
(2017) 03 BOM CK 0045
In the Bombay High Court
Case No : Criminal Appeal No. 439 of 2013

Mohan @ Mohan Baba

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 23-03-2017

Acts Referred:

Citation : (2017) 2 AIRBomRCri 305 : (2017) ALLMRCri 1761 : (2017) 2 MhLJCrI 571

Hon'ble Judges : B.R. Gavai and Kum. Indira Kanahaiyalal Jain, JJ.

Bench : Division Bench

Advocate : Shri C.H. Jaltare, Advocate, for the Appellant(Criminal Appeal No. 439 of 2013); Shri H.P. Lingayat, Advocate, for the Appellant(Criminal Appeal No. 442 of 2013); Shri S.P. Gadling, Advocate, for the Appellants(Criminal Appeal No. 483 of 2013); Shri R.B. Gaikwad, Advocate, for the Appellants(Criminal Appeal No. 502 of 2013); Shri Y.B. Mandpe, Advocate, for the Appellant(Criminal Appeal No. 453 of 2014); Shri A.C. Jaltare, Advocate, for the Appellant(Criminal Appeal No. 475 of 2016); Shri R.S. Nayak, Additional Public Prosecutor, for the Respondent/State along with Shri Abdul Subhan, Advocate assisting the prosecution in all appeals

Final Decision : Disposed Off

Judgement

Kum. Indira Kanahaiyalal Jain, J.—These appeals are preferred by appellants-accused against the judgment and order dated 25.7.2013 passed by the learned Additional Sessions Judge-13, Nagpur in Sessions Trial No.198/2011. By the said judgment and order, learned Additional Sessions Judge convicted the appellants for the offences punishable under Sections 147 read with 149, 148 read with 149, 302 read with 149 of the Indian Penal Code and Section 4 read with Section 25 of the Indian Arms Act and sentenced each of the accused as under :

Sr. Nos.

Conviction under sections

Punishments

1.

147 r/w 149, IPC

Rigorous imprisonment for 2 years and fine of Rs.1000/- each in-default Simple Imprisonment for 3 months.

2.

148 r/w 149, IPC

Rigorous imprisonment for 3 years and fine of Rs.1000/- each in-default Simple Imprisonment for 6 months.

3.

302 r/w 149, IPC

Imprisonment for life and fine of Rs.3000/- in-default Simple Imprisonment for 6 months

4.

4 r/w 25 of the Indian Arms Act.

Rigorous Imprisonment for 3 years and fine of Rs.1000/- in-default Simple Imprisonment for 6 months.

Learned Additional Sessions Judge directed that all the sentences of imprisonment shall run concurrently.

2. For the sake of convenience, we shall refer the appellants in their original status as accused nos.1 to 10 as they were referred before the trial court.

3. Prosecution case which emerges from charge-sheet and connecting papers thereto may be stated in brief as under :

(a) Accused nos.1 to 8 were residing in Rama Nagar, Kamptee. Accused no.9 was resident of Jaibhim Chowk, Kamptee. Accused no.1 Mohan Gedam is father of accused nos.2 to 6, whereas accused nos.7 to 9 are friends of accused nos. 2 to 6.

(b) Victim Chotu @ Akash Gopal Singh Yadao was resident of Yadao Nagar, Gavli Pura, Kamptee. He was aged about 24 years and dealing in business of Dairy Milk. Chotu had owned cattle and used to take the cattle to his field for grazing through the road in Rama Nagar, Kamptee.

(c) It is the case of prosecution that many times, accused asked Chotu not to take cattle through the road in Rama Nagar, as the same was causing disturbance to them and their family members. Chotu did not pay heed to it and he continued taking his cattle through the road in Rama Nagar, Kamptee.

(d) On 27.1.2011, Chotu had taken his cattle for grazing. He was asked by the accused not to take the cattle by the said road. At around 4-4.30 pm, Chotu was returning home from his field. Again accused scolded him saying that it was their area. Chotu did not listen and took his cattle to his house. He informed his brother Rohit about the same.

