



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.805 OF 2018

Nasib Osman Pathan,
Age 32 yrs., Occ. Driver,
R/o Bidkin, Tq. Paithan,
Dist. Aurangabad.

... Appellant

... **Versus** ...

The State of Maharashtra
Through The Police Station Officer,
Police Station, Bidkin,
Tq. Paithan, Dist. Aurangabad.

... Respondent

...

Ms. Anuradha S. Mantri, Advocate for appellant

Mrs. Uma S. Bhosale, APP for respondent

...

**CORAM : SMT. VIBHA KANKANWADI &
ABHAY S. WAGHWASE, JJ.**

RESERVED ON : 07st DECEMBER, 2023

PRONOUNCED ON : 19th DECEMBER, 2023

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present appeal has been filed by the original accused challenging his conviction by learned Additional Sessions Judge, Aurangabad in Sessions

Case No.148/2014, thereby convicting him for the offence punishable under Section 302 of the Indian Penal Code, 1860 on 12.12.2017.

2 What is emerging to be the admitted fact from the record is that deceased Seema got married to accused and they were the only two persons residing at Paithan Ves, Bidkin. Seema was doing the work of preparing food and washing utensils in the canteen of a private company.

3 The prosecution has come with a case that Seema was admitted to GHATI, Aurangabad on 13.01.2014. After the Medico Legal Certificate was given, her statement was recorded at 5.30 p.m. by Police Head Constable Khajekar of Bidkin Police Station. In her statement Seema disclosed that her husband is not doing any work to earn money, however, he used to demand money to her for drinking liquor. When she used to refuse to give money to him, he used to abuse her and ask her to go to her parents house. She has further stated that she came home in the evening from the work on 12.01.2014. She washed the clothes and utensils and prepared food. She was waiting for accused to arrive by lying down on bed. Accused came around 8.00 p.m. and started demanding money to her. When she refused, he started saying that he is not in need of such betrayer wife and then he poured kerosene from bottle on her person. She thought that it is water, but

immediately he lighted the matchstick and threw it on her. When her clothes caught fire, she got up and poured water on her person and doused the fire. She has stated that if she would not have done that, husband would have killed her by ablazing. Her husband fled away from the spot. Her maternal aunt and maternal uncle took her to Bidkin Government Hospital first and then shifted her to GHATI, Aurangabad. She has sustained burn injuries, but she gave the statement when she was in conscious state.

4 The said statement of deceased Seema was treated as First Information Report and offence vide Crime No.8/2014 was registered under Section 307, 498-A of the Indian Penal Code.

5 In the meantime, it appears that the Executive Magistrate was also informed to take dying declaration of Seema and, therefore, her statement was recorded by Executive Magistrate between 2.40 to 3.05 p.m. on 14.01.2014.

6 After the investigation was taken up, panchnama of the spot was got executed, statements of certain witnesses were recorded, however, it appears that Seema succumbed to the injuries on 17.01.2014 and thereafter after executing inquest panchnama her dead body was sent for postmortem.

After the provisional certificate was issued, offence under Section 302 of the Indian Penal Code came to be added. The clothes of the deceased as well as accused came to be seized and prior to that accused came to be arrested. The accused had shown the spot under Section 27 of the Indian Evidence Act and the memorandum and panchnama has been executed. The seized clothes and other articles were sent to chemical analysis. Further statements of witnesses were recorded, documents have been collected and after the completion of investigation charge sheet was filed.

7 The accused was never released on bail and after the committal of the case charge was framed. After denial to plead guilty by the accused, trial has been conducted. The prosecution has examined in all 14 witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides the learned trial Judge has held that the prosecution has proved offence under Section 302 of the Indian Penal Code against the accused beyond reasonable doubt. The accused came to be sentenced to suffer imprisonment of life and to pay fine of Rs.2,000/- (Rupees Two Thousand only), in default to suffer simple imprisonment for two months for the offence punishable under Section 302 of the Indian Penal Code. However, he has been acquitted for the offence punishable under

Section 498-A and 504 of the Indian Penal Code. The appellant challenges his conviction in this appeal filed under Section 374 of the Code of Criminal Procedure.

