RESERVED
AFR

Court No. - 46

Case :- CRIMINAL APPEAL No. - 5977 of 2019

Appellant :- Ishaque
Respondent :- State of U.P.
Counsel for Appellant :- S.K. Agrawal,Pushpendra Singh
Counsel for Respondent :- D.G.A.

Hon'ble Manoj Misra,J.
Hon'ble Sameer Jain,J.

(Delivered by Manoj Misra, J.)

1. This appeal is against a composite judgment and order dated 12.06.1996 passed by Ninth Additional District & Sessions Judge, Ghaziabad in two connected Sessions Trial Nos. 147 of 1991 and 149 of 1991 whereby, the appellant - Ishaque has been convicted under Sections 302 I.P.C. and section 4/25 Arms Act, respectively; and has been punished as follows: (i) under Section 302 I.P.C., life imprisonment with fine of Rs. 2,000/- and a default sentence of six months R.I. and (ii) under Section 25/4 Arms Act, two years R.I. with fine of Rs. 500/- and a default sentence of one month R.I. Both sentences to run concurrently.

INTRODUCTORY FACTS

2. (i) At 6.10 hours on 29.01.1991, Rajendra Kumar (PW-2) gave a written report (Ex. Ka-1), which was lodged as first information report (FIR) (Ex. Ka-4) at P.S. Shahibabad, District Ghaziabad, alleging therein that two days before, in the evening, at about 7.00 pm, Arun Jeev @ Bhaloo Sham (the deceased), a rickshaw puller, on his rickshaw, came with a lady, a man and a child. Claiming that the lady is his sister (Ayesha), the man is his brother-in-law (Ishaque Matwar - the

appellant), Arun Jeev asked for a room from the informant (PW-2) to stay for two days on the pretext that their own abode (hutment) at Nai Seemapuri would be ready in two days. It is alleged that on that request, PW2 gave them a room to stay. It is alleged in the FIR that in the morning of 29.01.1991, at about 5 am, PW2 and his wife Ruparani (not examined) heard noise. When they came out of their room, they saw the rickshaw puller (Arun Jeev) lying dead in a pool of blood, with his throat/neck slit, and his brother-in-law (Ishaque - appellant) having a big blood-stained knife in his hand. Soon thereafter, the appellant ran away with the knife, leaving his wife Ayesha behind.

(ii) Inquest was conducted at about 8 am at the place of the incident. Inquest report (Ex. Ka-8) was witnessed by Sameeruddin (PW-3); Ali Hasan; Afsar Ali (PW-5); Jameel Ahmad; and Raj Kumar.

(iii) S.I. Govind Krishna Dwivedi (PW-8) reached the spot, prepared site plan (Ex. Ka-7), collected blood in a small tobacco box and blood-stained piece of carpet. Recovery memo (Ex. Ka-2) was witnessed by Sameerudin (PW-3) and Afsar Ali (PW-5). Autopsy was conducted on the same day at about 5 pm. The autopsy report (Ex. Ka-3) prepared by PW-6 noticed: an incised wound 12 cm x 5.0 cm x bone deep on the front of neck 4.0 cm below to chin; 6.0 cm above Supra Sternal notch; 5.0 cm below to right ear; and 6.0 cm below to left ear, margin clear cut; larynx, trachea and oesophagus cut, through and through; and heart empty. Semi-digested food was found in the stomach. Small intestine and large intestine were half filled. Opinion was that death was due to shock and haemorrhage as a result of ante-mortem injury. Estimated time of death was three-fourth of a day before.

(iv) On 30.01.1991, at about 1.20 pm, in the presence of

witness Raj Kumar and Ibrahim (PW-4), on the pointing out of the accused, allegedly, a blood-stained knife, wrapped in a cloth, was recovered from a stack of bricks near the wall of premises No. 161 A, Shalimar Park, Pradeep Trading Comp. A memo (Ex. Ka-3) of that recovery and site plan (Ex. Ka-15) of that recovery was prepared by PW-8.

(v) Investigation was completed by Jitendra Pal Singh (not examined as a witness because he had died in an encounter) and a charge-sheet (Ex. Ka-6) was submitted, which was proved by H.C. Brijlal Singh (PW-7).

(vi) S.S. Guha (PW-9) recorded the statement of Ayesha under Section 164 of the Code of Criminal Procedure, 1973 (for short Cr.P.C. or the Code). P.W.9 stated that Ayesha could only speak in Bangla language therefore, her statement was recorded with the help of a translator/ interpreter. On PW-9's statement, statement of Ayesha was marked Ex Ka-7.

(vii) On recovery of the knife, a separate case under Section 25 Arms Act was registered. Investigation of which was assigned to S.I. Mahendra Singh Tyagi (not examined). After investigation, charge-sheet (Ex. Ka-16) was submitted, which was proved by PW-8. On the two charge-sheets, cognizance was taken and cases were committed to the Court of Session giving rise to two sessions trial, namely, S.T. No. 147 of 1991, under Section 302 I.P.C.; and S.T. No. 149 of 1991, under Section 25/4 Arms Act. Both the trials were connected with each other and a single set of evidence was led.

EVIDENCE OF THE PROSECUTION

3. (i) Upon committal, after the charges were denied by the accused-appellant, in the trial, the prosecution examined nine witnesses, namely, PW.-1 Alam; PW-2 Rajendra Kumar

(informant); PW-3 Sameeruddin; PW-4 Ibrahim; PW-5 Afsar Ali; PW-6 Dr. Jai Prakash; PW-7-Brij Pal Singh; PW-8 Govind Krishna Dwivedi; and PW-9 Sri S.S. Guha.

