

(2004) 05 CAL CK 0015
In the Calcutta High Court
Case No : Criminal A. No. 333 of 2002

Rajinder Singh @ Manu and Bijoy Singh	APPELLANT
Vs	
State of West Bengal	RESPONDENT

Date of Decision : 14-05-2004

Acts Referred:

Arms Act, 1959 — Section 25, 27
Criminal Procedure Code, 1973 (CrPC) — Section 207, 304, 313
Evidence Act, 1872 — Section 137, 146
Penal Code, 1860 (IPC) — Section 120B, 302, 34

Citation : (2004) 3 CHN 99 : (2004) CriLJ 4023

Hon'ble Judges : Nure Alam Chowdhury, J; Arun Kumar Bhattacharya, J

Bench : Division Bench

Advocate : Dilip Dutt, Jyotirmoy Adhikari, Anasuya Sinha, D. Mitra and Avishek Sinha, in Cr. A. No. 333 of 2002, Sekhar Basu, D. Roy, Kallol Mondal and Firoj Edulji, in Cr. A. No. 348 of 2002, Sekhar Basu, D. Roy and Souvik Mitter, in Cr. A. No. 356 of 2002, Sekhar Basu, D. Roy and Tushar Kanti Harsh, in Cr. A. No. 364 of 2002, Ashok Mukherjee and Krishnendu Bhattacharya, in Cr. A. No. 370 of 2002, Shekhar Basu, P.K. Mitra and Minati Gomes, in Cr. A. No. 371 of 2002, Shekhar Basu, P.K. Mitra and Firoj Edulji, in Cr. A. No. 389 of 2002, Dilip Dutt, A.K. Mukherjee, Rita Dutta, Devapriya Mitra and Krishnendu Bhattacharjee, in Cr. A. Nos. 391 and 392 of 2002, Sekhar Basu and Firoj Edulji, in Cr. A. Nos. 409 and 410 of 2002, Sekhar Basu, P.K. Mitra and Souvik Mittar, in Cr. A. No. 417 of 2002, Naranarayan Gooptu, Krishnandu Gooptu, Sarathi Sarma and Sourav Bhattacharya, in Cr. A. No. 429 of 2002 and Pradip Kumar Roy, in Cr. A. No. 438 of 2002, for the Appellant; Asimesh Goswami, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Arun Kumar Bhattacharya, J.—The hearing stems from 14 sets of appeals preferred by 19 convicts against the judgment and order of their conviction and sentence passed on 31.08.2002 by Mr. Intaj Ali Shah, Id. Additional Sessions Judge, 3rd Court, Midnapore in Sessions Trial Case Nos. XVII/March/2002 and XLVIII/May, 2002 arising out of G. R. Case No. 1392/2001.

2. A thumbnail sketch of the prosecution case is that Manas Chaubey, younger son of ex-leader of C.P.I. and M.P. Narayan Chaubey was murdered in the open daylight on 27.06.1999 by some antisocial elements with the assistance of local mafia B. Rambabu, for which 15 persons along with the said B. Rambabu are facing trial in the Court of Id. Additional Sessions Judge, and B. Rambabu and the people of his group became annoyed with the defacto-complainant's close friend Gautam Chaubey -- elder brother of Manas and used to threat him with dire consequences. On 11.09.2001 at about 8/6-30 p.m. as per previous talks with accused Satyen Singh, when the defacto-complainant along with Kamal Kundu, Shib Ranjan Mondal, Biswajit Adhikari, Tultul Chatterjee and Gautam Chaubey reached the den of Satyen Singh at Malancha Road near Parijat Sweetmeat Shop in scooter and motorcycles, Satyen Singh, Pappu Singh, Manu Singh, Luppi Singh and Bijoy Singh stopped them by waving hands. While Gautam asked Satyen as to the reason for calling them, B. Srinibas Rao @ Srinu -- brother of B. Rambabu, Ranjit Ghosh, Prasad Tadi, Ashok Tadi, Khokan Das, K. Gopi and 4/5 others appeared there, and Satyen asked Gautam to come down as he had some important matters to discuss. Gautam on alighting from his motorcycle proceeded towards Satyen, when Satyen, Pappu, Manu, Luppi and Bijoy unitedly shouted "Kill Salako" followed by surrounding him by Srinu, Ranjit, Shankar Rao, Prasad Tadi, Ashok Tadi, K. Gopi, Khokan Das and 4/5 others and firing him incessantly by revolvers, gun etc. and his fall on the ground in bleeding condition. Satyen and the abovementioned persons then shouted in chorus that they had finished Gautam and would now see who looks after the case of Manas Chaubey and gives evidence, and thereafter they left the place with their weapons. Kamal Kundu and Tultul Chatterjee received slight bullet injuries. The defacto-complainant conveyed the news to the victim's house as also Officer-in-Charge of the P.S. with the request to come to the P.O. The police came and took away the dead body of the victim. As there was no male member in the house of the victim and the defacto-complainant was busy in looking after the inmates of the victim's family, there was some delay. Due to common intention and conspiracy of B. Rambabu, accused Satyen Singh, Manu Singh, Pappu Singh, Luppi Singh, Bijoy Singh, B. Srinibas @ Srinu, Ranjit Ghosh, Prasad Tadi, Ashok Tadi, K. Gopi, Shankar Rao & 4/5 others committed murder of Gautam Chaubey. Hence, while all the accused persons barring accused Sanjay Thakur @ Ram Naresh, B. Rambabu and Dipak Bera were charged under Sections 302/120B & 302/34 IPC, accused Sanjay Thakur @ Ram Naresh was charged under Sections 302/120B & 302/34 IPC, 25/27 Arms Act and accused B. Rambabu and Dipak Bera were charged u/s 302/ 120B IPC.

