

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

FRIDAY, THE 9TH DAY OF OCTOBER 2015/17TH ASWINA, 1937

Crl.Rev.Pet.No. 782 of 2015 ()

**AGAINST THE JUDGMENT IN CRA 322/2013 of ADDITIONAL DIST. & SESSIONS
COURT,MOOVATTUPUZHA DATED 19-01-2015**

**AGAINST THE JUDGMENT IN CC 1333/2008 of J.M.F.C.,PERUMBAVOOR DATED 31-05-
2013**

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

**BABY AGED 53 YEARS
S/O.VARGHESE, ARACKAL HOUSE, G.P.THEATRE
DOOR NO.978, COIMBATORE, TAMIL NADU
NOW RESIDING IN THE HOUSE OF C.V.THOMAS
CHERUMADATHIL, BHAVANA NAGAR, ANGAMALY
ERNAKULAM DISTRICT.**

**BY ADVS.SRI.E.C.POULOSE
SMT.BOBBOY RAPHEAL.C**

RESPONDENT(S)/RESPONDENT/COMPLAINANT:

**STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM-682031.**

R BY PUBLIC PROSECUTOR V.S.SREEJITH

**THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON
09-10-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

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B.SUDHEENDRA KUMAR, J.

Cr.R.P.No.782 of 2015

Dated this the 9th day of October, 2015

JUDGMENT

The revision petitioner is the accused in C.C.No.1333/08 on the files of the Court of the Judicial Magistrate of First Class, Perumbavoor.

2. The revision petitioner was convicted by the trial court under Section 420 IPC and sentenced to rigorous imprisonment for 1 year. In the appeal filed against the said conviction and sentence, the Appellate Court allowed the appeal and remitted the case to the trial court. Aggrieved by the said judgment of the Appellate Court remanding the case to the trial court, this revision petition has been filed.

3. The case of the prosecution can be briefly stated as follows:-

PW1 is a native of Kuttampuzha. PW 1 had acquaintance with the revision petitioner through one

of his friends, namely, Reji. The revision petitioner approached PW1 and made him to believe that if PW1 would deposit an amount of Rs. 5,00,000/- in Marian Charitable Trust and Sheeba Foundation Trust (MCTSFT), the revision petitioner would return 10 times of its amount. On the basis of said representation, PW1 gave an amount of Rupees Fifty Lakhs to the revision petitioner. The revision petitioner at that time, executed Ext.P2 cheque in favour of the complainant for Rs.50 Lakhs. However, the revision petitioner did not pay the amount covered by Ext.P2 cheque.

4. Before the court below, PW1 to PW3 were examined and Exts.P1 to P4 were marked for the complainant. After closing the prosecution evidence, the trial court dispensed with the examination of the revision petitioner under section 313 Cr.P.C.for the reason that the counsel for the revision petitioner

filed a written statement before the Court in lieu of the examination of the revision petitioner under section 313 Cr.P.C. Thereafter, no evidence was adduced on the side of the revision petitioner.

5. The Appellate Court remanded the case mainly for two purposes, which are, (1) to comply with the provisions of Section 313 of Cr.P.C. and (2) to afford opportunity to the prosecution and the defence to adduce evidence.

6. The learned counsel for the revision petitioner has argued that the court below ought not have remanded the case for the purpose of examining the accused under Section 313 Cr.P.C and also for the purpose of permitting the prosecution to adduce further evidence, as the same will tantamount to filling up the lacuna in the prosecution case and consequently, the judgment of the court below remanding the case cannot be sustained.

7. Per contra, the learned Public Prosecutor has argued that the examination of the accused under Section 313 Cr.P.C is an opportunity to the accused to explain the incriminating materials appearing against him in the evidence of the prosecution witnesses and hence, remanding the case for the purpose of examining the accused under Section 313 Cr.P.C cannot be said to be for the purpose of filling up the lacuna in the prosecution case. It has been further argued by the learned Public Prosecutor that neither the prosecution nor the defence can be faulted in this regard as it was only due to the mistake of the Court that the revision petitioner was not examined under Section 313 Cr.P.C. and hence, it was the duty of the Superior Court to ensure that no party must be prejudiced due to the mistake of the Court and in the said circumstances, the learned Public Prosecutor has supported the Appellate judgment.