(ii) PW-3 Sameeruddin and PW-5 Afsar Ali are witnesses of recovery of blood-stained carpet from the spot; PW-4 Ibrahim is one of the witnesses of recovery of knife; PW-6 - the doctor who conducted the post-mortem - proved the post-mortem report; .PW-7 Brij Pal Singh - Head Moharir at the police station Shahibabad - proved the registration of the FIR on 29.01.1991 at 6.10 am and handing over copy /chik FIR to Sri G.K. Dwivedi (P.W.8) for investigation.

(iii) PW-8, S.I. Govind Krishna Dwivedi, is the investigating officer. He stated that on registration of the FIR, he reached the spot and on the directions of the informant prepared site plan, lifted blood and blood soaked carpet. He stated that a day after registration of the FIR, the investigation was transferred to Prabhari Nirikshak - Jitendra Pal Singh, who, later, died in an encounter in the district of Pilibhit. He stated that Jitendra Pal Singh had arrested the accused and effected recovery of the knife on the pointing out of the accused. He proved the signature of Jitendra Pal Singh on the recovery memo as also on the charge-sheet prepared by Jitendra Pal Singh. He also stated that he got the statement of Ayesha recorded under Section 164 Cr.P.C. He stated that investigation of the offence under Section 25 Arms Act was assigned to S.I. Mahendra Singh Tyagi who submitted charge-sheet. He recognised the signature of Mahendra Singh Tyagi on the charge-sheet.

In his cross-examination, PW-8 stated that the FIR was not written in his presence; that he reached the spot after about one hour i.e. on or about 7 am; that he does not remember that

there was light at the scene of the crime; that he does not remember as to how many doors were there in the room where the body was found though he can tell the same after looking at the site plan; that the house where the crime occurred had boundary wall about chest high; that the house had a common gate; and that adjoining the house there was a *Kothari* and inside the room, where the body was found, there was a cot. The body was 2-3 paces away from the cot, lying in a supine position with left hand on stomach and right hand on the floor. He saw accused's wife on spot. He had taken her statement but her clothes were not collected as she had no other clothes to wear. He also took photographs of the body. He, thereafter, got the body sealed after carrying out inquest. He stated that he had searched for the accused that day though he could not remember where he had searched for him. He also stated that he met Alam -the Chowkidar (PW1) - on that day. P.W.1 was Chowkidar of a different block. He stated that P.W.1 had not disclosed that Ishaque (appellant) had a knife in his hand. PW1 also did not disclose whether Ishaque's (appellant's) clothes were blood-stained.

(iv) PW-9, A.C.J.M., Sri S.S. Gupta. He proved the recording of statement of Ayesha under Section 164 Cr.P.C. with the help of a translator.

In his cross-examination, he stated that he used the service of a translator to translate Bangla into Hindi. He stated that he did not himself understand Bangla and that he did not understand what Ayesha stated in Bengali but he wrote whatever the translator told him. He disclosed the name of translator as Sikandar (not examined).

(v) PW-4-Ibrahim is the witness of recovery of knife. He stated that about two years ago while he was returning after

collecting fodder for his buffalo, he saw 5-6 police personnel and one Master Raj Kumar (not examined) sitting and enquiring from accused Ishaque (appellant). Ishaque told them that he could recover the weapon of assault. Ishaque moved ahead near the Kothi where the murder took place and just behind that, from a dilapidated kothari and stack of bricks, he took out a knife wrapped in a cloth, which was taken by the police. He stated that the police thereafter prepared a memo and got his signatures. He proved his signature on the memo.

In his cross-examination, he stated that the place from where the recovery was made is half a kilometer away from his house; that Ishaque had stated that he had killed Arun Jeev as he was seen lying close to his wife; he stated that there were 60-70 people standing there at that time; that at the time when the memo was prepared there were only 5-6 police personnel and Raj Kumar; he denied the suggestion that he is telling lie under pressure of police; he also stated that at the time when the confessional statement was made, the accused was in the custody of the police.

(vi) PW-2 is the informant. He proved the lodging of the FIR. In his statement- in- chief he reiterated what was narrated by him in the FIR. He identified the deceased from his photographs as Arun Jeev @ Bhalu Sham, the rickshaw puller.

In his cross-examination, he stated that he has a house at Shalimar Garden which has four rooms and a kitchen. Out of those four rooms, he uses two rooms for himself and two rooms lie vacant. All four rooms are in front of each other. The deceased Arun Jeev used to take his children to the school on a rickshaw therefore, he knew him from before. He saw Ishaque (the appellant) for the first time and came to know about him through the deceased. He denied the suggestion that

he lodged the FIR on the information provided by Ayesha. He stated that the police neither arrested the accused nor recovered anything from him in his presence. In paragraph 10 of his cross-examination though he denied the suggestion that he lodged a false FIR on the statement of Ayesha but stated that Ayesha had told him that her husband ran away after killing the deceased and on her statement, he lodged the report. He stated that he did not have a fondness for the rickshaw puller (the deceased) but as he used to take his children to school, he was allowed a room to sleep.