3. The defence case, as suggested to P.Ws. and as contended by the accused persona during their examination u/s 313 Cr.PC, is that the defacto-complainant along with the victim Gautam and others used to gossip in a house at Malancha Road in each evening. Manas and Gautam were antisocial elements of kharagpur. There was loadshedding at Malancha Road and no street-light at the relevant time. No such incident took place. The police had taken the snaps of each accused

person after their arrest and showed it as also the accused persons to the witnesses at the local P. S. before the T.I. Parade. Accused Abdul Rouf and his associate contractors have been falsely implicated in the case as they could not fulfil their financial demands. Accused Arunangshu, Dipak, Rajinder, Luppi and Pappu were not at the P.O. Rambabu is a great leader of Forward Block at Kharagpur and there was a political rivalry between him and Narayan Chaubey for a considerable period. He had no talk either with his wife or brother Srinu. Accused B. Manju has been falsely implicated in this case out of political rivalry as her husband is involved in politics. Accused Sanjay did not make any statement nor any pistol was recovered from the bush nearby Parijat Sweetmeat Shop. The pistol was produced by the police from their Malkhane. No witness was present at that time of alleged recovery of pistol and the witnesses signed the S. List at the P.S. Witnesses did not make any voluntary statement before the Magistrate. Mobile phone did not belong to B. Rambabu. On 10.09.1991 Srinu, Ashok Tadi and Prasad Tadi were arrested at Bimapur on the basis of a complaint of Subba Rao and they were freed on 11.09.2001 at 4.00 p.m. followed by their going to Hyderabad, Waltier etc. The present case is the outcome of political rivalry and feud of contractors.

4. To prove the prosecution case, 39 witnesses were examined, whereas none was examined on behalf of the defence, and after considering the facts, circumstances and materials on record, the Id. Court below found all the 19 accused persons guilty under Sections. 302/120B IPC and in addition found accused Sanjay Thakur @ Ram Naresh guilty under Sections 25 & 27 Arms Act, convicted them accordingly and sentenced them to suffer imprisonment for life and to pay fine of Rs. 10,000/- each i/d to S.I. for three months each and R.I. for four years and to pay fine of Rs. 3000/- i/d to three months respectively.

5. Being aggrieved by and dissatisfied with the above order of conviction and sentence, all the convicts have preferred these 14 sets of appeals.

6. All that now requires to be considered is whether the Id. Court below was justified in passing the above order of conviction and sentence.

7. Chargesheet was submitted against 29 accused persons, out of whom 19 have faced trial in the aforesaid two Sessions trial cases and one viz Subrata Barman @ Goga has faced trial separately and the balance accused persons are still absconding.

8. Out of the above witnesses, P.Ws. 1, 2, 3, 5, 8, 9 & 10 being eye-witnesses, P.W. 2 (autopsy surgeon) & P.W. 39 (I. O.) are vital, P.Ws. 25, 26 & 29 were declared hostile and the balance are post-occurrence and/or formal witnesses.

9. The gist of evidence as adduced by the above witnesses against those 19 accused persons are as follows : Accused Satyen called the victim Gautam Chaubey over phone. Accused Srinu (brother of accused B. Rambabu), Ashok Tadi, Prasad Tadi, K. Gopi, Sankar Rao, Khokan Das & 4/5 others assembled at the period. Accused Satyen, Pappu, Manu, Luppi & Bijoy incited saying "Mar

Salake". Accused Srinu, Ashok Tadi, Prasad Tadi & 4/5 others viz Kunwar Singh, S. Balaraju, P. Krishna Rao, R. Chinni & L. Kankar Rao (who were identified in the T.I. Parade) surrounded the victim and fired from their revolvers at him resulting in his fall on the ground with 19 bullet injuries. Accused Abdul Rouf, Kamal Jain, Debasis Dutta, Kaushik Chakraborty, Arunangshu, Subrata and others who were standing at little distance rushed to the P.O. and cried out "Mar Dalo Gautamko". Accused Ranjit assaulted the victim with a Bhojali on his head and neck. Witnesses Kamal Kundu (P. W. 9) and Tultul Chatterjee sustained slight bullet injuries. Accused B. Rambabu masterminded the plan. He and his wife B. Manju used to threat the victim Gautam Chaubey and other inmates of the house over phone with dire consequences if tadbir of the murder case of Manas Chaubey be not stopped. Pursuant to the statement of the accused B. Srinu, accused B. Rambabu and his other accomplices viz L. Kankar Rao, S. Balaraju, Sanjay Thakur, B. Krishna Rao, R. Chinni were arrested from Hyderabad. Accused B. Manju used to keep contact with her husband B. Rambabu over phone. Before the incident, accused B. Manju took certain contractors inside their house at Malancha Road, and at the time of incident she was found inside a Maruti Zen car at the P.O. and accused Dipak Bera was sitting at the steering of the said car parked outside the house of B. Rambabu and when B. Manju and others were fleeing away from the P.O., Dipak was the driver of the said vehicle.

