2023 INSC 520

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1471 of 2023
[Arising out of S.L.P.(Crl.)No.11256 of 2018]

Raj Kumar @ Suman .....Appellant

Versus

State (NCT of Delhi) .....Respondent

J U D G M E N T

Abhay S. Oka, J.

1. Leave granted.

FACTUAL ASPECTS

2. Appellant (accused no.2) was convicted by the Sessions Court by the Judgment dated 27th August 2003 for the offences punishable under Section 302 read with Section 120-B of the Indian

Penal Code (for short, 'IPC'). For the offence under Section 302, the appellant was sentenced to undergo life imprisonment. He was also convicted for the offence punishable under Section 307 read with Section 120-B of IPC, for which he was sentenced to undergo rigorous imprisonment for 7 years.

3. The allegation against this accused, along with one Vimal (since deceased) and five others, was that on 01st October 1995, around 03:30 pm, they conspired to criminally intimidate and commit the murder of Jawahar Lal (PW-3) and his relatives. The allegation is that PW-3 was running his own cable TV network, and the accused wanted him to stop the said cable TV network. The allegation of the prosecution is that on 01st October 1995 at about 03:30 pm, the accused entered the house of PW-3 Jawahar Lal where he, along with his family members, were residing. Accused nos.4 and 5 fired

bullets from their revolvers at Omi Devi, mother of PW-3 and Chander Shekhar (deceased – brother of PW-3). Accused no.3 and deceased Vimal attacked Chander Shekhar (deceased) and Omi with daggers and knives. PW-3 and PW-7 suffered serious injuries. As noted earlier, Chander Shekhar died. We may note that admittedly the only allegation against the present appellant (accused no.2) is that while 6 other accused entered the house of PW-3, the appellant was standing near the gate of the gallery with *katta* (country-made handgun) in his hand. By the impugned judgment, the High Court has confirmed the conviction of the appellant.

SUBMISSIONS

4. The learned counsel appearing for the appellant pointed out that only PW-5 Ved Prakash deposed that the appellant was standing near the gate of the gallery with *katta* in his hand. However, PW-3, in the cross-examination, accepted that he

had not seen the present appellant on the day of the incident and his name was told to him by PW-5. Learned counsel submitted that though the High Court, in paragraph 84 of the impugned judgment, has recorded a finding that even PW-13 had seen the appellant, in fact, PW-13 has not deposed anything about the appellant.

5. He submitted that the only circumstance appearing in the evidence against the appellant that he was standing outside near the gate of the gallery with a *katta* was not put to him in his statement under Section 313 of the Code of Criminal Procedure, 1973 (for short, 'CrPC'). He submitted that this argument was specifically canvassed before the High Court, which finds a place in the written submissions filed on behalf of the appellants, but the High Court did not consider it. He relied upon decisions of this Court in the case of

***Ranvir Yadav* v. *State of Bihar*[1]; *Sukhjit Singh* v. *State of Punjab*[2]; *Maheshwar Tigga* v. *State of Jharkhand*[3]; and *Samsul Haque* v. *State of Assam*[4].** He submitted that as a result of the failure of the Trial Court to put the only circumstance appearing against the appellant during his examination under Section 313 of CrPC, grave prejudice has been caused to the appellant resulting in failure of justice.

6. Learned counsel representing the respondent-State submitted that the appellant did not cross-examine PW-5. He relied upon a decision of this Court in the case of ***Satyavir Singh Rathi, Assistant Commissioner of Police & Ors.* v. *State through Central Bureau of Investigation*[5].** He submitted that in this decision, this Court held

1 (2009) 6 SCC 595
2 (2014) 10 SCC 270
3 (2020) 10 SCC 108
4 (2019) 18 SCC 161
5 (2011) 6 SCC 1.

that the objection regarding the omission or defect in recording the statement under Section 313, CrPC must be raised at the earliest so that the defect can be cured. He submitted that the said contention was raised 16 years after the passing of the judgment by the Trial Court. He would, therefore, submit that, at this stage, this objection cannot be sustained. He submitted that the very fact that the said objection was not raised at any time earlier shows that there is no prejudice caused to the appellant due to the failure of the Court to put the only circumstance against the appellant to him while recording his statement under Section 313, CrPC.