(vii) PW-1 Alam Chowkidar. He stated that about a year and 9 -10 months before, between quarter past 5 and 5.30 am, while he was performing his duties as a Chowkidar at D Block at New Seemapuri Colony, he saw the accused (present in Court) running; thinking him to be a thief, he caught hold of him. On being caught, he told him that he is not a thief and that he has to go to his maternal uncle Jabbar. He, thereafter, took him to his uncle Jabbar. When Jabbar told him that the accused is his nephew, he released him. At that point of time he was not aware that the accused was running after committing murder.

In his cross-examination, he admitted that from the statement of the lawyers present in Court he could guess that the accused before him is Ishaque. He stated that New Seemapuri and Old Seemapuri colonies are at a distance of half a kilometer and at the time when he saw the accused running he saw him running from half a mile away. At that time, the accused was wearing just a Tehmat (Lungi) with no upper garment on his body.

4. After the prosecution evidence was closed, the statement of the appellant was recorded under Section 313 Cr.P.C. The record of the statement of the appellant including the questions

put to him, under Section 313 Cr.P.C. is extracted below:-

''एस0टी0 नं0 147/91

सरकार बनाम ईशहाक

अ0 धा0 302 आई0पी0सी0

थाना साहिबाबाद।

नाम– ईशहाक, मातवर पिता का नाम– मंसूर मातवर उम्र– पेशा– निवासी– बहरतला, थाना– शिवसर, जिला फरीदपुर बंगलादेश– हाल झुग्गी सीमापुरी दिल्ली।

ब्यान अन्तर्गत धारा 313 सी0आर0पी0सी0

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प्रश्न 1– यह कि अभियोजन पक्ष का कथन है कि दिनांक 29.1.91 को सुबह करीब 5.00 बजे राजेन्द्र कुमार के मकान नं0 ए 184 शालीमार गार्डन साहिबाबाद में आपने आरूनजीव उर्फ भालू की चाकू से गर्दन काटकर हत्या कर दी जिसकी रिपोर्ट राजेन्द्र कुमार ने थाना साहिबाबाद पर लिखाई जो प्रदर्शक–1 है इस इस बारे में आपको क्या कहना है।

उत्तर–गलत है।

प्रश्न 2– अभियोजन पक्ष की ओर से आपके खिलाफ गवाहान राजेन्द्र कुमार, समीर, इब्राहीम, अफसर अली, आलम, डा0 जयप्रकाश हैड कान्स्टेबिल ब्रिजपाल सिंहविवेचनाधिकारी गोविन्द कृष्ण द्विवेदी, ए0सी0 जैन श्री एस0एस0 गुप्ता ने गवाही दी है इस बारे में आपको क्या कहना है।

उत्तर– गलत रंजिश से बयान देते है।

प्रश्न 3– यह कि अभियोजन पक्ष की ओर से आपके खिलाफ एफ0आई0आर0 तहरीर रिपोर्ट फर्द खून आलदा

दरी, नक्शा नजरी फर्द बरामदगी चाकू आरोप पत्र आदि करामात साबित किये जो प्रदर्शक–2 ता प्रदर्श क–16 है इस बारे में आपको क्या कहना है:–

उत्तर– पता नही।

प्रश्न 4– क्या आपको कुछ कहना है।

उत्तर– जी नही।

प्रश्न 5– आपके खिलाफ मुकदमा क्यो चला।

उत्तरः– रंजिश से।

प्रश्न 6– क्या आप सफाई देगे।

उत्तर–''

TRIAL COURT FINDINGS

5. The trial court by placing reliance on the evidence led, held that the following circumstances were proved: (a) that PW2 gave a room to the deceased, the appellant, his wife and child to sleep; that, in the morning, PW2 heard shrieks; upon coming to the spot, he saw the appellant with a blood soaked knife in his hand and the deceased lying dead in a pool of blood; that, soon thereafter, the appellant escaped; that, the wife of the appellant in her statement under section 164 CrPC disclosed that the appellant committed murder because he discovered the deceased lying next to her in the night; and that, the knife (weapon of assault) was recovered at the pointing out of the appellant. Upon finding the chain of circumstances complete to prove the guilt of the appellant and rule out all other hypothesis inconsistent with it, found the charge of murder proved and punished the appellant accordingly.

6. We have heard Sri Mandeep Singh, holding brief of Sri Pushpendra Singh, for the appellant; Sri J.K. Upadhyay,

learned A.G.A. for the State; and have perused the record.

SUBMISSIONS

7. The contentions of the learned counsel for the appellant are as follows:-

(a) The incriminating circumstances emanating from the prosecution evidence were not put to the accused-appellant as is required by law for recording statement of the accused under Section 313 Cr.P.C. which vitiates the trial and the order of conviction. It was urged that, admittedly, the appellant is a citizen of Bangladesh, he signed all papers in Bangla therefore, even if the evidence was recorded in his presence, unless the incriminating circumstances appearing in the prosecution evidence were put and explained to him, he could not have offered a plausible explanation. This caused serious prejudice to appellant's defence thereby vitiating the trial and the order of conviction.

(b) The key eye-witness of the incident, Ayesha, though listed as a witness in the charge sheet, was not examined. The prosecution is therefore guilty of withholding their best evidence. Otherwise, her statement under Section 164 Cr.P.C. is not admissible. The statement of P.W.9 as to what Ayesha said is not admissible, being hearsay. In addition to that, Ayesha, admittedly, was not conversant with Hindi language and, therefore, her statement recorded with the help of a translator, cannot be narrated by PW-9 as PW9 admitted that he could not understand what Ayesha stated in Bangla. Thus, the testimony of PW 9 as to what Ayesha told him is irrelevant and cannot be read

in evidence.

