# IN THE HIGH COURT OF JUDICATURE AT PATNA

**Criminal Appeal (SJ) No.230 of 2015**

Arising Out of PS. Case No. -281 Year- 2007 Thana -BHAGALPUR KOTWALI District- BHAGALPUR

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AJAY KR. GHOSHAL SON OF LATE TARA PADDO GHOSHAL, RESIDENT OF MOHALLA- TILKAMANJHI, P.S.- TILKAMANJHI, DISTRICT- BHAGALPUR.

..... .... APPELLANT/S

VERSUS

THE STATE OF BIHAR .... .... RESPONDENT/S

With

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**Criminal Appeal (SJ) No. 275 of 2015**

Arising Out of PS. Case No. -281 Year- 2007 Thana -BHAGALPUR KOTWALI District- BHAGALPUR

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MUNMUN GHOSHAL. W/O AJAY KUMAR GHOSHAL. RESIDENT OF MOHALLA - TILKAMANJHI, POLICE STATION - TILKAMANJHI, DISTRICT - BHAGALPUR.

.... .... APPELLANT/S

VERSUS

THE STATE OF BIHAR .... .... RESPONDENT/S

With

==========

**Criminal Appeal (SJ) No. 277 of 2015**

Arising Out of PS. Case No. -281 Year- 2007 Thana -BHAGALPUR KOTWALI District- BHAGALPUR

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RAJ KR. BHUSHAN @ GHOSHAL @ DR. RAJ KR. BHUSHAN @ GHOSHAL, SON OF AJAY KUMAR GHOSHAL, RESIDENT OF MOHALLA-TILKAMANJHI, POLICE STATION-TILKAMANJHI, DISTRICT-BHAGALPUR.

.... .... APPELLANT/S

VERSUS

THE STATE OF BIHAR .... .... RESPONDENT/S

With

==========

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**Criminal Appeal (SJ) No. 232 of 2015**

Arising Out of PS. Case No. -281 Year- 2007 Thana -BHAGALPUR KOTWALI District- BHAGALPUR

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RASHMI @ RASHMI GOSWAMI WIFE OF SRI. HEMANT KUMAR GOSWAMI RESIDENT OF MOHALLA- TILKAMANJHI, POLICE STATION- TILKAMANJHI, DISTRICT BHAGALPUR, AT PRESENT R/O MADHYA CHUTIYA, P.S CHUTIYA, DIST RANCHI(JHARKHAND)

.... .... APPELLANT/S

VERSUS

THE STATE OF BIHAR .... .... RESPONDENT/S

With

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**Criminal Appeal (SJ) No. 243 of 2015**

Arising Out of PS. Case No. -281 Year- 2007 Thana -BHAGALPUR KOTWALI District- BHAGALPUR

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ARCHANA BANARJEE WIFE OF SRI. TAPAS BANARJEE. RESIDENT OF MOHALLA- TILKAMANJHI, POLICE STATION- TILKAMANJHI, DISTRICT-BHAGALPUR.AT PRESENT R/O PRAJAKATA, II, FLAT NO. 7 CHINCHPADA, TALUKA, PEN, P.S- PEN DISTT- RAIGAD, MAHASTRASHTRA,-4020107

.... .... APPELLANT/S

VERSUS

THE STATE OF BIHAR .... .... RESPONDENT/S

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**Appearance:**

**(In CR. APP (SJ) No. 230 of 2015)**

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|---|---|---|
| For the Appellant/s | : | Mr. Vindhya Keshari Kumar, Sr. Adv. |
| | | Mr. Ajay Mukherjee, Advocate |
| For the State | : | Mr. Sujit Kumar Singh, APP |
| For Informant | : | Mr. Bashishthat Narayan Mishra, Adv. |
| | | Mr. Brij Kishore Mishra, Advocate |
| | | Mr. S.N. Rai, Adv. |

**(In CR. APP (SJ) No. 275 of 2015)**

| | | |
|---|---|---|
| For the Appellant/s | : | Mr. Vindhya Keshari Kumar, Sr. Adv. |
| | | Mr. Ajay Mukherjee, Advocate |
| For the State | : | Mr. Bipin Kumar(APP) |
| For Informant | : | Mr. Bashishthat Narayan Mishra, Adv. |
| | | Mr. Brij Kishore Mishra, Advocate |
| | | Mr. S.N. Rai, Adv. |

**(In CR. APP (SJ) No. 277 of 2015)**

| | | |
|---|---|---|
| For the Appellant/s | : | Mr. Vindhya Keshari Kumar, Sr. Adv. |
| | | Mr. Ajay Mukherjee, Advocate |
| For the State | : | Mr. Sujit Kumar Singh, APP |
| For Informant | : | Mr. Bashishthat Narayan Mishra, Adv. |
| | | Mr. Brij Kishore Mishra, Advocate |
| | | Mr. S.N. Rai, Adv. |

**(In CR. APP (SJ) No. 232 of 2015)**

| | | |
|---|---|---|
| For the Appellant/s | : | Mr. Vindhya Keshari Kumar, Sr. Adv. |
| | | Mr. Ajay Mukherjee, Advocate |
| For the State | : | Mr. Binod Bihari Singh, APP |
| For Informant | : | Mr. Bashishthat Narayan Mishra, Adv. |

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Mr. Brij Kishore Mishra, Advocate
Mr. S.N. Rai, Adv.

**(In CR. APP (SJ) No. 243 of 2015)**

For the Appellant/s : Mr. Vindhya Keshari Kumar, Sr. Adv.
Mr. Ajay Mukherjee, Advocate
For the State : Mr. S.A. Ahmad, APP
For Informant : Mr. Bashishthat Narayan Mishra, Adv.
Mr. Brij Kishore Mishra, Advocate
Mr. S.N. Rai, Adv.

