-State: -

16. *Per contra*, learned Counsel representing the State, supported the impugned judgment. He urged that both the Courts below, for convicting the accused appellants for the charge of murder, have

recorded concurrent findings of facts after due appreciation of evidence on record. The finding of facts so recorded by the trial Court and affirmed by the High Court do not suffer from any infirmity warranting interference by this Court in exercise of jurisdiction under Article 136 of the Constitution of India. He, therefore, sought dismissal of the appeal.

Discussion:-

17. We have given our thoughtful consideration to the submissions advanced at bar and shall deal with the same while reappreciating the evidence available on record. We have also gone through the impugned judgment of the High Court as well as the judgment of the trial Court and carefully reanalyzed the evidence on record.

A. Defective Examination of the Accused Under Section 313 CrPC (Section 351 BNSS)

18. It is evident from the record that only three questions were put to each of the accused in their examination under Section 313 CrPC (Section 351 BNSS). These questions were framed in an extremely generic and mechanical manner, without articulating any of the specific incriminating circumstances appearing in the prosecution evidence.

19. The purpose of recording the statement of an accused under Section 313 CrPC (Section 351 BNSS) is to make the accused aware of the circumstances as appearing against him in the prosecution case and to seek his explanation for the same. For this purpose, the accused must be informed of each and every incriminating circumstance which the prosecution intends to rely upon for bringing home the guilt of the accused. Omission to put material circumstances to the accused in the statement under Section 313 CrPC (Section 351 BNSS) would cause

grave prejudice and may, in a given case, even prove fatal to the case of the prosecution. Of course, the appellate Court can rectify this error by requiring that a fresh statement under Section 313 CrPC (Section 351 BNSS) be recorded for removing the lacunae, if any, in this procedure. In the present case, on going through the statements of both the accused persons recorded by the trial Court under Section 313 CrPC (Section 351 BNSS) (*supra*), we find that these statements are almost a reproduction of the language of the charge and, in no manner, convey to the accused persons the incriminating circumstances/evidence produced by the prosecution so as to indict them for the crime. This defect goes to the root of the matter.

20. In this regard, we may refer to the judgment of this Court in the case of ***Ashok v. State of Uttar***

Pradesh[8], wherein a three-Judge Bench of this Court observed as follows: -

> **"14.** Now, we come to the appellant's statement, recorded per Section 313 of the CrPC. Only three questions were put to the appellant. In the first question, the names of ten prosecution witnesses were incorporated, and the only question asked to the appellant was what he had to say about the testimony of ten prosecution witnesses. In the second question, all the documents produced by the prosecution were referred, and a question was asked, what the appellant has to say about the documents. In the third question, it was put to the appellant that knowing the fact that the victim belongs to a scheduled caste, he caused her death after raping her and concealed her dead body, and he was asked for his reaction to the same. **What PW-1 and PW-2 deposed against the appellant was not put to the appellant. The contents of the incriminating documents were not put to the appellant.**
>
> **15.** In the case of *Raj Kumar*, in paragraph 17, this Court has summarised the law laid down by this Court from time to time on Section 313 of the CrPC. Paragraph 17 reads thus:
> "17. 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**

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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."

In a given case, the witnesses may have deposed in a language not known to the accused. In such a

case, if the material circumstances appearing in evidence are not put to the accused and explained to the accused, in a language understood by him, it will cause prejudice to the accused.

16. In the present case, there is no doubt that material circumstances appearing in evidence against the appellant have not been put to him. **The version of the main prosecution witnesses PWs-1 and 2 was not put to him. The stage of the accused leading defence evidence arises only after his statement is recorded under Section 313 of the CrPC.** Unless all material circumstances appearing against him in evidence are put to the accused, he cannot decide whether he wants to lead any defence evidence. In this case, even the date and place of the crime allegedly committed by the appellant were not put to the appellant. **What was reportedly seen by PW-2 was not put to the appellant in his examination. Therefore, the appellant was prejudiced. Even assuming that failure to put material to the appellant in his examination is an irregularity, the question is whether it can be cured by remanding the case to the Trial Court.**