OUR VIEW

7. We have considered the submissions. There is no dispute that the only allegation against the appellant was that while six accused entered the

house of PW-3, the appellant was standing outside with a *katta* in his hand. In paragraph 84 of the impugned judgment, the High Court has observed that the evidence of PW-3, as regards the appellant, creates some doubt. However, it was held that the evidence of PW-5 and PW-13 is clear and consistent as regards his involvement. We have, therefore, perused the evidence of the said three prosecution witnesses. PW-3 Jawahar Lal deposed about the entry of 6 other accused into his house at about 03:30 pm on 01st October 1995. He did not depose that the appellant was standing outside with a *katta* in his hand. In further examination-in-chief, he stated that in his statement recorded by the police, he has wrongly mentioned that the accused-Rajinder Kumar was guarding the spot. He stated that it was the appellant who was guarding the spot. The High Court has expressed doubt about the version of PW-3 concerning the involvement of

the present appellant. The reason given by the High Court is that PW-3 also stated that on the day of the incident, he did not see the appellant, but his name was told to him by PW-5 Ved Prakash. Therefore, the testimony of PW-3 cannot be relied upon to implicate the appellant.

8. We have carefully perused the evidence of PW-13. Though the High Court has observed that PW-13 has ascribed a role to the appellant of standing outside with a *katta* in his hand, we find that PW-13 has made no such statement in his evidence.

9. Thus, what remains is the evidence of PW-5. All that he stated in his examination-in-chief was that he saw Raj Kumar standing at the gate of the gallery with a *katta* in his hand. He identified the appellant in the Court.

10. Hence, the only circumstance brought on record against the present appellant is in the

evidence of PW-5, who stated that the appellant was standing outside near the gate of the gallery with a *katta* in his hand. No overt act was attributed to him. There is a long statement of the appellant under Section 313 of CrPC in which as many as 42 questions were put to the appellant. Question no.13 is about what PW-5 deposed. Admittedly, it was not put to the appellant that it is brought on record that he was standing outside near the gate of the gallery with a *katta* in his hand. It is true that the answer given by him to every question is "I don't know". If all the circumstances put to the appellant in his statement under Section 313 CrPC are carefully perused, any person of ordinary intelligence will get the impression that none of the prosecution witnesses has stated anything against him. That is why one cannot find fault with the appellant when he gave standard answers to every question as nothing adverse

against him was put to him. We may note here that in paragraph 13 of the written submissions by the appellant before the High Court, a specific contention was raised that the only circumstance appearing against the appellant was not put to him in the statement under Section 313 of CrPC. It is not in dispute that this part of the argument is not considered by the High Court. We may also note that the Trial Court has not reproduced the submissions made by the learned counsel appearing for the accused.

11. Thus, we will have to proceed on the footing that the only alleged incriminating circumstance appearing against the appellant in the evidence produced by the prosecution has not been put to him in his statement under Section 313 of CrPC and, therefore, he had no opportunity to explain the said circumstance. Moreover, his conviction is based only on this circumstance.

12. Therefore, we will have to consider the effect of the aforesaid omission on the part of the Trial Court. The law on this aspect is no longer *res integra*. Apart from the decisions relied upon by the learned counsel representing the parties, there are other important decisions on this aspect. The first relevant judgment is of a Bench of four Hon'ble Judges of this Court in the case of ***Tara Singh* v. *State***[6]. The Court considered the provision of Section 342 of the Code of Criminal Procedure, 1898 (for short, 'CrPC of 1898'). Section 313 of CrPC and Section 342 of CrPC of 1898 are in *pari materia*. In paragraph 18, this Court held thus :

> **"18.** It is important therefore that an accused should be properly examined under Section 342 and, as their Lordships of the Privy Council indicated in *Dwarkanath Varma* v. *Emperor* [*Dwarkanath Varma* v. *Emperor*, AIR 1933 PC 124 at p. 130 : 1933 SCC OnLine PC 11] , **if a point in the evidence is considered**

6 1951 SCC OnLine SC 49

important against the accused and the conviction is intended to be based upon it, then it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it if he so desires. This is an important and salutary provision and I cannot permit it to be slurred over. I regret to find that in many cases scant attention is paid to it, particularly in the Sessions Courts. But whether the matter arises in the Sessions Court or in that of the Committing Magistrate, it is important that the provisions of Section 342 should be fairly and faithfully observed."

(emphasis added)

Again in paragraph 23, this Court held thus:

"23. Section 342 requires the accused to be examined for the purpose of enabling him "to explain any circumstances appearing in the evidence against him". Now it is evident that when the Sessions Court is required to make the examination under this section, the evidence referred to is the evidence in the Sessions Court and the circumstances which appear against the accused in that court. It is not therefore enough to read over the questions and answers put in the Committing Magistrate's Court and ask the accused whether he has anything to say about

> them. In the present case, there was not even that. The appellant was not asked to explain the circumstances appearing in the evidence against him but was asked whether the statements made before the Committing Magistrate and his answers given there were correctly recorded. That does not comply with the requirements of the section."