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**

CAV JUDGMENT

**Date: 28-08-2015**

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Criminal Appeal (SJ) No.230 of 2015 wherein Ajay Kumar Ghoshal is the appellant, Criminal Appeal (SJ) No. 232 of 2015 wherein Rashmi @ Rashmi Goswami is the appellant, Criminal Appeal (SJ) No. 243 of 2015 wherein Archana Banarjee is the appellant, Criminal Appeal (SJ) No. 275 of 2015 wherein Munmun Ghoshal is the appellant, Criminal Appeal (SJ) No. 277 of 2015 wherein Raj Kumar Bhushan @ Ghoshal @ Dr. Raj Kumar Bhushan @ Ghoshal is the appellant commonly originate against the same judgment of conviction and sentence on account thereof, there have been analogous hearing and are being disposed of by a common judgment.

**2.** All the appellants named above have been found guilty for an offence punishable under Section 498(A), 304(B), 120B, 201 IPC, 4 of Dowry Prohibition act vide judgment dated 06.04.2015 and each of them has been sentenced to undergo R.I. for ten years under Section 304(B)/120B of the IPC, R.I. for five years as well as fine of Rs.10,000/- in default to undergo S.I. for one year under Section 201 IPC, R.I. for two years under Section

4 of Dowry Prohibition Act while no separate sentence has been prescribed under Section 498(A) of the IPC vide order dated 09.04.2015 by the Fourth Additional Sessions Judge, Bhagalpur in Sessions Trial No.14 of 2008 / 637 of 2008.

**3.** Asim Kumar Chatarjee (PW.5) filed written report (Ext.2) on 15.05.2007 at about 04:15 P.M. disclosing therein that on the same day at about 09:00 A.M. he received information that death of his sister Bandhavi (Bani) has happened in suspicious circumstance at her Sasural on account of cutting of vein at wrist as well as hanging. He came from Bettiah to Bhagalpur and has seen dead body of his sister. After looking at the dead body, it is apparent that she has been murdered because of the fact that he had seen sign of hurt over her body as well as sign of wound near umbilicus by hard and blunt substance as well as sign of electrocution at her leg. He had also seen vein of both the hands cut, sign of hurt over her left hand as well as sign of assault over whole body. It has further been disclosed that motive for occurrence is his sister was married to Raj Kumar son of Ajay Ghoshal of Tilkamanjhi on 03.02.2007. At the time of marriage they have gifted according to their means including car, ornaments and cash appertaining to rupees twelve lacs. After marriage his sister had gone to her Sasural where family members of her Sasural began to torture her for procurement of dowry. Mother-in-law of his sister, namely, Munmun Ghoshal began to pressurize upon him to pay

Rs.60,000/- for doing House Surgeonship by her son Raj Kumar. He had shown his helplessness and also complained to father-in-law of his sister who also reiterated the demand. When he shown his inability to honour their demand on account thereof, father-in-law Ajay Ghoshal, mother-in-law Munmun Ghoshal, husband Raj Kumar, Rozy sister-in-law, Rashmi sister-in-law and Tapas husband of sister-in-law began to torture his sister physically as well as mentally. His sister was confined in a room at upper floor. On 11-05-2007 he along with his maternal grand mother came to meet with his sister and requested them not to indulge in such kind of activity but they did not pay heed to it. Then thereafter he requested mother-in-law of his sister to permit *Bidayi* which they also refused. Then he returned back. Today he has received an information regarding murder of his sister and on account thereof, he alleged that his sister has been murdered by the accused persons for dowry.

**4.** On the basis of the aforesaid written report Kotwali (Tilkamanjhi) P.S. Case No.281 of 2007 was registered under Section 304(B), 34 of the IPC and investigation commenced. After submission of charge sheet ultimately the accused persons /appellants were put on trial and during course thereof, they met with the result, subject matter of instant appeal.

**5.** Defence case, as has been pleaded is of complete denial of occurrence as well as false implication. There happens to be specific defence of alibi pleaded at the end of appellant Ajay

Kumar Ghoshal as well as Raj Kumar Bhushan. In likewise manner there happens to be same kind of suggestion relating to appellant Archana Banarjee as well as Rashmi @ Rashmi Goswami sister-in-laws in the background of being married were along with their respective husband at respective places. Then there happens to be conjoint defence to the effect that deceased Bandhavi @ Bani committed suicide and for that none was responsible. To support the same defence has also examined DWs as well as also exhibited series of documents.

**6.** While assailing the judgment of conviction and sentence recorded by the learned lower court, it has been submitted on behalf of learned counsel for the appellant that learned lower court failed to appreciate the materials having been placed on behalf of prosecution as well as defence in its right perspective contrary to it, acted in mechanical manner and on account thereof, the reasoning so assigned and the conclusion so arrived is not at all found supported therewith.

**7.** The first and foremost argument happens to be with regard to inception of the instant case. Highlighting the issue, it has been submitted that from the evidence of the I.O., it is apparent that Munmun Ghoshal, one of the accused had already approached the police and had requested to accompany as her daughter-in-law had locked herself in a room and is not opening the door. After registering Sanha, the police proceeded and reached at the house of Munmun Ghoshal. The disclosure so

made by the Munmun Ghoshal was suggesting otherwise and on account thereof, a substantial case ought to have been recorded by the police instead of Sanha.

**8.** Furthermore, it has also been submitted that from the evidence of I.O. as well as from the evidence of PW.3, Sunil Kumar Sharma, it is apparent that he was present at the time when police came at the house of Munmun Ghoshal. Room was locked from inside and on account thereof, he was requested by the police to open the door. Accordingly, he opened the door by giving iron rod blow over the door and then had seen the dead body hanging from ceiling fan with the help of "*Chunri*". Veins of both the hands were cut at wrist joint. There was pull of blood Blade was found over Bed and on account thereof, police had requested PW.3 to give his statement. However, he declined on the score that brother of deceased is to arrive who will disclose the event. Inquest was prepared. Seizure list was prepared. Dead body was sent to mortuary for postmortem. Statement of PW.3 was recorded by the police. So, once the statement of PW.3 was recorded divulging commission of cognizable offence then, in that event the statement of PW.3 should have been treated as First Information Report. Even a part, the police official was not precluded from registering a substantial case on his own statement in case, was apprehensive regarding commission of cognizable offence. There happens to be no explanation at the end of prosecution on this score and thus, create doubt over

unaccordant prosecution version.