17. The date of occurrence is of 27th May 2009. **Thus, the incident is fifteen and a half years old. After such a long gap of fifteen and half years, it will be unjust if the appellant is now told to explain the circumstances and material specifically appearing against him in the evidence. Moreover, the appellant had been incarcerated for about twelve years and nine months before he was released on bail. Therefore, considering the long passage of time,**

> **there is no option but to hold that the defect cannot be cured at this stage. Even assuming that the evidence of PW-2 can be believed, the appellant is entitled to acquittal on the ground of the failure to put incriminating material to him in his examination under Section 313 of the CrPC. We are surprised to note that both the Trial Court and High Court have overlooked noncompliance with the requirements of Section 313 of the CrPC.** Shockingly, the Trial Court imposed the death penalty in a case which ought to have resulted in acquittal. Imposing capital punishment in such a case shocks the conscience of this Court."
>
> (Emphasis supplied)

21. Recently, this Court in the case of ***Ramji Prasad Jaiswal v. State of Bihar***[9], reiterated the position of law and held as follows: -

> **"35**. After surveying the law on this print, let us revert back to the facts of the present case. The manner in which the trial court had recorded the statements of the appellants under Section 313 CrPC was not at all in tune with the requirements 5 (2025) 2 SCC 381 31 of the said provision as explained by this Court as discussed supra.
>
> **36. Four questions generally were put to the appellants, that too, in a most mechanical manner. These questions did not reflect the specific prosecution evidence which came on**

[9] (2025 INSC 738)

record qua the appellants. As all the incriminating evidence were not put to the notice of the appellants, therefore, there was a clear breach of Section 313 CrPC as well as the principle of audi alteram partem. Certainly, this caused serious prejudice to the appellants to put forth their case. Ultimately, such evidence were relied upon by the court to convict the appellants.

37. Therefore, there is no doubt that such omission, which is a serious irregularity, has completely vitiated the trial. Even if we take a more sanguine approach by taking the view that such omission did not result in the failure of justice, it is still a material defect albeit curable. In Raj Kumar (supra), this Court highlighted that while deciding whether such defect can be cured or not, one of the considerations will be the passage of time from the date of the incident.

38. As we have already noted, the period during which the offence was allegedly committed was from September, 1982 to December, 1982. Trial was concluded on 29.05.2006. **Nineteen years have gone by since then. At this distant point of time, instead of aiding the cause of justice, it will lead to miscarriage of justice if the case qua the two appellants are remanded to the trial court to restart the trial from the stage of recording the statements of the accused persons under Section 313 CrPC. In such circumstances, we are of the considered opinion that it is neither possible nor feasible to order such remand. Consequently, appellants are**

entitled to the benefit of doubt because of such omission in the recording of their statements under Section 313 Cr.P.C. since the trial court had relied on the evidence adverse to the appellants while convicting them."

(Emphasis supplied)

22. It is pertinent to note that the High Court, in the impugned judgment, has not even discussed the perfunctory manner in which the statements of the accused-appellants under Section 313 CrPC (Section 351 BNSS) were recorded *(supra)*.

23. Looking to the highly laconic and defective manner in which the statements of the accused-appellants were recorded under Section 313 CrPC (Section 351 BNSS) *(supra)*, we could have remanded the matter to the trial Court for re-recording the said statements and for delivering a fresh judgment. However, considering the fact that more than 35 years have passed since the incident took place, we feel that it would be nothing short of an exercise in

futility to direct such remand. We have, therefore, minutely sifted through the evidence on record and shall analyze the same to adjudicate as to whether the conviction of the accused-appellants is justified in the facts, circumstances and evidence as available on record.

