

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
AND
HON'BLE SRI JUSTICE T.AMARNATH GOUD

Crl.A.No.107 of 2012

Date:23.10.2018

Between.

Dasamanthula Hemasundar,
S/o Late Suryanarayana

.....Appellant

And.

The State of A.P, repled.,
by the Public Prosecutor, Hyderabad.

.....Respondent

Counsel for the appellant: Mrs. C.Vasundhara Reddy

Counsel for the respondent: Public Prosecutor for the State of AP

The Court made the following:

JUDGMENT: (*per Hon'ble Sri Justice C.V.Nagarajuna Reddy*)

The appellant being accused of killing his wife was subjected to trial by the Special Judge for Trial of Cases under SCs & STs (POA) Act-cum-Additional District and Sessions Judge, Vizianagaram, on the following charges:

“Firstly, that prior to 24.3.2010 and after your marriage with the deceased-Dasamanthula Varalakshmi at your house at Bangarammapeta, Kothapeta, Vizianagaram, you being the husband of deceased Varalakshmi, harassed her both mentally and physically by beating her and suspecting her fidelity and you used to return home everyday in drunken state and thereby you subjected her to cruelty and that you thereby, committed the offence punishable under Section-498-A I.P.C. and within my cognizance.

Secondly, that on the 20th day of March, 2010, at about 9 pm., you came home in a drunken state and assaulted and picked up quarrel with the deceased Varalakshmi and suddenly emptied kerosene stocked in the plastic bottle and lit fire on her with an intention to causing death of the deceased Varalakshmi and that the deceased raised hue and cry and on hearing the same, neighbours rushed there and saw her as burning faggot and put off the flame with clothes and on 07.4.2010 at about 7 am., the deceased expired as she was almost burnt while undergoing treatment in the hospital and that you thereby, committed the offence punishable under Section-302 I.P.C. and within my cognizance.”

As the appellant, on being questioned, pleaded not guilty, he was subjected to trial, during which, the prosecution examined P.Ws.1 to 14, got Exs.P-1 to P-22 marked and

produced M.Os.1 to 8. On behalf of the defence, no evidence was let in.

On appreciation of the oral and documentary evidence, the lower Court has found the appellant guilty for the offences punishable under Sections-302 and 498-A I.P.C. and sentenced to suffer Rigorous Imprisonment (for short 'RI') for life and to pay a fine of Rs.500/- and in default of payment of fine, to suffer RI for one month for the former offence and sentenced to suffer RI for a period of one year and to pay a fine of Rs.100/- and in default of payment of fine, to suffer simple imprisonment for 15 days for the latter offence. Both the sentences were directed to run concurrently.

At the hearing, Mrs. C.Vasundhara Reddy, learned counsel for the appellant, argued that it is highly improbable that Exs.P-3 and P-8 were recorded by P.Ws.2 and 4, respectively, with a time gap of five minutes and that therefore, the Dying Declarations could not have been relied upon by the lower Court. She further argued that during the examination of the appellant under Section-313 Cr.P.C., the contents of Exs.P-3 and P-8-the Dying Declarations were not put to him and that therefore, the trial itself is vitiated. In support of her plea, the learned counsel placed reliance on a Division Bench judgment of this Court in *Andugula Shankaraiah Vs. State of Andhra*

*Pradesh*¹. The learned counsel alternatively submitted that the fact that the appellant has allegedly poured kerosene from a kerosene lamp and the further fact that the deceased succumbed to the injuries due to septicaemia 15 days after the incident also proves that the appellant did not have the intention to cause the death of the deceased and that therefore, the conviction imposed on the appellant by the lower Court may be altered into one under Section-304 Part-II I.P.C.

Opposing the above submissions of the learned counsel for the appellant, Mr. Posani Venkateswarlu, learned Public Prosecutor for the State of Andhra Pradesh, submitted that considering the brief statement recorded by P.W-2 and marked as Ex.P-3, it can be said that there was every possibility for him to complete recording of the statement of the deceased within five minutes and immediately after P.W-2 completed recording of Ex.P-3, P.W-4-the learned Magistrate has commenced recording of Ex.P-8 at 11 pm. and that therefore, the genuineness of Exs.P-3 and P-8 cannot be doubted. He further submitted that P.W-4 being a judicial officer had no reason to act prejudicial to the interests of the appellant and that, even if the Court does not accept the case of the prosecution that Ex.P-3 was recorded by P.W-2 at 10.55 pm and presume that it must

¹ 2011 (2) ALD (Crl.) 516 (AP)

have been recorded earlier, that would not affect the creditability of Ex.P-8.