(c) In so far as the statement of PW-2 is concerned, from his statement during cross-examination, it appears that he lodged the first information report on the basis of information received from Ayesha and not on his own personal knowledge. PW2's statement in cross-examination that he lodged the FIR on the basis of information provided by Ayesha that her husband has killed the deceased and has run away with the knife reflects that he arrived at the spot after the accused had left therefore, his rendition of the incident that he saw the deceased standing with a knife appears doubtful. Further, PW-1, the Chowkidar, who claims to have caught hold the appellant between 5.15 and 5.30 am, on the date of the incident, as he was seen running from quite a distance, did not state that the appellant was having a knife in his hand. Thus, PW2's statement that the accused-appellant ran away with the knife is extremely doubtful because, in that scenario he would have no time to hide the weapon beneath a stack of bricks, as alleged by the prosecution, and that too, in close proximity to the scene of crime.

(d) The evidence of recovery of knife at the pointing out of the appellant is completely cooked up because hiding the knife in close proximity to the scene of crime does not seem to fit in with the prosecution evidence inasmuch as according to PW2 the appellant ran away with the knife whereas, from the statement of PW4, recovery of the knife, wrapped in a cloth, was made from beneath a stack of bricks near the scene of crime. Even otherwise, the Investigating Officer, who effected

recovery, was not examined as he is stated to have died in an encounter.

(e) In the alternative, it was contended that from the prosecution case it appears to be a case where the deceased was seen lying near appellant's wife therefore, in a fit of rage, the incident occurred. Thus, conviction could be under Section 304 I.P.C. and not Section 302 I.P.C. Under the circumstances, as up to 03.06.2021, the appellant has already suffered incarceration of 30 years 04 months and 03 days, and with remission 38 years, 8 months, he is liable to be released on sentence undergone.

8. **Per contra,** the learned A.G.A. submitted that this is a case where there is a prompt first information report; that the witnesses are not inimical; that the accused was seen with a blood-stained knife at a place where the body was lying in a pool of blood and that the injury on the body was referable to that knife therefore, in absence of any explanation on the part of the accused, the prosecution by proving the chain of incriminating circumstances was successful in proving the guilt. On the question of sentence, the learned A.G.A. submitted that since the statement recorded under Section 164 Cr.P.C. is not a substantive piece of evidence, as Ayesha was not examined in court, and no explanation came from the accused to demonstrate existence of mitigating circumstances, the conviction of the appellant for the offence punishable under Section 302 I.P.C. is justified and therefore no case for interference is made out. In respect of the contention that the incriminating circumstances appearing in the evidence were not put to the accused, the learned A.G.A. submitted that even if all the incriminating circumstances have not been put to the

accused while recording the statement under Section 313 Cr.P.C., but, as the entire evidence was laid by the prosecution in the presence of the accused, unless prejudice is shown, the accused gets no benefit. In support of the above submission, the learned A.G.A. cited Apex Court's decision in **Nar Singh v. State of Haryana : (2015) 1 SCC 496**.

ANALYSIS

9. Having noticed the rival submissions and the entire prosecution evidence, before we proceed to weigh the respective submissions, it would be apposite to observe that from the record it is established that the appellant is a citizen of Bangladesh and all papers including charge memorandum and statement under section 313 CrPC has been signed by him in Bengali. Further, from the own case of the prosecution, as would be apparent from the statement of PW9, the wife of the appellant did not understand Hindi and therefore, her statement was recorded with the help of a translator. No doubt, it has not come on record that any application was moved by the appellant that he needed the help of a translator or that he was not conversant with Hindi language but what cannot be ignored is that here was a trial of a citizen of Bangladesh who was signing in Bangla and his wife’s statement was recorded with the help of a translator as she did not know Hindi. In these circumstances, what were the precautions that the trial judge was required to take, and whether by not taking those precautions, the trial and the order of conviction stood vitiated needs to be examined. In that context we shall also examine whether there was due compliance of the provisions of section 313 CrPC, if not, whether it caused serious prejudice to the appellant thereby vitiating the order of conviction.

10. To address the issues culled out above, a brief glimpse at

the relevant statutory provisions in the Code would be useful. Under section 272 CrPC the language of each court within the State other than the High Court is as may be determined by the State Government for the purposes of the Code. Subject to its proviso, section 273 CrPC provides that evidence taken in the course of the trial shall be taken in the presence of the accused, or, when his personal presence is dispensed with, in the presence of his pleader. Section 277 CrPC provides for the language of record of evidence. Section 279 CrPC provides as follows:

> *"**279. Interpretation of evidence to accused or his pleader.-** (1) Whenever any evidence is given in a language not understood by the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him.*
>
> *(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.*
>
> *(3) When documents are put for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as necessary."*

11. Section 281 CrPC provides for the record of examination of accused. Sub-section (3) of section 281 provides that the record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court. Sub section (4) of section 281 further provides that the record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

12. Section 313 Cr.P.C. reads as under:

> ***"313. Power to examine the accused.-*** *(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-*
>
> *(a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;*
>
> *(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:*
>
> *Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).*
>
> *(2). No oath shall be administered to the accused when he is examined under sub- section (1).*
>
> *(3). The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.*
>
> *(4). The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.*
>
> *(5). The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section."*

13. There is nothing in the Code which may indicate that the provisions of sub-sections (3) and (4) of section 281 of the Code would not apply when there is an examination of the accused under section 313 of the Code. In fact, a combined reading of these provisions would indicate that they have been

crafted in the Code to ensure a fair trial so that the accused is in know of the circumstances appearing against him in the evidence and is able to set up his explanation or defence accordingly.

