IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

MONDAY, THE 21ST DAY OF DECEMBER 2020 / 30TH AGRAHAYANA, 1942

CRL.A.No.1000 OF 2005

AGAINST THE JUDGMENT IN SC 66/2002 DATED 14-06-2005 OF ADDITIONAL SESSIONS JUDGE FAST TRACK COURT NO.I (ADHOC), MANJERI

APPELLANTS/ACCUSED 1, 2, 4 TO 6:

	1	MUHAMMED MUNEER, S/O.ABDURAHIMAN, THAYYIL KARUTHODY HOUSE, PUZHAKKATTIRI AMSOM, RAMAPURAM DESOM, PERINTHALMANNA.
	2	ABDUL SALEEM, S/O.KUNHIKOYA THAYYIL KARUTHODY HOUSE, PUZHAKKATTIRI AMSOM, RAMAPURAM DESOM, PERINTHALAMANNA.
	3	ABDUL RASHEED ALIAS RASIPA, S/O.HAMZA, MACHINGAL HOUSE, KURUVA AMSOM, KARINHAPPADI DESOM.
	4	THAJUDHEEN ALIAS SHAJU, S/O.MUHAMMADALI, KUTTAKKADAN HOUSE, PUZHAKKATTIRI AMSOM, KARINHAPPADI DESOM, PERINTHALMANNA.
	5	MOIDEEN, S/O.MUHAMMADALI, KUTTAKKADAN HOUSE, PUZHAKKATTIRI AMSOM, KARINHAPPADI DESOM, PERINTHALMANNA.
		BY ADVS.
		SRI.SOJAN MICHEAL
		SRI.GILBERT GEORGE CORREYA

RESPONDENT/COMPLAINANT:

		THE STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.
		SRI.K.B.UDAYAKUMAR, SR.PP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-12-2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 21st day of December 2020

The appellants are accused Nos.1, 2 and 4 to 6 in S.C. No.66/2002 on the file of the Additional Sessions Judge, Fast Track Court No.I (Adhoc), Manjeri. The above case is chargesheeted against the appellants and others alleging offences punishable under Sections 143, 147, 148, 324, 326 and 307 r/w 149 IPC. When this appeal came up for consideration, the learned counsel for the appellants submitted that original accused Nos.2 and 6, who are the appellants Nos.2 and 5 are no more. After verification, the Public Prosecutor submitted that original accused Nos.2 and 6 who are the appellants Nos.2 and 5 are no more. The original 3rd accused has not faced trial in this case.

2. The prosecution case is that on 6.12.2000 at 9 am, all the accused in furtherance of their common object of committing murder of the defacto complainant and his father, due to previous

enmity, formed themselves into an unlawful assembly and committed rioting armed with deadly weapons like iron rod, sticks and stones. It is alleged that the accused inflicted grievous hurt to them by beating with the sticks and rod and by pelting stones. It is alleged that charge witness No.2 sustained multiple fracture on his both legs and he lost five teeth. It is also alleged that the accused voluntarily caused grievous hurt to the defacto complainant and therefore, all the accused committed the offence alleged.

3. To substantiate the case, the prosecution examined PW1 to PW12. Exts.P1 to P11 are the exhibits marked on the side of the prosecution. MO1 to MO3 are the material objects. One witness was examined on the side of the defence as DW1 and Exts.D1 to D2 are the exhibits marked on the side of the defence.

4. After going through the evidence and the documents, the trial court found that the accused committed the offences under Sections 143, 147, 148, 324, 326 and 307 IPC. Separate sentence was also imposed for the above offences. Aggrieved by the conviction and sentence, this Criminal Appeal is filed. As I stated earlier, now the appeal filed by the appellants Nos.1, 3 and 4 need to be considered because as far as the appeal of

appellants Nos.2 and 5 is concerned, they are no more, and the appeal is abated as far as the sentence of imprisonment imposed on them is concerned.