**9.** In an alternative, it has also been submitted that because of the fact that investigation of the case was already taken up, statement of the witnesses began to be recorded then in that event, Ext.2, written statement submitted by the informant Asim Kumar Chatarjee (PW.5) loosen its identity to be treated as First Information Report as, in the aforesaid background is found hit by Section 162 Cr.P.C. In order to support such plea, Learned counsel for the appellant cited AIR 1993 SC 2644, 2012(2) BBCJ 107.

**10.** It has also been submitted that intentionally as well as purposely, the prosecution withheld two important documents. The first one, the Sanha recorded at the behest of appellant Munmun Ghoshal and secondly, the suicidal note having in pen of deceased Bandhavi @ Bani and on account thereof, an adverse inference is liable to be drawn against the prosecution.

**11.** It has also been submitted that there happens to be complete absence of evidence at the score of prosecution regarding demand as well as torture for procurement of dowry and whatever evidence on this score has been flashed at the end of prosecution, a demand of Rs.60,000/- to facilitate raj Kumar for House Surgeonship which, could not be accepted as dowry and for that relied upon 1995 CR.L.J. 4047.

**12.** Then coming to reliability of the evidence of PWs, it

has been submitted that all the witnesses have developed the prosecution case from initial one and on account thereof, there happens to be material contradiction in their evidence which has been corroborated by the Investigating Officer, PW.8 during his examination. Then it has been submitted that from the evidence of PW.8, Investigating Officer as well as from the evidence of PW.3, Sunil Kumar Sharma, it is apparent that room was closed from inside and it could open only after having rod blow uprooting the latches which is indicative of the fact that there was no occasion for others during the intervening period even to peep into what to talk about coming inside the room. Furthermore, from the evidence of the Investigating Officer, PW.8 coupled with topography of the P.O., it is evident that the place of occurrence that means to say the room was not accessible from any other side. That being so, it was a clear cut of suicide which, is found further supported with the suicidal note having in pen of deceased and was received in the same room itself.

**13.** In the background of aforesaid consistent evidence of PW.3 as well as PW.8 there was no occasion left for the learned trial court to reject the aforesaid conclusive evidence and form an independent opinion which was not at all found supported with the materials available on the record.

**14.** Then it has been submitted that the finding recorded in the postmortem report inconsonance with the evidence of the doctor did not flash true picturisation of the ante-mortem injuries

which happens to be more inclination towards suicidal act than homicidal. Not only this, the finding recorded by the doctor DW.5 appears to be inconsistent with the view expressed by Modi in its medical jurisprudence as well as from the evidence of the doctor who has been examined on behalf of defence.

**15.** It has also been submitted that the appellant Ajay Kumar Ghoshal had proved by cogent and reliable evidence regarding his presence at Secretariat, Patna being a Government servant posted thee and in likewise manner, presence of appellant Raj Kumar at Banglore and the factum of alibi was investigated upon and found true and genuine. Furthermore, as the prosecution failed to bring positive as well as concrete evidence to justify meeting of mind in hatching a conspiracy in order to eliminate deceased in terms of Section 10 of the Evidence Act, the conviction with the aid of Section 120B of the IPC would not survive.

**16.** In an alternative, it has also been submitted that there happens to be no question for conviction under Section 306 IPC because of the fact that there happens to be complete absence of evidence on that very score. Contrary to it, as has been submitted though the prosecution tried to withheld the aforesaid part of evidence but the fact remains that prosecution party were themselves an abettor who falsely, wrongly informed the deceased that her husband will not permit her company as he was already married and virtually that happens to be reason

behind commission of suicide.

**17.** So, taking into account the facts and circumstances of the case, nature of evidence, quality of witnesses as well as over all situation, it is apparent that prosecution could not succeed in proving its case and on account thereof, the judgment of conviction and sentence happens to be cryptic, perverse as well as without any sum and substance.

**18.** The learned counsel also relied upon 2014 Cr.L.J. 2425, AIR 1986 SC 752, 2000 Cr.L.J. 4993, AIR 2001 SC 3026, 2014 Cr.L.J. 470.

**19.** Per contra, the learned Additional Public Prosecutor assisted by learned counsel for the informant has submitted that the finding recorded by the learned lower court is just, legal and proper and on account thereof, needs no interference. Furthermore, it has been submitted that apart from asking for Rs.60,000/- for the purpose of facilitating admission to do House Surgeonship, there was insistence of demand of dowry also and for that deceased was treated with torture. Torture is not assigned relating to physical act rather happens to be mental act of torture and it depends upon the quality of living of parties, intellectual equilibrium, behaviour and that is itself apparent from objective finding of place of occurrence which suggest that deceased a newly wed girl was forced to live secluded life confined in arrow while Munmun Ghoshal, mother-in-law an aged person was availing kinds of mortem facility.

**20.** It has also been submitted that there happens to be active connivance of all the accused in getting the deceased eliminated whereunder they virtually ignored the deceased and left her at the mercy of Munmun Ghoshal. Presence of sister-in-law more particularly younger sister-in-law whose marriage was solemnized few months after marriage of the deceased has not been controverted and therefore, her presence during course of occurrence could not be said to be borrowed.