(e) On the same day in the evening, Chotu at the time of milking the cattle, noticed that two buffaloes were less. He went by the said road in search of two buffaloes. He could find two buffaloes and while returning through the same road towards his house, at about 7-7.30 pm near statute of Ramabai, accused obstructed Chotu and uttered "Que Re Ek Bar Bolne Ke Bad Samazme Nahi Aya Kya". That time, accused Mohan, his sons and friends of his sons started assaulting Chotu by means of deadly weapons in their hands. Chotu sustained multiple grievous injuries on his face, neck, hand and head. After assault, accused fled away from the spot along with the weapons.

(f) On hearing shouts, people gathered there. Family members of victim were informed. They also rushed to the spot. Chotu was then shifted to hospital of Dr. Ratan Roy at Kamptee, who gave him some treatment and later declared Chotu as dead. Dr. Roy sent intimation to Police Station, Kamptee. In the meanwhile, Rohit informed about the incident to his cousin Abhishek, who in turn, lodged report with Police Station on the same day at 9.30 pm. PSI Mangesh Andhare (PW-17) was on duty. He recorded F.I.R. and registered Crime No.20/2011.

(g) PSI Andhare visited the hospital and recorded inquest panchanama on the dead body. The dead body was sent for postmortem. Dr. Subhash Titre (PW-14) was Medical Officer on duty. He performed postmortem and noticed the following external injuries on the dead body.

1. Superficial abrasion over the forehead of size 5 cm. in length.
2. Deep stab incised wound/injury over occipital region of size 11 cm. x 1.5 cm. x 1.5 cm. deep, injury with sharp margin, extent to fronto temporal region to occipital region of scalp with fracture of same size and same site vertically placed.
3. Deep stab incised injury over left side temporal region of scalp of size 3 cm. x 1 cm. with sharp margin obliquely placed.
4. Deep stab incised wound present over left parietal region of scalp of size 4 cm. x 2 cm. (sharp margins) obliquely placed.
5. Deep stab incised injury over left side of right and left occipital parietal region of scalp of size 7 cm. x 2 cm. each with sharp margin, with fracture at same site of size 2 cm. x 2 cm. each, bilaterally and obliquely placed.
6. Stab incised wound over forehead, right side of size each 3 cm. x 2 cm. x 0.5 cm. with sharp margin horizontally placed.
7. Deep stab incised wound over both side of eyebrow, horizontally placed with sharp margin of size 11 cm. x 1 cm. x 1.5 cm. Deep.

8. Deep stab incised wound over nose horizontally placed with sharp margin of size 10 cm. x 2 cm. x 2 cm. deep.
9. Deep stab incised wound over the upper lip horizontally placed, sharp margin of size 10 cm. x 1.5 cm. x 1.5 cm. deep.
10. Deep lacerated wound over right and left index finger and middle finger of size 2 cm. x 1 cm. deep.
11. Deep stab incised wound present anterior aspect of mandible (chin), obliquely placed, sharp margin of size 14 cm. x 2 cm. deep.
12. Deep stab incised wound over right cheek obliquely placed with sharp margin of size 5 cm. x 3 cm. x 1.5 cm. deep.
13. Superficial multiple contusion over back. Buttock right forearm back, right shoulder, right shoulder joint and left knee joint.

The Medical Officer also found the following internal injuries :

1. Under scalp haemorrhage (haematoma) present over occipital region of scalp of size 10 cm x 5 cm.
2. Multiple fracture base and vault of skull i.e. Right temporal region of size 2 x 1 cm. left temporal 2 cm. x 2 cm. occipital region of size 3 cm. x 1 cm. vertically placed.
3. Intra cerebral haemorrhage and brain tissue congested.
4. (i) Right pleura ruptured with oozing of blood and left pleura congested.
(ii) Right lung found ruptured and with multiple deep laceration of upper lobe with oozing of blood with haematoma of size 4 cm. x 4 cm.

All the injuries were ante mortem. Doctor opined cause of death due to multiple deep stab incised injuries over the scalp, face with head injury with intra cerebral haemorrhage with severe haemorrhage with hypovolumic shock with cardio respiratory arrest.

(h) On 27.1.2011, PI Suresh Bhoyar (PW-20) visited the spot of incident. As there was no sufficient light, spot panchanama could not be prepared on that day. Police officials were deputed on the spot to ensure that factual position of the place of occurrence is not altered. PI Bhoyar recorded statement of complainant in the night of 27- 28/01/2011.