10. Mr. Dilip Dutt, Id. counsel for appellants and Rajinder Singh @ Manu and Bijoy Singh, Mr. Naranarayan Gooptu, Id. counsel for appellant, Ashok Tadi, Mr. Sekhar Basu, Id. counsel for appellants, Kunwar Singh @ Madan @ Seru, Dipak Bera, Srinu, Chinni etc., Mr. Ashok Mukherjee, Id. counsel for Bikram Singh Baxi @ Luppi and Sailendra Singh Baxi & other Id. counsels appearing for different appellants, at the outset, assailed the impugned order of conviction and sentence one by one on certain technical grounds contending that the defects are so vital that it go to the root of the case and vitiate the entire trial.

11. Mr. Sekhar Basu, on taking us through the order being No. 41 dated 25.07.2002 and subsequent order of that date, evidence of the witnesses and on referring the decisions reported in Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others, and : [1969]1SCR32 advanced argument contending that barring five convicts viz B. Manju, Arunangshu Bhanja, Debasis Dutta, Abdul Rouf and Kaushik Chakraborty who were subsequently granted bail, all the convicts are behind the bars from the time of their arrest, that though one Mr. Gautam Chowdhury was engaged as State Defence Lawyer to defend his four clients S. Balaraju, B. Krishna Rao, L. Kankar Rao and R. Chinni @ R. Rambabu, due to some personal predicament he did not turn up, for which one Mr. Dipankar Das was engaged as State Defence Lawyer, but he too did not turn up and so as his said clients were undefended all along and as there was patent denial of legal aid and they had no opportunity to cross-examine the witnesses, the evidence adduced against them cannot be accepted. It was his further contention that when 24 material witnesses out of 39 were already examined, Mr. Chowdhury was asked by the Id. Court below to take part in cross-

examination which was really unmeaningful. Mr. Basu on drawing Court's attention to Order No. 6 dated 22.04.2002 and question No. 4 of cross-examination of accused L. Kankar Rao u/s 313 Cr.PC contended that Mr. Chowdhury was engaged as State Defence Lawyer on that very date but he was not given a reasonable time for preparation even on the request of Id. Special P.P. which might be the cause of declining of Mr. Chowdhury to act as a State Defence Lawyer and though the said question No. 4 was put to accused L. Kankar Rao @ Kanna during examination u/s 313 Cr.PC that he misbehaved with the next State Defence Lawyer Mr. Dipankar Das, there is no material on record in this regard that either he or any of the other 3 accused misbehaved with Mr. Das. Mr. Basu on referring to the cross-examination of P. W. 5, P. W. 8, P.W. 9 etc. further contended that his another client Kunwar Singh @ Seru @ Madan was also not offered to cross-examine. More or less similar is the argument advanced by Mr. Dutt contending that since his clients Rajinder Singh @ Manu and Bijoy Singh moved before the Apex Court they were not in a position to cross-examine the witnesses and they were not offered to cross-examine thereby depriving them of fair trial in breach of fundamental procedure. Mr. Asimesh Goswami, Id. Additional P.P., on the other hand, contended that in compliance with the provision of Section 304 Cr.P.C., Mr. Gautam Chowdhury was engaged as State Defence Lawyer and since due to personal predicament he could not conduct the case. Mr. Dipankar Das was engaged as the next State Defence Lawyer but as accused Chinni and other three accused persons did not avail of the opportunity, they cannot be permitted to take advantage of their own wrong and complain that they were undefended. Now, Section 304 Cr.PC places on a statutory footing the right of the accused without sufficient means to engage a lawyer to be defended at the expense of the State in regard to Sessions trials with a provision also enabling the State Govt. to extend this right by notification to any class of trials before other Courts in the State. The State is under a mandate to provide free legal aid to an accused who is unable to secure legal service on account of indigence or indommunicado situation provided the accused does not object, and whatever is necessary for this purpose has to be done by the State *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna*, . The State Govt. cannot engage a defence lawyer without ascertaining the wishes of the accused and without giving him any choice in selecting his lawyer *Panchu Gopal Das Vs. The State*, . Particular attention should be paid to appoint competent Advocate, equal to handling the complex cases, not patronising gestures to raw entrants to the Bar. Sufficient time and complete papers should also be made available so that the Advocate chosen may serve the cause of justice with all ability at his command and the accused may feel confident that the counsel has had sufficient time and material to defend him properly, as was observed by the Apex Court in *Ranchod Mathur Wasawa Vs. State of Gujarat*, . In other words, under-trial prisoners should be provided legal representation by fairly competent lawyers at the cost of the State [*Kadra Pehadiya and Others Vs. State of Bihar*,]. Here, when accused R. Chinni and three others refused to sign vokalatnama in favour of the State Defence Lawyer