14. The importance of the provisions of section 342 of the Code of Criminal Procedure, 1898, which is *pari materia* with section 313 of the Code, 1973, was highlighted in a Constitution Bench decision of the Apex Court in **Tara Singh v. State : AIR 1951 SC 441.** In paragraph 32, His Lordship Vivian Bose, J. observed as follows:

> "32. *I cannot stress too strongly the importance of observing faithfully and fairly the provisions of section 342 of the Criminal Procedure Code. It is not a proper compliance to read out a long string of questions and answers made in the committal court and ask whether the statement is correct. A question of that kind is misleading. It may mean either that the questioner wants to know whether the recording is correct, or whether the answers given are true, or whether there is some mistake or misunderstanding despite the accurate recording. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them.* ***He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the***

> ***significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand.*** *I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned. In my opinion, the disregard of the provisions of section 342, Criminal Procedure Code, is so gross in this case that I feel there is grave likelihood of prejudice."*
>
> *(Emphasis Supplied)*

15. Developing the law further, in **Ajay Singh v. State of Maharastra : 2007 (12) SCC 341,** interpreting the word 'generally' appearing in sub-section 1(b) of section 313 of the Code, it was observed by the Apex Court as follows:-

> *"14.* ***The word 'generally' in sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and***

> ***understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law.*** *The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give."*
>
> *(Emphasis Supplied)*

16. In **Naval Kishore v. State of Bihar : (2004) 7 SCC 502,** it was observed by the Apex Court as under:-

> *"5. …...Under Section 313 Cr.P.C. the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been produced by the prosecution, should have been put to the accused in the form of question and he should have been given opportunity to give his explanation. No such opportunity was given to the accused in the instant case.* ***We deprecate the practice of putting the entire evidence against the accused put together in a single question and giving an opportunity to explain the same, as the accused may not be in a position to give a rational and intelligent explanation.*** *The trial judge should have kept in mind the importance of giving an opportunity to the accused to explain the adverse circumstances in the evidence and the Section 313 examination shall not be carried out as an empty formality.* ***It is only after the entire evidence is unfurled the accused would be in a position to articulate his defence and to give explanation to the circumstances appearing in evidence against him. Such an opportunity being given to the accused is part of a fair trial and if it is done in slipshop manner, it may result in imperfect***

appreciation of evidence.”

(Emphasis Supplied)

17. In **Nar Singh v. State of Haryana : (2015) 1 SCC 496** with regard to the object of section 313(1)(b) Cr.P.C. it was observed by the Apex Court as follows:-

> *“11. The object of Section 313 (1)(b) Cr.P.C. is to bring the substance of accusation to the accused to enable the accused to explain each and every circumstance appearing in the evidence against him.* ***The provisions of this section are mandatory and cast a duty on the court to afford an opportunity to the accused to explain each and every circumstance and incriminating evidence against him.*** *The examination of accused under Section 313 (1)(b) Cr.P.C. is not a mere formality. Section 313 Cr.P.C. prescribes a procedural safeguard for an accused, giving him an opportunity to explain the facts and circumstances appearing against him in the evidence and this opportunity is valuable from the standpoint of the accused.* ***The real importance of Section 313 Cr.P.C. lies in that, it imposes a duty on the Court to question the accused properly and fairly so as to bring home to him the exact case he will have to meet and thereby, an opportunity is given to him to explain any such point.”***
>
> *(Emphasis Supplied)*

18. The above observations have been cited in a recent three-judge Bench decision of the Apex Court in **Maheshwar Tigga v. State of Jharkhand : (2020) 10 SCC 108**, wherein, in paragraph 8, it was observed as follows:-

> *“8.* ***It stands well settled that circumstances not put to an accused under Section 313 Cr.P.C. cannot be used against him, and must be excluded from consideration.*** *In a criminal trial, the*

> *importance of the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity not only to furnish his defence, but also to explain the incriminating circumstances against him. A probable defence raised by an accused is sufficient to rebut the accusation without the requirement of proof beyond reasonable doubt."*
>
> *(Emphasis Supplied)*

19. Having examined the relevant provisions of the Code and the decisions noticed above, the legal principle deducible is that the circumstances appearing against the accused in the evidence led during the course of trial must be put to the accused in a form that the accused could understand as to what circumstances appearing against him in the evidence, he has to explain. The language and the manner in which those circumstances are put to the accused assumes importance as that enables a person to have a clear picture of the circumstances which he has to explain. An incriminating circumstance appearing in the evidence not put to the accused to have his explanation is ordinarily to be eschewed from consideration.

20. Now, we shall examine as to what is the test to determine whether the accused has been fairly examined and whether a lapse in putting the incriminating circumstance to the accused in the manner required by law, vitiates the trial. And if there is any such lapse by the trial court, what are the courses available to the appellate court.

