REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2079 OF 2009

Liyakat and Another ....Appellants

Versus

State of Rajasthan ....Respondent

JUDGMENT

M.Y. EQBAL, J.

This appeal by special leave is directed against the judgment and order dated 4th February, 2009 passed by the High Court of Rajasthan at Jodhpur in D.B. Criminal Appeal No.304 of 2003 whereby the High Court partly allowed the appeal of the appellants and remanded the matter to the Trial Court for further trial.

2. The facts of the case in brief are that on 25.07.1999 at 2.00 P.M., one Mustaq Khan resident of Rajpura submitted a written typed report at Police Station Dudwakhara alleging inter alia that his two daughters Jumila and Bulkesh were married to two brothers Liyakat and Jakir of village Jhariya on 11.6.1993. After marriage, his daughters told that their father-in-law Ajeem Khan and mother-in-law Jannat harassed them for dowry, and therefore, as and when they used to come, the informant was giving necessary articles of dowry. It was further alleged that some three years ago, when Liyakat had gone abroad, a demand of Rs.40,000/- was made and the informant arranged to give the money after mortgaging his household articles. Still daughters were treated with cruelty, inasmuch as, they were not even given food. It is also alleged in his report that some two months ago, Liyakat, (husband of deceased daughter Jumila) returned back from abroad (Dubai) and raised a

demand of she-buffalo, which was conveyed by Jumila to the effect that if she-buffalo is not given, she would be killed. However, the informant could manage a cow and sent his daughter with a cow to her in-laws house. Mr. Khan alleged in his report that on 23.7.1999, he received information that Jumila has died. Thereupon, he along with his brother Sattar Khan went to Jhariya, by which time it was already night and it started raining as well. The dead body of Jumila was already buried and the body was not shown to him. It is alleged that his other daughter Bulkesh was unconscious at that time, and therefore, they brought her with them.

3. On 24.7.1999, after gaining consciousness, Bulkesh disclosed that the three accused persons have murdered Jumila by throttling, which she had seen and consequently become unconscious. She also disclosed that the accused planned to kill her also but she does not know as to how she was not killed and that three persons gave beating and

killed Jumila on account of her having taken cow instead of buffalo. On learning this, the informant Mustaq Khan along with his brother Sattar, Inayat Khan, Nawab Khan, Yakub Khan, Wahid Ali, Bhanwaru Khan and Kasam Khan went to Jhariya and narrated the things disclosed by Bulkesh. Thereupon, the three accused confessed their guilt that they had collectively killed Jumila, which was their mistake and they should be pardoned.

4. On the basis of his report, FIR No.76/99 was registered for offence under Sections 498-A, 304B and 201 of the Indian Penal Code, (in short, 'IPC'). Postmortem of the dead body was got conducted, site map and *Halat Mauka* was prepared, statements of witnesses were recorded, documents were seized, accused persons were arrested. After the investigation, chargesheet was filed against accused persons in the competent Court.

5. The trial court framed charges for the offences under Sections 302 or in the alternative 302/34 read with Section 201 and 498A of the Indian Penal Code and the trial was commenced. During trial, statements of some five witnesses were recorded upto 9.5.2000. Thereafter, accused Liyakat could be arrested from Delhi Airport and fresh trial was conducted by re-examining the witnesses, whose statements had already been recorded. This fresh trial commenced on 9.10.2000, wherein the prosecution examined 13 witnesses to prove the charges and several documents including written report, site map, memo of dead body, Panchayatnama, statement of Inayat Khan, seizure memo, postmortem report etc. have been exhibited as evidence.

6. The statement of accused persons under Section 313 of the Code of Criminal Procedure (in short, 'Cr.P.C.') were recorded, wherein the accused persons have refuted the prosecution evidence. The accused Ajeem Khan (father-in-

law of deceased Jumila) stated that his son Liyakat used to live in Dubai. Liyakat's wife used to tell him to take her to Dubai, but due to unavailability of accommodation there, he showed his inability to take her with him. So she committed suicide by hanging herself with the hook of fan with the help of her Chunni. He sent information to her paternal house and her father and father's elder brother came to village Jhariya along with mother and Bhabhi of the deceased, and Jumila was buried in their presence. At the instructions of some people, this false case has been lodged. They never demanded dowry from the Jumila and her father. The other accused also averred the same thing.

