



2024:DHC:8698

**IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment delivered on:11.11.2024

+ **CRL.A. 471/2024 & CRL.M.(BAIL) 858/2024****VIJAY PANDEY**

..... Appellant

versus

STATE OF NCT OF DELHI

..... Respondent

+ **CRL.A. 611/2024****RAJU SINGH**

..... Appellant

versus

STATE OF NCT OF DELHI

..... Respondent

Advocates who appeared in this case:

For the Appellants : Mr. Ashwin Vaish, Mr. Vinod Pandey, Mr. Himanshu Pandey, Ms. Ritu Pnadey, Mr. Rohan Nair & Mr. SandeepYadav, Advs.

For the Respondent : Mr. Ajay Vikram Singh, APP for the State. SI Sachin, PS Seemapuri.

CORAM**HON'BLE MR JUSTICE AMIT MAHAJAN****JUDGMENT**

1. The present appeals have been filed by the appellants against the judgment of conviction dated 13.03.2024 ('**impugned judgment**') passed by the learned Additional Sessions Judge ('**ASJ**'),



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Karkardooma Courts, New Delhi and order on sentence dated 08.05.2024 (**'impugned order on sentence'**) in case arising out of FIR No. 302/2011 registered at Police Station Seema Puri for offences under Sections 302/308/323/34 of the Indian Penal Code, 1860 (**'IPC'**).

2. The appellants, by the impugned judgment, were convicted for the offences under Sections 323/304(II)/308/34 of the Indian Penal Code. A tabular statement of the conviction rendered and the sentence imposed by the learned ASJ on the appellants is reproduced below from the impugned judgment. All the sentences were to run concurrently.

Convicts Vijay Pandey and Raju Singh

S.No.	Offence	Sentence Awarded
1.	304(II)/34 of the IPC	Rigorous Imprisonment for a period of 10 years and to pay fine of ₹50,000/- and in default of payment of fine to further undergo simple imprisonment for 6 months each
2.	308/34 of the IPC	Rigorous Imprisonment for a period of 5 years and to pay fine of ₹20,000/- and in default of payment of fine to further undergo simple imprisonment for 3 months.
3.	323/34 of the IPC	Rigorous Imprisonment for a



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		period of 1 year and to pay fine of ₹1,000/- and in default of payment of fine to further undergo simple imprisonment of 1 month.
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Brief Facts

3. The case of the prosecution is that on the night of 03.08.2011, at about 11:30 PM, on 64-foot road near the Gurudwara at DDA Quarters, New Seemapuri, the accused persons—Inder Kumar (alias Titu), Vijay Pandey/appellant in CRL.A. 471/2024, Raju Singh/appellant in CRL.A. 611/2024, and Narender Kumar @ Bittoo—acting in concert, attacked the complainant Raj Kumar, his brother Sanjeev Kumar, and Anil Kumar (who subsequently succumbed to his injuries) with sticks (dandas).
4. Subsequently, FIR No. 302/11 dated 03.08.2011 was registered under Sections 302/308/323/34 of the IPC at PS Seemapuri pursuant to which the appellants were arrested on 04.08.2011.
5. On completion of the investigation, the charge sheet was filed against the accused persons for the offences punishable under Sections 302/308/323/34 of the IPC and the case was sent for trial.
6. On the basis of the material available on record charge was framed against the accused persons under Sections 302/308/323/34 of the IPC, to which they pleaded not guilty and claimed trial. The



prosecution tendered a list of 28 prosecution witnesses to prove the guilt of the accused persons.

7. After the completion of the evidence, the statements of the accused/appellants under Section 313 of the CrPC were recorded on 07.12.2017. At the conclusion of the trial, the learned ASJ convicted the appellants.

8. The learned counsel for the appellants submitted that prime witnesses (PW-1 and PW-2) had already been examined extensively in 2012 and 2013. He submitted that surprisingly PW-1 and PW-2 were again recalled in the year 2019 by the prosecution to fill the lacunae and the conviction has been solely based on their re-examination. It is argued that after the re-examination of PW-1 and PW-2 in 2019, the appellants were not re-examined under Section 313 of the CrPC to address the additional evidence introduced during the re-examinations. This procedural lapse, the learned counsel argued, deprived the appellants of a fair opportunity to counter the revised testimonies.