5. Heard the learned counsel for the appellants and the learned Public Prosecutor.

6. The counsel for the appellants submitted that the entire trial, in this case, is vitiated for a single reason that Section 313 of Cr.P.C statement is not recorded by the lower Court in a manner known to law. According to the counsel, incriminating circumstances are not put to the accused in this case. The counsel submitted that accused were not separately questioned under Section 313 Cr.P.C and the answers of each accused were not separately recorded. According to the counsel, the Sessions Judge prepared certain common questions and put these questions to all the accused together and the answers were recorded. The counsel also submitted that the questions put to the accused were factually wrong also. The counsel submitted that, it will go to the root of the case. According to the counsel incriminating circumstances are not put to the accused and hence there is great prejudice to the appellants and that itself is a reason to set aside the conviction and sentence in the light of

judgment of the Apex Court in **Ranvir Yadav v. State of Bihar [(2009) 6 SCC 595]** and in **Asraf Ali v. State of Assam [(2008)16 SCC 328)]**

7. The Public Prosecutor submitted that simply because there is some mistake in the questions put to the witnesses, the trial is not vitiated. The Public Prosecutor also submitted that after the questioning of the accused together, separate questions were put to all the accused about any additional things to be stated and their answers to that questions were recorded separately. According to the Public Prosecutor there is no prejudice caused to the appellants in this case because Section 313 Cr.P.C statement of the witnesses were recorded together. The public Prosecutor submitted that at the maximum if this Court found that the questioning is not proper the case can be sent back to the trial court.

8. The point for consideration, in this case, is whether the prosecution is vitiated because of the reason that the statement under Section 313 Cr.P.C is not recorded correctly.

9. Section 313 Cr.P.C says about the power of the Court to examine the accused. Section 313 Cr.P.C is extracted hereunder:

> "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. A reading of Section 313 Cr.P.C will show that it is for the purpose of enabling the accused to personally explain any circumstances appearing in the evidence against him. As per Section 313(1)(a) Cr.P.C the questions **may** put at any stage by the Court without previous warning to the accused. Section 313(1)(b) Cr.P.C says that, **the Court 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. The usage of “may” in Section 313 (1)(a) Cr.P.C and “shall” used in Section 313(1)(b) Cr.P.C will show the mandatory nature of the provision in Section 313(1)(b) Cr.P.C.

11. I perused Section 313 Cr.P.C statement recorded by the learned Judge in this case. The questions were put to these accused by the learned Judge together and the answers of the accused are not recorded separately. That itself according to me is not correct. Moreover, I perused the questions put to the accused in this case. It is better to quote some of the questions put to the accused by the learned Judge, which is extracted hereunder:

> “Q) താൻ കൊടുത്ത പരാതിയാണ് Ext.P5 എന്ന് PW5 മൊഴി തന്നിട്ടുണ്ട്.
>
> A) ശരിയല്ല .
>
> Q) സംഭവസ്ഥലം തങ്ങളുടെ കൃഷിസ്ഥലമാണ് എന്നും 6.12.2000 ന്ന് രാവിലെ 9 മണിക്ക് താനും ബാപ്പയും പണിക്കാരും ജോലി ചെയ്യുമ്പോൾ നിങ്ങളും ബന്ധുക്കളും വന്നുവെന്നും പ്രതികളായ നിങ്ങൾ തങ്ങളുടെ അടുത്തേയ്ക്ക് വന്നുവെന്നും എന്തിനാണ് വന്നതെന്ന് ബാപ്പ ചോദിച്ചപ്പോൾ തന്റെ അനുജൻ ഒന്നാം പ്രതിയുടെ അനുജനെ പള്ളിയിൽ വെച്ച് പാണ്ടച്ചൻ എന്ന് വിളിച്ചു ആക്ഷേപിച്ചുന്ന് ഒന്നാംപ്രതി പറഞ്ഞതായി PW5 മൊഴിതന്നിട്ടുണ്ട്.
>
> A) ശരിയല്ല.
>
> Q) തന്റെ മകൻ അങ്ങിനെ വിളിക്കില്ല, വിളിച്ചെങ്കിൽ തന്നെ താൻ

മാപ്പു പറയാം എന്ന് ബാപ്പ പറഞ്ഞതായി PW5 മൊഴി തന്നിട്ടുണ്ട്.

A) ശരിയല്ല

Q) കൊല്ലടാ അവനെ എന്ന് ഒന്നാം പ്രതി പറഞ്ഞപ്പോൾ 5-)o പ്രതി കല്ലു കൊണ്ട് ബാപ്പയെ എറിഞ്ഞെന്നും അത് മുഖത്തും താടിയിലും കഴുത്തിലുമായി കൊണ്ടു ബാപ്പ വീണുവെന്നും അപ്പോൾ ഒന്നും രണ്ടും പ്രതികൾ ഇരുമ്പ് വടികൾ കൊണ്ടും ബാപ്പയുടെ കാലുകൾ അടിച്ചു പൊട്ടിച്ചുന്നും 3 ഉം 6 ഉം പ്രതികളും മരവടികൾ കൊണ്ടു അടിച്ചെന്നും PW4, PW5 മൊഴി തന്നിട്ടുണ്ട്.