**21.** It has also been submitted that Investigating Officer had intentionally left the patches since inception of the present case as guided by the appellant Ajay Kumar Ghoshal who was posted in Home Department at Secretariat, Patna. The conduct of Investigating Officer being hostile to the prosecution was perceived at nascent stage and for that criminal writ was filed whereunder specific direction was passed which ultimately compelled the Investigating Officer to file charge sheet otherwise instant case would have been nipped at the bud stage itself. In the aforesaid background, it has been submitted that it is ridiculous to say that the room occupied by Munmun Ghoshal as well as deceased being adjacent to each other and if any wrong event more particularly cut of vein at wrist joint would not have allowed deceased to sit idle as well as process of hanging also would not have permitted the deceased without any sort of sound which, is permissible only in case of death of deceased already taking place before hanging. Apart from this, it is also apparent

that it happens to be the Munmun Ghoshal who had informed the informant. Contrary to it none of the accused came forward to say that Munmun Ghoshal had informed them regarding aforesaid event whereunder deceased had not opened the door. After opening of door, finding deceased hanging with ceiling then in that circumstance fan, the natural conduct of Munmun Ghosal would have been to inform the husband as well as her son as well as to request to come to the place, but the appellant not only failed to substantiate the same, rather kept mum. Not only this, it happens to be the Munmun Ghoshal whose presence was at the police station and what kind of statement she had given, that was within her knowledge which, the Munmun Ghoshal during her statement as well as during course of defence failed to disclose and in likewise manner failed to suggest the Investigating Officer PW.8. After all, the death had occurred inside house of Munmun Ghoshal, and so, she was the best to divulge. Accused has failed to explain their genuine conduct as they failed to disclose why not they instituted a case as till then, they were not arrayed as an accused. Hence, conduct of accused speaks otherwise that pleaded subsequently.

**22.** Then it has been submitted that it was incumbent upon the Investigating Officer to have registered even a case of unnatural death on the statement of Munmun Ghoshal in case any kind of information was given at her end and non recording of any sort of statement that of Munmun Ghoshal suggest

collusiveness of the police officials with the accused persons in order to give undue advantage.

**23.** In likewise manner, it has also been argued that preparation of inquest, dispatch to dead body to mortuary and recording of statement of PW.3, as it relates to matrimonial offence comes within the purview of an inquiry permitted by the Constitution Bench of the Apex Court in Lalita Kumari's case.

**24.** Even discarding the aforesaid event for the moment, it has been submitted that when dead body was found and the parties were not willing to give their statement then, in that event, was not incumbent upon the police officials to record his own statement or should have treated the statement of PW.3 as fardbeyan asking for his signature over his statement. The conduct of police official in the aforesaid background is suggestive of the fact that anyhow he was bent upon to ruin the prosecution case and for that intentionally allowed such lapses to surface. Therefore, it happens to be categorically argument at the end of learned Additional Public Prosecutor assisted by learned counsel for the informant that lapses on the part of the police would not dent upon the prosecution case in case the prosecution case is otherwise proved.

**25.** It has also been submitted that presence of suicidal note is a part of aforesaid partisan conduct of the police official which is itself apparent from the fact that Investigating Officer had stated that suicidal note was handed over to him by

Gajendra Prasad Singh, ASI who disclosed that this paper was given to him by Munmun Ghoshal that means to say Munmun Ghoshal was in possession of the said document since before, for which no explanation has been offered at her end and in likewise manner, presence of vital lapses on his part during course of investigation which could have disclosed the complicity of other co-accused such as conducting photography of the chair, blade, "*Chunri*", obtaining finger print. Not only this, Investigating Officer, though disclosed that photography was conducted, but the same is not an exhibit of the record, which at least suggested the condition of hanging body.

**26.** Now coming to the material evidences, it has been submitted that there happens to be consistent evidence of the prosecution witnesses regarding demand of dowry as well as torture meted out to deceased and on account thereof, the judgment of conviction and sentence is fit to be confirmed. Also referred 2001 (1) PLJR 53 SC, (2013) 2 SCC 146, (2014) 2 SCC 1, 1997 (1) PLJR 24 Sc, 1994(1) PLJR 270, (2015) 4 SCC 452, (2015) 3 SCC 530, (2015) 1 SCC 792.

**27.** In order to substantiate its case, prosecution had examined altogether twelve PWs and those are, PW.1 Sabita Sharma, PW.2 Ranjeet Kumar Sharma, PW.3 Sunil Kumar Sharma, PW.4 Ranjan Kumar Sharma, PW.5 Asim Chandra Chaterjee, PW.6 Ranjeet Kumar Chaterjee, PW.7 Bhuneshwar Paswan, PW.8 Rajesh Kumar Tiwari, PW.9 Permeshwar Prasad

Singh, PW.10 Dr. Sandeep Lal, PW.11 Dr. Atrul Kumar Mallic, PW.12 Dr. Arun Kumar Singh. Prosecution had also exhibited, Ext.1-Signature over seizure list, Ext.2-written report, Ext.3-Signature of witness over inquest report, Ext.4-Seizure list, Ext.5-Seizure list, Ext.6-Photocopy of inquest, Ext.7 to 7/1- Para 49, 67 of the case diary, Ext.8-P.M. Report, Ext.8/1, 8/2-Signature of Doctors over PM Report, Ext.9-Examination report submitted by CID Laboratory.

**28.** On the other hand, defence had also examined witnesses as Dw.1-Dayanand Jha, DW.2-Dilip Kumar Mishra, DW-3-Hari Prasad Yadav, DW.4- Pradeep Kumar Das, DW.5-Dr. Haider Imam Ansari, DW.6 Nawin Chandra as well as also exhibited. Ext.-'A' undertaking, Ext.B-Signature over seizure list, Ext.C-Letter, Ext.D-Certificate granted by Ramaiya Dental College, Ext.E-Attendance register.

This court had also examined Tarulata sharma, as CW.1

**29.** At the time of dictating judgment when the lower court record has been gone through, certain lapses have been found on the part of the learned lower court which needs to be recorded.

a) Right from beginning, there happens to be consistent version of both sides that appellant Munmun Ghoshal had gone to P.S. and had informed the police officer whereupon Sanha was entered but, surprisingly neither the parties

were interested nor the court on its own liked to have the same attracting Section 311 of the Cr.P.C. for just decision of the case.

b) The hands of court was not found fettered more particularly in terms of Section 165 of the Evidence Act while examining Investigating Officer at least questioning the Investigating Officer over non-recording of FIR on his own statement as the parties were not interested as is evident from his deposition to record FIR.

c) In likewise manner when the statement of PW.3 was recorded, the same was speaking regarding commission of cognizable offence, then in that event, why not aforesaid statement got signed by the PW.3 and for that whether any step was taken at the end of Investigating Officer.

d) From the evidence of PW.8, Investigating Officer, it is apparent that suicide not was handed over to him by the ASI, Gagendra Prasad Singh disclosing that the same was handed over to him by Munmun Ghoshal, what kind of investigation was conducted.

e) Why not photographs were brought upon record, when the same has been narrated by the PW.8.

