

GAHC010015652016



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./126/2016

1. Sri Prabitra Das
Son of Mineswar Das,
R/o Negheriting Kaibarta Gaon,
P.S.-Dergaon, District-Golaghat, Assam.

2. Sri Mintu Das,
S/o Lt. Mineswar Das,
R/o Negheriting Kaibarta Gaon,
P.S.-Dergaon, District-Golaghat, Assam.

.....Appellants.

Versus

1. The State of Assam.

2. Sri Samiran Das,
S/o Kerkan Das
R/o Negheriting Kaibarta Gaon,
P.S.-Dergaon, District-Golaghat, Assam.

.....Respondents.

BEFORE
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MRS. JUSTICE MITALI THAKURIA

For the appellants : Mr. S. Borgohain
Mr. N.J. Gogoi Advocates.

For the respondent no.1 : Ms. B. Bhuyan Addl. P.P.

Date of hearing & judgment : 10.10.2023

JUDGMENT AND ORDER

(M. Zothankhuma, J)

1. Heard Mr. S Borgohain, learned counsel for the appellants. Also heard Ms. B Bhuyan, learned Additional Public Prosecutor appearing for the State respondent.

2. The appeal has been filed against the impugned judgment dated 12.06.2015, passed by the learned Sessions Judge, Golaghat in Sessions Case No. 139/2003, by which the two appellants have been convicted under Sections 302/34 IPC and have been sentenced to undergo imprisonment for life with a fine of Rs. 5,000/- each, in default simple imprisonment for 2 (two) months. They were also convicted and sentenced to undergo simple imprisonment for a period of 1 (one) month under Sections 323/34 IPC and simple imprisonment for 15 (fifteen) days under Sections 341/34 IPC.

3. The brief facts of the case is that the two appellants in this case and one Pranabjyoti Das had been convicted under Sections 341/323/302/34 IPC vide judgment dated 27.02.2007, passed by the learned Sessions Judge, Golaghat in Sessions Case No. 139/2003.

4. The appellants and Pranabjyoti Das thereafter filed Criminal Appeal No. 76/2007 before this Court. Criminal Appeal No.76/2007, which was disposed of vide order dated 05.12.2012, by remanding the case back to the learned Trial Court to determine the plea of juvenility taken by Pranabjyoti Das. This Court in its order dated 05.12.2012 also directed the learned Trial Court to examine the appellants under Section 313 Cr.PC as none of the incriminating circumstances contained in the evidence of PWs 1, 2, 3, 4 and 6 had been laid before the appellants so as to elicit their explanations with regard thereto. Thereafter, the learned Trial Court was to proceed with the case, from the stage of examining the appellants herein under Section 313 Cr.P.C and record its final verdict.

5. Consequent to the order dated 05.12.2012, passed in Criminal Appeal No. 76/2007, the learned Trial Court examined the plea of juvenility taken by Pranabjyoti Das and held that Pranabjyoti Das was a Juvenile. Thereafter, the learned Trial Court proceeded with the case against the appellant herein by examining them under Section 313 Cr.P.C on 25.04.2013. The final arguments of the parties was thereafter heard by the learned Trial Court on 20.05.2015 and the case was disposed of vide the impugned judgment dated 12.06.2015, wherein the appellants were convicted under Sections 302/34, 341/34 and 323/34 IPC. However, the learned Trial Court had also passed a separate order

on the date of disposal of the case, i.e. on 12.06.2015, stating that the learned Trial Court could not find the records of the examination of the appellants under Section 313 Cr.P.C made on 25.04.2013. Accordingly, a fresh examination of the appellants under Section 313 Cr.P.C was undertaken by the learned Trial Court on 12.06.2015, i.e., the date the impugned judgment was passed by the learned Trial Court.

6. On perusing the LCR, we have found the records of the previous examination of the appellants under Section 313 Cr.P.C taken on 25.04.2013. The order sheet of the learned Trial Court also shows that the appellants had been examined under Section 313 Cr.P.C on 25.04.2013. However, as the learned Trial Court could not find the examination of the appellants under Section 313 Cr.P.C taken on 25.04.2013, the subsequent examination under Section 313 Cr.P.C has been taken on 12.06.2015. Thus, it is quite apparent that there is irregularity in the manner in which the impugned judgment has been passed.

7. In the case of ***State of Maharashtra vs. Sukhdev Singh & Another***, reported in ***(1992) 3 SCC 700***, the Supreme Court has held that after the Section 313 Cr.P.C stage is over, the learned Trial Court has to hear the oral submissions of the counsels on the evidence adduced before pronouncing judgment on the evidence. The relevant paragraph 50 of the Supreme Court judgment in ***Sukhdev Singh (supra)***, wherein it has been stated that oral arguments are to be heard after the Section 313 Cr.P.C stage is over, is reproduced below as follows :