As regards the submission of the learned counsel for the appellant that the contents in Ex.P-8 have not been put to the appellant, learned Public Prosecutor submitted that before the Court holds that the trial is vitiated on account of non-compliance of Section-313 Cr.P.C., the appellant has to plead prejudice and that, neither such prejudice was pleaded before the lower Court nor any ground has been raised in the appeal either to the effect that the contents of Exs.P-3 and P-8 were not put to the appellant and prejudice was caused on account of the same. In support of his submission, he relied upon the judgments of the Apex Court in *Nar Singh Vs. State of Haryana*² and *Yogesh Singh Vs. Mahabeer Singh and Others*³.

We have carefully considered the respective submissions of the learned counsel for the parties with reference to the record.

With respect to the first submission of the learned counsel for the appellant, a perusal of Ex.P-3 shows that at the bottom of the statement of the deceased, 10.55 pm is mentioned below the date and signature of P.W-2, whereas in Ex.P-8, it is stated by P.W-4-the learned Magistrate that he received the hospital

² (2015) 1 SCC 496

³ (2017) 11 SCC 195

intimation at 10.45 pm and immediately, he rushed to the Government Hospital, Vizianagaram, at 11 pm and started recording the Dying Declaration of the victim. It thus appears that more than five minutes after P.W-2 completed recording Ex.P-3, P.W-4 has commenced recording of Ex.P-8. Therefore, there is nothing improbable in recording of Exs.P-3 and P-8. Hence, the theory of improbability put forth by the learned counsel for the appellant is without any merit. More over, as rightly submitted by the learned Public Prosecutor, P.W-4 being a judicial officer has no axe to grind against the appellant and therefore, it cannot be presumed that he might have mentioned incorrect time of recording of Ex.P-8. Indeed, P.W-4 was not subjected to any cross-examination on this aspect. Hence, we do not find any merit in this submission.

Coming to the crucial submission of the learned counsel for the appellant, we have carefully perused the statement of the appellant recorded under Section-313 Cr.P.C. The un-numbered question Nos.2, 3 and 5 which are relevant for this purpose, read as under:

“Qn.No.2: P.W-2-S.Khan, HC 892, Out post, Government Hospital, Vizianagaram, deposed that on 23.3.2010 while he was in-charge of Out post Police Station, on receipt of medical intimation (Ex.P-2) from the duty doctor, he went to the hospital and recorded Ex.P-3-declaration given by the deceased-Varalakshmi and the same was read over to the declarant who admitted the same to be

true and he obtained her toe mark as the hands of deceased were badly burnt and Ex.P-3 is the endorsement of the doctor who was present at that time to the fact that the deceased was in a fit state to give her declaration. On point of jurisdiction, he sent Ex.Ps-2 and P-3 to the SHO, II Town Police Station, Vizianagaram. What do you say?

Qn.No.3: P.W-4-B.Appalaswamy, JFCM, Special Mobile Court, Vizianagaram, deposed that on receipt of medical intimation-Ex.P-6 on 23.3.2010, he rushed to the Government Hospital at 11 am., and identified the declarant with the help of duty doctor who certified that the patient is conscious and in fit state of mind to give declaration and having satisfied with the answers given by the declarant, he recorded her declaration (Ex.P-8) and obtained her thumb impression. What do you say?

Qn.No.5: P.W-9-S.V.N.Krishna Sai, CAS, Govt. Hospital, Vizianagaram, deposed that on 23.3.2010 at 10.20 pm on his requisition (Ex.P-6), P.W-8 came to the hospital and recorded the declaration (Ex.P-8) of Varalakshmi and before recording the declaration, he made endorsement (Ex.P-7) stating that the declarant was conscious and coherent and in fit state of mind and after completion of declaration by the learned Magistrate he made Ex.P-9 endorsement stating that the patient was conscious and coherent while giving declaration. What do you say?"

