
(1996) 09 BOM CK 0016
In the Bombay High Court
Case No : Criminal Appeal No. 129 of 1993

Bhavlal Shankar Mahajan

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 06-09-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 391

Citation : (1997) CriLJ 3060 : (1997) 2 MhLj 709

Hon'ble Judges : V.K. Barde, J; N.P. Chapalgaonkar, J

Bench : Division Bench

Advocate : R.D. Mane, for the Appellant; S.B. Bhapkar, Assistant Public Prosecutor, for the Respondent

Judgement

1. The appellant is convicted for offence punishable u/S. 302 of Indian Penal Code and sentenced to suffer life imprisonment and to pay fine of Rs. 1,000/- in default of payment of fine, rigorous imprisonment for one year. Being aggrieved by this conviction and sentence, this appeal is filed.
2. When the appeal first came up for hearing, it was noticed that the doctor who had performed post-mortem examination was not examined as a prosecution witness in the trial Court. However, the post-mortem examination report was admitted by the accused u/S. 294 of the Code of Criminal Procedure. Therefore, it was admitted in evidence and was placed at Exhibit 9.
3. The learned Additional Public Prosecutor filed Criminal Application No. 1153/1996 for adducing additional evidence as per the provisions of Section 391 of the Code of Criminal Procedure. The said application was allowed as per the order passed on 3-7-1996.
4. The record and proceedings were transmitted to the trial Court for recording the additional evidence of the medical Officer who had performed post-mortem examination. The learned Additional Sessions Judge has recorded the deposition of the doctor and matter has come up again for hearing.

5. The accused was examined u/S. 313 of the Code of Criminal Procedure in the trial Court before the matter was remanded for recording the additional evidence. However, no specific question was asked to the accused in his examination u/S. 313 of Cr.P.C. regarding the statements made in the post-mortem examination report. After recording evidence of the medical Officer, the accused is not asked any specific questions regarding the medical evidence as per the provisions of section 313 of Cr.P.C. No doubt there is no specific provision under the Criminal Procedure Code that accused is to be examined u/S. 313 after recording the additional evidence as per the provisions of Section 391 of Cr.P.C. There may be certain cases where further examination of the accused u/S. 313 may not be necessary after recording evidence u/S. 391 of Cr.P.C. But at the same time, there may be cases or circumstances in a particular case which require that fair opportunity must be given to the accused to explain the circumstances appearing against him in the evidence recorded u/S. 391 of Cr.P.C. We are of the opinion that the present case is one of such cases. The accused ought to be given an opportunity to explain the circumstances appearing against him in the medical evidence by examining the accused u/S. 313 of Cr.P.C.

6. In this particular matter, we would also like to point out that the examination of the accused u/S. 313 Cr.P.C. carried out by the learned Additional Sessions Judge is not at all satisfactory. The provisions u/S. 313 of Cr.P.C. are such that the accused is given a chance to explain each and every circumstances appearing against him. So it becomes necessary for the Court to put specifically each and every circumstance appearing against the accused and to ask his explanation. Asking vague, complex or compound questions will not be proper examination of the accused u/S. 313 of Cr.P.C. Here it is noted that the learned Additional Sessions Judge has put 2 or 3 circumstances in the one question and the accused is called upon to give his explanation. Obviously the accused was not given proper opportunity. The question No. 5 is an example.

7. It is also noticed that instead of putting the specific circumstance appearing against the accused in the evidence of particular witnesses, a question is asked to the accused that prosecution witnesses Nos. 3 and 4 have stated that you have committed the murder of the deceased Janabai by giving an axe blow on her forehead and what he wants to say about it. It was necessary to put the specific statements made by these witnesses to the accused separately and to give him opportunity to explain those circumstances.

8. It will be thus seen that the examinations of accused u/S. 313 of Cr.P.C. carried out during the course of trial was not proper and sufficient. The learned Additional Sessions Judge has not properly followed the procedural law in this respect.

9. The question then arises as to whether the appellate Court can direct the re-trial of the accused from the stage of recording the statement of the accused u/S. 313 of Cr.P.C.

10. The learned Advocate for the accused has argued that by not putting proper questions to the accused u/S. 313 of Cr.P.C. and by not giving him opportunity to explain the circumstances u/S. 313 Cr. P.C., great prejudice is caused to the accused and, therefore, trial vitiates and the accused be acquitted.

11. However, for the mistake committed by the trial Court in following the procedural law, the appellate Court should not allow failure of justice. The Court has to see that there is a fair trial not only with reference to the accused, but also with reference to the prosecution and more important with reference to the society and the victim. The mistake if curable has to be cured.

12. While considering the powers of the appellate Court u/Ss. 423 and 428 of Old Criminal Procedure Code, the apex Court has observed in the matter between Rajeswar Prosad Misra Vs. State of West Bengal and Another, :

"The legislature has not chosen to indicate the limits of the power and this Court must not be understood to have laid them down. The cases may arise where either of the two courses may appear equally appropriate. Since a wide discretion is conferred on the appellate Courts, the limits of that Courts' jurisdiction must obviously be dictated by the exigency of the situation and fair-play and good sense appear to be the only safe guides."

We, therefore, think that a re-trial from the stage of recording of statements of the accused u/S. 313 of Cr.P.C. can be directed in the present case where the circumstances are very peculiar.

13. In this respect, we agree with the observations made in the Division Bench ruling of the Kerala High Court in the matter between Lakeshmanan Sunderam v. State of Kerala, 1990 Criminal Law Journal, 1800. It is observed at page 1810.

"When additional evidence by way of examination of witnesses for prosecution is ordered u/S. 391 of the Code that may necessitate further questioning by the Court of the accused u/S. 313 of the Code and thereupon the accused may have to get an opportunity to adduce evidence. It may not always be practicable or convenient for the appellate Court to go through this entire exercise. In appropriate cases, it must be open to the appellate Court to order retrial from a particular stage."

14. Considering the circumstances in this case, we think that the re-trial should be ordered from the stage of recording statements of the accused u/S. 313 of Cr.P.C. In a way this opportunity is being given to the accused to explain the circumstances appearing against him and no prejudice will be caused to him if such retrial is directed. The medical evidence which is brought on record it is taken into consideration without giving an opportunity to the accused to explain the same, that will cause prejudice to the accused. The accused will also get an opportunity to lead any defence evidence if he so desires.

15. Hence, the judgment and order passed by the learned Additional Sessions Judge, Jalgaon, in Sessions Case No. 246/92 on 18-2-1993 is set aside. The

matter is remanded to the trial Court for retrial from the stage of recording the statements of the accused u/S. 313 of Cr. P.C. The Additional Sessions Judge to record the statements of the accused u/S. 313 of Cr.P.C. by taking into consideration the observations made above. The accused be asked his explanation about all the circumstances appearing against him in evidence including the evidence recorded u/s 391 of Cr.P.C. The learned Additional Sessions Judge then may examine any defence witness if the accused so desires to examine. The learned Additional Sessions Judge then after hearing the arguments of prosecution and the accused should deliver the judgment. We make it clear that we have not expressed any opinion about the evidence of prosecution brought on record and about the findings and reasoning recorded by the Additional Sessions Judge in the judgment. The Additional Sessions Judge while deciding the matter is at liberty to reach at his own independent findings. The learned Additional Sessions Judge is directed to dispose of the case within a period of one month from the date of receipt of record and proceedings. The appeal is allowed accordingly. We quantify fees of Shri R. D. Mane, amicus curiae, at Rs. 500/-

16. Appeal allowed.