

(1998) 12 GAU CK 0035
In the Gauhati High Court
Case No : Criminal Appeal No. 132 of 1998

Abdul Mussabir Mazumdar and Others	APPELLANT
Vs	
State of Assam	RESPONDENT

Date of Decision : 23-12-1998

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 233, 313, 313(1), 314, 342
Penal Code, 1860 (IPC) — Section 102, 120B, 302, 34

Citation : (1998) 4 GLT 420

Hon'ble Judges : P.C. Phukan, J; D.N. Choudhury, J

Bench : Division Bench

Advocate : C.R. Dey, H.R.A. Choudhury, M.H. Rajborbhuyan and I.A. Hazarika, for the Appellant; J. Singh, Public Prosecutor, S.A. Laskar, A. Rashid and S. Rahman, for the Respondent

Judgement

D.N. Chowdhury, J.—This appeal arises out of and directed against the judgment and order of conviction and sentence passed by the learned Addl. Sessions Judge, Cachar, in Sessions Case No. 33/95 on 12.6.98, by which the accused Appellants, viz. Abdul Mussabir Mazumdar, Habibur Rahman, Abdul Latif, Md. Kamrul Islam Mazumdar, Anar Ali Mazumdar, Rafique Uddin and Khokan Barbhuiya, were convicted under Sections 120B and 302/34 IPC, and sentenced each of them with imprisonment for life and to pay a fine of Rs. 1000/- each in default, to undergo rigorous imprisonment for further one month for the offence u/s 302/34 IPC; for the offence u/s 120B IPC, each of the accused was sentenced to undergo rigorous imprisonment for a period of six months.

2. Barkhola Police Station Case No. 125/90 was initiated at the instance of Sahebudas Panika and Sanjit Chakraborty, reported at the Barkhola Police Station on 28.6.90 that a severed dead body was found lying near the Halflong Road. Investigation was taken-up by the Sub-Inspector of Police and the Investigating officer visited the place of occurrence, recovered the severed dead body, took photograph of the same and sent the dead body for post-mortem examination to

the Silchar Medical College. On 6.7.90, P.W. 6, Abdul Haque, appeared at the Barkhola Police Station and identified the dead body to be that of his younger brother, Mainul Haque. After investigation, the Police submitted Final Report and the learned Chief Judicial Magistrate, Cachar, by his order dated 6.12.90, accepted the Final Report submitted by the Sub-Inspector of Police and discharged the accused were arrested, and also passed orders for destroying the seized cloths and to return the other seized articles from whom those were seized. On an revision application filed, the learned Sessions Judge, Cachar, directed the investigating officer of the case to re-investigate the case and on conclusion of re-investigation, the police submitted charge sheet against the accused persons under Sections 120B, 302/102 IPC. On committal, the learned trial Court framed charges u/s 120B and 302/ 34 IPC against the accused. During trial, the prosecution examined as many as nineteen, witnesses including the Investigating Officer, Constables and Medical Officer. Admittedly, the entire case hinge on circumstantial evidence. The learned trial Court, considering the evidence on record, acquitted Begum Bibi and convicted and sentenced the other seven accused persons as indicated above. Hence the appeal.

3. We have heard the learned Counsel for the at length. Mr. C.R. Dey, learned Senior Counsel appearing on behalf of the accused/Appellants submitted that the prosecution miserably failed to prove the case against the accused persons beyond all reasonable doubts and, therefore, all the accused Were entitled to acquittal. The learned Senior counsel took us through the entire evidence on record to bring home the contention that the prosecution failed to established the circumstantial evidence from which a conclusion could be drawn about the involvement of the accused in the commission of the offence under which they have been convicted. Mr. Dey pointed out that the circumstances those were relied upon by the prosecution, are not compatible to the guilt of the accused persons and, therefore, the conviction is unsustainable in law.

4. Mr. Joginder Singh, learned Public Prosecutor, on the other hand seriously contested the case and submitted that this is a foolproof case where the learned trial Court rightly convicted the accused/Appellants.

5. While going through the materials on record, we were confronted with the statements recorded u/s 313 of the Code of Criminal Procedure. In purview, the learned. Sessions Judge failed to assiduously cany-out his duty while recording the statements u/s 313 Code of Criminal Procedure. There are about five or six circumstances which were mainly sought to be relied upon by the prosecution including the alleged false explanation given by the accused about the whereabouts of the deceased after their return and misleading the mother of the deceased of the prosecution pertaining to the lodging of the FIR as well as the circumstances under which the accused were last seen together as also the photograph and other materials which were sought to be relied upon by the prosecution, were not confronted to the accused persons.