The one word answer given to all these questions by the appellant is "false". No doubt, in almost in a similar case, a Division Bench of this Court in *Andugula Shankaraiah* (1 supra) observed that though the learned Sessions Judge has referred to P.W-6-the judicial Magistrate recording Ex.P-6 dying

declaration, its contents such as time of occurrence, the manner in which the deceased was subjected to burn injuries and the person by whom she sustained injuries were not put to the appellant and relying upon the judgments of the Apex Court in *Ajay Singh Vs. State of Maharashtra*⁴ and *Shaik Maqsood Vs. State of Maharashtra*⁵ and held that conviction was not sustainable.

The judgments cited by the learned Public Prosecutor referred to above, however, laid down that mere defect in the Court putting questions to the accused in his examination under Section-313 Cr.P.C. *ipso facto* would not vitiate the trial and that the burden lies on the accused to prove that omission to put incriminating questions has caused prejudice to him. In *Liyakat and another Vs. State of Rajasthan*⁶ after referring to the provisions of Section-313 Cr.P.C., the Supreme Court held as under:

“From bare perusal of the aforesaid provision, it is manifest that the Section intended to afford a person accused of a crime an opportunity to explain the circumstances appearing in evidence against him. Sub-section (1) of Section-313 empowers the Court to put such question to the accused as is considered necessary at the stage of the inquiry for trial. At the same time, it imposes a duty and makes it mandatory on the Court to question him generally on the

⁴ (2007) 12 SCC 341

⁵ (2009) 6 SCC 583

⁶ 2014 SCC Online SC 775

prosecution having completed the examination of its witnesses and before the accused is called on to enter upon his defence. Indisputably, the attention of the accused should be invited to inculpatory piece of evidence or circumstances laid on record and to give him an opportunity to offer an explanation if he chooses to do it. The purpose of examination of the accused under Section-313 of the Code is to give the accused an opportunity to explain the incriminating material which has come on the record. The scope and purpose of Section-313 of the Code came for consideration before this Court in a number of judgments, few of which are discussed for the present case.”

After discussing the relevant case law on the subject, the Supreme Court had this to say:

“The decisions of this Court quoted hereinabove would show the consistent view that a defective examination of the accused under Section-313 Cr.P.C. does not by itself vitiate the trial. The accused must establish prejudice thereby caused to him. The onus is upon the accused to prove that by reason of his not having been examined as required by Section-313 he has been seriously prejudiced.

As noticed above, the High Court highlighted certain facts and circumstances of the case, i.e., immediately after the alleged suicide the accused person did not give any report to the police about her unnatural death; the statement of P.W-10, that the door was got bolted from inside and it did not open on being pushed from outside; and the trial Court considered that the accused Liyakat could not be arrested after the incident and could be arrested only on 15.5.2000. The High Court is of the opinion that all these circumstances have not been put to the

accused in his statement under Section-313 Cr.P.C. which vitiated the trial.

In our considered opinion, the High Court fell in error in coming to the above conclusion. It is an admitted fact that the accused persons immediately after the alleged suicide did not give any report to the Police about her unnatural death. There is no denial to this fact and the accused are fully aware about the fact that they have not reported the matter to the police. From bare perusal of the statement recorded under Section-313 Cr.P.C., it is evident that the Court elaborately put questions to the accused and the same have been answered in detail. The entire incident has been fully apprised to the accused including that the accused Liyakat was confronted with the Exhibit 14, 15, 16 and 17 to the effect that the accused Liyakat, who was absconding, was finally arrested. In answer, the accused said "not aware". Same answer was given by the accused Ajeem Khan.

The Court apprised the accused persons in a very elaborate manner about the incident that took place, the sequence of events and the material on evidence brought on record. The accused persons were fully aware about all these evidences. The appellants did not raise the question before the trial Court that any prejudice has been caused to them in examination under Section-313 Cr.P.C. The burden is on the accused to establish that by not apprising all the incriminating evidences and the inculpatory material that had come in the prosecution evidence against them, prejudice has been caused resulting in miscarriage of justice. In the instant case, we are of the definite view that no prejudice or miscarriage of justice has been done to the appellants."