B. Evaluation of the Two Reports and Non-Examination of the Investigating Officer

24. The High Court, while dealing with the issue of two FIRs, held that the *Fardbeyan* (Exh. 1) dated 12th May, 1990 was totally denied by the informant (PW-3) and, therefore, the same could not be treated to be the actual First Information Report. It was further held that the written information (Exh. 5) dated 13th May, 1990, the contents whereof were proved by the maker (PW-3), was the actual FIR of the incident. For arriving at this conclusion, the High Court, observed that merely because the informant, Rameshwar Sahu

(PW-3), admitted his signatures on the *Fardbeyan* (Exh. 1), the same could not, by itself, establish it to be the FIR of the incident. The explanation offered by the informant (PW-3) that his brothers, Laxman and Bigan, took his signatures on the document by keeping him into dark and misleading him, was accepted to be justifiable, and on this unconvincing premise, the FIR based on the *Fardbeyan* (Exh. 1) was excluded from consideration.

25. However, we find this approach of the High Court to be quite perfunctory and unacceptable on the face of record. We may note that the *Farbdeyan* (Exh. 1) as well as the formal FIR (Exh. 5) were both recorded and acknowledged by the same police officer ASI R. Paswan, who had also conducted the investigation of the matter. Both documents contain facts which could not have been within the knowledge of anyone other than the informant,

Rameshwar Sahu (PW-3). Indisputably, the informant signed both the reports. If, at all, the prosecution was desirous of questioning the veracity of the *Fardbeyan* (Exh.1), on the ground of tampering/undue influence, it was absolutely imperative for it to have examined the Investigating Officer ASI R. Paswan in evidence. However, the prosecution neither made any effort nor offered any explanation for non-examination of the most crucial witness, *i.e.,* the Investigating Officer ASI R. Paswan. Had ASI R. Paswan been examined on oath, the genuineness or otherwise of the *Fardbeyan* (Exh. 1) could have been duly tested. Non-examination of a material witness would give rise to adverse inference and the benefit thereof would normally go to the defence unless of course a satisfactory explanation for the omission was offered.

26. No such explanation having been offered, there is no escape from the conclusion that the withholding of the witness was a deliberate attempt by the prosecution to cover up the crucial flaw in its case.

27. This Court in ***Harvinder Singh @ Bachhu v. State of Himachal Pradesh***[10] has held that deliberate withholding of material witnesses by the prosecution would destroy its credibility, leading the Court to draw adverse inference. It was observed as follows:-

> **"24.** Failure on the part of the prosecution in not examining a witness, though material, by itself would not vitiate the trial. **However, when facts are so glaring and with the witnesses available, particularly when they are likely to give a different story, the Court shall take adequate note of it. When a circumstance has been brought to the notice of the Court by the defense and the Court is convinced that a prosecution witness has been deliberately withheld, as it in all probability would destroy its version, it has to take adverse notice. Anything contrary to such an approach would be an affront to the concept of fair play.** In

[10] 2023 SCC OnLine SC 1347, 2023 INSC 907.

Takhaji Hiraji v. Thakore Kubersing Chamansing, (2001) 6 SCC 145,

> "19. So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses**. It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case.** On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself — whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of

> drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses…"
>
> (Emphasis supplied)

28. In the light of the above principle, the failure of the prosecution to examine ASI R. Paswan, the police officer who recorded the *Fardbeyan* (Exh. 1) and registered the formal FIR (Exh. 5), assumes critical significance. The prosecution's failure to produce this material witness for deposition necessarily attracts an adverse inference. Rank failure of the prosecution to explain the circumstances under which the *Fardbeyan* (Exh. 1) was recorded and by avoiding to produce the scribe of the vital document *i.e.* ASI R. Paswan, gives the defence a right to claim grave prejudice and the prosecution cannot be allowed to take advantage of its own follies.