A) ശരിയല്ല.

Q) താൻ കുറച്ചകലെ ജോലി ചെയ്യുകയായിരുന്നെന്നും ഓടി എത്തി നിങ്ങളെ മാറ്റാൻ ശ്രമിച്ചപ്പോൾ ഒന്നും രണ്ടും പ്രതികൾ ഇരുമ്പ് വടി കൊണ്ട് തന്നെയും അടിച്ചുന്നും താൻ വീണപ്പോൾ ഒന്നാം പ്രതി ചവിട്ടി എന്നും PW4, PW5 മൊഴി തന്നിട്ടുണ്ട്.

A) ശരിയല്ല

Q) തങ്ങളുടെ നിലവിളി കേട്ടു ആളുകൾ ഓടി എത്തിയപ്പോൾ നിങ്ങൾ പോയി എന്നും പോവുന്ന വഴിക്ക് ഇവിടെ വെച്ച് ചത്തില്ലെങ്കിൽ വീട്ടിൽ വന്ന് തച്ചുകൊല്ലും എന്ന് ഭീഷണിപ്പെടുത്തിയെന്നും PW4 & PW5 മൊഴി തന്നിട്ടുണ്ട്.

A) ശരിയല്ല.

Q) സംഭവത്തെ തുടർന്ന് രണ്ടു വർഷം താൻ ചികിത്സായിലായിരുന്നെന്ന് PW5 മൊഴി തന്നിട്ടുണ്ട്.

A) ശരിയല്ല .

Q) താൻ PW5 ന്റെ സ്ഥലത്ത് പണിയെടുത്തു നിൽക്കുമ്പോളാണ് സംഭവമെന്നും താൻ പേടിച്ചുമാറി നിന്നെന്നും PW6 മൊഴി തന്നിട്ടുണ്ട്.

A) ശരിയല്ല."

12. The above questions put to the accused are factually wrong. For example, the first question put to the accused is that PW5 gave Ext.P5 statement. That is factually wrong. PW4 given Ext.P5 statement. Similarly, the next question is about the version

of PW5. That is also factually wrong. PW5 is the father of PW4. But the question is formulated in a manner by which PW5 is treated as a son. Similarly, the other questions are also factually wrong. I don't want to repeat the same. On a reading of the entire Section 313 Cr.P.C statement recorded in this case, it is clear that the questions were not appropriately formulated and the main incriminating circumstances were not even put to the accused in this case. Moreover, the questions were not asked individually to all the accused and the answers were not recorded separately. Therefore, according to me, prima facie, the recording of Section 313 Cr.P.C in this case is not proper.

13. The Apex Court in **Asraf's** case (supra) considered this point. The relevant portion of the above judgment is extracted hereunder:

> "13. Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. **It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.** The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and

proper that the accused should be questioned about the matter and be given an opportunity of explaining it. **Where no specific question has been put by the trial Court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice.** This Court also expressed similar view in S. Harnam Singh v. The State MANU/SC/0666/1976 : 1976CriLJ913, while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non- indication of inculpatory material in its relevant facets by the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

14. Contextually we cannot bypass the decision of a three- Judge Bench of this Court in Shivaji Sahabrao Bobade v. State of Maharashtra MANU/SC/0167/1973: 1973CriLJ1783 as the Bench has widened the sweep of the provision concerning examination of the accused after closing prosecution evidence. Learned Judges in that case were considering the fallout of omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence. The three- Judge Bench made the following observations therein: (SCC p. 806, para 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." (Emphasis supplied)

14. From the above judgment of the Apex Court, it is clear that the material circumstances appearing in the evidence against the accused is required to be put to him under Section 313 Cr.P.C specifically, distinctly and separately. The failure to do so amounts to a serious irregularity vitiating trial if it is shown that the accused is prejudiced.