In *Nar Singh* (2 supra), it was pleaded on behalf of the appellant that since Ex.P-12 and the ballistic expert opinion-a

material piece of evidence was not put to him during his examination under Section-313 Cr.P.C., the same must be completely excluded from consideration and that barring the same, there is no other evidence to sustain the conviction. The Supreme Court after undertaking elaborate discussion of the scope and purport of Section-313 Cr.P.C. and the case law on the point, held that the question whether the trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance of Section-313 Cr.P.C. has materially prejudiced him or is likely to cause prejudice to him; that merely because of defective questioning under Section-313 Cr.P.C., it cannot be inferred that any prejudice has been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out and that, 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. and such prejudice should also demonstrate that it had occasioned failure of justice to the accused. The Supreme Court further held that 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 that the Court may draw an inference of such prejudice. The Apex Court also visualised a

situation where the defence raised such objection for the first time in the appellate Court and answered the same as under:

"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:-

(i) Whenever a plea of non-compliance of [Section 313](#) Cr.P.C. 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;

(ii) 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.

(iii) If the appellate court is of the opinion that non-compliance with the provisions of [Section 313](#) Cr.P.C. 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](#) Cr.P.C. and the trial Judge may be directed to examine the accused afresh and defence witness if any and dispose of the matter afresh;

(iv) 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.”

A two-judge Bench of the Supreme Court in *Yogesh Singh* (3 supra) referred to and relied upon the judgment in *Nar Singh* (2 supra) while reiterating the doctrine of prejudice.

The ratio as could be culled out from the above discussed judgments of the Apex Court is as follows:

- (1) It is the duty and responsibility of the Court to put all the incriminating aspects which are material for holding the accused guilty of the offence with which he is charged, to him during his examination under Section-313 Cr.P.C.
- (2) The omission on the part of the Court to put such incriminating points has not only to be specifically raised by the defence but also pleaded and prejudice to be proved apart from also proving that such prejudice has resulted in failure of justice.
- (3) If the plea of prejudice and failure of justice are raised for the first time in the appeal, then the appellate Court has the option to either examine the convict or the counsel appearing for him and

the answers given by them shall be taken into consideration for deciding the matter.

- (4) If the accused is unable to offer the appellate Court any reasonable explanation of such circumstances, the Court may assume that there is no acceptable explanation to offer and in the facts and circumstances of the case, if the appellate Court comes to the conclusion that no prejudice was caused and no failure of justice was occasioned, it will hear and decide the matter on merits.
- (5) If the appellate Court is of the opinion that non-compliance of provisions of Section-313 Cr.P.C., has caused or is likely to have caused 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, i.e., from the stage of questioning the accused under Section-313 Cr.P.C. and the trial Judge may be directed to examine the accused afresh and defence witnesses, if any, and dispose of the case afresh.
- (6) The appellate Court may decline to remit the matter to the lower Court on account of long

time already spent in the trial of the case and the period of sentence already undergone by the accused and in the facts and circumstances of the case, it may itself decide the appeal on its own merits keeping in view the prejudice caused to the accused.

Applying the law as discussed above to the facts of the present case, the appellant has neither pleaded omission as regards putting the contents of Exs.P-3 and P-8 to him nor any prejudice due to such omission and the resultant failure of justice to him. More over, it is not the submission of the learned counsel for the appellant that the lower Court has not put Exs.P-3 and P-8 to the appellant during his examination under Section-313 Cr.P.C. All that she has argued is that the contents of the said two documents were not specifically put to the appellant. When we specifically questioned the learned counsel whether the appellant was not aware of the contents of Exs.P-3 and P-8, she replied in negative. That the contents of at least Ex.P-8 were placed on record is evident from the deposition of P.W-4-the learned Magistrate, who recorded the said statement of the victim. The relevant portion of his deposition reads as under:

“I received a medical intimation from Government Head Quarters Hospital, Vizianagaram at 10.45 pm on 23.3.2010 with a request to record the statement

of Dasamanthula Varalakshmi, W/o Hemasundara Rao. Ex.P-6 is the said requisition. Immediately, I went to the Government Hospital, Vizianagaram, at 11 pm on the same day and I identified the patient/declarant with the help of duty doctor-Dr. S.V.N.Krishna Sai and the duty doctor certified that the patient is conscious and coherent and in a fit state of mind to give declaration. He made an endorsement to that effect on the declaration recorded by me. Ex.P-7 is the said endorsement. I also put certain questions to the declarant to know the mental condition of the declarant whether she can give declaration or not. As per the answers given by her, I was satisfied, the patient/declarant was conscious and coherent and in a fit state of mind to give answers. Hence, I proceeded to record her statement. The declarant stated to me that her husband poured kerosene and set her fire and was always suspecting her fidelity and they used to quarrel every day, as detailed in the statement recorded by me.”