7. The trial court convicted all the three accused persons. Accused Liyakat was sentenced to undergo life imprisonment and a fine of Rs.1000/- for the offence under Section 302, IPC. In default of payment of fine, to further undergo six months simple imprisonment. For the offence under Section 498A IPC, he was sentenced to undergo

rigorous imprisonment of one year and a fine of Rs. 500/- and RI for one year and a fine of Rs. 500/- for the offence under Section 201 IPC. Another accused Ajeem Khan and Jannat were sentenced to undergo life imprisonment and fine of Rs. 1000/- each for the offence under Section 302/34 IPC. In default of payment of fine, to further undergo six months S.I. The accused Ajeem Khan and Jannat were sentenced to undergo RI for one year and a fine of Rs. 500/- each for the offence under Section 498A IPC and in default of fine to undergo three months SI each. And they were also sentenced to undergo RI for one year and a fine of Rs. 500/- each for the offence u/s 201 IPC. The sentences were ordered to run concurrently.

8. Aggrieved by the judgment passed by the Additional Sessions Judge (Fast Track) Churu, the accused persons challenged the above decision before the High Court of Judicature for Rajasthan at Jodhpur. It may be noted here that during the pendency of the appeal before the High

Court, accused Ajeem Khan died and his appeal was ordered to have abated. The High Court while partly allowing the appeal and remanding the matter to the trial court for further trial, held that in the present case, various material circumstances appearing against the accused from the material on record have not been put to accused under Section 313, Cr.P.C. The High Court observed that:-

> "..The question then is as to what is the consequence i.e. whether notwithstanding any other material being there on record which by itself may or may not be sufficient to convict the accused simply for the omission on the part of the learned trial court to put certain or few important circumstance to the accused in his statement under Section 313, the accused should be allowed to go scot-free solely on that ground or whether in every case, where despite the fact that there is no reliable evidence on record to convict the accused still since he has been convicted by relying upon certain circumstances not put to the accused under Section 313, in every case as a rule, the trial should be held vitiated and the matter should be remanded back to the learned trial court or whether the importance and significance of the circumstances omitted to be put to the accused is required to be considered in the sense that the conviction should be upheld if even after excluding those circumstances, the conviction can be upheld. We are to consider as to out of these various options, which is to be chosen in circumstances, where certain circumstances have not been put to the accused in his statement under Section 313.

> Laying down any other straight-jacket formula would cause great hardship sometime on the prosecution and sometime on accused. The accused cannot be allowed to go scott-free simply on the basis of the fact that all evidence has not been put on him under Section 313 even though there is sufficient material available on record as in that event the possibilities are not ruled out about unscrupulous accused managing to have omissions in the statement under Section 313 and claim immunity even in heinous offences. Likewise, where there is no material on record against the accused, then also the trial cannot be prolonged simply for the lapse of the officer in not putting the appropriate questions to the accused".

9. The High Court further held that:-

> "Before parting with the case, it may be observed that it is on account of the perfunctory manner of recording statement under Section 313 that the matter is required to be remanded with the further result that one of the accused person, who is in jail and is to face the continued prolonged trial for no fault of his. The officers, at least in R.H.J.S. cadre, are supposed to know the importance of proper recording of the statements of the accused under Section 313 as highlighted in series of judgments, some of which have been noticed in this judgment. The observations may be sent to the officer concerned and may also be brought to the notice of the Hon'ble Chief Justice if His Lordship feels appropriate to take any disciplinary action".

10. Hence, the present appeal by special leave by two accused persons. As noticed above, accused Ajeem Khan

died during the pendency of the appeal before the High Court.

11. We have heard Mr. Pallav Shishodia, learned senior counsel appearing for the appellants and Mr. Jayant Bhatt, learned counsel for the State of Rajasthan and perused the papers placed before us including the original record received from the lower courts.

12. Mr. Shishodia, learned senior counsel contended on behalf of the appellants that the purpose of examination of an accused under Section 313, Cr.P.C., 1973 is to enable the accused personally to explain any circumstances appearing in the evidence against him. The object is to benefit the accused and not to nail him to any position in compliance of principle of natural justice *audi altram partem*. He relied upon the decision of this Court in ***Basavaraj R. Patil vs. State of Karnataka,*** (2000) 8 SCC 740, and ***Ajay Singh vs. State of Maharashtra,*** (2007) 12 SCC 341.