The second important decision on this aspect is the decision of a Bench of three Hon'ble Judges of this Court. This is a decision in the case of ***Shivaji Sahabrao Bobade & Anr.*** **v.** ***State of Maharashtra***[7]. In paragraph 16 of the decision, this Court examined the issue of non-compliance with the requirements of Section 342 of CrPC of 1898. Paragraph 16 reads thus:

> **"16.** The discovery of incriminating materials pursuant to confessions made by the accused constitutes the third category of evidence. Obviously, the confessions are inadmissible but the discoveries are, provided they are pertinent to the guilt of the accused. So far as Accused 2 is concerned, his statement resulted in the discovery of a knife (*Vide* Panchnama, Ext. 13). Of

7 (1973) 2 SCC 793

course, knives were discovered long ago and not now but this knife lay buried and was recovered by the accused from a pit in the corner of a wall of his house. There was human blood on the blade of the knife, MO 5/1 according to the chemical analyst's report. The second accused's clothes also were picked up by him pursuant to his statement. He had worn a shirt and pants on the day of occurrence and PW 13, a neighbour deposes that the second accused had come to him at about 6 p.m. on the Monday when Hariba died and had mentioned to him that since his own house was locked he might be permitted to keep his clothes in the witnesses house. Thereafter he left his clothes under an empty *khokha* from where he himself took them out when he later came in the company of the police. There are blood-stains on the clothes and it is found by the chemical examiner that the blood on the pants are of the same blood group as that of the deceased. When the second accused was asked under Section 342, CrPC about the report of the chemical examiner noticing blood stains on the shirt, MO 5/2 and of human blood on the blade of the knife, MO 5/1, he merely answered, "I do not know". He also described as false the fact of his recovering the clothes and the knife. Bald denial notwithstanding, we are inclined to believe, with the learned Judges of the High Court, that the knife and the shirt have been identified as his

and since he had recovered them, thereby making the police discover the fact, there was incriminating inference available against the said accused. We may notice here a serious omission committed by the trial Judge and not noticed by either court. The pants allegedly worn at the time of the attack by the second accused has stains of blood relatable to the group of the deceased. This circumstance binds him to the crime a little clear but it is unfortunate that no specific question about this circumstance has been put to him by the Court. **It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances**

established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the Court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction. In such a case, the Court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342, CrPC, the omission has not been shown to have caused prejudice to the accused. In the present case, however, the High Court, though not the trial court has relied upon the presence of blood on the pants of the blood group of the deceased. We have not been shown what explanation the accused could have offered to this chemical finding particularly when we remember that his answer to the question regarding the human blood on the blade of the knife was "I do not know". Counsel for the appellants could not make out any intelligent explanation and the "blood" testimony takes the crime closer to the accused. However, we are not inclined to rely over much on this evidentiary circumstance, although we should emphasise how this inadvertance of the trial court had led to

a relevant fact being argued as unavailable to the prosecution. Great care is expected of Sessions Judges who try grave cases to collect every incriminating circumstance and put it to the accused even though at the end of a long trial the Judge may be a little fagged out."

(emphasis added)

13. Then we come to the decision of this Court in the case of ***S. Harnam Singh* v. *State (Delhi Admn.)***[8]. 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.**"

8 (1976) 2 SCC 819

(emphasis added)

14. Then we come to a decision in the case of ***Samsul Haque***[4] 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***[9]. 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***[5] relied upon by the learned counsel for the respondent. The

9 2023 SCC OnLine SC 174.

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***[7], 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.

17. Now, we will have to apply the principles enunciated by this Court to the facts of this case. The High Court has reproduced the charge framed on 04th July 1998 against the accused, which reads thus :

> "Charge
>
> 6. The charge framed against all the accused by the order dated 4th July 1998 by the trial Court was as under :
>
> (i) That on or before 1st October 1995 at around 3.30 pm at Delhi A-1 to A-6 along with Vimal (since dead) agreed to criminally intimidate and commit the murder of Jawahar Lal (PW-3) and his relatives on account of the failure of PW-3 to stop his TV cable network in the area of

Paschimpuri thereby committing the offence of criminal conspiracy punishable under Section 120B IPC.

(ii) That at House No.618/3, Paschimpuri on 1st October 1995, in pursuance of the aforementioned conspiracy, A-4 and A-5 fired bullets from their respective revolvers on Smt. Omi Devi and Chander Shekhar whereas Vimal and A-3 attacked Chander Shekhar and Omi with their respective dagger and knife and committed their murders and thus all of them had committed an offence punishable under Section 302 read with 120B IPC.