(i) On 28.1.2011, he prepared spot panchanama in the presence of panch witnesses. From the spot, simple earth, earth mixed with blood were seized. Some of the accused were arrested on 28.1.2011. Accused Rajdeep Gedam was having injuries on his person. He was sent for medical examination.

(j) On 28.1.2011, P.C. Imran, who had taken the dead body for postmortem, brought the clothes of deceased and produced before the Investigating Officer.

Those clothes were seized under a seizure panchanama drawn in presence of panch witnesses. Statements of several other witnesses were recorded.

(k) On 30.1.2011, other accused, except accused no.10 Sandip @ Bunt, who was absconding, were arrested. Their clothes were seized and separate seizure panchanamas were accordingly recorded. The blood samples of the accused were collected.

(l) Accused no.4 Pawan was in police custody. On 3.2.2011, he made a memorandum in the presence of panch witnesses to discover a sword concealed in his house and showed his readiness to produce the same. At the instance of accused no.4, sword was recovered from his house which was kept beneath diwan (cot) in his house. Discovery panchanama of sword was drawn before panch witnesses.

(m) On the same day, accused no.5 Sudhir gave a statement to discover Farsa concealed near the temple of his house. His memorandum was drawn and Farsa concealed in the temple premises on the back side of his house was recovered in pursuance to information given by accused Sudhir. Recovery panchanama of Farsa was recorded.

(n) On 3.2.2011 itself, accused no.6 Bhagwan gave a memorandum statement to discover a sword concealed in the office of his father. Memorandum statement was recorded. Accused no.6 Bhagwan discovered a sword as per his memorandum statement and discovery panchanama of the same was drawn.

(o) On 4.2.2011, accused no.7 Siddharth had shown his readiness to produce a sword concealed in his house. His memorandum was drawn and sword was recovered at his instance under a discovery panchanama.

(p) On that day, accused no.9 Swapnil also gave a statement to discover a stick concealed by him. Statement of accused no.9 Swapnil was recorded and at his instance, stick found hanging in the corner of third room of his house was recovered.

(q) The seized weapons were referred to Medical Officer for examination and reports of examination of weapons were collected by the Investigating Officer. Seized articles were sent to Forensic Science Laboratory. On completing investigation, charge sheet was submitted to the Court of the Judicial Magistrate, First Class, Kamptee, who in his own turn, committed the case for trial to the Court of Sessions.

4. On committal, trial court framed charge against accused nos. 1 to 9, vide Exh.42. They pleaded not guilty and claimed to be tried. Their defence was of total denial and false implication. According to the accused, false and frivolous report came to be lodged against them due to previous enmity. Accused nos.4 and 5 also raised the defence of right of private defence and submitted that deceased used to take cattle through Ramabai Nagar road which was not a public road. Since it was causing disturbance to them, they and their family members

used to ask the deceased not to take cattle through the said road. It is their defence that deceased was an aggressor as he was taking the cattle from the road from which he was not entitled and thereby himself invited the occurrence of incident. It is contended that deceased was responsible for the occurrence and not the accused.

5. In support of its case, prosecution examined in all 20 witnesses. Accused nos.6 and 7 examined DW-1 Prabhakar Sirsat in support of their defence that location of spot was such which would make it clear that for all the eyewitnesses it was not possible to see the spot of incident and all eyewitnesses are the got up witnesses. Accused no.3 Sandip Gedam examined himself to substantiate his plea of alibi which he raised as his defence and denied the presence at the time of incident.

6. Considering the evidence adduced by the parties, learned Additional Sessions Judge convicted and sentenced the appellants-accused nos.1 to 9, as stated in paragraph 1 above.

7. Accused No. 10-Sandip @ Bunt s/o Ashok Dhamgaye was absconding. It appears that trial against him was separated. Trial Court directed to file supplementary charge-sheet against absconding accused Sandip whenever he traced out. After the judgment and order of conviction and sentence was passed against accused nos.1 to 9 on 25.7.2013 by the learned Additional Sessions Judge-13, Nagpur, absconding accused no.10-Sandip was arrested on 9.10.2013. As directed, charge-sheet was filed against him and the case was committed to the Court of Sessions. Sessions Case No. 484/2013 was registered against absconding accused. Charge came to be framed against him. He pleaded not guilty and claimed to be tried vide his plea separately recorded at Exh.8. His defence was of total denial and false implication.

