

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 1840 of 2019

- Rajesh Tandi, S/o Rupa Tandi, aged about 36 years, R/o Alekh, Mahima Nagar, Jal Bihar, Colony, Raipur, P.S.- Telibandha, Raipur, District Raipur (C.G.)

---- Appellant

Versus

- State of Chhattisgarh through Station House Officer, Police Station Telibandha, Raipur, District Raipur (C.G.)

---- Respondent

For Appellant : Shri Neeraj Kumar Jain, Advocate

For Respondent/State : Shri Avinash Choubey, Panel Lawyer

Hon'ble Shri Justice Prashant Kumar Mishra, J
Hon'ble Shri Justice Gautam Chourdiya, J

Judgment on Board by Justice Prashant Kumar Mishra

26.02.2020

1. This appeal would raise an important question as to what extent the statement of an accused recorded under Section 313 of the Code of Criminal Procedure (for short 'CrPC') can be used for sustaining the conviction.
2. Challenge in this appeal is to the judgment of conviction and order of sentence dated 27.11.2009 passed by learned Sessions Judge, Raipur (C.G.) in Sessions Trial No. 186 of 2009, whereby the appellant stands convicted under Section 302 of the Indian Penal Code (for short 'IPC') for committing murder of deceased Vijay @ Bande Nayak and sentenced to undergo life imprisonment and fine of Rs.100/-, in default of payment of fine to undergo additional rigorous imprisonment for ten days.
3. There is no evidence on the record as to the relations between the appellant and the deceased. The appellant used to reside in his one room accommodation with adjoining similar accommodation occupied by two other

individual who have not been examined before the trial Court. In the morning of 02.05.2009, dead body of deceased- Vijay @ Bande Nayak was seen in the one room accommodation of the appellant. One Dukalu Nayak was informed by his younger brother Kisun Nayak about the incident on which Dukalu Nayak lodged *Dehati* FIR on 02.05.2009 at 10:20 am vide Ex.-P/7 and he had also lodged *Dehati* Merg Intimation vide Ex.-P/5 at 10:00 am on the same day. As per *Dehati* FIR, deceased Vijay @ Bande Nayak was cousin brother of Dukalu Nayak. The deceased was a labourer having no place of residence as he had already sold his house at Ambedkar Nagar. He used to visit and stay at night in the house of the appellant on few occasions. In the *Dehati* FIR neither any suspicion was raised against the appellant, nor any other person was named therein.

4. In the postmortem report Ex.-P/3 proved by PW-3 Dr. Shivnarayan Manjhi, the deceased was found to have died due to haemorrhage and shock as a result of head injury; injuries were caused by hard, blunt and heavy object; duration of injuries was within 12 hours prior to death and duration of death was within 24 hours prior to postmortem examination which was done at 01:25 pm on 02.05.2009.
5. The accused was arrested on the same day, however, his memorandum statement has not been recorded. The slate-stone (*pharsi-pathhar*) used for causing injury over person of the deceased was recovered from the place of occurrence vide Ex.-P/9 whereas jeans-pant and shirt belonging to the appellant were seized vide Ex.-P/10. Preserved viscera was seized vide Ex.-P/11. Seized articles were sent for FSL examination but the report thereof is not available.
6. Accused/appellant was sent for trial on the basis that the dead body has been recovered from his place of residence.
7. In course of trial, the prosecution examined only five witnesses to bring

home the charge. PW-1 Jonu Besra and PW-2 Chandrabhan Thakur are the neighbours, however, they have not seen the occurrence, nor seen the appellant and the deceased together prior to the date of incident. PW-3 Dr. Shivnarayan Manjhi has proved the postmortem report Ex.-P/3. In the postmortem report, this witness (PW-3) has opined that death was caused within 24 hours prior to the postmortem examination and the injuries sustained by the deceased were caused within 12 hours prior to death. Thus, as per medical expert's opinion, the deceased died at about 01:00 am on 01.05.2009 and injuries were caused within 12 hours prior therefrom which means the injuries were caused in the intervening night of 30th April and 1st May 2009. However, there is absolutely no evidence as to whether the appellant and the deceased were seen together at the place of occurrence or in the vicinity on 30th April or 1st May 2009.