21. In **Jai Dev and others v. State of Punjab : AIR 1963 SC 612,** a three- judge Bench of the Apex Court, with reference to section 342 of 1898 Code (*pari materia* with section 313 of the 1973 Code), in paragraph 21 of its judgment, observed as follows:-

"21. ……..The examination of the accused person under a. 342 is undoubtedly intended to give him an opportunity to explain any circumstances appearing in the evidence against him. In exercising its powers under Section 342, the Court must take care to put all relevant circumstances appearing in the evidence to the accused person. ***It would not be enough to put a few general and broad questions to the accused, for by adopting such a course the accused may not get opportunity of explaining all the relevant circumstances. On the other hand, it would not be fair or right that the Court should put to the accused person detailed questions which may amount to his cross examination. The ultimate test in determining whether or not the accused has been fairly examined under s. 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity. It is obvious that no general rule can be laid down in regard to the manner in which the accused person should be examined under Section 342. Broadly stated. however, the true position appears to be that passion for brevity which may be content ' with asking a few omnibus general questions is as much inconsistent with the requirements of Section 342 as anxiety for thoroughness which may dictate an unduly detailed and large number of questions which may amount to the cross-examination of the accused person……."***

(Emphasis Supplied)

22. Further, in **Shivaji Sahabrao Bobade and another : State of Maharastra : (1973) 2 SCC 793,** a three-judge Bench

of the Apex Court, in paragraph 16 of its judgment, observed as follows:-

> "*.....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.*"

23. In **Asraf Ali v. State of Assam : (2008) 16 SCC 328,** in paragraph 21, 22 and 24 of the judgment, the Apex Court had observed as under:-

> *"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 similar view in S. Harnam Singh v. The State, 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 vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise.*

24. ***In certain cases when there is perfunctory examination under Section 313 of the Code, the matter is remanded to the trial Court, with a direction to re-try from the stage at which the prosecution was closed.****"*

(Emphasis Supplied)

24. Upon a conspectus of its earlier decisions, in **Alister Anthony Pareira v. State of Maharastra : (2012) 2 SCC 648,** the Apex Court, in paragraph 61 of its judgment, observed as follows:-

"From the above, the legal position appears to be this: the

accused must be apprised of incriminating evidence and materials brought in by the prosecution against him to enable him to explain and respond to such evidence and material. ***Failure in not drawing the attention of the accused to the incriminating evidence and inculpatory materials brought in by prosecution specifically, distinctly and separately may not by itself render the trial against the accused void and bad in law; firstly, if having regard to all the questions put to him, he was afforded an opportunity to explain what he wanted to say in respect of prosecution case against him and secondly, such omission has not caused prejudice to him resulting in failure of justice. The burden is on the accused to establish that by not apprising him of the incriminating evidence and the inculpatory materials that had come in the prosecution evidence against him, a prejudice has been caused resulting in miscarriage of justice."***

(Emphasis Supplied)

25. In **Nar Singh v. State of Haryana (supra),** after considering various earlier decisions, the Apex Court, in paragraph 30 of the judgment, held as under:-

"30.1.Whenever a plea of non-compliance with Section 313 Cr.P.C. is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer.

30.2. In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon

merits.

30.3. If the appellate court is of the opinion that non-compliance with the provisions of Section 313 Cr.P.C. has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 Cr.P.C. and the trial Judge may be directed to examine the accused afresh and defence witness, if any, and dispose of the matter afresh.

30.4. The appellate court may decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused."

(Emphasis supplied)

26. Having noticed the various decisions, in our view, the legal principles deducible therefrom, with regard to - (a) the test whether the accused has been fairly examined under section 313 of the Code; (b) whether the lapse, if any, in putting the incriminating circumstance to the accused has vitiated the trial; and (c) the courses available to the appellate court, if there is a lapse on the part of the trial court while examining the accused under section 313 CrPC, are summarised below:-

(a) All incriminating circumstances must be put to an accused as to enable him to explain those circumstances. But there is no prescribed form in which those circumstances are to be put to the accused. Ordinarily, the incriminating circumstances must be specifically and distinctly put. The practice of putting all

the incriminating circumstances in one large question has been deprecated as it is likely to confuse the accused and may thereby hamper an articulate and a proper explanation. But that would not mean that the questions are put on every minute details or be so thorough that the examination becomes a cross-examination of the accused. In fact, the questions are to be framed in a way as to enable the accused to know what are the circumstances against him that he has to explain, and for which an explanation is needed. The whole object of the section (i.e. S. 313 CrPC) is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him therefore, the questions must be couched in a form which even an ignorant or illiterate person will be able to appreciate and understand. The ultimate test therefore, in determining whether or not the accused has been fairly examined under section 313 CrPC, would be to enquire whether, having regard to all the questions put to him, did the accused get an opportunity to say what he wanted to say in respect of prosecution case against him.

(b) An omission on the part of the Court to question the accused on any incriminating circumstance would not ipso facto vitiate the trial, unless it is shown that some prejudice is caused to the accused resulting in miscarriage of justice.

(c) Ordinarily, where any incriminating circumstance has not been put to the accused, the Court must eschew such circumstance appearing in the evidence from consideration and decide the matter on the basis

of the remaining evidence.