**30.** During course of statement under Section 313 of the Cr.P.C., call details of mobile appertaining to accused Ajay Kumar Ghoshal and exhibit of the record was not confronted. In likewise manner, the other incriminating circumstances, that

means to say the paper (suicide note) was handed over to Gajendra Prasad Singh, ASI by Munmun Ghoshal, with regard to topography of the P.O. including other materials have also not been confronted.

**31.** The functioning of the court as well as duty of the Presiding Officer while proceeding with criminal trial has times without number been explained. More recently in ***Sister Mina Lalita Baruwa v. State of Orissa*** and others reported in ***2014 CRI.L.J. 671***, it has been observed:

> "**16**. Having heard the learned senior counsel for the appellant as well as the Public Prosecutor, the State counsel and counsel for the 9th respondent and having perused Exhibit-8, the evidence of PW-18 and PW-25, who was the victim, the order of the learned trial Judge, as well as that of the High Court, we are of the considered view that both the learned trial Judge, as well as the High Court, miserably failed to come alive to the situation while dealing with a case of this nature where a charge under Section 376(2)(g) has been alleged against the accused in which PW-18 a Judicial Officer as a statutory authority who held the identification parade made a totally blatant and wrong statement not in consonance with the record of identification parade, namely, Exhibit-8 and thereby provided scope for serious illegality being committed for dispensing justice. At the very outset, however, we must state that whatever views which we express in the judgment are mainly pertaining to the nature of documentary evidence as recorded prior to the examination of PW-18 and PW-25, as well as, the oral evidence in the course of their examination before the trial Court.
>
> 17. Having perused the said evidence with particular reference to the issue brought to the notice of this Court, we are of the firm view that the inability of the trial Court in failing to take appropriate action as and when it was brought to

its notice about the fallacy in the oral version, would certainly cause a serious miscarriage of justice, if allowed to remain. Unfortunately, in our considered view, the High Court appears to have adopted a very casual approach instead of attempting to find out as to the appropriate procedure which the trial Court should have followed in a situation like this. The High Court also committed a serious illegality in merely stating that under Section 301 Cr.P.C. there is no scope for a victim as a private party to take any effective step to rectify a serious fallacy committed by a statutory witness who is supposed to maintain cent per cent neutrality while giving evidence before the Criminal Court. Where the said witness is a Judicial Officer whose version before the Court carries much weight, by virtue of his status as a Judicial Officer while acting as a statutory witness, namely, as an officer who was authorized to hold a test identification parade, it was incumbent upon such witness to maintain utmost truthfulness without giving any scope for any party to gain any advantage by making a blatantly wrong statement contrary to records. We, therefore, find serious irregularity in the orders impugned in this appeal.

19. In criminal jurisprudence, while the offence is against the society, it is the unfortunate victim who is the actual sufferer and therefore, it is imperative for the State and the prosecution to ensure that no stone is left unturned. It is also the equal, if not more, the duty and responsibility of the Court to be alive and alert in the course of trial of a criminal case and ensure that the evidence recorded in accordance with law reflect every bit of vital information placed before it. It can also be said that in that process the Court should be conscious of its responsibility and at times when the prosecution either deliberately or inadvertently omit to bring forth a notable piece of evidence or a conspicuous statement of any witness with a view to either support or prejudice the case of any party, should not hesitate to interject and prompt the prosecution side to clarify the position or act on its own and get the record of proceedings straight. Neither the

prosecution nor the Court should remain a silent spectator in such situations. Like in the present case where there is a wrong statement made by a witness contrary to his own record and the prosecution failed to note the situation at that moment or later when it was brought to light and whereafter also the prosecution remained silent, the Court should have acted promptly and taken necessary steps to rectify the situation appropriately. The whole scheme of the Code of Criminal Procedure envisages foolproof system in dealing with a crime alleged against the accused and thereby ensure that the guilty does not escape and innocent is not punished. It is with the above background, we feel that the present issue involved in the case on hand should be dealt with.

20. Keeping the said perspective in mind, we refer to Sections 301 and 311 of Cr.P.C.

"**301. Appearance by public prosecutors.-** (1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.

**311. Power to summon material witness, or examine person present.-** Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

21. Having referred to the above statutory provisions, we could discern that while under

Section 301(2) the right of a private person to participate in the criminal proceedings has got its own limitations, in the conduct of the proceedings, the ingredients of Section 311 empowers the trial Court in order to arrive at a just decision to resort to an appropriate measure befitting the situation in the matter of examination of witnesses. Therefore, a reading Sections 301 and 311 together keeping in mind a situation like the one on hand, it will have to be stated that the trial Court should have examined whether invocation of Section 311 was required to arrive at a just decision. In other words even if in the consideration of the trial Court invocation of Section 301(2) was not permissible, the anomalous evidence deposed by PW-18 having been brought to its knowledge should have examined the scope for invoking Section 311 and set right the position. Unfortunately, as stated earlier, the trial Court was in a great hurry in rejecting the appellant's application without actually relying on the wide powers conferred on it under Section 311 Cr.P.C for recalling PW-18 and ensuring in what other manner, the grievance expressed by the victim of a serious crime could be remedied. In this context, a reference to some of the decisions relied upon by the counsel for the appellant can be usefully made.

22. In the decision reported in **J.K. International** (supra), this Court considered the extent to which a complainant can seek for the redressal of his grievances in the on going criminal proceedings which was initiated at the behest of the complainant. Some of the passages in paragraphs 8, 9, 10 and 12 can be usefully referred to which are as under:

**8.**……What is the advantage of the court in telling him that he would not be heard at all even at the risk of the criminal proceedings initiated by him being quashed. It is no solace to him to be told that if the criminal proceedings are quashed he may have the right to challenge it before the higher forums.