8 This Court is supposed to re-appreciate and re-visit the evidence that has been led in the matter and then come to the conclusion as to whether the judgment by the trial Court is perverse or not.

9 It has been vehemently submitted on behalf of the appellant that the learned trial Judge has not appreciated the evidence properly. It is the prosecution story that the neighbours of the accused viz. PW 1 Osmankhan, PW 4 Azizkhan, PW 5 Ashrafkhan and PW 6 Halimabee had gone to the spot immediately after hearing noise and got the first time information from Seema that accused had put her to fire, however, they have turned hostile. The case was therefore based on two dying declarations and the other circumstantial evidence. As regards the two dying declarations are concerned, the Police Officer, who recorded the first dying declaration, which has been treated as First Information Report, was no more and, therefore, could not be examined. The said First Information Report came to be exhibited as PW 14 PSI Mr. Gorakh Khandalkar has identified the signature of PHC Khajekar. Exh.74 has been given to the signature which was identified

by PW 14 Gorakh. However, the contents of the said First Information Report have not been proved. PW 12 Dr. Mayur Dalvi is the Medical Officer, who was on duty at the relevant time, has stated that the Seema came to be admitted for burn injuries around 55%. He is the Medical Officer who had given endorsement in respect of dying declaration Exh.74. He is also the person who has given endorsement in respect of dying declaration recorded by Special Executive Magistrate. There was inconsistency in between the two dying declarations though the second dying declaration recorded by the Special Executive Magistrate came to be proved through PW 8 Ashok Nandagawali. There is no mention about demand of money by the accused to her and its refusal by her. Merely by coming back to the house the accused could not have poured kerosene on the person of deceased Seema without any reason and set her to fire. Possibility of either tutoring or as she wanted to create a picture she might have disclosed such fact. If we discard both the dying declarations, there is much scope to infer that the act of catching fire was appears to be accidental in nature. PW 7 Syed Chand is the father of deceased, whose testimony is mainly on the offence under Section 498-A of the Indian Penal Code, however, accused has been acquitted from the said offence. He has stated that accused had given oral dying declaration to him. Therefore, his testimony is not helpful to the prosecution. The prosecution

has not ruled out the possibilities of accidental injuries and, therefore, the learned trial Judge ought to have acquitted the accused appellant.

10 Learned Advocate for the appellant raised a point while arguing the matter which she has not raised in the appeal memo, but since it is a law point she was permitted to raise the same. She submitted that there is absolutely no legal compliance of recording of statement under Section 313 of the Code of Criminal procedure. The statement of the accused under Section 313 of the Code of Criminal Procedure is very cryptic and incriminating material has not been put to him. An opportunity to explain the circumstances against him has been taken away and it has caused prejudice to the accused. The learned trial Judge lost sight of a fact that statement of the accused under Section 313 of the Code of Criminal Procedure is not an empty formality, but here, the preparation of the questions to be put to the accused for his statement under Section 313 of the Code of Criminal Procedure itself has been taken as an empty formality. The learned Advocate, therefore, submits that the trial has vitiated and this is additional point to allow the appeal.

11 Per contra, the learned APP strongly supported the reasons given by the learned trial Judge. He submitted that the hostility of some of the

witnesses i.e. neighbours has not affected the merit of the case. Admittedly the neighbours had come to the spot after the incident. The case is based on two dying declarations of the deceased and the other circumstantial evidence. The scribe of First Information Report Exh.74 or 66 was no more when the evidence started and, therefore, it cannot be said that non examination of the said Police Officer has given any benefit to the accused. The Medical Officer who had given the endorsement regarding the fitness of Seema to give statement has been examined. He has categorically stated that the patient had suffer around 55% burns. He has denied the suggestion that any sedative was given before the recording of dying declaration Exh.74. The burns sustained by Seema were superficial to deep and the autopsy Doctor has stated that the death of deceased was the outcome of the burn injuries which she had sustained. There is absolutely no inconsistency between two dying declarations. The role attributed to the accused is same in both the dying declarations. Therefore, those dying declarations were believable and cogent. Conviction can safely based on the basis of those dying declarations. There is absolutely no perversity in the impugned judgment and, therefore, appeal deserves to be dismissed.