Mr. Dipankar Das, it shows their lack of confidence in him and as such did not accept him, Moreover, a mere formal compliance with the said provision of Section 304 cannot be expected to carry out the *raison d'être* of the provision. No hard and fast rule can be laid down as to the time which must elapse between the appointment of the counsel and the beginning of the trial; but on the circumstances of each case, the Court of Sessions must ensure that the time granted to the counsel is sufficient to prepare for the defence. When the counsel was appointed just before the trial started, it is clear that there was failure to comply with the requirements of the rule of procedure in this behalf [1969]1SCR322. In the case on hand, the State Defence lawyer Sri Chowdhury was appointed just before starting of the trial and virtually no time was granted to him even at the request of the Id. Special P.P. or to the next State Defence lawyer Sri Das to prepare himself. As discussed earlier, not only sufficient time but also complete papers should be made available to the lawyer to serve the cause of justice. There is nothing to suggest in this case that all papers were made available either to Mr. Chowdhury or to Mr. Das. Accordingly, there cannot be moment's doubt to accept that there was total failure to comply with the requirements of the rule of procedure contained in the said provision.

12. Furthermore, the doctrine of *audi alteram partem* which is a part of natural justice is that no man should be condemned unheard. The said principle ensures that both sides should be heard fairly and reasonably and if any reliance is placed on evidence or record against a person, then that evidence or record must be placed before him for his information, comment and criticism. Natural justice requires that any statement of a person before it is accepted against somebody else, that somebody else should have an opportunity of meeting it whether by way of interrogation or comment. So long as the party charged has a fair and reasonable opportunity to see, comment and criticise the evidence, statement or record on which the charge is being made against him, the demands and the tests of natural justice are satisfied. In this connection, the decision reported in *Kishanlal Agarwalla Vs. Collector of Land Customs*, may be referred to. Cross-examination is the most effective of all means for extracting truth and exposing falsehood. The exercise of this right is justly regarded as one of the most efficacious tests which the law has devised for the discovery of truth. The Court is not bound to accept the testimony of a witness which on the face of it is not acceptable merely because there was no cross-examination *Juwarsingh and Others Vs. State of Madhya Pradesh*, . In the present case, most of the witnesses, as it appears, were cross-examined by a few accused persons only e.g. P.W. 1 was cross-examined by accused B. Rambabu, B. Manju, Pappu & Luppi in one set, Srinu & Ashok in one set, Madan @ Seru & Sanjay in one set, Abdul Rouf, Arunangshu, Debasis individually, P.W. 2 was cross-examined by accused B. Rambabu and others in one set, Debasis, Srinu & Ashok in one set, Arunangshu, Abdul Rouf, Kaushik, Madan @ Seru & Sanjay, Dipak etc. In the absence of any indication either in the order sheet or in the deposition of the witnesses regarding the other accused persons, it will necessarily be inferred that

other accused persons were not offered to cross-examine. So far accused Balaraju, Krishna Rao, Kankar & Chinni are concerned, they, as stated earlier, were all along unrepresented. They having no legal background cannot be expected to deal with the case involving complicated questions of law and fact themselves, but still how they were asked to cross-examine P.W. 4, P.W. 5 etc. and cross-examination on their part was noted "declined" or "disinclined" is really not understood. Nevertheless, since they were not legally offered to cross-examine the witnesses, no part of evidence against them can be used. Similar is the fate of evidence against other accused persons who were not at all offered to cross-examine. As regards accused Kunwar Singh @ Seru @ Madan he along with other accused persons appears to have adopted the cross-examination of some witnesses e.g., P.W. 1, P.W. 2, P.W. 4 etc. So the contention of Mr. Basu that he was not offered to cross-examine does not appear to be sustainable in respect of all the witnesses. He may however, have the right of cross-examination in respect of those witnesses only where there is nothing to indicate that he was offered to cross-examine. As regards accused Rajinder Singh @ Manu & Bijoy Singh, they disinclined to cross-examine as they filed one "Diary" before the Hon"ble Supreme Court, as noted in the deposition of P.W. 2. How "Diary" can be filed before the Hon"ble Supreme Court is not clear. Nevertheless, Mr. Dilip Dutt appearing for the above two appellants on referring to commitment order dated 21.2.02 passed by the Id. SDJM, Midnapore contended that the prayer of his above clients for supply of translated version of the copies of police report and other documents either in Hindi or in English was turned down, for which they ultimately moved before the Apex Court and as such non-supply of copies of those documents either in English or in Hindi caused serious prejudice to them. The Apex Court did not interfere with the decision of this Court as the petitioners know Bengali language, they were born and brought up in West Bengal and studied in Bengali language and that all witnesses have been examined by the prosecution and statements u/s 313 Cr. PC have also been recorded and the matter was kept for examining defence witnesses. So the SLP was dismissed with the observation that it will be open to the petitioners to raise the contention before the Trial Court or at the appellate stage that by not giving translated version of the statements of the witnesses, their right to defend was adversely affected. Now, the object of Section 207 Cr. PC of supplying copies of statements of witnesses and other documents to the accused is to put him on notice of what he has to meet at the inquiry or trial Narayan Rao Vs. The State of Andhra Pradesh, . Unlike Section 277 or 279 or 281 Cr.PC which deal with language of record of evidence, interpretation of evidence to the accused or his pleader & record of examination of the accused respectively, the Code is silent regarding preparation and supply of translated version of copies of documents mentioned in Section 207 to an accused. It appears to be pertinent to point out in this connection that even in case of interpretation of evidence in a language other than the language of the Court to an accused appearing through pleader and not understood by the pleader, interpretation to such pleader in that language is required under Sub-section (2) of Section 279. In other words, all