8. PW-5 Rajesh Choudhary is the Investigating Officer. He admits that the persons living in the adjoining house of the appellant namely Bablu Mangal and Raju were not interrogated. Similarly, he did not obtain any information about family and relatives of the deceased or the accused/appellant. The investigation was thus conducted in a lackadaisical manner. The *Dehati* FIR lodged by Dukalu Nayak itself says that the deceased was his cousin brother, yet neither Dukalu Nayak has been examined, nor Kissun Nayak who gave information to Dukalu Nayak has been examined.
9. Conviction of the appellant is based on two reasons i.e. *firstly*, the dead body of the deceased has been recovered from the house of the appellant and *secondly*, the appellant has admitted in his examination under Section 313 CrPC that he has committed murder. The precise statement made by him while answering Question No. 25 is reproduced hereunder:

“प्रश्न—25 क्या तुम्हें बचाव में कुछ कहना है ?

उत्तर—मृतक मुझे हमेशा तंग करता था मुझसे मेरे कपड़े मांगता था नए कपड़े लाता था उसे भी ले लेता था । घटना

की रात मृतक तलवार लेकर आया था यदि मैं मृतक को नहीं मारता तो वह मुझे मार देता इसलिए मैंने मृतक को पहले हाथ से फिर पत्थर से मार दिया वह गिर गया तब मैं घर बंद कर भाग गया । पुलिस मुझे बाद में पंचशीलनगर वाले घर में पकड़ी । साहब मुझे छोड़ दो या सजा दो ।”

10. To appreciate as to what extent statement made by the accused under Section 313 CrPC can be used against him, it would be necessary to refer to the provision which reads as follows:

“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.”

11. A careful reading of the provisions would manifest that the statement of the

accused is recorded to provide him an opportunity to explain any circumstance appearing in the evidence against him and that such statement is recorded without administering oath. Provisions say that accused shall not render himself liable for punishment by refusing to answer such questions put to him under Section 313 CrPC. The answers given by him 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.

12. It is thus plain and categorical that the purpose of examination of accused is to seek his explanation which may be considered while rendering judgment. It can be used as evidence against him in any other inquiry or trial but not in the same inquiry or trial in which it is recorded. The provision is intended to benefit the accused and not to nail the accused. In the matter of ***Nagaraj Vs. State Represented By Inspector of Police, Salem Town, Tamil Nadu, (2015) 4 SCC 739***, the Hon'ble Supreme Court has considered the scope and applicability of the provision under Section 313 CrPC in paras 14 & 15 which is reproduced as under:-

“**14.** The impugned judgment (*Nagaraj v. Inspector of Police, Criminal Appeal No. 426 of 2003, decided on 5-10-2005 {Mad}*) has found the answers of the accused under Section 313 CrPC evasive and untrustworthy, and held this to be another factor indicating his guilt. Section 313 CrPC is of seminal importance in our criminal law jurisdiction and, therefore, justifies reiteration and elucidation by this Court. We shall start, with profit, by reproducing extracts from the 41st Report of the Law Commission made in the context of Section 342 of the old Criminal Procedure Code which corresponds to this section where the Commission observed, inter alia, thus:

“**24.40. Section 342 – Introductory.** – Section 342 is one of the most important sections in the Code. It requires that the Court must, at the close of prosecution evidence, examine the accused 'for the purpose of

enabling him to explain any circumstances appearing in the evidence against him'. The section for a moment, brushes aside all counsel, all prosecutors, all witnesses, and all third persons. It seeks to establish a direct dialogue between the Court and the accused for the purpose of enabling the accused to give his explanation. For a while the section was misunderstood and regarded as authorising an inquisitorial interrogation of the accused, which is not its objects at all. The key to the section is contained in the first sixteen words of the section. Giving an opportunity to the accused to explain the circumstances appearing in the evidence is the only object of the examination. He may, if he chooses, keep his mouth shut or he may give a full explanation, or, he is so advised, he may explain only a part of the case against him.

* * *

24.45. Section 342 should be retained. – We have, after considering the various aspects of the matter as summarised above, come to the conclusion that Section 342 should not be deleted. In our opinion, the stage has not yet come for its being removed from the statute book. With further increase in literacy and with better facilities for legal aid, it may be possible to take that step in the future.”

