

(2024) 02 CAL CK 0098
In the Calcutta High Court
Case No : Criminal Revision No. 3255 Of 2023

Dhanu Ghosh @ Bhiku @ Bhanu Ghosh & Others	APPELLANT
Vs	
State Of West Bengal & Another	RESPONDENT

Date of Decision : 27-02-2024

Acts Referred:

Indian Penal Code, 1860 — Section 34, 326, 341
Code Of Criminal Procedure, 1973 — Section 248(1), 313, 313(5)
Evidence Act, 1872 — Section 3

Citation : (2024) 02 CAL CK 0098

Hon'ble Judges : Ajay Kumar Gupta, J

Bench : Single Bench

Advocate : Surya Prasad Chattopadhyay, Arjun Samanta, A. Chatterjee, Ronobir Roy Chowdhury, Mainak Gupta

Final Decision : Dismissed

Judgement

Ajay Kumar Gupta, J

1. This instant Criminal Revisional application has been filed by the petitioners assailing the judgment and order dated 4th August, 2023 passed by the learned Additional District and Sessions Judge, Fast Track Court-II Court at Krishnanagar, Nadia in Criminal Appeal No. 19/2022 preferred by the opposite party no. 2/default complainant, thereby setting aside the judgment of acquittal dated 18.06.2022 passed by the learned Judicial Magistrate, 3rd Court, Krishnanagar, Nadia in G.R. Case No. 2112/2021, arising out of Nakashipara Police Station Case No. 19/2021 dated 13th January, 2021 under Sections 341/326/34 of the Indian Penal Code, 1860 and remanded the case back for retrial from the stage of recording of statements of the accused persons under Section 313 of the Code of Criminal Procedure.

2. The factual matrix of the instant case leading to filing of this application is as under: -

The opposite party no. 2/de-facto complainant lodged a written complaint against the petitioners/accused persons alleging, inter alia, that the petitioners herein allegedly attacked and physically assaulted the elder brother of the opposite party no. 2 herein. He suffered serious injuries resulted in registration of Nakashipara Police Station Case No. 19/2021 dated 13.01.2021 under Sections 341/326/34 of the Indian Penal Code, 1860. After conclusion of the investigation, the investigating officer submitted charge sheet being No. 146/2021 dated 10.04.2021 against the petitioners herein under Sections 341/326/34 of the Indian Penal Code though the contention of the petitioners is that the accusation is false and fabricated and only on the basis of concocted stories and counterblast of the initiation of a Civil Suit being Title Suit No. 45/2016. The said proceeding was finally concluded in its logical conclusion after completion of trial and upon recording the statements of the accused persons under Section 313 of the Cr.PC. Ld Magistrate after considering the case of the parties and scanning of evidences brought on record finally vide judgment and order dated 18.06.2022 acquitted all the accused persons under Section 248(1) of the Code of Criminal Procedure, 1973.

Feeling aggrieved by and dissatisfied with the said acquittal order, the de-facto complainant filed Criminal Appeal being No. 19/2022 and the same was transferred to the learned Additional District and Sessions Judge, Fast Track Court – II at Krishnanagar, Nadia for its disposal.

After hearing the parties, the learned Additional District and Sessions Judge set aside the judgment and order dated 18.06.2022 passed by the learned Judicial Magistrate, 3rd Court at Krishnanagar, Nadia and thereby remanded the case back for retrial from the stage of recording of statements of the accused persons under Section 313 of the Cr.PC though there was no sufficient evidence brought on record by the prosecution. Furthermore, it is further contention of the Petitioners that remand order is bad in law since further examination of accused under Section 313 of the Cr.P.C. is only to fulfil lacuna/gap in prosecution case. Examination of the accused persons under Section 313 of the Cr.PC has already been done as per law after inviting them on the basis of circumstances and evidence brought with regards to alleged offence as such same is liable to set aside. Hence, the instant revisional application has come up before this bench for disposal.

