

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 434 of 2015

1. Raj @ Vikram S/o Nanhu Devar, aged about 21 years.
2. Firoz S/o Albela Devar, aged about 32 years
3. Anup S/o Bilwa Devar, aged about 27 years
4. Vicky S/o Sanju Devar, aged about 19 years
5. Raju S/o Rudhir Kaushik, aged about 23 years.

All residents of Nan Bada Bazar, Tikrapara, Police Station Chirmiri, Civil And Revenue District - Korea, District Korea, Chhattisgarh

---- Appellants

Versus

- State Of Chhattisgarh, Through Station House Officer, Police Of Police Station Chirmiri, District Korea (C.G.)

---- Respondent

For Appellants	:	Shri P.K. Tulsiyan, Advocate
For Respondent	:	Shri Ravindra Agrawal, Government Advocate

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Smt. Justice Rajani Dubey

Judgement

Per P. Diwaker, J

28/08/2018

1. Though the matter is listed today for orders on I.A. No.1/2018, an application for suspension of sentence and grant of bail to accused/appellants during pendency of this appeal, yet looking to the argument advanced by learned counsel for the appellants to the effect that statements of accused No.1 to 3 under Section 313 of CrPC have not been recorded properly by the trial Court, this Court is of the opinion that it would be proper to hear and decide the appeal itself finally.

2. It has been submitted by learned counsel for the appellants that every incriminating circumstance appearing against an accused in the statement of prosecution witnesses has to be put to him one by one and he has to be given an opportunity to accept or negate the same. It is a well settled principle of law that anything incriminating the accused if not put to him in his statement under Section 313 CrPC, the same cannot be read into evidence against him. In the present case, though a questionnaire under Section 313 of CrPC has been prepared by the trial Court in respect of appellants No.1 to 3 but none of the questions so prepared was put to them as mandated under Section 313 CrPC because the questionnaires so prepared do not contain answers of the appellants. In other words, opportunity to admit or rebut the incriminating circumstances / evidence available against them in the prosecution case had not been granted, which has caused serious prejudice to them. It is thus apparent that the provisions of Section 313 CrPC was not strictly observed, which was mandatory in nature and non-compliance of which has vitiated the whole trial and therefore only on this count, the appellants are entitled to be acquitted.
3. On the other hand, learned counsel appearing for the State submits that mere non-examination of accused/appellants concerned under Section 313 of CrPC would not vitiate the entire trial making them entitled for an order of acquittal. He submits that *prima facie* there is a procedural flaw and therefore this Court may remit the matter to the trial Court with a direction to examine the accused/appellants concerned under Section 313 CrPC and to pass the judgment afresh in accordance with law.
4. We have heard learned counsel for the parties and perused the record of the trial Court.

5. In order to appreciate the argument advanced on behalf of the learned counsel for the appellants with regard to non-compliance of the provisions of Section 313 CrPC, it will be necessary to refer to Section 313 CrPC, which reads thus;-

"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 question 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;
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.”

6. From perusal of above it is clear that the object of examination under this Section is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt. In other words, this Section has been incorporated in the Code of Criminal Procedure to give the accused a fair chance to explain his stand with regard to the circumstances in the evidence, which has been collected against him and has come on record during the trial. The Apex Court in its various judgements stressed the importance of Section 313 CrPC in recording the statement of accused and the duty imposed on the Court to question the accused properly and fairly so as to bring home the exact case he will have to meet and thereby an opportunity is given to him to explain any such point.
7. Now coming to the facts of the present case. A perusal of the order sheet of trial Court dated 23.1.2015 shows that after recording of statements of accused/appellants namely Raj alias Vikram, Firoj & Anup under Section 313 CrPC, in which they have pleaded innocence, the matter has been fixed for final arguments. This order sheet bears thumb impression of afore named accused. However, a glance of questionnaires prepared under Section 313 CrPC for the aforesaid accused persons reveal that the answers of accused/appellants No.1 to 3 for the questions framed under Section 313 CrPC have not been incorporated or written in the statements and their thumb impressions have only been obtained at the bottom of each page of the questionnaires. This suggests that the trial Court had not examined the aforesaid appellants in terms of Section 313 CrPC to provide them mandatory opportunity to explain the incriminating circumstances available against them in the prosecution case and had simply obtained

their thumb impressions on each page of the blank questionnaire. If the questions so framed were asked to them, their answers would have been incorporated or written at the appropriate place. In these circumstances, we are of the opinion that trial Judge concerned has not performed its legal duty mandated under Section 313 CrPC, which has caused grave prejudice to the accused persons as they had been deprived of the opportunity to explain the incriminating circumstances against them.