(d) If the incriminating circumstances appearing in the prosecution evidence are not put to the accused by the trial court and the accused demonstrates before the appellate court, or it is apparent from the record, that prejudice has been caused to him, following courses are available to the appellate court:-

(i) The appellate court may examine or further examine the convict (appellant) or the counsel appearing for him and take into consideration the answers for deciding the matter;

(ii) The appellate court may direct re-trial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 Cr.P.C. and the trial Judge may be directed to examine the accused afresh and defence witness, if any, and dispose of the matter afresh;

(iii) The appellate court may decline to remit the matter to the trial court for re-trial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused.

27. Having noticed the legal principles above, now, we shall proceed to examine whether in the instant case the examination of the accused-appellant under Section 313

Cr.P.C. was in the manner mandated by law. If not, whether any prejudice was caused to him. If so, its legal consequence.

28. In the instant case, the incriminating circumstances appearing in the evidence against the appellant were as follows:-

(i) The deceased, the appellant, appellant's wife Ayesha and their child, were provided a room by the informant (PW-2) two days before the date of the incident to stay as their hutment at Nai Seemapuri was being redone;

(ii) In the morning of 29.01.1991, at about 5 am, on hearing noise, PW-2 arrived at the spot (i.e. the room provided above) to notice the deceased lying in a pool of blood, with his throat slit, and the appellant holding a blood stained knife in his hand;

(iii) Seeing P.W.2, the appellant ran away with the knife and while he was running away, at some distance from the spot, he was apprehended by PW-1 but, upon intervention of appellant's Mama (Jabbar) was let off;

(iv) Later, when the appellant was arrested, at his pointing out, on 30.01.1991, knife, wrapped in a cloth, was recovered from a stack of bricks lying in a kothari.

29. The circumstances that have been culled out above have not been put to the accused while recording his statement under Section 313 Cr.P.C. The questions put to the appellant to evoke his explanation are detailed below:

(i) The first is with regard to the allegation made in the FIR (Ex. Ka1). This question is couched in a form as to what the appellant has to say in respect of the accusation made in the FIR (Ex. Ka1) that he had killed the deceased by slitting his

throat with a knife in the morning of 29.01.1991 at about 5.00 am.

The first question narrates the charge of murder but not the circumstances appearing in the evidence against the appellant. The circumstances, as we have noticed, were that the informant gave a room to the deceased, appellant, his wife and child to stay; and that, in the morning of 29.1.1991, the deceased was lying dead with his throat slit and the appellant was seen standing there, with a knife in his hand, and, upon seeing the informant, he ran away with the knife. Importantly, in the prosecution evidence, no witness stated that the appellant killed the deceased by slitting his throat at 5.00 am on 29.01.1991. Such an allegation appeared only in the statement of Ayesha, under section 164 CrPC, which is not admissible in evidence as she was not examined in the trial. The charge of murder was based on circumstantial evidence but, unfortunately, the circumstances that appeared in the prosecution evidence were not put to the accused.

(ii) The second question too, does not at all narrate the incriminating circumstances that appeared in the deposition of the witnesses. Rather, the question just enumerates the witnesses who had deposed against the appellant. As to what they deposed is not put to the appellant.

(iii) The third question recites the documents exhibited without disclosing their contents and as to what they relate to.

(iv) The fourth question is general as to what the accused has to say.

(v) The fifth question does not seek explanation but seeks answer from the accused as to why he has been prosecuted.

(vi) The sixth question just asks the accused as to

whether he would like to give his defence.

30. From a close examination of the questions put, as noticed above, it is clear that the examination of the appellant under Section 313 Cr.P.C. was not in respect of the circumstances that appear against him in the prosecution evidence. Rather, the appellant was merely apprised as to who have testified against him and what documents were produced by the prosecution. As to what their testimony had been and what the documents contained and related to, were not put to the appellant. We are therefore of the considered view that the circumstances appearing in the prosecution evidence against the accused-appellant were not put to the accused in the manner required by law.

31. Now, we shall examine whether by not putting those circumstances any prejudice has been caused to the appellant resulting in miscarriage of justice. Whether prejudice has been caused or not to the accused has to be seen from the stand point of the accused. At this stage, we may observe that from the order sheet of the trial court it appears that on 20.01.1993 a prayer was made on behalf of the appellant to the Court that the *amicus curiae* representing the appellant thus far be discharged because he has engaged a counsel. The entire order sheet of the trial court reflects that the appellant had been signing in Bangla script. These circumstances as also the fact that the appellant has suffered continuous incarceration since the year 1991 reflects that the appellant is not a person with means or support to fight for his freedom. In that back drop, in our view, the trial court ought to have put itself on guard, while examining the accused under section 313 CrPC, to ensure that the accused (i.e. appellant herein) had understood what he had to explain. The Code also, by inserting sub-sections (3) and (4)

to section 281, mandates that the record of the examination of accused shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court; and the record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers. In the instant case, nothing of the sort appears on the record of the trial court. No doubt, where, the accused is a literate person, well versed with the nuances of law, and is represented by a battery of competent lawyers who undertake gruelling cross examination of the witnesses on behalf of the accused, in the presence of the accused, the accused may have to demonstrate that omission during examination under section 313 CrPC has caused serious prejudice to the accused and, in absence of such demonstration, failure to raise the issue during trial may prove detrimental to the plea of prejudice set up for the first time in the appellate court as was held by the Apex Court in the case of **Satyavir Singh Rathi ACP V. State, (2011) 6 SCC1.** But where the accused is a foreign national who signs in a language which is not the language of the court, absence of a proper examination in the true spirit of the provisions of section 313 CrPC read with sub-sections (3) and (4) of section 281 CrPC would certainly cause prejudice to him resulting in miscarriage of justice. To illustrate it further, in the context of the instant case, say the circumstances appearing in the prosecution evidence had been put to the accused in a manner he could have understood, he might have given an explanation that seeing his wife sleeping next to the deceased, he lost his bearings and self control and, in a fit of sudden rage, committed