8. To substantiate the guilt of accused Sandip, prosecution examined 12 witnesses. Accused did not examine himself or other witness in support of his defence. On going through the evidence of prosecution witnesses, trial court convicted and sentenced accused no.10, as stated herein-above. Being aggrieved thereof, appellants have preferred these appeals.

9. We have heard at length the learned counsel for appellants and learned Additional Public Prosecutor for respondent-State.

10. At the threshold, we propose to consider the appeals in view of a crucial question raised regarding noncompliance of the provisions of Section 313 of the Code of Criminal Procedure. In this connection, submission of appellants is that in a joint trial, Sessions Court did not examine each accused separately and individually and a joint common questionnaire containing eighty questions for all the accused, without bothering to refer even name, age, occupation and address of each accused was prepared. It is submitted that role attributed to each of the accused is individual, ocular evidence adduced by the prosecution indicates separate role to each of the accused and in such a situation, failure to follow the

mandatory provisions of law which contemplates that accused must have ample opportunities of explaining circumstances occurring against him would vitiate the trial and accused would be entitled to acquittal. It is pointed out that a bare look at the statement under Section 313 of the Code of Criminal Procedure would show total non-application of mind in a serious case of murder and various questions, though not relevant, were asked to the accused thereby creating unnecessary confusion and causing great prejudice to them.

11. On applicability and scope of Section 313 of the Code of Criminal Procedure, learned counsel for accused nos.4 and 5 placed reliance on the decision of this Court in *Arvind Dayaram Choure and another v. State of Maharashtra* [2003 ALL MR (Cri) 45] and learned counsel for accused nos. 2, 3, 6, 7 and 9 placed reliance on the decision of this Court in *Swapnali @ Sapana Sharad Mahadik v. The State of Maharashtra* [2016 ALL MR (Cri) 1824].

12. Per contra, learned Additional Public Prosecutor Shri R.S. Nayak submitted that all incriminating circumstances were put to the accused persons and it is not a case of non questioning. He submits that joint common questionnaire was prepared but all questions were not put to all the accused and only relevant questions were asked to each of the accused by leaving blank the answers to the questions not put to a particular accused. Learned Additional Public Prosecutor submitted that it is for the accused to show that prejudice has been caused and since accused could not show any prejudice caused to them, it would not amount to non-compliance with the mandatory provisions of Section 313 of the Code of Criminal Procedure and the trial would not get vitiated. Alternatively, the submission is that for not recording individual statement of the accused proper course available would be to remand the case to the trial court for re-decision from the stage of recording of statement under Section 313 of the Code of Criminal Procedure. In support of argument, learned Additional Public Prosecutor placed vehement reliance on the decisions of the Hon"ble Apex Court in .-

(i) *State of Punjab v. Naib Din*, [2001 CRI.L.J. 4656]

(ii) *Liyakat and another v. State of Rajasthan*, [2014 AIR SCW 5876]

(iii) *Nar Singh v. State of Haryana*, (2015) 1 SCC 496]

13. We have gone through the above referred decisions. The power to examine the accused is provided in Section 313 of the Code of Criminal Procedure, which reads thus :

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 subsection (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."

14. The Hon"ble Apex Court in the case of Nar Singh v. State of Haryana (supra) referring to its earlier decisions summarised the fundamental principles underlying Section 313 of the Code of Criminal Procedure. The Hon"ble Apex Court in para 30 observed thus :

30. Whenever a plea of omission to put a question to the accused on vital piece of evidence is raised in the appellate court, courses available to the appellate court can be briefly summarised as under :

30.1. Whenever a plea of non-compliance with Section 313, CrPC Is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer.

30.2. In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits.

30.3. If the appellate court is of the opinion that non-compliance 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.

30.4. The appellate court may decline to remit the matter to the trial court for

retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused.