(iii) **All of them pursuant to the criminal conspiracy attempted to commit the murder of PW-3 by firing bullets from their revolvers on both PW-3 and PW-7** due to which both of them received dangerous injuries and thereby all of them committed an offence punishable under Section 307 read with 120B IPC.'

(emphasis added)

18. In paragraph 7 of the High Court Judgment, it is noted that a separate charge under Section 452 read with 120-B of IPC was framed against all accused except the present appellant. Thus, the charge as framed against the appellant was of being a party to criminal conspiracy. There is also a charge that all the accused fired bullets from their revolver. Only based on the version of PW-5 regarding the appellant's presence with a weapon outside the premises where the offence took place, the involvement of the appellant has been held as proved. There is absolutely no other evidence against him. This is not a case where there are several incriminating circumstances appearing against the appellant in the evidence adduced by the prosecution. This is a case where there is only a solitary circumstance appearing in the evidence against the appellant. The prosecution examined

37 witnesses. The material against the appellant is in the form of one sentence in the evidence of PW-5. As mentioned earlier, if we read 42 questions put to the appellant in his statement under Section 313 of CrPC, any accused having ordinary intelligence will carry an impression that there is absolutely no material against him. The appellant was not confronted during his examination under section 313 of CrPC with the only allegation of the prosecution against him. This is how, on facts, we find that a serious prejudice was caused to the appellant.

19. The incident is of 1995. It is not clear whether this aspect was argued before the Trial Court as the Trial Court has not reproduced the submissions of the counsel for the appellant. However, before the High Court, it was certainly canvassed as it forms a part of the written submissions.

20. Even assuming that the defect or irregularity was curable, the question is whether today, the appellant-accused can be called upon to explain the said circumstance. More than 27 years have passed since the date of the incident. Considering the passage of time, we are of the view that it will be unjust now at this stage to remit the case to the Trial Court for recording further statement of the appellant under Section 313 of CrPC. In the facts of the case, the appellant cannot be called upon to answer something which has transpired 27 years back. There is one more aspect of the matter which persuaded us not to pass an order of remand. The said factor is that the appellant has already undergone incarceration for a period of 10 years and 4 months.

21. Before we part with this judgment, we must take a note of sub-section (5) added to Section 313

of CrPC w.e.f. 31st December 2009. Sub-section (5) reads thus :

> "**313. Power to examine the accused.**-
> (1) … … …
> (2) … … … …
> (3) … … … …
> (4) … … … …
> (5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section."

In many criminal trials, a large number of witnesses are examined, and evidence is voluminous. It is true that the Judicial Officers have to understand the importance of Section 313. But now the Court is empowered to take the help of the prosecutor and the defence counsel in preparing relevant questions. Therefore, when the Trial Judge prepares questions to be put to the accused under Section 313, before putting the questions to the accused, the Judge can always

provide copies of the said questions to the learned Public Prosecutor as well as the learned defence Counsel and seek their assistance for ensuring that every relevant material circumstance appearing against the accused is put to him. When the Judge seeks the assistance of the prosecutor and the defence lawyer, the lawyers must act as the officers of the Court and not as mouthpieces of their respective clients. While recording the statement under Section 313 of CrPC in cases involving a large number of prosecution witnesses, the Judicial Officers will be well advised to take benefit of sub-section (5) of Section 313 of CrPC, which will ensure that the chances of committing errors and omissions are minimized.

22. In 1951, while delivering the verdict in the case of ***Tara Singh***[6]**,** this Court lamented that in many cases, scant attention is paid to the salutary provision of Section 342 of CrPC of 1898. We are

sorry to note that the situation continues to be the same after 72 years as we see such defaults in large number of cases. The National and the State Judicial Academies must take a note of this situation. The Registry shall forward a copy of this decision to the National and all the State Judicial Academies.

23. In the circumstances, we are of the view that the conviction of the appellant stands vitiated. In the facts of the case, the option of remand will be unjust. Accordingly, we allow the appeal and set aside the conviction and sentence of the appellant under the Judgment and Order dated 27th August 2003 passed by the learned Additional Sessions Judge, Delhi, in Sessions Case No.9 of 2000. Consequently, the impugned judgment of the High Court is also set aside. We make it clear that both judgments are set aside only insofar as the appellant is concerned. We, accordingly, direct that

the respondent shall forthwith set the appellant at liberty unless he is required to be detained in connection with any other case.

.....J.
[ABHAY S. OKA]

.....J.
[RAJESH BINDAL]

New Delhi
May 11, 2023.