**9.** The scheme envisaged in the Code of Criminal Procedure (for short "the Code") indicates that a person who is aggrieved by the offence committed, is not altogether wiped out

from the scenario of the trial merely because the investigation was taken over by the police and the charge-sheet was laid by them. Even the fact that the court had taken cognizance of the offence is not sufficient to debar him from reaching the court for ventilating his grievance…….

**10.** The said provision falls within the Chapter titled "General Provisions as to Inquiries and Trials". When such a role is permitted to be played by a private person, though it is a limited role, even in the Sessions Courts, that is enough to show that the private person, if he is aggrieved, is not wiped off from the proceedings in the criminal court merely because the case was charge-sheeted by the police. It has to be stated further, that the court is given power to permit even such private person to submit his written arguments in the court including the Sessions Court. If he submits any such written arguments the court has a duty to consider such arguments before taking a decision.

**12.**……The limited role which a private person can be permitted to play for prosecution in the Sessions Court has been adverted to above. All these would show that an aggrieved private person is not altogether to be eclipsed from the scenario when the criminal court takes cognizance of the offences based on the report submitted by the police. The reality cannot be overlooked that the genesis in almost all such cases is the grievance of one or more individual that they were wronged by the accused by committing offences against them."

(Emphasis Added)

23. In the famous Best Bakery case in **Zahira Habibullah H. Sheikh and another** vs. **State of Gujarat and others** - (2004) 4 SCC 158, this Court has reminded the conscientious role to be played by the criminal Courts in order to ensure that the Court is alive to the realities, realizing its width of power available under Section 311 of the Cr.P.C read along with Section 165 of the Evidence Act. The relevant part of the said decision can be culled out from paragraphs 43, 44, 46 and 56, which are as under:

"**43.** The courts have to take a

participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence-collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

**44.** The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e.: (*i*) giving a discretion to the court to examine the witness at any stage, and (*ii*) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In *Mohanlal* v. *Union of India* this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, “any court”, “at any stage”, or “any enquiry or trial or other proceedings”, “any person” and “any such person” clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked

as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code…….

**46.** …….Section 311 of the Code does not confer on any party any right to examine, cross-examine and reexamine any witness. This is a power given to the court not to be merely exercised at the bidding of anyone party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case.

**56.** As pithily stated in *Jennison* v. *Baker*: (All ER p. 1006*d*)

"The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope."

Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies, courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. (See *Shakila Abdul Gafar Khan* v. *Vasant Raghunath Dhoble*.)"

(Emphasis added)

24. The said decision was also subsequently followed in a recent decision of this Court in **Sidhartha Vashisht alias Manu Sharma** (supra), wherein one sentence in paragraph 188 is relevant for our purpose, which reads as under:

"**188.** It is also important to note the active role which is to be played by a court in a criminal trial. The courtmust ensure that the Prosecutor is

doing his duties to the utmost level of efficiency and fair play. This Court, in *Zahira Habibulla H. Sheikh* v. *State of Gujarat*, has noted the daunting task of a court in a criminal trial while noting the most pertinent provisions of the law…..

(Emphasis added)

25. In one of the earlier decisions of this Court in **Mohanlal Shamji Soni** (supra), wherein Section 540 of Cr.P.C of 1898 which corresponds with Section 311 Cr.P.C of 1973, this Court has pithily stated the purport and intent of the said section, which is to be worked out at times of need by the Criminal Courts in order to ensure that justice always triumphs. Paragraph 16 of the said decision is relevant for our purpose which reads as under:

"**16.** The second part of Section 540 as pointed out albeit imposes upon the court an obligation of summoning or recalling and re-examining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential to the just decision of the case. When any party to the proceedings points out the desirability of some evidence being taken, then the court has to exercise its power under this provision — either discretionary or mandatory — depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice. In this connection we would like to quote with approval the following views of Lumpkin, J. in *Epps* v. *S.*, which reads thus:

"… it is not only the right but the duty of the presiding judge to call the attention of thewitness to it, whether it makes for or against the prosecution; his aim being neither to punish the innocent nor screen the guilty, but to administer the law correctly …. Counsel seek only for their client's success; but the judge must watch that justice triumphs."

(Emphasis added)

26. In the decision in **Rajendra Prasad** (supra), this Court pointed out the distinction

between lacuna in the prosecution and a mistake or error inadvertently committed which can always be allowed to be set right by permitting parties concerned by the Criminal Courts in exercise of its powers conferred under Section 311 Cr.P.C or under Section 165 of the Evidence Act. In paragraph 7, this Court has clarified as to what is a lacuna which is distinct and different from an error committed by a public prosecutor in the course of trial. The relevant part of the said paragraph reads as under:

"……A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses……."

27. Again in paragraph 8, this Court has pointed out as to the duty of the Criminal Court to allow the prosecution to correctsuch errors in the interest of justice. Paragraph 8 of the said judgment reads as under:

"**8.** Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

(Emphasis added)

**32.** In ***Nar Singh v. State of Haryana*** reported in **, *(2015) 1 SCC 496,*** wherein the infirmities relating to examination of an accused under Section 313 of the Cr.P.C. has

been considered in detail and has been held:

> **"8.** As main thrust of the argument of the appellant is on the question of non-compliance with Section 313 CrPC, we do not propose to consider the appeal on merits, except on the important question viz. whether non-compliance with the mandatory provisions of Section 313 CrPC vitiates the trial and conviction of the appellant.
>
> **9.** The power to examine the accused is provided in Section 313 CrPC which 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."

**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)

> *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*[5] and *State of Maharashtra* v. *Sukhdev Singh*[6].)"

**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*[8] Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focussed 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.'

*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 that 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."

**15.** In *Avtar Singh case (2002) 7 SCC 419*, when the accused were examined under Section 313 CrPC, the essence of accusation, particularly the possession of goods was not brought to their notice. It was also noticed that the possibility of the accused persons being labourers of the truck was not ruled out by the evidence. *Avtar Singh case*[9] was rendered on consideration of several peculiar factual aspects of that case and it does not lay down the law of universal application as it had been decided on its own facts.