15. In the case on hand, Sessions Trial was against ten accused persons. We have meticulously examined the statements of accused persons recorded by the Trial Court under Section 313 of Cr.P.C. Except in Criminal Appeal No.475/2016, we could notice that 80 identical questions were drawn and a joint questionnaire was prepared by the learned Additional Sessions Judge, though entirely different incriminating circumstances against each of the accused were brought on record. It is pertinent to note that role played by each accused, even according to the prosecution, is different and individual. Therefore, there was no meaning in preparing a joint questionnaire containing eighty identical questions. We have noticed that the learned Additional Sessions Judge even did not bother to mention the name and preliminary details of each of the accused in the statements recorded under Section 313 of Cr.P.C. Only on the basis of signature of accused, we could know at least about the name.

16. In the facts and circumstances of the case, it was obligatory on the trial court to put specific, distinct and separate questions to each of the accused as per the incriminating circumstances brought against him individually. In our view, preparing a common questionnaire for all accused persons in a joint trial without bothering to even consider, whether any question relates to any particular accused, would render the examination under Section 313 of Cr.P.C. deceptive and improper. Not only this, the entire exercise by the trial Court in recording statements of accused persons under Section 313 of Cr.P.C. clearly demonstrates that serious prejudice has occasioned to the accused as statements were recorded in the total disregard of the provisions of Section 313 of Cr.P.C. This provision is based on the fundamental principle of fairness and it is not an empty formality. The court is under a legal obligation to put the incriminating circumstances to the accused and solicit his response.

17. So far as case against absconding accused Bunty is concerned, we have gone through statement of the accused recorded under Section 313 of Cr.P.C. It can be seen from the statement at Exh.34 that instead of specifically putting the incriminating circumstances, the Trial Court has reproduced the evidence of witnesses in verbatim thereby creating unnecessary confusion. It further appears that the Trial Court has also relied upon the evidence of Investigating Officer PW-12 Suresh Bhoyar, but did not put all the questions including question of seizure panchanama (Exh.27) showing that earth mixed with blood and simple earth came to be seized from the spot. This would indicate that the statement of the accused whose trial was separated was also not drawn with due application of mind.

18. Needless to state that every error or omission in compliance with the provisions of Section 313 does not necessarily vitiate the trial. Such errors fall

within the category of curable irregularities and question, whether trial is vitiated in each case, depends upon the degree of error and whether prejudice has been or is likely to have been caused to the accused. The ultimate test in determining whether or not the accused has been fairly examined under this Section is to see whether, having regard to the questions put to him, he did not get an opportunity to say what he wanted to say in respect of the prosecution case against him. Where the non-compliance with Section 313 holds the trial to be vitiated, ordinarily the proper course is to order a retrial from the stage at which the provisions of this section were not complied with.

19. In the above premise, we are of the view that accused are not entitled to acquittal on the ground of noncompliance with the mandatory provisions of Section 313 of Cr.P.C. We agree to some extent that appellants are prejudiced on account of a joint questionnaire put to each of them just by copy paste. The trial court should have been more careful in framing the questions considering the incriminating circumstances brought on record against each of the accused. Since the Trial court has failed in it's imperative duty, we find it fit to direct the retrial from the stage of recording statements of the accused under Section 313 of Cr.P.C. and proceed to pass the following order :

(i) Conviction of appellants under Sections 147 r/w 149, 148 r/w 149 and 302 r/w 149 of the Indian Penal Code and Sections 4 r/w 25 of the Indian Arms Act and sentenced imposed on them is set aside.

(ii) Matters are remanded back to the trial Court for proceeding afresh from the stage of recording statements of the accused under Section 313 of the Code of Criminal Procedure.

(iii) The Trial court shall examine each of the accused afresh under Section 313 of the Code of Criminal Procedure in the light of the above observations and in accordance with the law.

(iv) The Trial court is directed to put specific, distinct and separate questions with regard to incriminating circumstance appearing against each of the accused.

(v) Appellants are in jail since 2012. Hence, Trial court to expedite the matter and dispose of the same in accordance with the law preferably within a period of six months from the date of receipt of copy of this judgment.

(vi) We make it clear that we have not expressed any opinion on merits of the matters.

(vii) Criminal Appeals are disposed of in the above terms.

(viii) No order as to costs.