Serial No.2
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A. No. 1 of 2018

Date of Hearing: 05-04-2021
Date of Decision:06-05-2021

Shri. Alphon Khardewsaw Vs. State of Meghalaya.

Coram:

Hon'ble Mr. Justice Ranjit More, Judge

Hon'ble Mr. Justice W.Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. K.C.Gautam, Adv.
Mr. B.K.Biswa, Adv.
Mr. M.Halder, Adv.

For the Respondent(s) : Mr. K.Khan, Sr. PP
Mr. S.Sengupta, APP

i) Whether approved for reporting in Law journals etc: Yes/No

ii) Whether approved for publication in press: Yes/No

Per R.More, (J)

1. Heard Mr. K.C.Gautam, learned counsel for the appellant and Mr. K.Khan, learned Sr. PP for the respondents.

2. By the judgment and order dated 22-02-2018, passed in G.R.Case. No. 488 (A) of 1985, the learned Judge, District Council Court. Khasi Hills, Shillong convicted the present appellant, original accused No. 1 for an offence punishable under Section 302 IPC. The learned Judge, District Council Court thereafter, heard the appellant on the quantum of punishment on 07-03-2018 and by order dated 09-03-2018, directed him to suffer sentence for life

imprisonment. The appellant by filing the above appeal, has challenged both the orders referred herein above.

3. The prosecution case in short is that in the night of 20-07-1985, at about 8p.m. the accused persons namely, Shri. Alphon Khardewsaw (present appellant) and Shri. Siren Marshiangbai of Tiriang had assaulted the deceased namely, U Drikshon Khardewsaw at Rwiang on the PWD main road with a hammer, stones and an iron chain causing multiple fractured wounds on the head of the deceased and as a result the deceased died on the spot instantaneously. The family members of the deceased on hearing the hue and cry of the deceased rushed to the spot while the accused persons fled away from the spot. During investigation, it was found that prima facie case under Section 302 r/w 34 IPC has well been established against both the accused and hence Charge-sheet No. 43/1985 under Section 302 IPC was filed. In the Charge-sheet, police named 13 witnesses.

4. The trial of the case started in the year 1992. In the course of the trial, the prosecution examined 8 (eight) witnesses between June 1993 to August, 1993 and from August 1993 till 2002, the court repeatedly issued summons to the remaining prosecution witnesses including the Investigating Officer of the case and the Doctor who conducted the post-mortem. However, the remaining witnesses despite repeated issuance of process by the trial court failed to appear. Consequently, these witnesses were dropped and prosecution evidence was treated to be closed. Thereafter, the statement of the accused was recorded under Section 313 CrPC in the month of December, 2003. Meanwhile, it appears from the record that accused No. 2, Shri. Siren Marshiangbai expired in the year 2006. Thereafter, defense examined their witnesses, DW-No.1 and DW-No. 2 in the month of September, 2006. The learned Judge, District

Council Court thereafter, heard the argument of the prosecution and defense and by passing the impugned order, convicted and sentenced the accused No. 1 (present appellant).

5. Mr. K.C.Gautam, learned counsel for the appellant took us through the deposition of witnesses, especially the alleged eye witnesses, that is, PW-2, PW-3, PW-4 and PW-5 and submitted that there are inherent contradictions. He further submitted that though the prosecution in the Charge-sheet named 13(thirteen) witnesses to establish their case against the appellant, but only 8(eight) witnesses were examined. He stated that since the prosecution has not examined the Investigating Officer and the Doctor who conducted the autopsy on the deceased, the contradiction could not be brought on record and therefore, great prejudice is caused to the appellant/accused. It was also submitted that in the absence of medical evidence of the Doctor, prosecution failed to prove that the death of the deceased was homicidal. Mr. Gautam further invited our attention to the statement of the appellant/accused under Section 313 CrPC and submitted that same is recorded in a perfunctory manner and thereby great prejudice is caused to the appellant/accused. In above circumstances, he submitted that benefit of doubt has to be given to the appellant and impugned judgment and order may be quashed and set aside. In order to support his submission, he relied upon the decision of the Apex Court in ***Bahadur Naik v. State of Bihar (2000) 9 SCC 153***, the decision of the Division Bench of High Court of Jharkhand in ***Manik Singh & Anr. v. State of Jharkhand, 2019 SCC Online Jhar 244***, the decision of the Apex Court in ***Samsul Haque v. State of Assam, 2019 SCC Online SC 1093*** and ***Nar Sing v. State of Haryana (2015) 1 SCC 496***.