29. The *Fardbeyan* (Exh. 1) sets out minute details of the incident and also takes note of the fact that after the incident, when Gajendra had fallen down injured, the informant (PW-3) along with his companions, took him to the Mandar Hospital for treatment, from where the injured was referred to R.M.C.H., Ranchi. Hence, the reasoning given by the High Court for discarding the *Fardbeyan* (Exh. 1) and not treating it to be the actual First Information Report is patently erroneous and unacceptable on the face of record. It may be noted that in the said *Fardbeyan* (Exh. 1), the informant (PW-3) did not mention the name of any of the assailants. Hence, once the *Fardbeyan* (Exh. 1) is treated to be the actual First Information Report of the incident, this omission assumes great significance in evaluating the prosecution's case. Consequently, the subsequent report (Exh. 5) could not be treated to be

anything other than a statement under Section 161 CrPC (Section 180 BNSS).

C. Credibility of the Informant and Inconsistencies in His Statements

30. In the first report dated 12th May, 1990 based upon the *Fardbeyan* (Exh. 1), there is a clear reference of two incidents, the first of which took place when the deceased Gajendra was selling sweets in the fair, and the second, when the informant (PW-3) along with his son and other companions were returning home. In the second report (Exh. 5) dated 13th May, 1990, the informant completely changed the version and did not make any reference of the first incident. For the second incident, he tried to rope in the accused-appellants claiming that his son, while being assaulted, was shouting "Do not beat me, leave me Aditya, leave me Suresh". This belated theory projected in the subsequent report (Exh. 5), on the

face of the record seems to be a sheer embellishment introduced by the informant at a belated stage for oblique motive of implicating the accused-appellants in the case.

31. This theory projected in subsequent report (Exh. 5) was further harped upon in the sworn testimony of the informant, Rameshwar Sahu (PW-3), recorded at the trial. In our opinion, this is a clear embellishment which has been put forth under legal advice to overcome the effect of omission of names of the accused in the original report registered on the basis of *Fardbeyan* (Exh. 1). The High Court, while considering the impact of this material omission, and the plea of the accused claiming adverse inference based on the fact of non-examination of the Investigating Officer, recorded the following findings:-

> **"43.** The learned senior counsel for the appellants also contended that in this case, the I.O. was not examined and same is fatal to the prosecution case. More so, the very first fard

beyan was also suppressed and the F.I.R. was not lodged. All these circumstances could have been explained by the I.O. and his non-examination is fatal to the prosecution case.

44. Admittedly, the I.O. was not examined on behalf of the prosecution in this case. Non-examination of the I.O. is not found fatal keeping in view 'the facts and circumstances of the case. So far as the place of occurrence is concerned, there is no dispute in regard to the place of occurrence. The only dispute is raised on the issue that the assailants were the unknown persons and name of the appellants were mentioned by the informant on account of animosity.

45. In this case whether the appellants were falsely implicated in this case on account of animosity is to be decided in view of the testimony of the informant and other corroborating evidence to that effect. P.W.-3 Rameshwar Sahu and other witnesses who were examined before the trial court in regard to the fact that there is no contradiction in their testimony given before the court and their statements recorded by the I.O. under Section 161 Cr.P.C. as well as the statement of this witness P.W.-3 Ramehswar Sahu which was recorded under Section 164 Cr.P.C. before the Magistrate and the same are also proved by P.W.-4 B.K. Singh, Judicial Magistrate.

Certainly, the presence of the I.O. is necessary in order to show the contradiction in the testimony of the witnesses, if the same is brought out during cross-examination of the witnesses or if there is recovery of any article, the examination of the I.O. was necessary. Keeping in view the facts and circumstances and also the evidence on record, the non-examination of the I.O. is not found fatal to the prosecution case.**"**

32. Admittedly, litigation was going on between the deceased Gajendra and the accused-appellants in relation to the grant of employment, pursuant to the acquisition of the family lands by the C.C.L. This ongoing litigation, in our opinion, gave a strong motive to the complainant party to implicate the accused-appellants in the crime for settling the scores.

33. Another important and vital factor which needs to be noted is that the informant, Rameshwar Sahu (PW-3), did not mention in the subsequent report (Exh. 5) that anyone had taken his signatures on a blank paper on which the *Fardbeyan* (Exh. 1) was written. Had there been a semblance of truth in this allegation, the informant would definitely have mentioned in the subsequent report (Exh. 5) that his brothers, Laxman and Bigan, had taken his signatures on a blank sheet of paper. The omission

to disclose such a material fact at the earliest opportunity renders the belated explanation wholly unconvincing and bereft of substance.