the act. Such an explanation perhaps could have fit in with the prosecution evidence and absolved him of the charge of an offence punishable under section 302 IPC and might have served as a mitigating factor to convert the charge of murder to one of an offence punishable under section 304 IPC. Likewise, he could have offered explanation as to why he was seen running, may be by telling that because he was terrified seeing his wife, or somebody else, commit the murder. Importantly, the appellant was not seen by PW1 running with a knife though, according to PW2 he ran away with the knife whereas, the knife was recovered, found hidden, wrapped in a cloth, beneath a stack of bricks, from a Kothri near the scene of crime. Had all these circumstances been put in the form required by law and in the language understood by the accused, result might have been different. We are therefore of the considered view that the improper examination of the accused under section 313 CrPC has caused serious prejudice to the accused (appellant) and has resulted in miscarriage of justice.

32. At this stage, we may again put on record that in all the papers of the trial court as well as the police papers wherever the signature of the appellant appears, it is in Bangla script. Noticeably, from the statement of PW-9, who recorded the statement of appellant's wife, namely, Ayesha, under Section 164 Cr.P.C., stated that she did not understand Hindi and therefore a translator was used. We also find from the record that due to long incarceration of the appellant pending decision in this appeal, he had filed a ***Writ Petition (Criminal) No. 291 of 2021*** in the Apex Court. The said writ petition was disposed off by order dated 26.07.2021, which is there on the record of this appeal. The said order is extracted below:-

"Heard learned counsel for the parties.

From the bare facts, it may appear that it is a hard case of unduly long incarceration of the petitioner. But, after considering the submissions of the learned counsel for the State, we find no reason to entertain the relief as claimed in the fact situation of the present case. The order sheet produced by the petitioner along with the petition, itself, makes it amply clear that the High Court was inclined to hear the criminal appeals filed by the petitioners expeditiously. However, for reasons best known to the petitioners, the conditional order lastly passed on 23.10.2019 by the High Court, had not been complied with.

Our attention is also invited to the fact that petitioner no.1 is a foreign national and as per the policy of the State Government, premature release of such convict is not permissible.

It is also pointed out that during the pendency of the proceedings in respect of which the petitioners have been convicted, the petitioner no.2 indulged in another offence under Section 307 of Indian Penal Code, which trial is still pending.

Taking overall view of the matter, therefore, we direct the State Government to file paper book in the pending criminal appeals within two weeks from today, as per the High Court Rules, if the petitioners have already not done so; so that Criminal Appeal Nos. 1944 of 2007 and 5977 of 2019 may proceed for hearing before the High Court.

Besides, the respondent-State take necessary steps to ensure that the pending trial against the petitioner No.2 is taken to its logical end expeditiously.

We request the High Court to make an endeavor to dispose of the criminal appeals within four months from the date of filing of additional paper book by the State.

The Writ Petition is disposed of accordingly.

Pending applications, if any, stand disposed of."

From the order of the Apex Court, it becomes clear that appellant is a foreign national. Further, the certificate provided by the Senior Superintendent, Central Jail, Agra also indicates that the appellant is a Bangladesh national. Therefore, if his wife, as per the statement of PW-9, did not understand Hindi language, keeping in mind that the appellant had been signing in Bangla, though we cannot say with certainty that the appellant did not know Hindi, we hold with certitude that these circumstances were sufficient to put the trial judge on guard to ensure that the incriminating circumstances appearing in the prosecution evidence were meticulously put and explained to the accused to evoke his explanation under Section 313 of the Code. This having not been done, we are of the firm view that it has seriously prejudiced the accused-appellant and it vitiates the order of conviction.

33. Once we come to the above conclusion, the circumstances that were not put to the accused would have to be eschewed from consideration which leaves us with virtually nothing to analyse. Hence an analysis of the evidence to find out whether it would lead to conviction of the appellant or not would be an exercise in futility. Further, at this stage, an exercise to record fresh statement of accused- appellant, or his counsel, under Section 313 Cr.P.C., or remit the matter back to the trial court, to cure the defect, would not be justified as, according to the certificate of the Senior Superintendent, Central Jail, Agra, the appellant has already served 30 years, 04 months and 03 days, up to 03.06.2021, in prison. Any fresh exercise to cure the defect, after such a long gap, would be travesty of justice.

34. In view of the foregoing discussion, once we eschew the

circumstances not put to the accused in the manner required by law, nothing much remains to sustain the order of conviction rendered by the trial court. We thus have no option but to allow the appeal and set aside the conviction and sentence recorded by the court below. The appeal is accordingly **allowed**. The judgment and order of the trial court (i.e. court below) in both the trials is set aside. The appellant is acquitted of the charges for which he has been tried. He shall be set at liberty forthwith, unless wanted in any other case, subject to compliance of the provisions of Section 437 A Cr.P.C. to the satisfaction of the court below

35. Let a copy of this order along with the lower court record be transmitted to the trial court for compliance.

Order Date :- 29.11.2021
Sunil Kr Tiwari