SUBMISSION ON BEHALF OF THE PETITIONERS:

3. Learned Advocate appearing on behalf of the Petitioners vehemently submitted that the entire case is based on concocted and fabricated story although a charge sheet has been submitted against the present petitioners and subsequently trial has been commenced. Be that as it may, finally after appreciation and scanning of the evidence, the learned Magistrate has acquitted all the accused persons from the aforesaid proceeding. The learned Appellate Court has failed to consider that the learned Magistrate has examined the accused persons under Section 313 of the Cr.PC as to afford the accused persons

a fair and proper opportunity for explaining the circumstances which appears against them in evidence. Prosecution has failed to substantiate evidences against accused persons/petitioners herein. So, question of remand does not arise at all when the accused persons were acquitted from the case after maintaining all the procedure as prescribed in the code of criminal procedure. The only remedy remains with the de-facto complaint to prefer an appeal and the learned Appellate Court should have considered the evidence adduced by the prosecution and decide the case but miserably failed and only on the basis of surmises and conjectures, the order of acquittal has been set aside and remanded back case for retrial from the stage of recording the statements of the accused persons under Section 313 of Cr.PC. Accordingly, the order passed by the learned Judge is bad in law, perverse and without applying judicious mind. As such, the impugned judgment is liable to be set aside.

4. It is further submitted that in a criminal trial, the purpose of examining the accused persons under Section 313 of the Cr.PC is to meet the requirement of the principle of natural justice i.e. *audi alteram partem* only to the accused persons when there are incriminating circumstances found against the accused persons so that the accused persons can explain the circumstances with regard to the materials that has surfaced against them and that formalities had already been maintained by the learned Magistrate before pronouncing of judgment. Statements recorded under Section 313 of Cr.PC cannot be made a basis for conviction of the accused persons or to fulfil the gap/lacuna left by the prosecution while adducing witnesses. Therefore, it cannot be treated as evidence within the meaning of Section 3 of the Evidence Act. To bolster his submissions, he referred two judgments reported in *Raj Kumar Singha Alias Raju Alias Batya Versus State of Rajasthan* (2013) 5 Supreme Court Cases 722 and *Prem Chand Versus State of Maharashtra* (2023) 5 Supreme Court Cases 522.

SUBMISSION ON BEHALF OF THE STATE:

5. On the other hand, learned counsel appearing on behalf of the State submitted that the examination of accused persons under Section 313 of Cr.PC is not an empty or mere formality. Learned Magistrate, without considering the incriminating materials brought on record by the prosecution, simply put some general five questions as under:

- i. Have you heard the prosecution witnesses?
- ii. You will be asked certain questions and you are not bound to answer them and due to answer them, it may be used against you?
- iii. What do want to say against the prosecution witnesses?
- iv. Have you got anything to say about this case?
- v. Do you want to adduce Defence witnesses?

The Learned Magistrate did not ask any circumstances appearing in the oral and

documentary evidence brought on record by the prosecution against the Petitioners. Accordingly, the learned Magistrate has grossly erred in following the provision contemplated under Section 313 of the CrPC in letter and spirit.

6. It is further submitted that the learned Magistrate while examining the accused persons under Section 313 of the CrPC, overlooked the evidence of ocular witnesses/injured persons as well as medical documents marked as exhibits therein. There are other circumstantial evidences appearing in the evidences of the prosecution witnesses but those circumstances had not been put by way of questions under Section 313 of the CrPC. In view of such ignorance, the learned Magistrate has hyper-technically examined the accused persons by asking general questions and finally acquitted the accused persons from the proceeding. Accordingly, the learned Appellate Court has rightly set aside the judgment of acquittal and further remanded back the case to the learned Trial Court for retrial from the stage of examination of the accused persons under Section 313 of the CrPC. In such a situation, the petitioners/accused persons have got further opportunity to adduce their evidence on their behalf, if any, and further get opportunity of being heard so the accused persons would not be suffered or prejudice. Accordingly, the instant application is liable to be dismissed.

