A STATE OF PUNJAB

v.

NAIB DIN

SEPTEMBER 28, 2001

B [K.T. THOMAS AND S.N. VARIAVA, JJ.]

Criminal Procedure Code, 1973—Sections 296 and 313—Formal Evidence—Deposition of—On affidavit deponents not cross-examined—No request for cross-examination Failure to put question to the accused C *regarding the evidence—Conviction set aside by High Court in Revisional Jurisdiction—On appeal held acquittal not justified—Failure to put question to the accused is too insufficient for holding that the proceedings were vitiated—Even if such evidence is of vital nature effort should be made to undo or correct that lapse—And if it cannot be corrected, court should consider the* D *impact of the lapse on the overall aspect of the case—Opium Act, 1857—Section 9.*

Respondent-accused was convicted under Section 9 of the Opium Act 1857. In the trial court two police officers who had handled the opium and taken the same to chemical examiner had deposed on affidavit. Accused E **made no request to summon the deponents for cross-examination. Conviction, in appeal was confirmed by Sessions Court. High Court, in the revision petition quashed the conviction of the accused-respondent on the ground that deponents were not tendered for cross-examination; and that the affidavits were also not put to the accused for the purpose of his** F **statement under Section 313 Cr.P.C. Hence this appeal.**

Allowing the appeal and remitting the case back to the High Court, the Court

HELD : 1. In the present case, the facts stated in the affidavit were G **purely of a formal character. At any rate, even the defence could not dispute that aspect because no request or motion was made on behalf of the accused to summon the deponents of those affidavits to be examined in Court. In such a situation it was quite improper that the High Court used such a premise for setting aside the conviction and sentence passed on the** H **respondent, that too in revisional proceedings. [400-E]**

2.1. In observing that the contents of the affidavit were not put to the accused during the examination under Section 313 of the Code, the Court over-looked the formal nature of the evidence. It was too pedantic an insistence on the part of the High Court that every item of evidence, even of a formal nature, should also form part of the questions under Section 313 of the Code. [400-F; G]

2.2. The omission to put the question concerning evidence which is purely of a formal nature, is too insufficient for holding that the proceedings were vitiated. Respondent failed to show that there was any failure of justice on account of the omission to put a question concerning such formal evidence when he was examined under Section 313 of the Code. No objection was raised in the trial court on the ground of such omission. No ground was taken up in the appellate court on such ground. If such objection was not raised at appellate stage the revisional court should not normally boother about it. If any appellate court or revisional court comes across that the trial court had not put any question to an accused even if it is of a vital nature, such omission alone should not result in setting aside the conviction and sentence as an inevitable consequence. Effort should be made to undo or correct the lapse. If it is not possible to correct it by any means the Court should then consider the impact of the lapse on the overall aspect of the case. After keeping that particular item of evidence aside, if the remaining evidence is sufficient to bring home the guilt of the accused, the lapse does not matter much, and can be sidelined justifiably. But if the lapse is so vital as would affect the entire case, the appellate or revisional court can endeavour to see whether it could be rectified. [400-H; 401-A; B; C]

Shivaji Sahabrao Bobade **v.** *State of Maharashtra*, **[1973] 2 SCC 793 and** *Basavaraj Patil* **v.** *State of Karnataka*, **[2000] 8 SCC 740, referred to.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 995 of 2001.

From the Judgment and Order dated 15.2.2001 of the Punjab and Haryana High Court in Crl. R. No. 1323 of 1988.

Seeraj Bagga and R.S. Suri for the Appellant.

The Judgment of the Court was delivered by

THOMAS, J. Leave granted.

The evidence of a policeman was tendered in a criminal trial by means of an affidavit but it was not accepted by the High Court and consequently the entire prosecution case was thrown over board. The conviction and sentence passed on an accused were resultantly quashed on that ground alone. The State of Punjab challenges the said verdict of the High Court in this appeal by special leave.The respondent was charge-sheeted by the police for the offence under Section 9 of the Opium Act before the Court of a Judicial Magistrate of 1st Class, Ludhiana. The substance of the allegation against him was that he was found in possession of 4.5 kg. of opium wrapped in glazed papers on 11.10.1984. The police version was this: while some of the police personnel were returning after patrol duty they came across the respondent near the railway crossing at Kanod village (Sanhewal in Ludhiana district). On seeing the police he tried to run away from the scene and then the police felt suspicious about him and intercepted him. When a search was conducted the police could seize the contraband article (Opium) from him. The police officials separated ten grams of Opium as a sample and put it in a matchbox and sealed it. The sample was forwarded to the Chemical Examiner, who, after testing the same, reported that it was opium. On completion of the investigation the police laid the charge sheet against the respondent.

Prosecution examined Head Constable Dhian Singh as PW1 and Head Constable Ranji Dass as PW2. Ex. PD is the report of the Chemical Examiner. Two police personnel (Mr. Satpal Singh and Mr. Sohan Lal) produced affidavits regarding the role-played by them in forwarding the sample to the Chemical Examiner. When the respondent was examined under Section 313 of the Code of Criminal Procedure (For short 'the Code') he repudiated the allegations made against him and put forward a version that the police nurtured vengeance towards him for not obliging them by becoming a witness in another case. According to the respondent the police had falsely concocted the present case against him to teach him a lesson. He further said that he was taken from his house on the early morning of 11.11.1984 and brought to the police station and foisted the case on him.