7. In this context, it will be profitable to extract the provisions of Section 313 Cr.P.C., which reads as follows:-

(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 at 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.

There are two kinds of examination under Section 313 Cr.P.C. The first under Section 313(1)(a) Cr.P.C. relates to any stage of the enquiry or trial, while the second under Section 313 (1)(b) Cr.P.C takes place after the prosecution witnesses are examined and before the accused is called up to enter upon his defence. The former is particular and optional, whereas the latter is general and mandatory. When there is omission to examine the accused under Section 313 (1)(b) Cr.P.C, the prosecution is not guilty of not adducing or suppressing such evidence; but it is only the failure on the part of the trial court. Since the

provisions under Section 313(1)(b) Cr.P.C are intended to enable the accused to give explanation with regard to the incriminating materials appearing in the evidence of prosecution witnesses, unless that opportunity is granted to the accused, there cannot be any legal conviction. However, the omission on the part of the Court to put questions under Section 313 of Code cannot enure to the benefit of the accused. The victim of the offence or the accused should not suffer for the lapses or omission of the Court in not conducting the examination of the accused under Section 313 (1)(b) Cr.P.C. Mere filing of a statement by the counsel for the accused cannot be a substitute for the examination of the accused under Section 313 Cr.P.C. Of course, in a summons case, where the Court has dispensed with the personal attendance of the accused, the Court is having the discretion to dispense with his examination under section 313 (1)(b) Cr.P.C.

as is evident from proviso to Section 313 (1)(b) of the Code.

8. The Apex Court in ***Nar Singh V. State of Haryana [2015 1 SCC 496]*** held thus “ 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 Cr.P.C. has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under Section 313 of Cr.P.C., 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 Cr.P.C. 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.

9. The Apex Court in ***Ranveer Yadav v. State of Bihar [(2009) 6SCC 595]*** held that *Section 313 of the Code is not an empty formality and there is a purpose behind examination under Section 313 of the Code.*

The above discussion would make it clear that the non- examination of the revision petitioner in this case under Section 313(1)(b) of the Code does not vitiate the entire trial as there is no material before the Court to indicate that any prejudice had been caused to the accused. However, it was necessary to get it cured by the Appellate Court. Since the matter was brought to the notice of the Appellate Court, the Appellate Court

correctly remanded the case to the trial court for the examination of the accused under Section 313 of the Code.

9. Now the question to be considered is as to whether the direction of the Appellate Court that the opportunity must be given to the prosecution to adduce further evidence to prove its case, was correct or not. A learned single Judge of this Court in ***P. Mammadkutty and others v. State [1996 (1) KLJ 810]*** held that the remand ordered by the Sessions Court for fresh trial for filling up the lacuna on the side of the prosecution was not justified. The Apex Court in ***Mohammad Hussain alias Julfikar Ali V. State (Government of NCT) Delhi [AIR 2012 SC 3860]*** held that the power of the Appellate Court to order re-trial of the accused under Section 386 of the Code cannot be used to allow the prosecution to improve upon its case or fill up the lacuna.

In view of the above proposition of law, it is settled that the remand should not be done for the purpose of allowing the prosecution to improve its case or fill up the lacuna. In view of the above reason, the judgment of the Appellate Court granting opportunity to the prosecution to adduce further evidence to prove its case cannot be sustained.

In the result, this revision petition stands allowed in part confirming the judgment of the Appellate Court setting aside the conviction and sentence passed by the trial court and remanding the case to the trial court to comply with the provisions under Section 313 of the Code. However, the direction of the Appellate Court to afford opportunity to the prosecution to adduce further evidence cannot be sustained. The trial court shall examine the revision petitioner under Section 313 (1)(b) of the Code and thereafter proceed with the case in accordance with the law.

Needless to state that this order will not affect the power of the Court under Section 311 of the Code.

Sd/-
B.SUDHEENDRA KUMAR
JUDGE

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PA TO JUDGE

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