**16.** Undoubtedly, the importance of a statement under Section 313 CrPC, insofar as the accused is concerned, can hardly be minimized. The statutory provision is based on the rules of natural justice for an accused, who must be made aware of the circumstances being put against him so that he can give a proper explanation to meet that case. If an objection as to Section 313 CrPC 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. When objections as to defective Section 313 CrPC statement is raised in the appellate court, then difficulty arises for the prosecution as well as the accused. When the trial court is required to act in accordance with the mandatory provisions of Section 313 CrPC, failure on the part of the trial court to comply with the mandate of the law, in our view, cannot

automatically enure to the benefit of the accused. 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. Insofar as non-compliance with mandatory provisions of Section 313 CrPC is concerned it is an error essentially committed by the learned Sessions Judge. Since justice suffers in the hands of the court, the same has to be corrected or rectified in the appeal.

**17.** So far as Section 313 CrPC is concerned, undoubtedly, the attention of the accused must specifically be brought to inculpable pieces of evidence to give him an opportunity to offer an explanation, if he chooses to do so. A three-Judge Bench of this Court in *Wasim Khan* v. *State of U.P. AIR 1956 SC 400* and *Bhoor Singh* v. *State of Punjab (1974) 4 SCC 754* held that every error or omission in compliance with the provisions of Section 342 of the old CrPC does not necessarily vitiate trial. The accused must show that some prejudice has been caused or was likely to have been caused to him.

**18.** Observing that omission to put any material circumstance to the accused does not ipso facto vitiate the trial and that the accused must show prejudice and that miscarriage of justice had been sustained by him, this Court in *Santosh Kumar Singh* v. *State (2010) 9 SCC 747*, has held as under: (SCC p. 779, para 92)

> "*92*. … the facts of each case have to be examined but the broad principle is that all incriminating material circumstances must be put to an accused while recording his statement under Section 313 of the Code, but if any material circumstance has been left out that would not ipso facto result in the exclusion of that evidence from consideration unless it could further be shown by the accused that prejudice and miscarriage of justice had been sustained by him."

**19.** In *Paramjeet Singh* v. *State of Uttarakhand (2010) 10 SCC 439*, this Court has held as under: (SCC p. 451, para 30)

> "*30*. Thus, it is evident from the above that the provisions of Section 313 CrPC make it obligatory for the court to question the accused

on the evidence and circumstances against him so as to offer the accused an opportunity to explain the same. But, it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance, instead he must show that such non-examination has actually and materially prejudiced him and has resulted in the failure of justice. In other words, in the event of an inadvertent omission on the part of the court to question the accused on any incriminating circumstance cannot ipso facto vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the court."

**20.** The question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance with Section 313 CrPC has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under Section 313 CrPC, it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that the accused has suffered some disability or detriment in relation to the safeguard given to him under Section 313 CrPC. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The burden is upon the accused to prove that prejudice has been caused to him or in the facts and circumstances of the case, such prejudice may be implicit and the Court may draw an inference of such prejudice. The facts of each case have to be examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused.

**21.** We may refer to few judgments of this Court where this Court has held that omission to put the question under Section 313 CrPC has caused prejudice to the accused vitiating the conviction. In *State of Punjab* v. *Hari Singh (2009) 4 SCC 200*, question regarding conscious possession of narcotics was not put to the accused when he was examined under Section 313 CrPC. Finding that question relating to

conscious possession of contraband was not put to the accused, this Court held that the effect of such omission vitally affected the prosecution case and this Court affirmed the acquittal. In *Kuldip Singh* v. *State of Delhi (2003) 12 SCC 528*, this Court held that when important incriminating circumstance was not put to the accused during his examination under Section 313 CrPC, prosecution cannot place reliance on the said piece of evidence.

**22.** We may also refer to other set of decisions where in the facts and circumstances of the case, this Court held that no prejudice or miscarriage of justice has been occasioned to the accused. In *Santosh Kumar Singh* v. *State (2010) 9 SCC 747*, it was held that on the core issues pertaining to the helmet and the ligature marks on the neck which were put to the doctor, the defence counsel had raised comprehensive arguments before the trial court and also before the High Court and the defence was, therefore, alive to the circumstances against the appellant and that no prejudice or miscarriage of justice had been occasioned. In *Alister Anthony Pareira* v. *State of Maharashtra (2012) 2 SCC 648*, in the facts and circumstances, it was held that by not putting to the appellant expressly the chemical analyser's report and the evidence of the doctor, no prejudice can be said to have been caused to the appellant and he had full opportunity to say what he wanted to say with regard to the prosecution evidence and that the High Court rightly rejected the contention of the appellant-accused in that regard.

**23.** When such objection as to omission to put the question under Section 313 CrPC is raised by the accused in the appellate court and prejudice is also shown to have been caused to the accused, then what are the courses available to the appellate court? The appellate court may examine the convict or 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 under Section 313 CrPC and the said answer can be taken into consideration.

**24.** In *Shivaji Sahabrao Bobade* v. *State of Maharashtra (1973) 2 SCC 793*, this Court considered the fallout of the omission to put a

question to the accused on vital circumstance appearing against him and this Court has held that the appellate court can question the counsel for the accused as regards the circumstance omitted to be put to the accused and in para 16 it was held as under: (SCC p. 806)

> "*16*. … It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. *It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the Court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction. In such a case, the Court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342 CrPC, the omission has not been shown to have caused prejudice to the accused*."
>
> (emphasis supplied)

**25.** The same view was reiterated by this Court in *State (Delhi Admn.)* v. *Dharampal (2001) 10 SCC 372*, wherein this Court has held as under: (SCC pp. 376-77, paras 13-14)

> "*13*. Thus it is to be seen that where an omission, to bring the attention of the accused to an inculpatory material has occurred that does not ipso facto vitiate the proceedings. The accused must show that failure of justice was

occasioned by such omission. Further, in the event of an inculpatory material not having been put to the accused, the appellate court can always make good that lapse by calling upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against the accused but not put to him.