DISCUSSIONS AND ANALYSIS BY THIS COURT:

7. Heard the rival submissions of the parties and on perusal of the Case Diary as well as the judgment passed by the learned Trial Court and the judgment and order passed by the learned Additional District and Sessions Judge, Fast Track Court-II Court at Krishnanagar, Nadia, a moot question arises before this Court as under:

(1) Whether setting aside and remanding back of the case to the learned Trial Court for retrial from the stage of examination of accused persons under Section 313 of the CrPC even after acquittal is not proper or legal?

8. Before deciding the issue arises, this Court would like to refer the provisions of Section 313 of the CrPC as under for convenience and ready reference:

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.]

9. Upon careful perusal of the aforesaid provision, an opportunity is to be given to the accused persons to explain personally any circumstances appearing in the evidence against him. But accused persons shall not render themselves liable to punishment by refusing answer of such question or by giving false answer and no oath shall be administered to the accused when he is examining sub-section (1). Finally, Court may even think fit to take a help of Prosecutor and Defence Counsel for preparing relevant questions which are to be put to the accused. The Court may take help of the Prosecutor and Defence Counsel and even may permit filing of written statement by the accused as sufficient compliance of the Sections.

10. Apart from that, purpose of examining the accused persons under Section 313 of the CrPC is to meet the requirement of the principles of natural justice i.e. audi alteram partem. If there is no evidence or circumstances appearing in the prosecution evidence implicating the accused with the commission of crime with which he is charged, there is nothing for the accused to explain and hence examination under Section 313 of Cr.PC of the accused would be wholly unnecessary and improper. In such a situation, accused cannot be questioned and his answers cannot be used to fulfil the gaps left by the witnesses in their evidence.

11. This Court gets confidence from the referred Judgment of the Hon'ble Supreme Court passed in Raj Kumar Singh @ Raju @ Batya Vs. State of Rajasthan AIR 2013 SC 3150 whereby the Hon'ble Supreme Court has observed as under after an extensive deliberation on the Section 313 of Cr.PC:-

"The proper methodology to be adopted by the Court while recording the statement of the accused under Sec. 313 Cr.P.C is to invite the attention of the accused to the circumstances and substantial evidence in relation to the offence, for which he has been charged and invite his explanation. In other words, it provides an opportunity to an accused to state before the Court as to what is truth and what is his defence, in accordance with law. In a criminal trial, the purpose of examining the accused person under Sec. 313 Cr.P.C is to meet the

requirement of the principles of natural justice i.e. "audi alteram partem". If there is no evidence or circumstance appearing in the prosecution evidence implicating the accused with the commission of the crime with which he is charged, there is nothing for the accused to explain and hence his examination under section 313 Cr.P.C would be wholly un-necessary and improper. In such a situation the accused cannot be questioned and his answers cannot be used to supply the gaps left by the witness in their evidence"

12. The answer given by the accused may be taken into consideration in such enquiry or trial, and put in evidence against him in any other enquiry too or trial for, any other evidence and such answer did not to show he has committed. Therefore, from the above provisions of the judgment relied by the petitioners the examination of the accused under Section 313 of the Cr.PC is not a mere formality but it is important and relevant to decide the criminal case in hand and it is also essential to examine properly for proper and effective adjudication of the case.

13. So far as the aforesaid issue is concerned, it is admitted fact that the allegations against the accused persons are under Sections 341/326/34 of the Indian Penal Code, 1860. So, in this case the evidence of ocular witnesses/ injured persons as well as medical documents are relevant for formulating questions as well as other attending circumstances are also vital for consideration. The injury Reports dated 12.01.2021 are marked as Exhibits 4 and 5, Certified Copy of Bed Head Ticket dated 13.01.2021 marked as Exhibit 6, Certified copy of medical report dated 12.01.2021 marked as Exhibit 7 series. P.W. 5 one Jagannath Ghosh an injured person deposed in evidence that incident had taken place on 11.01.2021 at around 10.30 pm in the night when the accused persons had assaulted him with iron rod, wooden stick and Hansua owing to a land dispute. He further stated in his evidence that the incident has taken place in front of his house and he was admitted by their neighbours when he sustained bleeding injuries. He further stated that he had narrated the attending doctor about the incident and name of the assailants.