8. Now a further question arises as to whether non-compliance of the provisions of Section 313 CrPC by the trial Court vitiates the whole trial and whether appellants concerned are entitled for an order of acquittal?
9. In **Janak Yadav & ors v. State of Bihar** reported in **(1999) 9 SCC 125** the examination of accused under Section 313 Cr.P.C. was not conducted by the trial court and in such a situation, the Hon'ble Supreme Court has observed thus:-

"5. Section 313 CrPC prescribes a procedural safeguard for an accused facing the trial to be granted an opportunity to explain the facts and circumstances appearing against him in the prosecution's evidence. That opportunity is a valuable one and cannot be ignored. It is not a case of defective examination under Section 313 CrPC where the question of prejudice may be examined but a case of no examination at all under Section 313 CrPC and as such the question whether or not the appellants have been prejudiced on account of that omission is really of no relevance. It was open to the High Court to have either examined the accused, whose statements under Section 313 CrPC had not been recorded, itself under Section 313 CrPC and then proceeded with the hearing of the appeal or

directed retrial of the case confined to the stage of recording of the statements of the appellants under Section 313 CrPC but it was not justified to order the retrial of the entire case by framing *de novo* charges and examining afresh prosecution evidence. The direction of the High Court to that extent cannot be sustained."

10. The Hon'ble Supreme Court in somewhat similar circumstance in **Nar Singh v. State of Haryana** reported in **AIR 2015 SC 310** has observed thus;-

27. The point then arising for our consideration is, if all relevant questions were not put to accused by the trial court as mandated under Section 313 Cr.P.C. 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 re- decision from the stage of recording of statement under Section 313 Cr.P.C. Section 386 Cr.P.C. deals with power of the appellate court. As per sub-clause (b) (i) of Section 386 Cr.P.C., 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 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 Cr.P.C. and may direct remanding the case again for re-trial of the case from that stage of recording of statement under Section 313 Cr.P.C. 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 Cr.P.C. 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 vs. Government of Gujarat & anr*, (1980) 1 SCC 363, after closure of evidence of the prosecution and examination of accused under Section 313 Cr.P.C. 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 case to trial court to proceed afresh from the stage of examination under Section 313 Cr.P.C.”

The Hon'ble Apex Court has further observed thus:-

“34. In our view, accused is not entitled for acquittal on the ground of non-compliance of mandatory provisions of Section 313 CrPC. We agree to some extent that the appellant is prejudiced on account of omission to put the question as to the opinion of Ballistic Expert (Ex- P12) which was relied upon by the trial court as well as by the High Court. Trial court should have been more careful in framing the questions and in ensuring that all material evidence and incriminating circumstances were put to the accused. However, omission on

the part of the Court to put questions under Section 313 Cr.P.C.

cannot enure to the benefit of the accused.”

11. From the afore quoted legal provisions, it is clear that if the statement of accused has not been recorded by the Court in accordance with the provisions of Section 313 CrPC, this is an illegality committed by the Court and not by the prosecution and for that, the entire trial is not to be vitiated but this illegality committed by the trial Court can be set right so that accused may get an opportunity to explain incriminating evidence appearing against him in the prosecution evidence. In the case in hand, admittedly the trial Court did not record statement of accused/appellants No.1 to 3 as per provisions of Section 313 CrPC. Off course, the record goes to show that statements of accused/appellants No.4 & 5 under Section 313 CrPC were recorded but the entire judgment does not deal with the same. The trial Court appears to have turned a blind eye even to Section 313 CrPC statement of accused/appellant No.4 & 5 because had it not been so, the glaring error in not recording the proper statement of accused/appellants No.1 to 3 under Section 313 CrPC would have come to the fore. We have gone through the impugned judgment time & again yet no appreciation of any of the accused/appellants' statement under Section 313 of CrPC appears to have been made by the trial Court and thereby they have been deprived of their legal right of putting forth their case as per requirement of law before being held guilty. In this view of the matter, this Court is of the opinion to remit the matter to the trial Court with a direction to record Section 313 CrPC statements of all the accused/appellants so that they cannot be deprived of their right of being heard properly.

12. In the result, the appeal is allowed. Impugned judgment of conviction and order of sentence dated 9.2.2015 is hereby set aside. The matter is

remanded back to the trial Court with a direction to start the case from the stage of recording of statements of all the accused persons under Section 313 CrPC afresh and to pass appropriate judgment in accordance with law within a period of two months from the date of receipt of certified copy of this judgment. The trial Court shall be at liberty to re-frame the questions under Section 313 of CrPC in the light of available evidence on record. The trial Court shall also permit the accused/appellants to adduce evidence in their defence, if so desired by them. All the accused persons, however, be kept in detention during such further trial and in case any bail application is filed on their behalf, the same shall be considered and decided on its own merit in accordance with law. We make it clear that we have not expressed any opinion on the merits of the case.

13. Accused/appellants are reported to be in custody. They shall be produced by the State before the trial Court on **8.10.2018**. The trial Court shall also take appropriate steps to ensure presence of accused/appellants. Record of the trial Court be sent back with a copy of this order through personal messenger.
14. Let the matter be placed before Hon'ble the Chief Justice on administrative side for appropriate departmental action against the trial Judge concerned.

(Pritinker Diwaker)
Judge

(Rajani Dubey)
Judge

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