6. Mr. K.Khan, learned Sr.PP opposed this appeal vehemently. He submitted that evidence of the eye witnesses, that is, PW-2, PW-3, PW-4 and PW-5 has fully supported the prosecution case as to the occurrence, as such, inspite of the fact that the Doctor and the Investigation Officer could not be examined, the appellant has been rightly tried and sentenced by the court below and no prejudice has been caused to the defense due to non-examination of these witnesses. In this regard, he relied upon the decision of the Apex Court in ***Dayal Singh & Ors. v. State of Uttaranchal (2012) 8 SCC 263*** and ***Bahadur Naik v. State of Bihar*** *(supra)*. Mr. K.Khan heavily relied upon the decision of the Apex Court in ***Dayal Singh*** *(supra)* to contend that non examination of the Doctor in the present case is not fatal to the prosecution case. This decision however is not applicable since in the present case, the prosecution failed to examined not only the Doctor but the Investigating officer as well and non-examination of the Investigating Officer has caused great prejudice to the defense as contradiction in the evidence of the eye witnesses could not be brought on record. So far as statement of the accused under Section 313 CrPC is concerned, he conceded that same is not recorded in terms of the provision of Section 313 CrPC as interpreted by the Apex Court. However, he submitted that for that purpose, the appeal can be remanded back to the trial court.

7. PW-2, U Bendro Khardewsaw was the informer at whose instance the FIR was registered. In the FIR he has stated that 3(three) persons namely, Mr. Kanding Marbaniang, Mr. Alphon Khardewsaw and Mr. Siren Marshiangbai had beaten his brother to death using a log of wood, as a result of which he died on the spot. In his evidence before the court, he has however stated that on reaching the place of occurrence, he saw the 2(two) accused persons namely, Mr. Alphon Khardewsaw and Mr. Siren Marshiangbai beating his

brother with an iron chain and hammer. PW-2 has admitted that the contents of the FIR was written by PW-6 as explained by him. This statement is corroborated by PW-6 who has admitted his handwriting and signature on the FIR saying that FIR was written by him as explained by PW-2.

PW-2 has stated that at the time of the incident around 8 p.m., he was at home when he heard a sound from his sister, PW-3 Ka Sbiansimai Khardewsaw and wife of the deceased, PW-4 Ka Albina Mawlieh. He has further stated that the distance from the place of occurrence and his house is about half km. PW-4 has stated in her cross examination before the Magistrate First Class on oath that she went to call the brother of her husband. Thus, PW-3 and PW-4 have offered different explanations pertaining to the presence of PW-2 at the place of occurrence.

PW-3, Ka Sbiansimai Khardewsaw, sister of the deceased in her cross examination stated that the first person who arrived at the place of occurrence after hearing their shout was PW-5, U Wosting Marngar, the brother-in-law of the deceased. PW-5 has however, in his cross examination before the court admitted that he appeared at the place of occurrence about 10 minutes after hearing the hue and cry.

Pw-3 in her cross examination has stated that one Shri. Kanding was also present at the place of occurrence. This fact is not supported in her examination in chief. PW-3 further stated that the place of occurrence is very close to the Forest check gate of Myriaw Syiemship.

8. The above evidence of the alleged eye witnesses, that is, PW-2, PW-3, PW-4 and PW-5, in our opinion is full of inherent contradictions. PW-2 in his FIR stated that a log of wood was the weapon of assault. However, in the

deposition before the court, he stated that the deceased was assaulted by the accused persons with an iron chain and hammer. This witness in the FIR stated that he saw 3(three) persons namely, the present appellant, the deceased Siren Marshiangbai and one Kanding Marbaniang assaulting the deceased. However, in the deposition before the court, he stated that only the appellant/accused and deceased Siren Marshiangbai assaulted the deceased. If the evidence of PW-3 and PW-4 is taken into consideration, it is clear that they have offered different explanation pertaining to the presence of PW-2 at the place of occurrence. This major contradiction has been ignored by the court below in finding of guilt against the appellant/accused. The prosecution, as stated earlier has failed to examine the Investigating Officer and in the absence of the examination of the Investigating Officer, the defense has been vitally prejudiced as necessary contradictions could not be taken from the Investigating Officer. The Apex Court in ***Bahadur Naik*** *(supra)* in para 2 observed that non-examination of the Investigating Officer as a witness is of no consequences when material contradictions could not be brought on record. However, in the present case, there are inherent contradictions in the evidences of PW-2, PW-3, PW-4 and PW-5 who are the eye witnesses. Therefore, it can definitely be said that great prejudice has been caused to the appellant/accused by such non-examination.

Facts of the present case and facts of ***Manik Singh's*** *case (supra)* are more or less similar. In ***Manik Singh's*** *case* also, the Investigating Officer and the Doctor who conducted the post mortem were not examined, the Division Bench also found that there are apparent discrepancies in the FIR and the evidence of the informant and evidence of other witnesses. The Division Bench of Jharkhand accordingly acquitted the appellant therein by giving benefit of doubt.