14. P.W. 6 Doctor Pinaki Joardar, Medical Officer had stated he had examined one Jagannath Ghosh and upon examination he found one cut injury over his scalp measuring 2 cm X 1 cm, one swelling over his right eye brow lateral side and swelling over his body. Whereas during cross-examination, he has asserted that he had not seen any blood over the cut injury and there is probability to sustain such types of injuries if someone falls on the ground.

15. P.W. 8, another doctor Nabarun Banerjee also examined who narrated that he had examined one patient, namely, Jagannath Ghosh. The patient had complained of head injury and admitted therein. He further stated that he had found two inches cut in the scalp and the nature of injury was simple.

16. Apart from above evidences, Subhadra Ghosh, P.W. 7 another injured witness deposed that the accused persons had assaulted her and her husband with iron

rod and Hansua owing to a long pending land dispute. She further stated she was assaulted by the accused persons. Dhanu Ghosh has assaulted her husband with Hansua on his head. Her husband had received four stitches.

17. Similarly, some other evidences also brought on record by the prosecution. These attending circumstances are appearing in the evidence against the accused persons. But questions on such attending circumstances have not been put to the accused persons. Whereas only simple five general questions put by the learned Trial Court to all accused persons. Those questions are as follows even at the cost of repetition:

- i. Have you heard the prosecution witnesses?
- ii. You will be asked certain questions and you are not bound to answer them and due to answer them, it may be used against you?
- iii. What do want to say against the prosecution witnesses?
- iv. Have you got anything to say about this case?
- v. Do you want to adduce Defence witnesses?

From these five questions, it reveals no question formulated or asked to the accused persons about the attending circumstances appearing against them in the evidence.

18. In such circumstances, examination under Section 313 of Cr.PC is necessary for proper and effective disposal of the proceeding. Every criminal Court having responsibility of scanning the evidence after the prosecution closes its case to trace the incriminating circumstances in the evidence against accused to prepare relevant questions to extend opportunity to the accused to explain any such circumstances in the evidence and that could be used against him. Prior to the amendment under Section 313 in 2009, the Court alone has to perform its task but subsequently amendment under Sub-section (5) of Section 313 of the CrPC was introduced with effect from 31.12.2009 only on the ground of failure of Trial Court to frame relevant question and to put the same to the accused to explain the same. It is boast of the criminal justice system to ensure a fair and speedy trial and with emphasis on cut down delay the Parliament Amended Sub-Section 5 of the Section 313 in the year 2009 and given effect from 31.12.2009 so that final outcome which would in effective promote utility of the exercise rather than its futility.

19. Under the above facts and circumstances, the learned Judge rightly set aside the order of acquittal and remanded back the case to the learned Trial Court for retrial from the stage of examination of the accused persons under Section 313 of the Cr.PC. Furthermore, the learned Appellate Court is given liberty to the learned Trial Court to give sufficient opportunity for adducing defence evidence, if any, from the side of accused persons and, thereafter, heard the argument afresh and passed judgment afresh without being influenced of any observations made

by the learned Judge in the said appeal.

20. Consequentially, this Court does not find any illegality or perversity or jurisdiction error in law. As such, the Criminal Revisional application is devoid of merit and deserves to be dismissed.

21. Accordingly, CRR 3255 of 2023 is, thus, dismissed without order as to costs. Connected applications, if any, are also, thus, disposed of.

22. Let a copy of this judgment and order be sent to the learned Court below for information with a direction to expedite and conclude the trial within four months from the date of communication of this order to come to its logical conclusion in pursuant of the observations made by the Learned Additional District and Sessions Judge vide judgment and order dated 4th August, 2023 from the stage of recording of statement of accused persons under Section 313 of Cr.PC without allowing unnecessary adjournment to the parties. Parties shall co-operate with the learned Trial Court for early disposal.

23. Case Diary is to be returned to the learned counsel for the State.

24. Interim order, if any, stands vacated.

25. Parties shall act on the server copies of this order uploaded on the website of this Court.

26. Urgent photostat certified copy of this judgment, if applied for, is to be given as expeditiously to the parties on compliance of all formalities.