that is required is understanding of the language of the Court by the pleader of the accused. So, on the face of the above order of the Apex Court, in view of the aforesaid discussion and when both the above accused were born and brought up in West Bengal, studied in Bengali language and over and above they were duly represented by a lawyer whose mother-tongue is Bengali, the said contention of the accused persons that they were seriously prejudiced, I regret, appears to be more captious than substantial. Accordingly, when despite opportunity being given, the said two accused disinclined to cross-examine the witnesses on a plea which is not legally tenable, they, perhaps, did that at their own peril and they cannot be permitted to take advantage of their own fault. To make it clear, merely because the said two accused moved before the Apex Court for some relief, this was no ground for refusal to cross-examine, as the decision of the Court below in that case would have been subject to the ultimate decision of the Apex Court. When a party declines to avail himself of the opportunity to put his essential and material case in a cross-examination, it follows that he believes that the testimony given even in criminal case cannot be disputed at all which is the rule of essential justice. To permit the above accused persons to cross-examine at this stage will amount to giving indulgence to them which will be a dangerous proposition since a judicial proceeding in that event would be governed by their sweet will--at one time they would decline on a flimsy ground and at another they would express their intention to cross-examine. Unnatural expansion of natural justice without reference to the situation of a given case can be exasperating. They, however, can claim the right of cross-examination like accused Seru or others only where they were not at all offered to cross-examine.

13. Almost all the Id. counsels for the appellants on referring a number of decisions reported in *Ajmer Singh Vs. The State of Punjab*, , *Zwinglee Ariel Vs. State of Madhya Pradesh*, , *Machander Vs. State of Hyderabad*, , *Jai Dev Vs. The State of Punjab*, , *Radhakishan Vs. State of U.P.*, , 2003 SCC (Cr.) 544, 2003 C.Cr.L.R. (Cal.) 346 etc. and on drawing Court's attention to the examination of the accused persons u/s 313 Cr.PC next contended that instead of putting the incriminating circumstances as disclosed in the evidence to some accused persons, some irrelevant and extraneous matters were put having no nexus with the materials on record and sometimes questions were put in the form of cross-examination which the Id. Judge could not do and it has seriously prejudiced their clients. Mr. Goswami, on the other hand, on citing the decisions reported in *Makan Jivan and Others Vs. The State of Gujarat*, argued that even if there may be a few questions which may be irrelevant, since the incriminating circumstances were put to the accused persons, they cannot be said to have been prejudiced in any way. The law on the point of examination of accused u/s 313 Cr.PC is well-settled and it has been elaborately discussed in this Court's decision reported in *Ranjit Mondal, Sajal Bouri and Ors. v. State of West Bengal* 1996 C.Cr.L.R. (Cal.) 122, where all the earlier important decisions on the subject were considered. As a matter of law, the examination of the accused u/s 313 Cr.PC is a very important duty which should be performed with particular

care and in the proper way. The section is intended mainly for the benefit of the accused and also to help the Court in finding the truth. The principle on which it is based is that before the damaging points in the prosecution evidence are used against the accused for determining his guilt, it is essential that his pointed attention should be drawn to them one by one avoiding the form of cross-examination in order to afford him an opportunity of giving an explanation consistent with his innocence. The correct method of performing the duty in Section 313 is not to ask generally if the accused has anything to say about the charges or the evidence against him, but to place before him separately one by one in short sentences all the vital and salient parts of the evidence appearing against him in the simplest possible language so that he can realize what things he has got to explain, and to ask him after putting to the accused each material fact against him whether he wanted to say anything about the matter. The question should not be savour of cross-examination nor should be inquisitorial *Tara Singh Vs. The State*, . The questioning must be fair and must be couched in a form which an ignorant and illiterate person will be able to appreciate and understand *Mohinder Singh Vs. State of Punjab*, . Omission to ask on a point which appears to be vital is a departure from the statutory rule in Section 313 and basing a conviction on the failure of the accused to explain what he was never asked to explain is unjustified AIR 1933 124 (Privy Council) . Failure to put to the accused specifically, distinctly and separately each material circumstance appearing in evidence against him amounts to a serious irregularity vitiating the trial if it has prejudiced the accused *S. Harnam Singh Vs. The State (Delhi Admn.)*, , and when circumstance against the accused is not put to him. Prosecution cannot be permitted to rely on that circumstance *Harijan Magha Jesha Vs. State of Gujarat*, . In the present case, a few questions out of many put to some of the accused persons during their examination u/s 313 Cr.PC are as follows :

Debasis Dutta;

1) Q. 6: Are you the Secretary of the Association of Contractors of B. Rambabu, Satyen Singh, Kamal Jain and others ? Did you go with your gang to the Railway Officials and after an understanding between you all get commission of scrap materials or you used to get money or did the creation of Panna Flegance Contractor by Gautam Chaubey affecting your business of commission or business of restaurant, and so did you remove Gautam from the face of the earth. What are your comments?