12 Though we can go ahead with the scrutiny and re-appreciation

of the evidence led on behalf of the prosecution, the question that requires to be addressed is in respect of statement of accused under Section 313 of the Code of Criminal Procedure. The very purpose of recording statement of the accused under Section 313 of the Code of Criminal Procedure is to make an opportunity available to him/her/them to explain the incriminating circumstances against them in the evidence adduced by the prosecution. In **Tara Singh vs. State** [AIR 1951 SC 441] (dealing with old Section 342 of the Code of Criminal Procedure which is *pari materia* Section 313 present Code of Criminal Procedure] it is observed thus -

“38. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand. I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether

prejudice has been occasioned or is likely to have been occasioned.”
(Emphasis supplied)

12.1 Further, in **Nirmal Pasi and another vs. State of Bihar** [JT 2002 (6) SC 28 : AIR OnLine 2002 SC 214] it has been observed that -

“The purpose of recording statement under Section 313 of the Code of Criminal Procedure is to enable the accused person to explain any circumstances appearing in the evidence against him. A piece of incriminating evidence relied on by the prosecution and found proved by the Court so as to rest the conviction of the accused thereon must be put to the accused in his statement under Section 313 of the Code of Criminal Procedure Code enabling him to offer such explanation as he may choose to do. Unless that is done, the piece of incriminating evidence cannot be relied on for finding a verdict of guilty.”

12.2 In **Alister Anthony Pareira vs. State of Maharashtra** [(2012) 2 SCC 648] it has been held by the Hon’ble Supreme Court that accused has to show that a prejudice has been caused resulting in miscarriage of justice by not apprising him of the incriminating evidence. It is also for the Courts to consider as to what ought to have been put and what has not been put in the form of question to the accused before coming to the conclusion that it has caused prejudice. We may borrow para No.61 from **Alister Anthony Pareira**

(supra) to explain the point, which is as under :

“61. From the above, the legal position appears to be this: the accused must be apprised of incriminating evidence and materials brought in by the prosecution against him to enable him to explain and respond to such evidence and material. Failure in not drawing the attention of the accused to the incriminating evidence and inculpatory materials brought in by prosecution specifically, distinctly and separately may not by itself render the trial against the accused void and bad in law; firstly, if having regard to all the questions put to him, he was afforded an opportunity to explain what he wanted to say in respect of prosecution case against him and secondly, such omission has not caused prejudice to him resulting in failure of justice. The burden is on the accused to establish that by not apprising him of the incriminating evidence and the inculpatory materials that had come in the prosecution evidence against him, a prejudice has been caused resulting in miscarriage of justice.”

(Emphasis supplied)

13 It is well settled principle of law that the stage of putting incriminating circumstances to the accused and record his statement under Section 313 of the Code of Criminal Procedure is not an empty formality. Under the said circumstance, if a circumstance or circumstances were not at all put to him, then they cannot be used against him. This has been so held in **Sharad Birdhichand Sarda vs. State of Maharashtra** [AIR 1984 SC 1622]. Utmost care has to be taken by the trial Courts while recording such

statement under Section 313 of the Code of Criminal Procedure. Now, after the amendment of Code of Criminal Procedure in 2009 even the Court can take help of the prosecutor as well as the learned Advocate for the defence in preparation of the questions to be put to the accused in Sub Section (5) of Section 313 of the Code of Criminal Procedure. In the nutshell, every circumstance which is worth using against the accused for conviction i.e. incriminating him/her/them should be put in the form of question.