6. Examination u/s 313 of the Code of Criminal Procedure has its own object and

meaning which is basically introduced for providing a fair trial to the accused. Section 313 Code of Criminal Procedure confers a power on the trial Court to examine the accused. It is a power coupled with duty bestowed upon the court to provide opportunity to the accused personally to explain aint circumstance appearing against him in the evidence, By this provisions, the Court is required to examined the accused after evidence for the prosecution is taken. The entire object of this provision is to give opportunity to the accused for explaining any circumstance which may tend to incriminate him as well as to enable the court to assess the case in its entirety. It is a important duty cast on the Court to guarantee a fair trial as envisaged under Article 21 of the Constitution of India. The accused is to be properly examined as per the mandate of this Section and all the evidence which are considered important and against the accused basing on which conviction is sought to be made, the accused is to be questioned about all those circumstances and subject-matter and be given an opportunity to explain those curcumstances. A solemn duty is cast upon the Court to question the accused properly and fairly to enable the accused to meet what is brought on against him m clear words and thereby giving him an opportunity to explain any point against him. It is an important and solemn task which is not to be whittled down. The importance of examination u/s 313 Code of Criminal Procedure is emphasised by the Supreme Court in a number of cases. In the case of Tara Singh Vs. The State, the Supreme Court dealing with Section 342 (old) Code of Criminal Procedure 1898, made the following observation:

Section 342 requiers the accused to be examined for the purpose of enabling him to explain any circumstances apearing in the evidence against him." Now it is evident that when the Sessions Court is required to make the examination under this section the evidence referred to is the evidence in the Sessions Court and the circumstances which appear against the accused in that Court. It is not therefore enough to read over the questions and answers put in the Committing Magistrate"s Court and ask the accused whether he has anything to say about them. In the present case, there was not even that. The Appellant was not asked to explain the circumstances appearing in the evidence against him but was asked whether the statements made before the committing Magistrate and his answers given there were correctly recorded. That does not comply with the requirements of the section. There is also more than that in this case. The evidence recorded in the committal Magistrate"s court is not as full and as complete as the evidence recorded in the trial before the Sessions Judge. Accordingly, it of en happens that evidence is given in the sessions court and facts are disclosed which do not appear on the recorde of the committing Magistrate. If the Judge intends to use these against the accused it is clearly not enough to question him about matters which occurred in the committal court for material of this kind will not be found on the Sessions record in these circumstances. That has happened here.

The High Court has fallen into the same error and has based its decision on material which the Appellant was not asked to explain. For example, the learned

Judges rely on the evidence of the three eyewitnesses before committing magistrate they also rely on the fact that Narindar's evidence in the Committing Magistrate's Court corroborated by the First Information which he gave to the Police. The Appellant was not questioned about these matters either in the sessions Court or by the committing Magistrate. The High Court also relies on the three witnesses who speak about the extra-judicial confession and the learned Judges state that these witnesses are not suggested to be in any way unfriendly to the Appellant and they seem to be persons of respectability, here again, if the Appellant was not asked whether these witnesses were unfriendly or not, it is not fair to use the absence of such a suggestion as something which tells against the Appellant. It is true the accused can cross-examine as to competency but he is not confined to that. It may be that in a given case cross examination would be futile, for it would only elicit a denial, whereas a statement made by the accused which the code directs should be used as evidence for or against him, might be of great value. In any event the code directs that the accused shall be afforded these opportunities and an omission to do so vitiates the trial if prejudice occurs or is likely to occur.

I cannot stress too strongly the importance of observing faithfully and fairly the provisions of Section 342, Code of Criminal Procedure. It is not a proper compliance to read out a long string of questions and answers made in the committal Court and ask whether the statement is correct. A question of that kind is misleading. It may mean either that the questioner wants to know whether the recording is correct, or whether the answers given are true, or whether there is some mistake or misunderstanding despite the accurate recording. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to be used against him. 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. In my opinion, the disregard of the provisions of Section 342, Code of Criminal Procedure, is so gross in this case that I feel there is grave likelihood of prejudice.