34. Hence, we do not subscribe to the observations made and finding recorded by the High Court that the *Fardbeyan* (Exh. 1) was not the actual FIR of the incident.

35. We are convinced that the prosecution is guilty of superseding the actual first information report of the incident *i.e.* (Exh. 1) dated 12th May, 1990 and replacing it by subsequent report (Exh. 5) dated 13th May, 1990, which incorporated an improved/exaggerated version, to be specific, by nominating the accused-appellants for the assault made on the deceased. The view taken by the trial Court and affirmed by the High Court that the first report based on the *Fardbeyan* (Exh. 1) was written out by keeping the informant in dark, is unacceptable

looking to the material available on record and the discussion made *supra*.

36. It can be presumed that the *Fardbeyan* (Exh.1) must have been scribed by the police officer ASI R. Paswan who also endorsed the same at the R.M.C.H., Ranchi. There could not have been any reason for the police officer, ASI R. Paswan to not faithfully record the *Fardbeyan* (Exh. 1) and leave out the names of the accused had the informant made such revelations to him. In this background, non-examination of the Investigating Officer ASI R. Paswan, who recorded the vital documents *i.e.* *Fardbeyan* (Exh. 1) and the subsequent report (Exh. 5) gains even more significance and is fatal to the prosecution case. The informant (PW-3) was put a pertinent question in his cross-examination regarding the allegation that his brothers Laxman and Bigan had taken his signatures on the

Fardbeyan (Exh. 1). The witness admitted that he did not state this at the Mandar Police Station. Furthermore, this fact also does not find mention in both his statements recorded under Section 164 CrPC (Section 183 BNSS). Thus, the conclusion drawn by the High Court casting a doubt on the *Fardbeyan* (Exh. 1) and not treating it to be the actual FIR of the incident is contrary to the evidence available on record and cannot be accepted.

37. Another significant loophole in the prosecution case is borne out from the two statements of the informant, Rameshwar Sahu (PW-3), recorded under Section 164 CrPC (Section 183 BNSS). In his first statement recorded on 19th May, 1990, the informant alleged that the incident took place after darkness had set in. He was carrying a lantern. Suresh pushed him down and broke the lantern. His son took the name of Suresh and shouted that he should be

spared. Significantly, in this statement, the name of the accused Aditya was not mentioned. It was only in the second statement of the informant recorded under Section 164 CrPC (Section 183 BNSS) on 21st May, 1990 wherein he introduced the name of accused Aditya in addition to Suresh. We may take note of the fact that the lantern was not mentioned in the subsequent report (Exh.5).

38. On a perusal of the evidence of the Magistrate (PW-4), who recorded both these statements recorded under Section 164 CrPC (Section 183 BNSS), it is evident that the second statement dated 21st May, 1990 was recorded on the basis of an application stating that the entire facts could not be disclosed in the first statement dated 19th May, 1990 because of panic. This deliberate attempt by the informant (PW-3) to improve and modulate the version step by step by substituting the original FIR (Exh. 1) with the

subsequent report (Exh. 5) and recording multiple statements to fill up the lacunae, completely demolishes the credibility of the prosecution case. This systematic attempt by the prosecution to introduce the names of the accused-appellants in subsequent documents and statements completely undermines the evidentiary worth of the star prosecution witness, *i.e.,* the first informant-Rameshwar Sahu (PW-3).

39. Even if the embellished version of the witness (PW-3) were to be accepted, it is apparent that he could not himself identify the accused-appellants which is very strange and unbelievable considering the fact that the accused-appellants were none other than his own nephews and hence, the failure of the informant to identify his own close relatives as being the assailants of his son makes his evidence doubtful.