14 Here, in the present case, 14 witnesses have been examined and there are documents on record which have been proved by these witnesses. The 14 witnesses include the Medical Officer, who had certified Seema to be in fit condition to give dying declaration and also the Special Executive Magistrate, who recorded dying declaration Exh.43. However, the trial Court in this case has asked only 16 questions; out of those, question No.1 and questions Nos.12 to 16 are general questions regarding, whether he has heard the evidence, what he wants to say about the case, why prosecution witnesses were deposing against him, whether he wants to examine himself or lead defence evidence and whether he wants to say anything more. Thus, only question Nos.2 to 11 were surprisingly found to be based on incriminating evidence by the learned trial Court. As regards dying

declaration is concerned, there is only one question i.e. question No.11, which says that - it has come in evidence that her dying declaration was recorded, what he wants to say ? This is in respect of a singular dying declaration, whereas there are two dying declarations in this case. The entire statement does not say which witness has stated what. Thus, a very cryptic statement has been recorded and there is absolutely no application of mind while preparing those questions.

15 We would like to take note of **Mohan Baba Janglu Gedam and others vs. State of Maharashtra and others** [2017 (3) Bom.C.R. (Cri.) 85], **Sunil vs. State of NCT of Delhi** [AIR 2023 SC 4822], **Nababuddin @ Mallu @ Abhimanyu vs. State of Haryana** [2023 SCC OnLine SC 1534]. In all these cases, reference has been made to the decision in **Nar Singh vs. State of Haryana** [(2015) 1 SCC 496], wherein Hon'ble Supreme Court has laid down the course available to an appellate Court when it finds that there is failure in putting certain incriminating circumstances to the accused while recording his statement under Section 313 of the Code of Criminal Procedure or there is non compliance of the said mandatory provisions. Paragraph No.30 of **Nar Singh** (supra) is relied in the above said authorities, which we also reproduce here for the sake of convenience :

30. 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 summarized as under :

(i) Whenever a plea of non-compliance of Section 313 of the Code of Criminal Procedure 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 of the Code of Criminal Procedure 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 of the Code of Criminal Procedure 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.

15.1 Taking into consideration the said ratio in **Nar Singh** (supra) it has been observed in **Sunil** (supra) after taking into consideration the other decisions also that -

“44. From the decisions noticed above, the legal position that emerges, inter-alia, is that to enable an accused to explain the circumstances appearing in the evidence against him, all the incriminating circumstances appearing against him in the evidence must be put to him. But where there has been a failure in putting those circumstances to the accused, the same would not *ipso facto* vitiate the trial unless it is shown that its non-compliance has prejudiced the accused. Where there is a delay in raising the plea, or the plea is raised for the first time in this Court, it could be assumed that no prejudice had been felt by the accused.”

15.2 In **Nababuddin** (supra) reliance has been placed on the decision in **Raj Kumar vs. State (NCT of Delhi)** [2023 SCC OnLine SC 609] by summarizing the law on the point that -

“17. The law consistently laid down by this Court can be summarized as under :

(i) It is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction;

(ii) The object of examination of the accused under Section 313 of the Code of Criminal Procedure is to enable the accused to explain any circumstance appearing against him in the evidence;

(iii) The Court must ordinarily eschew material circumstances not put to the accused from consideration while dealing with the case of the particular accused;

(iv) The failure to put material circumstances to the accused amounts to a serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused;

(v) If any irregularity in putting the material circumstance to the accused does not result in failure of justice, it becomes a curable defect. However, while deciding whether the defect can be cured, one of the considerations will be the passage of time from the date of the incident;

(vi) In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him; and

(vii) In a given case, the case can be remanded to the Trial Court from the stage of recording the supplementary statement of the

concerned accused under Section 313 of the Code of Criminal Procedure.

(viii) While deciding the question whether prejudice has been caused to the accused because of the omission, the delay in raising the contention is only one of the several factors to be considered.”