7. A similar view was pithily expressed by the Supreme Court in the case of

Sharad Birdhichand Sarda Vs. State of Maharashtra, and in the case of State of Maharashtra Vs. Sukhdeo Singh and another Vs. State of Maharashtra Through C.B.I. Vs. Sukhdev Singh alias Sukha and others, relevant portion of which reads as follows:

Section 313 of the code is a statutory provision and embodies the fundamental principle of fairness based on the maxim *audi alteram partem*. It is triate law that the attention of the accused must be specifically invited to inculpatory pieces of evidence or circumstances laid on record with a view to giving him an opportunity to offer an explanation if he chooses a heavy duty on the court to take great care to ensure that the incriminating circumstances are put to the accused and his response solicited. The words "shall question him" clearly bring out the mandatory character of the clause and cast an imperative duty on the Court and confer corresponding right on the accused to an opportunity to offer his explanation for such incriminating material appearing against him. It is, therefore, true that the purpose of examination of the accused u/s 313 is to give the accused an opportunity to explain the incriminating material which has surfaced on record. The Stage of examination of the accused under Clause (b) of sub-section (1) of Section 313 reaches only after the witnesses for the prosecution have been examined and before the accused called on to enter upon his defence. At the stage of closure of the prosecution evidence and before recording of statement u/s 313, the learned Judge is not expected to evaluate the evidence for the purpose of deciding whether or not he should question the accused. After Section 313 stage is over he has to hear the oral submission of counsel on the evidence adduced before pronouncing on the evidence. The learned trial Judge is not expected before he examines the accused u/s 313 of the code, to sift the evidence and pronounce on whether or not he would accept the evidence regarding any incriminating material to determine whether or not to examine the accused on that material. To do so would be to pre-judge the evidence without hearing the prosecution u/s 314 of the code. Therefore, no matter how weak or scanty the prosecution evidence is in regard to a certain incriminating material, it is the duty of the Court to examine the accused and seek his explanation thereon. It is only after that stage is over that the oral arguments have to be heard before the judgment is rendered. It is only where the court finds that no incriminating material has surfaced that the accused may not be examined u/s 313 of the Code. If there is material against the accused he must be examined. In the instant case, it is not correct to say that no incriminating material had surfaced against the accused, particularly accused No. 5, and hence the learned trial Judge was not justified in examining the accused u/s 313 of the code.

8. Circumstances which are not put to the accused in examination u/s 313 of the code, cannot be used against the accused and have to be excluded from consideration. The Court is to sum-up the evidence and put to the accused the necessary question which appear from the evidence. It is for the court to decide the question and put the same to the accused. If the examination u/s 313 Code

of Criminal Procedure is not properly made, the trial becomes a suspect and in that view of the matter, the courts are to take necessary care in this regard.

9. When the case is based on circumstantial evidence only, it is of vital importance that all the material circumstances which clinch the issue against the accused are to be put to the accused and seek explanation from the accused. When an evidence is considered against the accused and the conviction is to be based on the said piece of material, then fairness demands that the accused be questioned on the matter and provide him the opportunity to explain the same. Section 313 of the code imposes a duty upon the court to question the accused fairly and judiciously to enable the accused to meet the case. The accused must be questioned separately about each material circumstance those are intended to be used against the accused. The Court should not however hold an inquisitorial proceeding. The accused also should not be subjected to cross-examination. The accused also is not to be examined to fill-up a gap in the prosecution evidence. The court is to act strictly in conformity with the provisions of the statute to dispense justice to the parties.

10. We have already indicated the infirmity so far as examination of the accused u/s 313 Code of Criminal Procedure is concerned and on that count alone, we set aside conviction and sentences of the accused/Appellants and remand the matter to the learned Sessions Judge, Cachar, to proceed with the trial of the case from stage of examination of accused u/s 313 Code of Criminal Procedure and after completion of the examination, the learned trial Court shall hereafter call upon the accused persons to enter on their defence and adduce any evidence/explanation the accused may have in support thereof as indicated in Section 233 of the Code of Criminal Procedure.

11. As the matter is old and pending since a long time, it is expected that the learned Sessions judge shall conclude the trial within a period of two months from the date of receipt of the records of the case.

12. At this stage, Mr. C.R. Dey, learned senior counsel appearing on behalf of the accused/Appellants made a prayer for bail of the accused, more particularly accused/Appellants, Abdul Mussabir Mazumdar and Md Kamrul Islam Mazumdar, on medical ground. Considering the medical evidence, we allow Abdul Mussabir Mazumdar, son of late Guler Ali Mazumdar, to go on bail of Rs. 20,000/- with two local sureties each of the like amount to the satisfaction of the learned Sessions Judge, Cachar, subject to the condition that accused, Abdul Mussabir Mazumdar, shall give an undertaking to appear personally before the learned Sessions Judge on each day of trial, and that he shall not leave Silchar Town. It would be open for the learned Sessions Judge to cancel the bail whenever he finds that the accused/Appellant Abdul Mussabir Mazumdar causes any impediment in fair and expeditious trial. The prayer for bail of the other accused persons including that of Md Kamrul Islam Mazumdar, is rejected. Send down the records to the trial Court forthwith by a special messenger.