13. Contending that the power of Appellate Court hearing a Criminal Appeal to order for a retrial would result in *de novo* trial of entire matter which should be ordered in exceptional and rare cases only when such course of fresh trial becomes indispensable to avert failure of justice. Mr. Shishodia, learned senior counsel relied upon the decision of this Court in ***Mohd. Hussain @ Julfikar vs. State (Govt. of NCT of Delhi),*** (2012) 9 SCC 408, ***State of M.P. vs. Bhooraji & Ors.,*** (2001) 7 SCC 679 and ***Ganesha vs. Sharanappa & Anr.***, (2014) 1 SCC 87.

14. According to learned senior counsel, in the present case, there appears no major omission on the part of prosecution to put its case and/or material evidence or circumstances for explanation by accused appellants. He contends on behalf of the appellants that the accused appellants have explained the same and/or cross examined the prosecution witness on all material

aspects. Therefore, the course of partial remand adopted by the High Court in the impugned judgment is not justified even on facts, much less in law especially when accused appellants have not raised the grievances that the trial is vitiated by not being given opportunity to explain the material evidence and/or circumstances allegedly against accused. Mr. Shishodia submitted that in any case this failure, if any, can be addressed by seeking explanation of counsel for accused appellants by the Appellate Court.

15. Concluding his arguments, learned senior counsel appearing for the appellants drew our attention to the case of ***Fahim Khan and another vs. State of Bihar***, (2011) 13 SCC 147, wherein this Court in somewhat similar circumstances was pleased to remit the matter back to the High Court for decision on merits.

16. The High Court proceeded on the basis that there is perfunctory examination of the accused under Section

313 Cr.P.C. The High court further proceeded on the basis that the trial court has used it against the accused and considered the circumstances viz. that immediately after the alleged suicide, the accused persons did not give any report to the police after her unnatural death with the result that enquiry under Section 174 could not be done. The relevant portion of the High Court judgment is quoted hereinbelow:-

> "If the present case is considered from the above standpoint, as we have found that the learned trial Court has used against the accused and considered the circumstances viz., that immediately after the alleged suicide the accused persons did not give any report to the police about her unnatural death with the result that an inquiry under Section 174 could not be done and no reason has been put forward by the accused for not lodging the report. Similarly, the learned trial Court has relied upon Ex.P/4A and the statement of P.W.10 that in the Halat Mauka, the door was got bolted from inside and it did get opened on being pushed from outside. Likewise, the learned 40 trial Court has also considered that in the site plan Ex.P/4 at Point E a 15 inch x 15 inch hole has been made anew in the 9 inch thick wall in an attempt to show it to be a case of suicide and hole having been made with a view to show an attempt on the part of the accused to save the deceased while there was no justification for making this opening and thus a false story of suicide has been projected. Similarly the learned trial Court has also considered that the accused Liyakat despite being

> husband of the deceased could not be arrested after the incident and could be arrested only on 15.5.2000 and this absconding of the accused also confirms his being guilty. In our view, in this regard there is material on record being Ex.P/21 the warrant having been obtained for arresting the accused, the fact is that challan was filed against the accused under Section 299 and in that trial statements of 5 witnesses were recorded and then after arrest of the accused Liyakat, the matter was retried. Then we also find that the learned Public Prosecutor has pressed into service the circumstance that as deposed by Mustaq P.W.1 that information about the death of Jumila was not conveyed to them and she was buried as a incriminating circumstance against the accused. We have found that all these circumstances have not been put to the accused in his statement under Section 313 and those circumstances by themselves so also in conjunction with the existing material on record with regard to which we do not propose to express any opinion either ways lest it should prejudice the case of either side, does have material bearing on the aspect, as to whether the accused/s can be convicted or are entitled to be acquitted."

17. On the basis of the aforesaid finding, the High Court allowed the appeal, set aside the judgment of the trial court and remanded the matter back to the trial court to retry the matter at the stage of completion of prosecution evidence and seek explanation of the accused

with respect to all the circumstances appearing against them.

18. Prima facie, we do not agree with the view taken by the High Court remanding the matter back to the trial court for retrial. Section 313 of the Code 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"

19. 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 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.

20. In the case of ***Sharad Birdhi Chand Sarda vs. State of Maharashtra***, AIR 1984 SC 1622, this Court observed that when no question has been put to the appellant in the course of his examination under Section 313 Cr.P.C. about any ill-treatment of the deceased by the appellant or his parents and if the explanation has not been sought for, by putting the circumstances to the

appellant-accused in his examination under Section 313 Cr.P.C. that has to be excluded from consideration.