15. Admittedly in this case the questions were not put to the accused specifically, distinctly, and separately. Moreover, the questions put to the accused are factually wrong also. Moreover, there is no question in Section 313 Cr.P.C statement as far as the overt acts of accused No.4 is concerned. The apex court, in paragraph 17 of the **Asraf Ali**'s case observed that the questioning under Section 313 Cr.P.C is part of the salutary principle of natural justice enshrined in the maxim *'audi alteram partem'* and that is also relevant in this case. Paragraph 17 of the

above judgement which is extracted hereunder:

> "17. 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."

16. Therefore, in this case, there is total violation of Section 313 Cr.P.C. Similarly, in **Ranvir Yadav**'s case (supra) the Apex Court again considered the relevancy of Section 313 Cr.P.C statements. The relevant portion of the judgment in **Ranvir Yadav**'s case is extracted hereunder:

> "4. The purpose of Section 313 of the Code is set out in its opening words- 'for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him'. In Hate Singh, Bhagat Singh v. State of Madhya Pradesh MANU/SC/0073/1951: AIR1953SC468 it has been laid down by Bose, J that the statements of accused persons recorded under Section 313 of the Code are among the most important matters to be considered at the trial'. It was pointed out that the statements of the accused recorded by the committing magistrate and the Sessions Judge are intended in India to take the place of what in England and in Amercia he would be free to state in his own way in the witness box and that they have to be received in evidence and treated as evidence and be duly considered at the trial. This position remains unaltered even after the insertion of Section 315 in

> the Code and any statement under Section 313 has to be considered in the same way as if Section 315 is not there.
>
> 5. 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 guilty. Where there is an onus on the accused to discharge, it depends on the facts and circumstances of the case if such statement discharges the onus.
>
> 6. The word 'generally' in Sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the Circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give."(Emphasis supplied)

Moreover in **Samsul Haque V State of Assam** (AIR 2019 SC 4163) the apex court reiterated the dictum in **Asraf's Ali's** case.

17. In the light of the above judgment in **Ranvir Yadav**'s case and in **Asraf Ali**'s case, it is now a settled position that the Court should put to the accused, each material circumstances appearing in evidence against him/her specifically,

distinctly and separately. Here in this case, the trial court violated the mandatory provisions of Section 313 Cr.P.C in its letter and spirit.

18. Next question to be decided is that, if any illegality is committed while questioning an accused under Section 313 Cr.P.C, whether it will vitiate the trial. The answer is that, unless some prejudice is caused to the accused, it will not vitiate the trial. In paragraph 17 of the **Asraf Ali**'s case it is specifically stated that if the Court fails to put the needed question under Section 313(1)(b) Cr.P.C, 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. Of course these defects can be cured in appropriate cases by remanding the case to the lower Court or by putting the relevant question by the appellate Court to the accused or his/her counsel and eliciting answers at the appellate stage.

19. In the light of the above principle, I have to consider this case. Admittedly two appellants in this appeal are no more. Therefore the illegality committed while recording the statement under Section 313 Cr.P.C of deceased appellants can't be cured completely by sending the matter back to the trial court. The

illegality in the statement recorded from the deceased appellants will continue. As I said earlier, the questions under Section 313 Cr.P.C were not put to the accused in this case specifically, distinctly and separately. Moreover if the case is remanded for a proper questioning under Section 313 Cr.P.C, the Court will be handicapped to decide the case because there will not be any answers to the questions put to the accused under Section 313 Cr.P.C from the deceased appellants, who faced trial along with other appellants. This is a case in which the appellants are convicted with the aid of Section 149 IPC. So the remand of this case for questioning will not cure the defect in this case. The alleged incident in this case happened in 2000. Now 20 years elapsed. At this distance of time, I don't want to send back this case to the trial court, especially because the illegality committed by the trial court can't be cured completely even after remand, because of the death of the two appellants. In the facts and circumstances of the case, according to me, the appellants are prejudiced because the statement under Section 313 Cr.P.C is recorded not properly. For that simple reason the appellants in this case are entitled the benefit of doubt.

Therefore this Criminal Appeal is allowed. The

conviction and sentence imposed on appellants 1, 3, and 4 are set aside. The appellants are set at liberty. The bail bond, if any executed by them, are cancelled. The appeal filed by appellants Nos.2 and 5 are abated, as far as the sentence of imprisonment is concerned. But in the light of the facts and circumstances of the case, I think the sentence of fine also can be set aside. Therefore, the sentence of fine imposed on the appellants Nos.2 and 5 are also set aside.

Sd/-

P.V KUNHIKRISHNAN

JUDGE

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