9. He submitted that that Section 313 of the CrPC mandates that all evidence against an accused be presented to them for explanation. The failure to re-examine the appellants under Section 313 of the CrPC following the re-examination of witnesses in the year – 2019 constitutes a grave procedural lapse. The learned counsel while citing ***Nar Singh v. State of Haryana : (2015) 1 SCC 496***, submitted that non-compliance with Section 313 of the CrPC, particularly in the context of additional evidence, undermines the fairness of the trial and materially affects the accused's right to defend.



10. As the main thrust of argument of the appellants is on the question of non-compliance of Section 313 of the CrPC, I do not propose to consider the appeal on merits, except on the limited question – whether non-compliance of the mandatory provisions of Section 313 of the CrPC vitiates the trial and conviction of the appellants.

11. Before parting with the judgment, it relevant to take note of Section 313 of the CrPC, which reads as under :

“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.”

12. The purpose of Section 313 of the CrPC is well-established: it serves as a procedural safeguard to ensure that the accused have a fair



opportunity to explain any incriminating evidence against them. The language of the section underscores that this examination is not a mere formality; it is a crucial aspect of fair trial standards enshrined within the Indian criminal jurisprudence. The Hon'ble Apex Court in ***Basavaraj R. Patil v. State of Karnataka : (2000) 8 SCC 740***, elucidated the scope of Section 313 of the CrPC and observed as under:

*“18. What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is “for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him”. In *Jai Dev v. State of Punjab* [AIR 1963 SC 612 : (1963) 1 Cri LJ 495] Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focussed on the ultimate test in determining whether the provision has been fairly complied with. He observed thus:*

“The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to inquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity.”

19. Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion.

20. 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.”

13. In the present case, the learned trial court’s failure to re-examine the appellants under Section 313 of the CrPC, following the re-examination of PW-1 and PW-2, deprived them of a vital opportunity to contest this new evidence, thereby impacting their ability to mount an effective defense.

14. The re-examination of PW-1 and PW-2, conducted about seven years after their initial statements, seems aimed at clarifying ambiguities or filling gaps in their original testimonies, which were the main basis for convicting the appellants. This delay raises significant questions about the credibility and reliability of these testimonies and further weakens the trustworthiness of the new details during re-examination.

15. Additionally, the selective re-examination of prosecution witnesses to address specific aspects of the case, particularly after such a long interval, introduces the possibility of improvement in the testimony or adjustments made to align with the prosecution’s narrative.

16. Courts have consistently cautioned against the dangers of “gap-filling” in testimonies through selective re-examinations, as this can compromise the authenticity of the witness’s account.

17. The Hon’ble Apex Court in ***Kuldip Singh v. State of Delhi, (2003) 12 SCC 528***, has held that when an important incriminating circumstance is not put to the accused during examination under



Section 313 of the CrPC, the prosecution cannot place reliance on that piece of evidence. This principle is directly applicable here, as significant new details were introduced during the re-examination of PW-1 and PW-2, which the appellants were not given a chance to respond to under Section 313 of the CrPC.

18. PW-1 was examined on 31.01.2012 where he stated that he was not acquainted with accused persons prior to the incident and only knew accused 'Inder' prior to the incident by face as he was running a milk dairy and did not know his name at the time of incident.

19. In his re-examination on 27.07.2019, PW-1 stated that he came to know about the names of all the four accused at the time of incident itself as they were addressing each other by their respective names while committing the incident.

20. One of the defences raised by the accused persons was that they were not present at the time of the incident. There is certainly an improvement in the statement which was given by PW-1 during his re-examination. His re-examination, as noted above, was conducted approximately seven years after the initial examination.

21. The testimony has been relied upon by the learned Trial Court for convicting the accused persons.

22. Admittedly, the evidence which led to conviction of the appellant was not put to the appellant under Section 313 of the CrPC. Thus, undoubtedly grave prejudice is caused to the appellant by not affording him opportunity to personally explain the circumstances appearing in the evidence.



23. It is mandatory that the accused is given an opportunity to explain the evidence against him which has come on record after the prosecution witnesses are examined and before the accused is called for his defence.

24. The reliance placed by the learned trial court on this newly introduced evidence, without allowing the appellants to explain or challenge them, has compromised the fairness and integrity of the trial process.