15.3 We would also like to rely on the observations in **Chandrabhagabai w/o Namdev Jagle vs. The State of Maharashtra in Criminal Appeal No.617 of 2015** and companion matter decided on 28.04.2023 by the Division Bench, to which one of us (SMT. JUSTICE VIBHA KANKANWADI) was party, wherein this Court had taken note of the decision in State of U.P. vs. Mohd. Iqram and another [2011(8) SCC 80] and made observations in paragraph No.18 of the judgment in respect of statement of the accused under Section 313 of the Code of Criminal Procedure.

15.4 In **Nababuddin** (supra) and **Raj Kumar** (supra) Hon’ble Supreme Court has refused remand the matter on the ground that it will not be appropriate after a gap of more than 20 years of incident and substantial period of incarceration.

15.5 We hope and trust that all the Judicial Officers would follow proper procedure and the Judicial Academy will take note of directions in **Raj**

Kumar (supra).

16 Here, it is further to be noted that at this stage we are considering it prima facie, the accused has not taken plea of *alibi* but has definitely raised the competency of deceased Seema to make or give statement at the time of admission in the hospital and as aforesaid, there are other documents also in respect of which there is absolutely no question framed. Even sometimes the contents of a document proved may amount to incriminating circumstances and, therefore, that should also be put to the accused if conviction can be based or it can be taken as a linking piece of evidence. Here, definitely, it has caused prejudice to the accused/appellant when an opportunity has been withheld from him to explain those circumstances. Therefore, as per **Nar Singh** (supra) (30.1 as quoted above) we have examined that there is non-compliance with Section 313 of the Code of Criminal Procedure and definitely it appears that the appellant is willing to offer his explanation and, therefore, recourse available to us in paragraph No.30.3 of **Nar Singh** (supra) prompts us in directing re-trial from the stage of recording of statement of the accused as it is the point where the irregularity has occurred. We are of the firm opinion that the accused/appellant is not entitled to acquittal on the ground of non-

compliance with the mandatory provisions under Section 313 of the Code of Criminal Procedure as it has not vitiated the trial, but definitely, a prejudice has been caused due to not putting the said incriminating circumstance and giving an opportunity of explanation to him. This order of sending the matter for re-trial has arisen only because of the failure on the part of learned trial Judge to put mandatory questions. It could have been avoided if proper procedure would have been adopted. Since the then Presiding Officer has now retired, we cannot call his explanation for such basic failure. As it was the duty of the trial Court to put all the incriminating circumstance, we direct the re-trial as aforesaid and, therefore, proceed to pass following order.

ORDER

1 The conviction of the appellant by learned Additional Sessions Judge, Aurangabad on 12.12.2017 for the offence punishable under Section 302 of the Code of Criminal Procedure in Sessions Case No.148/2014 is hereby set aside.

2 The matter is remanded to the trial Court for proceeding afresh from the stage of recording statement of the accused under Section 313 of the Code of Criminal Procedure.

3 The trial Court shall examine the accused afresh under Section 313 of the Code of Criminal Procedure in the light of the above observations and in accordance with the provisions of the law.

4 The trial Court is directed to frame appropriate questions in respect of incriminating circumstance and may also take help of the learned APP and the learned Advocate for the accused in framing the questions.

5 The appellant is in jail since 16.01.2014, hence, the trial Court is directed to expedite the matter and dispose it of in accordance with law, preferably within a period of two months from the date of receipt of copy of this judgment along with the Record and Proceedings.

6 Registrar (Judicial) is directed to send a copy of this judgment along with Record and Proceedings, immediately, to the trial Court.

7 We may also direct the trial Court that if the accused is unable to engage Advocate of his choice, Legal Aid be provided immediately.

8 We make it clear that we have not expressed any opinion on merits of the matter and the trial Court shall not get influenced by any of the observations.

9 The Criminal Appeal, thus, stands disposed of on above terms.

10 Registrar (Judicial) to circulate a copy of this judgment to all
Judicial Officers in the State and a copy to Maharashtra Judicial Academy,
Uttan, Dist. Thane.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

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