“50. Section 313 of the Code is a statutory provision and embodies the fundamental principle of fairness based on the maxim audi alteram partem. It is trite law that the attention of the accused must be specifically invited to inculpatory pieces of evidence or circumstances laid on record with a view to giving him an opportunity to offer an explanation if he chooses to do so. The section imposes a heavy duty on the Court to take great care to ensure that the incriminating circumstances are put to the accused and his response solicited. The words “shall question him” clearly bring out the mandatory character of the clause and cast an imperative duty on the Court and confer a corresponding right on the accused to an opportunity to offer his explanation for such incriminating material appearing against him. It is, therefore, true that the purpose of the examination of the accused under Section 313 is to give the accused an opportunity to explain the incriminating material which has surfaced on record. The stage of examination of the accused under clause (b) of sub-sec. (1) of Section 313 reaches only after the witnesses for the prosecution have been examined and before the accused is called on to enter upon his defence. At the stage of closure of the prosecution evidence and before recording of statement under Section 313, the learned Judge is not expected to evaluate the evidence for the purpose of deciding whether or not he should question the accused. After the Section 313 stage is over he has to hear the oral submissions of counsel on the evidence adduced before pronouncing on the evidence. The learned trial Judge is not expected before he examines the accused under Section 313 of the Code, to sift the evidence and pronounce on whether or not he would accept the evidence regarding any incriminating material to determine whether or not to examine the accused on that material. To do so would be to pre-judge the evidence without hearing the prosecution under Section 314 of the Code. Therefore, no matter how weak or scanty the prosecution evidence is in regard to a certain incriminating material, it is the duty of the Court to examine the accused and seek his explanation thereon. It is only after that stage is over that the oral arguments have to be heard before the judgment is rendered. It is only where the Court finds that no incriminating material has surfaced that the accused may not be

examined under Section 313 of the Code. If there is material against the accused he must be examined. In the instant case it is not correct to say that no incriminating material had surfaced against the accused, particularly accused No. 5, and hence the learned trial Judge was not justified in examining the accused under Section 313 of the Code."

8. In the case of ***Nar Singh vs. State of Haryana***, reported in **(2015) 1 SCC 496**, the Supreme Court has held that the importance of a statement under Section 313 Cr.P.C, insofar as the accused is concerned, can hardly be minimised. It further held that any omission on the part of the Court to question the accused on any incriminating circumstance would not *ipso facto* vitiate the trial, unless some material prejudice is shown to have been caused to the accused. It further held that insofar as non-compliance with the mandatory provision of Section 313 Cr.P.C is concerned, it is an error essentially committed by the learned Trial Court and since justice suffers in the hands of the Court, the same has to be corrected or rectified in the appeal. It further held that if an objection as to Section 313 Cr.P.C. statement is taken at the earliest stage, the Court can make good the defect and record additional statement of the accused, as that would be in the interest of all. A further reading of the judgment in ***Nar Singh (supra)*** would go to show that the Appellate Court can decide the appeal when there is an error committed by the learned Trial Court or remit the matter to the learned Trial Court for re-trial of the case.

9. In the earlier round of litigation before this Court, i.e in Criminal Appeal No.76/2007, incriminating circumstances contained in the evidence of the prosecution witnesses had not been put to the appellants in their examination under Section 313 Cr.P.C, this Court had directed that the same should be done

by remanding the matter back to the learned Trial Court. The learned Trial Court had accordingly examined the appellants under Section 313 Cr.P.C, by examining them on the basis of the incriminating evidence adduced against them on 25.04.2013. The arguments of the parties were heard by the learned Trial Court on 20.05.2015. The learned Trial Court thereafter passed the impugned judgment and order convicting the appellants on 12.06.2015 and made a separate order on 12.06.2015, to the effect that the learned Trial Court could not find the records of the examination of the appellants under Section 313 Cr.P.C made on 25.04.2013. Accordingly, an additional examination of the appellants had been done under Section 313 Cr.P.C, on the date of passing of the impugned judgment and order i.e. 12.06.2015.

10. As the Supreme Court in the case of ***Sukhdev Singh (supra)*** has clearly held that arguments of the parties are to be heard after the Section 313 Cr.P.C stage is over and as the same has not been done in the present case, as can be seen from the facts enumerated above, we are of the view that the parties would have to give their final arguments afresh. We are also of the view that there is no bar for the learned Trial Court to consider the examination of the appellants under Section 313 Cr.P.C, made on both dates, i.e. 25.04.2013 and 12.06.2015, while taking a fresh decision while disposing off Sessions Case No. 139/2003. The learned Trial Court shall pass a fresh decision after hearing the parties, without being influenced by any observations and findings made in the impugned judgment and order dated 12.06.2015. It is also made clear that as the appellants are on bail, in terms of the order dated 24.06.2021 passed in I.A. (Crl.) 271/2021, arising out of Criminal Appeal No.126/2016, the appellants shall continue to remain on bail till a final decision is taken by the learned Trial

Court, in terms of the order passed today.

11. Mr. S Borgohain, learned counsel for the appellants and Ms. B. Bhuyan, learned Additional Public Prosecutor appearing for the State respondent submit that a date may be fixed for hearing the final argument of the parties and for disposal of the case by the learned Trial Court .

12. On considering the prayer of the learned counsels for the parties, we direct the learned Trial Court to hear the final arguments of the parties on 08.11.2023, if not inconvenient for some other reason. Thereafter, the learned Trial Court shall dispose of Sessions Case No. 139/2003 at the earliest and preferably within a period of 1 (one) month after hearing the final arguments of the parties.

13. The appeal is accordingly disposed of. Consequently, the impugned judgment dated 12.06.2015 passed by the learned Sessions Judge, Golaghat in Sessions Case No. 139/2003 is hereby set aside.

14. Send back the LCR.

JUDGE

JUDGE

Comparing Assistant