25. It is contended on behalf of the prosecution that the argument that the provisions of Section 313 of the CrPC have not been followed is taken for the first time before this Court. The Hon'ble Apex Court in *Nar Singh v. State of Haryana* (*supra*), while addressing a similar argument held as under :

“33. The objection as to the defective Section 313 CrPC statement has not been raised in the trial court or in the High Court and the omission to put the question under Section 313 CrPC, and prejudice caused to the accused is raised before this Court for the first time. It was brought to our notice that the appellant is in custody for about eight years. While the right of the accused to speedy trial is a valuable one, the Court has to subserve the interest of justice keeping in view the right of the victim's family and society at large.”

26. Undisputedly, the said argument has not been taken note of by the learned Trial Court. Therefore, it can be presumed that the same was not taken at that stage. The provisions of Section 313 of the CrPC cast a duty on the Court to mandatorily follow the procedure. Not following the procedure, in some circumstances, cause serious prejudice to the accused which can vitiate the trial. The Court not following the mandatory procedure, cannot be put to the detriment of



the accused when the same causes prejudice and vitiates the trial.

27. As noted above, one of the essential reasons which led to conviction of the accused was the evidence which was recorded in the year 2019. It was admittedly not put to the accused so as to enable him to explain and lead evidence.

28. In some circumstances, the failure on the part of the learned Trial Court to comply with the provisions of Section 313 of the CrPC cannot automatically inure to the benefit of the accused and may not *ipso facto* vitiate the trial. However, once it is apparent that the prejudice has been caused, the error committed by the Court needs to be corrected and can be rectified in appeal even if the same was not pointed or argued before the learned Trial Court.

29. It is also settled law that the appeal is essentially the extension of the trial and thus, does not debar the accused from raising all arguments.

30. Thus, when the accused has shown that prejudice was caused to him, this Court deems it fit to remand the case to examine the appellants again under Section 313 of the CrPC. Section 386 of the CrPC defines the powers of the Appellate Court to order retrial of the case by a Court of competent jurisdiction subordinate to such appellate court and reads as under :

“386. Powers of the Appellate Court.

After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers



that there is no sufficient ground for interfering, dismiss the appeal, or may---

(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction---

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same---

(c) in an appeal for enhancement of sentence---

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or, the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper:

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."

31. In ***Nar Singh v. State of Haryana*** (*supra*), the Hon'ble Apex Court while considering the question whether the Appellate Court can direct a retrial if all the relevant questions are not put to the accused by the trial court as required under Section 313 of the CrPC, answered the question in the affirmative, holding that the Appellate Court may



direct a retrial in such circumstances from the stage of questioning the accused because non-compliance of Section 313 of the CrPC had caused prejudice to the accused:

“30.3. If the appellate court is of the opinion that noncompliance with the provisions of Section 313 CrPC 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 CrPC and the trial Judge may be directed to examine the accused afresh and defence witness, if any, and dispose of the matter afresh.”

32. In light of the foregoing analysis, the present appeal is allowed and the impugned judgment passed by the learned ASJ is set aside. The case is remanded back to the trial court for proceeding with the matter afresh from the stage of recording statement of the under Section 313 of the CrPC in accordance with law. Since the incident pertains to the year 2011, I deem it apposite to request the trial court to expedite the matter and make efforts to dispose of the same in accordance with law preferably within a period of six months from the date of receipt of this judgment.

33. Considering that the appellants were on bail during the trial and were only remanded to custody upon conviction, this Court considers it apposite to admit the appellants on bail on furnishing personal bonds of ₹25,000/- each with one surety of the like amount, on the following conditions :

- a. The appellants shall not directly or indirectly make any inducement, threat or promise to any person



- acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever;
- b. The appellants shall under no circumstance leave the boundaries of the country without the permission of the learned Trial Court;
 - c. The appellants shall appear before the learned Trial Court as and when directed;
 - d. The appellants shall provide the address where they would be residing after their release and shall not change the address without informing the concerned IO/ SHO;
 - e. The appellants shall, upon their release, give their mobile numbers to the concerned IO/SHO and shall keep their mobile phone switched on at all times.
34. The present appeals are allowed in the aforementioned terms. Pending application(s) also stand disposed of.
35. A copy of this judgment be placed in both the matters.

AMIT MAHAJAN, J

NOVEMBER 11, 2024
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