9. This takes us to consider another submission of Mr. Gautam, learned counsel for the appellant that prosecution failed to comply with the mandatory provision of Section 313 CrPC. The statement under Section 313 CrPC of the present appellant was recorded by the court on 04-12-2003. It reads as follows:

> *"**Examination U/S 313 Crpc***
>
> *I did not murdered one U Drikson Khardewsaw. The evidence against me that I used a chain to kill the deceased is not true. I do not know the deceased. I don't know one U Bendro Khardewsaw (P.W. 2). It is not true that I and U Siren invited the deceased to visit the house of U Kanding. All the evidence given against me and U siren are false."*

Let us see if this statement is in compliance with the provision of Section 313 CrPC as interpreted by the Apex Court. In ***Nar Singh*** *(supra)*, the Apex Court reiterated the object, scope and importance of statement under Section 313 CrPC. The Apex Court made the following observations in para 10 to 13 as follows:

> ***"10.*** *There are two kinds of examination under Section 313 CrPC. The first under Section 313(1)(a) CrPC relates to any stage of the inquiry or trial; while the second under Section 313(1)(b) CrPC takes place after the prosecution witnesses are examined and before the accused is called upon to enter upon his defence. The former is particular and optional; but the latter is general and mandatory. In Usha K. Pillai v. Raj K. Srinivas (1993) 3 SCC 208, this Court held that: (SCC p. 212, para 3)*
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> *3. ... the court is empowered by [Section 313(1)] clause (a) to question the accused at any stage of the inquiry or trial; while [Section 313(1)] clause (b) obligates the Court to question the accused before he enters his defence on any circumstance appearing in prosecution evidence against him.*
>
> ***11***. *The object of Section 313(1)(b) CrPC 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 the accused under Section 313(1)(b) CrPC is not a mere formality. Section 313 CrPC 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 CrPC 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.

12. *Elaborating upon the importance of a statement under Section 313 CrPC, in Paramjeet Singh v. State of Uttarakhand (2010) 10 SCC 439, this Court has held as under: (SCC p. 449, para 22)*

> *"22. Section 313 CrPC is based on the fundamental principle of fairness. The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Therefore, the court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. Circumstances which were not put to the accused in his examination under Section 313 CrPC cannot be used against him and have to be excluded from consideration." (Vide Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116 and State of Maharashtra v. Sukhdev Singh (1992) 3 SCC 700.)"*

13. *In Basavaraj R. Patil v. State of Karnataka (2000) 8 SCC 740, this Court considered the scope of Section 313 CrpC and in paras 18 to 20 held as under: (SCC pp. 752-53)*

> *"18. What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is 'for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him'. In Jai Dev v. State of Punjab AIR 1963 SC 612, Gajendragadkar, J. (as he then was) speaking for a three-*

Judge Bench has focused on the ultimate test in determining whether the provision has been fairly complied with. He observed thus: (AIR p.620, para 21)

> *'21.....The ultimate test in determining whether or not the accused has been fairly examined under Section 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.'*
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> *19. Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion.*
>
> *20. At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim audi alteram partem. The word 'may' in clause (a) of sub-section (1) in Section 313 of the Code indicates, without any doubt, that even if the court does not put any question under the clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him."*

In ***Nar Singh's*** *case (supra)*, the Apex Court briefly summarized the course available to the appellate court whenever the plea of permission to put question to the accused on vital piece of evidence is raised in the appellate court as follows:

> ***30.1.*** *Whenever a plea of non-compliance of Section 313 CrPC 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 CrPC 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 CrPC 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."*

In ***Samsul Haque*** *(supra)*, the Apex Court summarized the purpose and requirement of Section 313 CrPC. The Apex Court made following observation in para 21 and 22:

"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. 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 similar view in S. Harnam Singh v. State (Delhi Admn.) 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."

10. In terms of the decision of the Apex Court in ***Nar Singh***'s case and ***Samsul Haque***'s case (*supra*), it was the duty of the court to bring the substance of accusation to the appellant/accused to enable him to explain each and every circumstance appearing in the evidence against him. The provision of Section 313 CrPC is not only mandatory but it cast a duty upon the court to afford an opportunity to the appellant to explain each and every circumstance and incriminating evidence against him. Obviously, in the present case this was not done and therefore in our considered opinion, great prejudice is caused to the appellant/accused. By now, it is established principle of law that where there is a perfunctory examination under Section 313 CrPC, the matter is capable of being remitted to the trial court from the

stage at which prosecution was closed. However, in the present case, examination under Section 313 CrPC of the appellant/accused was not only perfunctory but prosecution also failed to examined the Investigating Officer and the Doctor. On that count also, great prejudice is caused to the appellant/accused. Coupled with this fact, we also must consider the inordinate delay in trial of the appellant/accused. Though charge-sheet was submitted in the year 1985, appellant/accused was convicted by impugned judgment and order dated 22-02-2018. Thus, trial remained pending for 33 years.

11. In above circumstances, we are of the view that appellant/accused could not have been convicted and sentenced by the trial court. Rather, the appellant/accused is entitled to be given the benefit of the doubt. As such, the impugned judgment of conviction and sentence passed by the court below cannot be sustained in the eyes of law and same is quashed and set aside. The appeal is accordingly allowed. The appellant/accused is directed to be released forthwith if not required in any other case.

(W.Diengdoh)
Judge

(R. More)
Judge

Meghalaya
06 .05.2021
"Samantha PS"