The trial magistrate found that the evidence of prosecution was enough to convict him of the offence under Section 9 of the Opium Act. Accordingly, he was convicted and sentenced as aforesaid. The Sessions Court upheld the conviction and sentence and dismissed the appeal filed by him. Respondent filed a revision before the High Court of Punjab and Haryana. Learned Single

Judge who disposed of the revision did not think it necessary to go into the details of the case. The following is what the learned Single Judge said:

> "There is no need at all to go into the details of this case in as much as it has been undisputed during the course of arguments before this court that affidavits of police officials, who had handled the opium and taken the same to the Chemical Examiner, even though filed in court, no opportunity was given to the petitioner to cross examine those, who had filed their affidavits. In other words, they were not tendered for cross-examination. Further, it has remained undisputed that affidavits of these witnesses were not even put to petitioner in his statement under Section 313 Cr.P.C."

We feel that the view adopted by the learned Single judge was too stilted for approval. At any rate, acquittal of the accused even without affording an opportunity to the prosecution to make up the lapse (if it was a lapse) only resulted in miscarriage of justice. Presently we may consider whether it is necessary for the prosecution, as an indispensable course to examine the police official who played only a formal role during investigation. In this context Section 296 of the Code can be read:

> "(1) The evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.
>
> (2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavits."

The normal mode of giving evidence is by examining the witness in Court. But that course involves, quite often, spending of time of the witness, the trouble to reach the court and wait till he is called by the Court, besides all the strain in answering questions and cross-questions in open court. It also involves costs which on many occasions are not small. Should a person be troubled by compelling him to go to the court and depose if the evidence which he is to give is purely of a formal nature? The enabling provision of Section 296 is thus a departure from the usual mode of giving evidence. The object of providing such an exception is to help the court to gain the time and cost, besides relieving the witness of his troubles, when all that the said witness has

A to say in court relates only to some formal points.

What is meant by an evidence of a formal character? It depends upon the facts of the case. Quite often different steps adopted by police officers during the investigation might relate to formalities prescribed by law. Evidence, if necessary on those formalities, should normally be tendered by affidavits and B not by examining all such policemen in court. If any party to a lis wishes to examine the deponent of the affidavit it is open to him to make an application before the Court that he requires the deponent to be examined or cross-examined in Court. This is provided in sub-section (2) of Section 296 of the Code. When any such application is made it is the duty of the Court to call such C person to the court for the purpose of being examined.

In *Shankaria* v. *State of Rajasthan,* [1978] 4 SCC 453 this Court accepted the evidence tendered on affidavit filed by a policeman who had taken specimen finger-prints of the accused in the case. The contention advanced in this Court that the said affidavit should not be relied on was repelled by the three-judge D bench in the afore-cited decision.

In the present case, the facts stated in the affidavit were purely of a formal character. At any rate, even the defence could not dispute that aspect because no request or motion was made on behalf of the accused to summon E the deponents of those affidavits to be examined in Court. In such a situation it was quite improper that the High Court used such a premise for setting aside the conviction and sentence passed on the respondent, that too in revisional proceedings.

Added to the above, learned Single Judge observed that the contents of F the said affidavit were not put to the accused during the examination under Section 313 of the Code. Learned Single judge, on that score also, over-looked the formal nature of the evidence. The substantive evidence relating to the sample is the result of the chemical examination. There is no grievance for the accused that the trial court did not put that aspect to the accused when he was G questioned under Section 313 of the Code. If so it was too pedantic an insistence that every item of evidence, even of a formal nature, should also form part of the questions under Section 313 of the Code.

That apart, respondent failed to show that there was any failure of justice on account of the omission to put a question concerning such formal evidence H when he was examined under Section 313 of the code. No objection was raised

in the trial court on the ground of such omission. No ground was taken up in the appellate court on such ground. If any appellate court or revisional court comes across that the trial court had not put any question to an accused even if it is of a vital nature, such omission alone should not result in setting aside the conviction and sentence as an inevitable consequence. Effort should be made to undo or correct the lapse. If it is not possible to correct it by any means the court should then consider the impact of the lapse on the overall aspect of the case. After keeping that particular item of evidence aside, if the remaining evidence is sufficient to bring home the guilt of the accused, the lapse does not matter much, and can be sidelined justifiably. But if the lapse is so vital as would affect the entire case, the appellate or revisional court can endeavour to see whether it could be rectified.

How is it possible to rectify or undo the lapse if it pertains to a vital piece of evidence?

A three-judge bench of this Court has observed in *Shivaji Sahabrao Bobade* v. *State of Maharashtra,* [1973] 2 SCC 793 that such an omission does not *ipso facto* vitiate the proceedings unless prejudice was established by the accused If the accused succeeds in showing any prejudice it is open to the appellate court to call upon the counsel for the accused to show what explanation the accused has got regarding the circumstances not put to him.

In *Basavaraj Patil* v. *State of Karnataka,* [2000] 8 SCC 740 a three-judge bench has followed the aforesaid observation and stated thus:

> "The above approach shows that some dilution of the rigour of the provision can be made even in the light of a contention raised by the accused that non-questioning him on a vital circumstance by the trial court has caused prejudice to him. The explanation offered by the counsel of the accused at the appellate stage was held to be a sufficient substitute for the answers given by the accused himself."

If such objection was not raised at the appellate stage the revisional court should not normally bother about it. At any rate, the omission to put the question concerning evidence which is purely of a formal nature, is too insufficient for holding that the proceedings were vitiated. The evidence sought to be advanced through the affidavits in this case is, no doubt, only of a formal nature.

A For aforesaid reasons we allow this appeal and set aside the impugned judgment of the High Court. We remit the revision filed by the respondent before the High Court to be disposed of afresh after affording a reasonable opportunity to both sides for hearing.

The appeal is disposed of accordingly.

B

K.K.T. Appeal allowed.