40. Further, in the first statement dated 19th May, 1990 recorded under Section 164 CrPC (Section 183 BNSS), the informant (PW-3) manipulated his earlier version by claiming that before being taken to the hospital, his son was taken to their home. This deviation appears to be a calculated design to introduce the theory of an oral dying declaration by Gajendra in the presence of his sisters Tapeshwari Kumari (PW-1) and Saroj Kumari (PW-2). However, when we go through the evidence of these two witnesses, it is evident that their statements under Section 161 CrPC (Section 180 BNSS) mentioning about the oral dying declaration were recorded after more than one and a half months of the incident. Furthermore, in neither of the two reports lodged by the informant Rameshwar Sahu (PW-3), *i.e.,* Exh. 1 and Exh. 5, is there a whisper that Gajendra after being assaulted was first taken to their home, where

he made an oral dying declaration and from there, he was taken to the hospital. Thus, the projection of an oral dying declaration, as sought to be introduced in the testimony of the witnesses, Tapeshwari Kumari (PW-1) & Saroj Kumari (PW-2) whose 161 CrPC (Section 180 BNSS) statements were recorded after a great delay is a sheer piece of concoction, and their evidence on this aspect is unworthy of credence and unacceptable.

D. Implausibility of the Oral Dying Declaration

41. The prosecution relies heavily on the disclosure of the names of the accused-appellants in the oral dying declaration of the deceased. However, having gone through the evidence of the medical jurist, Dr. Ajit Kumar Chaudhary (PW-5), we are unable to subscribe to the theory that the deceased would have been in a position to speak after receiving the injuries described below: -

"Abrasions:

1) ½ x ½ cm, ½ x ½ cm over left elbow back.
2) ½ x ½ cm over left thumb.

Bruises:

1) 8 x 2 cm over front of abdomen upper part situated transversely.
2) 5 x 2 cm over front of right side abdomen.
3) 4 x 2 cm over front of right thigh.

Lacerated wound (stitched):

1) 4 x 1 cm x scalp deep over the right parietal region of head.
2) 4½ x 1 cm x scalp deep on the right occipital region of head.
3) 4 x 1 cm x scalp deep over left parietal region of head.

Internal Injuries:

There was defused contusion of whole scalp and both temporalis muscles. There was Crack Fracture of right temopro-parieto-occipital bone and the fracture line extends to left parietal bone and another crack fracture measuring 7 cm long was present on right parietal bone situated anteroposterior. There was presence of subdural blood and blood clot over both sides of right temporal lobe of brain."

(Emphasis supplied)

42. It is impossible to believe that, having received such grave head/cranial injuries, the deceased would have been in a position to speak what to talk of making an oral dying declaration.

43. That apart, admittedly, the deceased was taken to the hospital at Mandar, at the first instance, from where he was referred to R.M.C.H., Ranchi. The treatment documents of the deceased from the Mandar Hospital could have provided vital information regarding his condition at the time of arrival at the hospital. However, the prosecution did not bring any such document on record, which further weakens the case of prosecution on the theory of oral dying declaration.

44. The evidence of Tapeshwari Kumari (PW-1) and Saroj Kumari (PW-2), being the sisters of the deceased, on the aspect of oral dying declaration is

unworthy of credence for the reasons which we have assigned above[11].

45. The evidence of the informant, Rameshwar Sahu (PW-3), suffers from inherent inconsistencies and contradictions and suspicious circumstances which convinces us that he was, as a matter of fact, not present at the crime scene and has been subsequently introduced to be an eyewitness of the incident. The deliberate and calculated attempt by the informant to introduce and add the names of the accused-appellants stage by stage is manifested from the inherent contradictions between his *Fardbeyan* (Exh.1), written report (Exh. 5) and the two statements under Section 164 CrPC (Section 183 BNSS) dated 19th May, 1990 and 21st May, 1990, which we have highlighted above.[12]

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[11] Paras 42 and 43.
[12] Paras 37 and 38.

46. Once the testimonies of Rameshwar Sahu (PW-3), Tapeshwari Kumari (PW-1) and Saroj Kumari (PW-2) are discarded, there remains no evidence whatsoever to connect the accused-appellants with the crime.