“Clause 320. – The existing provision in Section 342(2) enabling a Court to draw an inference, whether adverse or not from an answer or a refusal to answer a question put to the accused during the examination, is being omitted as it may offend Article 20(3) of the Constitution. – SOR”

15. In the context of this aspect of the law it has been held by this Court in *Parsuram Pandey v. State of Bihar*, (2004) 13 SCC 189 that Section 313 CrPC is imperative to enable an accused to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the accused, its corollary being to benefit the court in reaching its final conclusion; its intention is not to nail the accused, but to comply with the most salutary and fundamental principle of natural

justice i.e. audi alteram partem, as explained in *Asraf Ali v. State of Assam*, (2008) 16 SCC 328. In *Sher Singh v. State of Haryana*, (2015) 3 SCC 724 this Court has recently clarified that because of the language employed in Section 304-B IPC, which deals with dowry death, the burden of proving innocence shifts to the accused which is in stark contrast and dissonance to a person's right not to incriminate himself. It is only in the backdrop of Section 304-B IPC that an accused must furnish credible evidence which is indicative of his innocence, either under Section 313 CrPC or by examining himself in the witness box or through defence witnesses, as he may be best advised. Having made this clarification, refusal to answer any question put to the accused by the court in relation to any evidence that may have been presented against him by the prosecution or the accused giving an evasive or unsatisfactory answer, would not justify the court to return a finding of guilt on his score. Even if it is assumed that his statements do not inspire acceptance, it must not be lost sight of that the burden is cast on the prosecution to prove its case beyond reasonable doubt. Once this burden is met, the statements under Section 313 assume significance to the extent that the accused may cast some incredulity on the prosecution version. It is not the other way around; in our legal system the accused is not required to establish his innocence. We say this because we are unable to subscribe to the conclusion of the High Court that the substance of his examination under Section 313 was indicative of his guilt. If no explanation is forthcoming, or is unsatisfactory in quality, the effect will be that the conclusion that may reasonably be arrived at would not be dislodged, and would, therefore, subject to the quality of the defence evidence, seal his guilt. Article 20(3) of the Constitution declares that no person accused of any offence shall be compelled to be a witness against himself. In the case in hand, the High Court was not correct in drawing an adverse inference against the accused because of what he has stated or what he has failed to state in his examination under Section 313 CrPC."

(Emphasis Supplied)

13.In two earlier judgments in the matters of *Dehal Singh Vs. State of Himachal Pradesh, AIR 2010 SC 3594* and *Sanatan Naskar & Anr. Vs. State of West Bengal, AIR 2010 SC 3570*, the Supreme Court held that statement of the accused recorded under Section 313 CrPC can be used to test the veracity of the exculpatory of the admission, if any, made by the accused and that it is not strictly an evidence in the case. The Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution. An important caution noticed by the Supreme Court is that conviction of the accused cannot be based merely on the statement made under Section 313 CrPC as it cannot be regarded as a substantive piece of evidence.”

14.In the case at hand, principles under Section 106 of the Evidence Act may be applied against the appellant since the dead body was found at his residence but here again there is no evidence that the appellant and the deceased used to reside together in the house, nor there is statement of any of the witnesses that on the fateful day, they had seen the appellant and the deceased together in the said house. Application of Section 106 of the Evidence Act may at once be considered if the accused and the deceased are close relatives like husband-wife, father-son, brother-sister etc. but in case of two strangers such presumption of common residence is not available, therefore, mere recovery of the dead body from the place where the appellant resides by itself would be of no assistance to the prosecution so as to make out a circumstance appearing against the appellant. Except for this, there is no evidence against the appellant, not even in the shape of motive as to why he would commit murder of the deceased. Prosecution has

also not submitted and proved the chemical examiner's report of the jeans-pant and the shirt belonging to the accused which were recovered from him at the time of his arrest. Similarly, there is no memorandum statement of the appellant where from disclosure of fact would have been gathered by the prosecution, nor neighbours residing in the house adjoining the house of the appellant or in the locality have been examined. There is absolutely no circumstance appearing against him so that the statement recorded under Section 313 CrPC would provide a missing link in the chain of circumstances and can be considered for sustaining conviction alongwith other admissible evidence.

15. Therefore, the trial Court has wrongly convicted and sentenced the appellant for the offence under Section 302 of IPC and he deserves to be acquitted of the charge.

16. Accordingly, we set aside the impugned judgment of conviction and acquit the accused/appellant of the charge under Section 302 of IPC. The appellant is in jail. He be released forthwith if not required in any other case, on his furnishing a personal bond for a sum of Rs.25,000/- with one surety in the like sum to the satisfaction of the trial Court. The bail bond shall remain in operation for a period of six months from today as required under the provisions of Section 437-A of the CrPC. The appellant shall appear before the higher Court as and when directed.

17. In the result, the instant criminal appeal is allowed.

Sd/-
(Prashant Kumar Mishra)
Judge

Sd/-
(Gautam Chourdiya)
Judge

Head Note

Conviction cannot be based solely on the statement of the accused u/S 313 CrPC, as it cannot be regarded as a substantive piece of evidence.