Kunwar Singh @ Madan @ Seru:

2) Q. 6: There are lot of Singh families residing in Kharagpur and there are people in various States, then Why were you involved in the K.C.P. (T) Case?

Arunangshu Bhanja:

3) Q. 3: It is revealed from the evidence of prosecution witness Nos. 1, 2, 3, 5, 8, 9 & 10 i.e. Debasis, Pradip, Biswajit Adhikari, Ramesh, Kamal Kundu and

Ashok Roy respectively that when the Singh brothers stopped Gautam at Malancha Road by showing hands near the shelter of Satyen Singh and you and the other assistants i.e. B. Srinu, Ashok Tadi and other 4/5 people started firing upon Chaubey from a gun and he fell on the ground and you and your associates saw from a distance and started shouting "Kill Gautam "Sala" and Don't Keep Him Alive" At that time some witnesses saw a revolver in your hands and saw you going to the house of B. Rambabu with others. What are your comments ?

4) Q. 6: What do you do in your personal life?

Tell me what you want to tell regarding your involvement in the case of Kharagpur (T) P.S. on 16/01 till being arrested on 11.09.2001 by S.I. of Calcutta High Court?

Sanjay Thakur @ Ram Naresh:

5) Q. 3: The Prosecution witness Nos. 6 & 10 i.e. Balai Bhattacharya and Saibal Sinha have said in their evidence that you recovered on 16.11.2001 from a bush and you said to them i.e. to S.I. Dilip Dutta that on 11.09.2001 you assaulted Gautam Chaubey by an importer revolver or pistol or you shot him and as a result Gautam Chaubey faced an untimely death. What are your comments?

6) Q. 4: After all the misdeeds you hid your boss or the "Don" of Kharagpur Basav Rambabu in room No. 201 of Jogita Circuit in Hyderabad and protected him like a shadow. But today on 1.11.2001 he was arrested by the police after investigation and till date you are in this jail end hearing the judgment in the presence of 4/5 or 6 special lawyers. Your boss or the members of his family carried on the case by one or two dozen lawyers, no one came forward to help you or you did not also ask or did you mentally support the incident on 11.09.2001 or did you want to spoil the trials with the help of the mentally balanced individual. What are your comments?

7) Q. 5: Where is your permanent residence ? Have you been brought from any place in exchange of money for taking part in the incident in 11.09.2001 or did you engage yourself in the brutal killing with the assistance of others accomplices and ill-suggestions and help. What are your comments?

B. Rambabu:

8) Q. 25: Do you assume yourself as a humble Indian citizen and the leader of this State and the leader of Kharagpur Forward Block or you think yourself as the other 18 accomplices or the "Don" of Kharagpur. After being arrested in Kharagpur when you produced yourself in unit then did you submit a statement like the villain of a film "There is no wall in West Bengal that can stop me anywhere". You are almost 8 months in jail custody and while in trial in the Court you have worn a necklace around your neck with a white packet that you hold in the palms of your hand and show it straight to the Court for what reason can you tell or what are your comments in this matter?

14. These are some of the instances of questions, a glance to which will reveal that not only questions were in the form of a long narration but also in the form of cross-examination and in some cases incriminating circumstances were left and wrong questions were put and some questions were quite irrelevant having no nexus with the materials on record. The manner in which the accused persons were examined is totally bad and is not legally sustainable. The decision cited by Mr. Goswami are distinguishable and cannot be said to have any manner of application in the above facts and circumstances. So, the contention of the Id. counsels for the appellants that their clients were seriously prejudiced due to the above nature of examination of their client u/s 313 Cr.PC cannot be ruled out.