P.W-4 was subjected to cross-examination. The only material suggestion that was put to him on behalf of the accused was that he did not follow the due procedure in recording the dying declaration of the deceased and the declarant was tutored by her family members to depose “in the above said manner”. It is thus manifest that the appellant, who engaged a counsel, is expected to know the contents of Ex.P-8-dying declaration through the deposition of P.W-4, but, he has not raised any whisper about the alleged omission to put the contents of Ex.P-8 to him by the Court during his examination under Section-313

Cr.P.C. The situation, however, would have been different had the lower Court not put any question on Exs.P-3 and P-8 to the appellant. Indeed, both the documents were specifically put to the appellant, which he has denied as false. In fact, to the penultimate question whether he has got to say anything more, all that the appellant said was everything is false. He did not try to explain the incriminating suggestions put to him with respect to Exs.P-3 and P-8. In our opinion, on the facts of the present case, it cannot be said that incriminating material has not been put to the appellant or that non-disclosure of contents of Exs.P-3 and P-8 has caused any prejudice to him resulting in failure of justice to him.

Reverting back to the judgment in *Andugula Shankaraiah* (1 supra), the said judgment placed reliance upon two judgments of the Supreme Court, viz., *Ajay Singh* (4 supra) and *Shaik Maqsood* (5 supra). It needs to be noted that the observations referred to and relied upon by the Division Bench in the said two judgments are general in nature based on the interpretation of Section 313 Cr.P.C. Neither of the two judgments discussed the *doctrine of prejudice* and the resultant failure of justice. In the judgments of the Supreme Court discussed above, post *Andugula Shankaraiah* (1 supra), the law has further evolved. Therefore, taking into consideration the march of law as reflected in *Liyakat* (supra), *Nar Singh* (2 supra)

and *Yogesh Singh* (3 supra), the judgment in *Andugula Shankaraiah* (1 supra) would not be of any help to the appellant, as we are bound to follow the law as developed after the disposal of *Andugula Shankaraiah*. We are, therefore, of the opinion that the instant case is not vitiated by the purported non-compliance of the provisions of Section 313 Cr.P.C.

Apropos the last submission of the learned counsel for the appellant, Ex.P-3 reveals that a quarrel ensued before the appellant, who was in a drunken state, pouring kerosene on the deceased and setting fire on her. Both Exs.P-3 and P-8 reveal that the appellant had used kerosene from the oil lamp being used in their house in the absence of electricity. Though the burns were described as extensive deep burns up to 80%, the fact remains that the deceased survived for 16 days and Ex.P14 –Post-mortem certificate, shows that the deceased died due to septic shock due to extreme deep ante mortem burns. The above facts reveal that the appellant did not nurse a pre-meditated intention to kill the deceased. But at the same time, the burns caused by him led to septicaemia, which finally resulted in her death after 16 days. The fact that the appellant was in an inebriated condition would not weigh with the Court in knowing whether he had knowledge that the injuries caused by him would likely kill the deceased. In the facts and circumstances of the case, we are of the opinion that the offence

committed by the appellant falls under Section 304 Part-I I.P.C. The appellant has two daughters and one son, who appear to be still minors. Having lost their mother, the appellant would be the only one who will look after their welfare.

In the facts and circumstances of the case, we are of the opinion that interests of justice would be met, if the appellant is sentenced to suffer rigorous imprisonment for seven years.

In the result, the judgment under appeal is modified, by altering the conviction into one under Section 304 Part-I I.P.C. and sentencing the appellant to undergo rigorous imprisonment for seven years, while sustaining the fine imposed by the lower court.

The Criminal Appeal is, accordingly, partly allowed, to the extent indicated above.

JUSTICE C.V.NAGARJUNA REDDY

JUSTICE T.AMARNATH GOUD

23rd October, 2018

dr/msb