21. In the case of ***Shivaji Sahabrao Bobade and Anr. vs. State of Maharashtra,*** (1973) 2 SCC 793, three Judges Bench of this Court considered the provision of Section 313 of the Code. Writing the judgment, Justice Krishna Iyer, J. observed:-

> "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. In such a case, the Court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342, CrPC, the omission has not been shown to have caused prejudice to the accused.

22. In the case of ***S. Harnam Singh vs. State (Delhi Admn.)***, (1976) 2 SCC 819, this Court held as under:-

> "22. Section 342 of the Cr.PC, 1898, casts a duty on the Court to put, at any enquiry or trial questions to the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in evidence against the accused is required to be put to him specifically, distinctly and separately. Failure to do so amounts to a serious irregularity vitiating the trial if it is shown to have prejudiced the accused. If the irregularity does not, in fact, occasion a failure of justice, it is curable under Section 537 of the Code.
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> 23. In the instant case, as already observed, the time of the actual exit of the goods in question from the Mills was a vital circumstance appearing in the prosecution evidence. Indeed, Counsel for the respondent has primarily staked his arguments on it to show that the goods could not have reached the Goods Shed before 10 a.m. on the 11th. In view of Section 342, therefore, it was incumbent on the trial Court to put this circumstance clearly and distinctly to the

accused during his examination. The failure to do so amounts to a grave irregularity. The gravity of this irregularity was accentuated by another lapse on the part of the prosecution. That lapse was the failure to produce three crucial witnesses, namely, Chiranjilal, the truck driver, Mukand Lal, the Marker, and Om Parkash, the Railway Gate Clerk with his record. It may be noted that these witnesses were cited by the prosecution in the calendar of witnesses and were required to appear along with the records maintained by them. But subsequently, without good reason, they were given up. They were the persons who could give the best and direct evidence with regard to the receipt of these goods in the Goods Shed. The non-production of this evidence has certainly prejudiced the fair trial of the appellant.

24. Mr. H.R. Khanna points out that the question of the appellant being prejudiced owing to the failure of the prosecution to put this circumstance to him in examination under Section 342, was not raised in the Courts below, and consequently, the appellant is debarred from raising it now."

23. In the case of ***Asraf Ali vs. State of Assam,*** (2008) 16 SCC 328, this Court held that:-

"21. 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 a 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 prejudice.
>
> 22. 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 a similar view in S. Harnam Singh vs. State (Delhi Admn.) (1976) 2 SCC 819 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 facts by the trial court to the accused adds to the vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

24. In the case of ***Paramjeet Singh @ Pamma vs. State of Uttarakhand,*** (2010)10 SCC 439, this Court after considering the earlier views of this Court observed in para 13 as under:-

> "13. Though a conviction may be based solely on circumstantial evidence, this is something

that the court must bear in mind while deciding a case involving the commission of a serious offence in a gruesome manner. In Sharad Birdhichand Sarda vs. State of Maharashtra, this Court observed that it is well settled that the prosecution's case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence put up by the accused. However, a false defence may be called into aid only to lend assurance to the court where various links in the chain of circumstantial evidence are in themselves complete. This Court also discussed the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone and held as under: (SCC p. 185, para 153)

"(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established,

* * *

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused." (emphasis supplied)

25. In the case of ***Alister Anthony Pareira vs. State of Maharashtra,*** (2012) 2 SCC 648, the provision again came for consideration before this Court, when it held 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."

26. 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.

27. 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 PW-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.

28. 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.

29. 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.

30. Learned counsel for the respondent-State submitted that the trial court has gone into the merits of the case. He fairly submitted that it is not a case where matter is to be remanded back to the trial court for deciding fresh as held by the High Court.

32. Taking into consideration the entire facts and circumstances of the case and the law discussed, hereinbefore, we are of the opinion that the High Court has erred in law in setting aside the trial court judgment and remanding the matter back for retrial and afresh decision. It is a fit case where the High Court should decide the appeal on merit.

33. For the reasons aforesaid, we dispose of this appeal, set aside the judgment and order passed by the High Court and remand the matter back to the High Court to decide the appeal on merit in accordance with law. The appellants shall remain on bail till further orders of the High Court in the matter.

.....J.
(M.Y. Eqbal)

.....J.
(Abhay Manohar Sapre)

New Delhi
September 26, 2014.