15. Mr. Gooptu appearing for appellant Ashok Kumar Tadi, on referring a few decisions reported in AIR 1954 SC 455, AIR 1954 SC 551, 1997 Cr.LJ 82, Bhadrans Vs. State of Kerala, , 2003 C.Cr.L.R. (Cal.) 346 & 2002 (4) Crimes 379 and on drawing Court's attention to the materials on record next argued that an alibi was taken by his client with the appellant Srinu from the very inception that on the previous date of the alleged incident they were arrested in connection with a case at Kakinada, Andhra Pradesh which is about 800 kms. off from Kharagpur and on the next date they were released on bond at about 4,00 p.m. in support of which necessary certified copies of documents in Telegu as also translated version in English were filed with a prayer for calling for the records and summoning witnesses but though summons were drawn up and that documents could be marked exhibits in view of the provisions of Sections 72 to 80 of the Evidence Act, the said prayer was ultimately rejected vide Order No. 53 dated 14.8.2002 without assigning any reason and his client was thus not given reasonable opportunity to adduce evidence in violation of Section 233 Cr.PC. Mr. Gooptu adversely criticized the reasoning of the Id. Court below at page 69 of the impugned judgment that no certified copy of the order of Kakinada Court of Andhra Pradesh has yet been furnished by the two accused persons which is far from true. Similar argument was advanced by Mr. Basu for appellant Srinu contending that even though the petition for summoning witnesses was filed on 14.08.2002 which was prior to examination of his client u/s 313 Cr.PC on 21.08.2002, it was rejected without assigning any reason and after examination of his client u/s 313 Cr.PC on 21.08.2002, the next day was fixed for production of defence witnesses i.e. less than 24 hours time was given for the purpose though summons were not issued and the prosecution was given more than three weeks time to bring its witnesses from Andhra Pradesh and Jamshedpur within the State of Jharkhand and so the said opportunity in favour of his client as also appellant Ashok Tadi was unmeaningful or a mere show of justice and the Id. Judge cannot be said to have acted in unpartisan way. Now, onus to prove alibi is on the accused, as it is a matter within his special knowledge Chandrika Prasad Singh and Others Vs. The State of Bihar, , (AIR 1975 SC 1433), and as such plea of alibi when taken by an accused must be proved by him State of Haryana Vs. Sher Singh and Others, and he is to substantiate and make it reasonably probable State of Uttar Pradesh Vs. Sughar Singh and Others, .

Accused pleading an alibi must lead evidence to show that he was so far off at the moment of the crime from that place when the offence was committed and that he could not have committed that offence). In Session trial, only after the Court finds that the accused cannot be acquitted u/s 232, then it can direct the defence to enter into defence. Subsection (3) of Section 233 Cr. PC in mandatory terms obligates the Court to issue process for attendance of defence witnesses unless it considers its refusal on the ground that the application has been made by the accused for the purpose of vexation or delay or for defeating the ends of justice. Here, accused Ashok Tadi and Srinu were examined u/s 313 Cr.PC on 14.08.2002 and 21.08.2002 respectively. Both the accused filed a petition on 14.08.2002 praying for issuing summons upon their witnesses as mentioned therein, but the same was rejected on that date vide Order No. 53 without assigning any reason with a direction to them to bring witnesses at own risk on 23.08.2002. If completion of examination of another accused viz Srinu was taken to be a bar, the application could have been kept for consideration at the proper time i.e. on 21.8.2002 instead of rejecting the same. Their prayer for calling for the records was also rejected observing that the Court will not call for any record from other province. On 21.08.2002 accused Srinu along with others were examined u/s 313 Cr.PC and the Id. Judge passed an order that for the ends of justice an opportunity be given to those accused persons to adduce evidence on and from tomorrow i.e. 22.08.2002 and the next date i.e. 23.08.2002 was fixed for argument. The direction to accused to bring witnesses at own risk without issuing summons and opportunity to the accused persons vide Order No. 55 dated 21.08.2002 knowing fully well that they are behind the bare all along appear to be an empty formality in total disregard of the mandatory provision of Section 233(3) Cr.PC. The ground for rejection of the prayer for calling for the records as spelt out in Order No. 53 dated 14.08.2002 does not appear to be at all convincing. Which of the witnesses are to be summoned and which witnesses not is, of course, within the ambit of decision of the Id. trial Judge. So, since by declining to issue process and to call for the records the said two accused were deprived of the opportunity of proving their case, there was no fair and proper trial and as such conviction cannot be sustained. It is to be borne in mind that rules of procedure designed to ensure justice should be scrupulously followed and the Court should be jealous in seeing that there is no breach of them. In this connection, the decisions reported in *Habeeb Mohammad Vs. The State of Hyderabad*, AIR 1954 SC 455, 1982 Cr.LJ 899, 1993 Cr.LJ 1966 etc. may well be referred to.

16. In the light of the above discussion when there was violation of the fundamental principles of judicial procedure on account of breach of the mandatory provision of Section 304 Cr.P C denial of opportunity to some of the accused persons to cross-examine the prosecution witnesses, denial of opportunity to some of the accused persons to adduce evidence in support of their case, non-compliance with the provision of Section 313 Cr.PC by not putting incriminating circumstances and asking irrelevant questions and in cross-

examination form and absence of fair and proper trial, the question of going into the merits of the appeals is out of the way and the only course open to this Court is to send back the case on remand after setting aside the order of conviction and sentence, for fresh decision after observing necessary formalities.

17. The respondent has filed one application each u/s 391 Cr.PC in CRA No. 429/2002, appellant being Ashok Kumar Tadi and in CRA No. 371/2002, appellant being B. Srinibas Rao @ Srinu, along with xerox copies of a few documents, praying for permitting it to adduce additional evidence in order to prove the documents contained in annexures, inter alia contending that the papers produced in Court by those two appellants in support of their alleged alibi are false, concocted and fabricated. The said Section 391 empowers the Appellate Court to take additional evidence which for reasons to be recorded is considered necessary in order to prevent failure of justice and for arriving at a correct finding. The documents filed by the above two accused in the Id. Court below in order to prove their alibi have not yet been proved and marked exhibits. Only when this course of complete, the question of giving contrary evidence on behalf of the prosecution in order to show the same as fraudulent and fabricated, as alleged, would arise. Moreover, the said power may be exercised only by an Appellate Court. When the Appellate Court is the High Court, such evidence may be taken either by itself or by Court of Session or a Magistrate provided the appeal is kept pending, as will be evident from the provisions of Sub-sections (1) & (2) read together. That apart, an Appellate Court cannot decide if additional evidence should be admitted unless it has heard the appeal on merits. As retrial is involved in the present case and this Court could not go into the merits of the appeals, the provision of said Section 391 cannot be invoked.