*14*. This being the law, in our view, both the Sessions Judge and the High Court were wrong in concluding that the omission to put the contents of the certificate of the Director, Central Food Laboratory, could only result in the accused being acquitted. The accused had to show that some prejudice was caused to him by the report not being put to him. Even otherwise, it was the duty of the Sessions Judge and/or the High Court, if they found that some vital circumstance had not been put to the accused, to put those questions to the counsel for the accused and get the answers of the accused. If the accused could not give any plausible or reasonable explanation it would have to be assumed that there was no explanation. Both the Sessions Judge and the High Court have overlooked this position of law and failed to perform their duties and thereby wrongly acquitted the accused."

**26.** This Court has thus widened the scope of the provisions concerning the examination of the accused after closing prosecution evidence and the explanation offered by the counsel of the accused at the appeal stage was held to be a sufficient substitute for the answers given by the accused himself.

**27.** The point then arising for our consideration is, if all relevant questions were not put to the accused by the trial court as mandated under Section 313 CrPC and where the accused has also shown that prejudice has been caused to him or where prejudice is implicit, whether the appellate court is having the power to remand the case for redecision from the stage of recording of statement under Section 313 CrPC. Section 386 CrPC deals with power of the appellate court. As per sub-clause (*b*)(*i*) of Section 386 CrPC, the appellate court is having power to order retrial of the case by a court of competent jurisdiction subordinate to such appellate court. Hence, if all

the relevant questions were not put to the accused by the trial court and when the accused has shown that prejudice was caused to him, the appellate court is having power to remand the case to examine the accused again under Section 313 CrPC and may direct remanding the case again for retrial of the case from that stage of recording of statement under Section 313 CrPC and the same cannot be said to be amounting to filling up lacuna in the prosecution case.

**28.** In *Asraf Ali* v. *State of Assam (2008) 16 SCC 328*, this Court has examined the scope and object of examination of accused under Section 313 CrPC and in para 24 it was observed that in certain cases when there is perfunctory examination under Section 313 of the Code, the matter could be remitted to the trial court with a direction to retry from the stage at which the prosecution was closed.

**29.** In *Ganeshmal Jashraj* v. *State of Gujarat (1980) 1 SCC 363*, after closure of evidence of the prosecution and examination of the accused under Section 313 CrPC was completed, the accused admitted his guilt presumably as a result of plea bargaining and the accused was convicted. Pointing out that the approach of the trial court was influenced by the admission of guilt made by the accused and that conviction of the accused cannot be sustained, this Court has remanded the case to the trial court to proceed afresh from the stage of examination under Section 313 CrPC.

**30.** Whenever a plea of omission to put a question to the accused on vital piece of evidence is raised in the appellate court, courses available to the appellate court can be briefly summarised as under:

**30.1.** Whenever a plea of non-compliance with 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.

**31.** On the question of remitting the matter back to the trial court on the ground of non-compliance with mandatory provisions of Section 313 CrPC, the learned counsel for the appellant contended that in the present case, the accused is in custody for more than eight years and the accused person cannot be kept under trial indefinitely and that the accused has a right to speedy trial. The learned counsel placed reliance upon the judgment of this Court in *Abdul Rehman Antulay* v. *R.S. Nayak (1992) 1 SCC 225*. In paras 63 and 64 of the said judgment it was held as under: (SCC p. 259)

> "*63*. In *Machander* v. *State of Hyderabad AIR 1955 SC 792* this Court observed that while it is incumbent on the Court to see that no guilty person escapes, it is still more its duty to see that justice is not delayed and accused persons are not indefinitely harassed. The scales, the Court observed, must be held even between the prosecution and the accused. In the facts of that case, the Court refused to order trial on account of the time already spent and other relevant circumstances of that case.

> *64*. In *S. Veerabadran Chettiar* v. *E.V. Ramaswami Naicker AIR 1958 SC 1032* this Court refused to send back proceedings on the ground that already a period of five years has elapsed and it would not be just and proper in the circumstances of the case to continue the proceedings after such a lapse of time. Similarly, in *Chajoo Ram* v. *Radhey Shyam (1971) 1 SCC 774* the Court refused to direct a retrial after a period of 10 years having regard to the facts and circumstances of the case. In *State of U.P.* v. *Kapil Deo Shukla (1972) 3 SCC 504*, though the Court found the acquittal of the accused unsustainable, it refused to order a remand or direct a trial after a lapse of 20 years."
>
> **32.** While we are of the view that the matter has to be remitted to the trial court for proceeding afresh from the stage of Section 313 CrPC questioning, we are not oblivious of the right of the accused to speedy trial and that the courts are to ensure speedy justice to the accused. While it is incumbent upon the court to see that persons accused of crime must be given a fair trial and get speedy justice, in our view, every reasonable latitude must be given to those who are entrusted with administration of justice. In the facts and circumstances of each case, the court should examine whether remand of the matter to the trial court would amount to indefinite harassment of the accused. When there is omission to put material evidence to the accused in the course of examination under Section 313 CrPC, the prosecution is not guilty of not adducing or suppressing such evidence; it is only the failure on the part of the learned trial court. The victim of the offence or the accused should not suffer for laches or omission of the court. Criminal justice is not one-sided. It has many facets and we have to draw a balance between conflicting rights and duties."

**33.** Order to retrial, though happens to be within the competence of Appellate Court, but same should be exercised sparingly. In ***Pandit Ukha Kolhe vs. The State of***

***Maharashtra*** reported in ***(1964) SCR 926***, the constitution Bench held:

> "An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. Harries, C.J., in Ramanlal Rathi v. The State [AIR (1951) Cal.305], observed:
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> > "If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the Court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case."

**34.** Consequent thereupon, the judgment of conviction and sentence recorded by the learned trial court is set aside. Appeal is allowed. The matter is remitted back to the learned lower court to proceed afresh in accordance with law backed by an observation as made herein above.

**(Aditya Kumar Trivedi, J.)**

Patna High Court
Dated 28th day of Aug., 2015
Prakash Narayan

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