E. Evidentiary value of Defence Witness

47. Jatan Sahu and Khakhandu Sahu were named as eye-witnesses in the subsequent report (Exh. 5) as being the companions of the first informant and the deceased. The prosecution offered no explanation whatsoever for not examining these witnesses in evidence. The defence examined them as DW-1 and DW-2. The witnesses categorically stated that some unknown assailants had assaulted Gajendra and that the appellants were not present at the time of the incident. Neither the trial Court nor the High Court assigned any plausible reason for discarding the evidence of these two witnesses.

48. It is well settled that the testimony of a defence witness carries the same evidentiary value as that of a prosecution witness. This Court in ***State of U.P. v. Babu Ram***[13] observed as follows:-

> **"23. <u>Depositions of witnesses, whether they are examined on the prosecution side or defence side or as court witnesses, are oral evidence in the case and hence the scrutiny thereof shall be without any predilection or bias. No witness is entitled to get better treatment merely because he was examined as a prosecution witness or even as a court witness. It is judicial scrutiny which is warranted in respect of the depositions of all witnesses for which different yardsticks cannot be prescribed as for those different categories of witnesses</u>**."
>
> (Emphasis supplied)

49. Similarly, in ***Munshi Prasad v. State of Bihar***[14], this Court has clarified that evidence of a witness cannot be discarded merely on the ground that the witnesses were examined by the defence. It was observed as follows:-

> **"3.** Without attributing any motive and taking the evidence on its face value, therefore, it appears that the place of occurrence was at 400-500 yards from

[13] (2000) 4 SCC 515
[14] (2002) 1 SCC 351

> the place of Panchayat and it is on this piece of evidence, the learned advocate for the State heavily relied upon and contended that the distance was far too short so as to be an impossibility for the accused to be at the place of occurrence — we cannot but lend concurrence to such a submission: a distance of 400-500 yards cannot possibly be said to be "presence elsewhere" — it is not an impossibility to be at the place of occurrence and also at the Panchayat meet, the distance being as noticed above: the evidence on record itself negates the plea and we are thus unable to record our concurrence as regards acceptance of the plea of alibi as raised in the appeal. Before drawing the curtain on this score, however, **we wish to clarify that the evidence tendered by the defence witnesses cannot always be termed to be a tainted one by reason of the factum of the witnesses being examined by the defence. The defence witnesses are entitled to equal respect and treatment as that of the prosecution. The issue of credibility and trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution** — a lapse on the part of the defence witnesses cannot be differentiated and be treated differently than that of the prosecutors' witnesses."
>
> (Emphasis supplied)

50. The failure of the prosecution to examine these material eye-witnesses (DW-1 and DW-2) named in the report (Exh. 5), coupled with the fact that the Courts below disregarded their testimony on oath,

severely dents the credibility of the prosecution version and strengthens the case of the defence. Their evidence creates a clear doubt regarding the identity of the assailants. In such a situation, the defence version appears more probable, and the benefit of doubt must go to the accused-appellants.

51. As a consequence of the above discussion, we have no hesitation in holding that the prosecution has miserably failed to fasten the guilt upon the accused-appellants as there is total lack of credible evidence to indict them for the charges. The conviction of the accused-appellants, as recorded by the trial Court and affirmed by the High Court is based on misreading and erroneous appreciation of evidence on record and, hence, the same is unsustainable in facts as well as in law.

Conclusion: -

52. Hence, the impugned judgment dated 10th February, 2023 rendered by the High Court affirming the judgment dated 30th August, 1994 and order of sentence dated 31st August, 1994 passed by the trial Court is set aside. The appellants are acquitted of the charges. They are in custody and shall be released forthwith, if not wanted in any other case.

53. The appeal is allowed accordingly.

54. Pending application(s), if any, shall stand disposed of.

.....J.
(VIKRAM NATH)

.....J.
(SANDEEP MEHTA)

NEW DELHI;
NOVEMBER 27, 2025.