18. It is worthwhile to point out that as required under Clause (c) of subsection (1) of Section 354 Cr.PC, it is imperative that for each separate conviction there should be a separate sentence. The sentence in the case of conviction is a part of the judgment. Conviction of several persons charged with different offences without specifying different sections of the Indian Penal Code and passing a combined sentence is illegal. In the present case, though all the accused persons barring accused B. Rambabu and Dipak Bera were charged under Sections 302/120B & 302/34 IPC and in addition accused Sanjay Thakur @ Ram Naresh was charged u/s 25/27 of Arms Act and accused B. Rambabu and Dipak Bera were charged u/s 302/120B IPC, they were all convicted u/s 302/120B/34 IPC and in addition accused Sanjay was convicted u/s 25/27 of Arms Act and all were sentenced to suffer life-imprisonment each and to pay fine of Rs. 10,0000/- each i/d to S.I. for three months each, and in addition a combined sentence of 4 years R.I. under Sections 25/27 of Arms Act and to pay fine of Rs. 3000/- i/d to three months imprisonment (without specifying the nature of imprisonment i.e. R.I. or S.I.) was passed upon accused Sanjay Thakur. The said sentence cannot be said to be proper and valid. Moreover, as regards sentence of fine, the sentence of death or of life-imprisonment being an extreme penalty, adding sentence of fine is hardly calculated to serve any social purpose, as was held by the Apex Court in

the decisions reported in Surinder Kumar Vs. State (Delhi Administration, Delhi), and Palaniappa Gounder Vs. State of Tamil Nadu and Others,).

19. It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done Manak Lal Vs. Dr. Prem Chand, . Confidence in the administration of justice is an essential element of good Government, and reasonable apprehension of failure of justice in the mind of the litigant public should, therefore, be taken into serious consideration. Courts should not fail to remember that it is their duty no less to preserve an outward appearance of impartiality than to maintain the internal freedom from business. Transfer in certain cases is made not because the party approaching the Court will not have a fair and impartial trial but because the party has reasonable apprehension that it will not have such a trial. Examination of the accused u/s 313 Cr.PC amounting to lengthy cross-examination, refusal to give opportunity to cross-examine the witnesses etc. are some of the instances where transfer of a case is justified. When the whole procedure was extremely arbitrary and in direct contravention of law and the Judge displayed plenty of zeal and want of judicial spirit, the apprehension entertained by a party that it will not have a fair trial is justified. In the case on hand, the way the Id. Judge dealt with the case, the manner in which questions were put to different accused persons during their examination u/s 313 Cr.PC and some observations made in the orders lead to suggest that he has already formed an idea not conducive to fair trial, and in fact some of the Id. counsels during argument before this Court expressed their apprehension in this regard. In such circumstances, it is desirable that the case should be dealt with by a Judge other than Mr. LA. Shah.

20. Accordingly, the aforesaid appeals heard analogously be allowed on contest. The impugned judgment and order of conviction and sentence of all the appellants passed by Mr. I.A. Shah in Sessions Trial Case No. XVII/March, 2002 & Sessions Trial Case No. XLVIII/ May, 2002 on 31.08.2002 be set aside. The case be remanded to the Id. Court below with a direction to comply with the provision of Section 304 Cr.PC, in respect of the accused persons who are undefended followed by giving opportunity to those accused persons only as mentioned in the body of the judgment to cross-examine the prosecution witnesses and then examination of the accused persons u/s 313 Cr.PC strictly in accordance with the provisions of law and in the light of the observations made above and thereafter an opportunity to the defence to adduce evidence in support of its case and then to conclude the trial within a period of three months from the date of receipt of the record.

21. The accused persons who are on bail will remain on the same bail bonds with this modification of the bail order, applicable in case of the accused person/ persons where restriction in respect of entry was imposed, that they are permitted to enter into the jurisdiction of Midnapore (West) District only on the date/dates of trial to attend the Court, other conditions remaining unaltered.

22. As nine accused persons are still absconding and chance of abscondance of

the accused persons who are behind the bars and facing the trial cannot be ruled out and in view of the aforesaid direction to conclude the trial within a specified period, the question of releasing those accused persons in custody on bail does not arise.

23. Department is directed to send down a copy of this judgment along with the L. C. R. at once to the Id. Sessions Judge, Paschim Medinipur through Special Messenger at the cost of the appellants to be deposited positively by Monday, 17th May, 2004, with a request for allotting the case to a Judge other than Mr. I. A. Shah for trial in accordance with the law and in the light of the directions made above.

Nure Alam Chowdhury, J.

24. I agree.