

(2007) 05 GAU CK 0055
In the Gauhati High Court
Case No : Criminal Appeal No. 1 (K) of 2003

State of Nagaland

APPELLANT

Vs

Lipok Ao and Others

RESPONDENT

Date of Decision : 17-05-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 313(1), 314, 342
Penal Code, 1860 (IPC) — Section 302, 307, 326, 34

Citation : (2007) CriLJ 3395 : (2007) 3 GLT 786 : (2007) 3 GLT 656

Hon'ble Judges : M.B.K. Singh, J; I.A. Ansari, J

Bench : Division Bench

Advocate : B.N. Sharma and Apok Pongener, for the Appellant; C.T. Jamir, E.Y. Renthungo and Makheto Sema, for the Respondent

Judgement

I.A. Ansari, J.—Though the present appeal arises out of acquittal of persons, who had been charged under Sections 302, 307 and 326 read with Section 34, IPC, it, as would transpire, demonstrates trial Court's complete lack of knowledge of the procedure for trial of criminal cases, particularly, a trial by a Court of Session and also reveals ignorance of the fundamental concepts of criminal jurisprudence.

2. With the above prefatory remarks, we must also point out that this is an appeal against the judgment and order, dated 18-2-2002, passed by the Additional Deputy Commissioner (Judicial), Dimapur, in GR-Case No. 256/99, acquitting the accused-respondents of the charges framed against them under Sections 302, 307 and 326 read with Section 34, IPC.

3. The case of the prosecution, as unfolded at the trial, may, in brief, be described as follows:

(i) In the afternoon of 29-5-1999, Shri L. Imkong, the then Minister, Govt. of Nagaland, was escorted by the personnel of the Nagaland Police including the accused respondents, in four vehicles, from Kohima to his private residence at Diphupar, Dimapur. At around 5-30 p.m. when the escort vehicles reached near a

petrol pump, located in an area called Six Mile, at Dimapur, on Dimapur-Kohima road, they came dangerously close to a Maruti Zen bearing registration No. NL-01-2552, which was coming from their opposite direction, i.e. from the direction of Dimapur and proceeding towards Kohima, and as the said Maruti Zen was about to collide against the escort vehicle, the occupants of the Maruti Zen shouted at the escort party. The escort vehicles and the said Maruti Zen did not stop, rather, the vehicles aforementioned kept proceeding towards their respective destinations. However, the occupants of the Maruti Zen, while proceeding towards Kohima from Dimapur, stopped, for a other hand, soon after dropping the Minister at his private residence at Diphupar, the accused-respondents, who were members of the escort party, took leave of the Minister on the pretext that the next day was a Sunday and that they would deposit their arms and ammunitions at the quarter-guard, which was situated at Khopanalla near Dimapur. Having been permitted to leave, the accused respondents, however, came, in the pilot vehicle of the escort party, namely, NL-01-2648, towards Kohima in search of the said Maruti Zen and its occupants.

(ii) Thus, instead of proceeding, as had been projected by them before the Minister, to deposit their arms and ammunitions at the quarter-guard at Khopanalla, the accused-respondents proceeded with their vehicle towards Chumukidema and on reaching Chumukidema, when they saw the said Maruti Zen parked by the side of the road, they stopped their vehicle in front of the Maruti Zen blocking its way. On finding the accused-respondents blocking their way, when Shri Michael, one of the occupants of the Maruti Zen, who was at the driving seat, started reversing their vehicle to turn around, three of the accused-respondents, namely, Constable Ato Yimchunger, Constable Akaho Sumi and Constable Mayang Ao fired as many as 19 rounds of bullets from their arms on the occupants of the Maruti Zen without any provocation from them and without any danger of imminent threat to their own lives or to the lives of others. As a result of such shooting, one of the victims, namely, Shri Adina, who was sitting on the front seat of the Maruti Zen, by the side of Shri Michael, died instantly inside the car, the two other victims, namely, Shri Michael and Shri Pangertemsu were seriously injured and, later on, Shri Michael also died at a hospital at Delhi, while undergoing treatment there and Shri Pangertemsu, who had sustained bullet injuries on his right shoulder, had to suffer amputation of his right hand.

(iii) In the circumstances depicted above, when the victims had been either seriously injured or killed, Michael, who was, as indicated hereinbefore, at the driving seat, managed to, somehow, take the Maruti Zen to a nearby students' hostel looking for help", but the inmates of the hostel could not do much and, thereafter, they took the Maruti Zen back to the main road, i.e. NH-39. However, when the vehicle reached back near Patkar Bridge, Michael was no longer in a position to drive. Hence, the Maruti Zen was stopped there and help from the passers-by was sought for. Michael and Pangertemsu were, eventually, picked up by a person, who was proceeding towards Dimapur, and they were taken to the Civil Hospital, at Dimapur, for treatment, leaving behind the dead-body, of Adina

in the Maruti Zen.

(iv) Having accomplished their mission, the accused respondents went back to the house of the Minister and reported to him that on their way to deposit arms, they had, first, gone to Chumukidema gate to see some of their friends, whom they had seen at the Chumukidema gate, while coming from Kphima along with the Minister and that when they had reached near Chumukidema gate, they saw a vehicle, with which they were about to meet an accident, lying parked at a short distance from Chumukidema police check post. The accused-respondents also reported to the Minister that they had stopped their vehicle to enquire as to why they had been threatened by gun and shouted at and when they so made enquiry from the occupants of the said car, one of the occupants of the car had fired at the escort party and, thereafter, the occupants of the car had reversed their car and tried to run away. The accused-respondents further reported to the Minister that while the said car was being so reversed, one of the Minister's bodyguards was hit by the Maruti car and it was at that point of time that his bodyguards opened fire. When the Minister enquired from his bodyguards if anyone had been injured, his bodyguards replied in the negative. When the Minister asked them as to why they had not chased the vehicle, the bodyguards replied to him by saying that they had spent a lot of time collecting empty shells and it was because of this reason that they could not chase the fleeing vehicle.

(v) Having been advised by the Minister to report the matter to Diphupar Police Station, the accused-respondents went to Diphupar Police station and reported there that they had fired on the occupants of a Maruti Zen in retaliation of a shot, which had been fired by one of the occupants of the said Maruti Zen. On receipt of this report, Officer-in-Charge, Diphupar Police Station, made GD Entry No. 310, dated 29-5-2002, in this regard and a case, namely, Diphupar Police Station Case No. 42/1999 was accordingly registered. During investigation, police came to the place of occurrence and on arrival at the place of occurrence, they found the Maruti Zen with a dead-body lying riddled with bullets on its" head and right elbow. The Maruti Zen bore as many as 12 bullet holes. The police also found the front and the back windscreens of the Maruti Zen broken with bullet holes and its tyres intact. The police took photographs of the Maruti Zen and, on finding as many as seven numbers of empty bullet-cases of AK-47 and two pieces of glass of red colour, the same were seized. Further investigation by police revealed that persons, who had fired on the victims, were Constable Ato Yimchunger, Constable Akaho Sumi and Constable Mayang. On completion of investigation, police laid charge-sheet against all the five accused persons and one Constable Yingphong Konvak under Sections 302/307/34, IPC.

4. During trial, while accused Yingphong Konvak was discharged, the remaining accused (i.e. the present accused respondents) pleaded not guilty to the charges framed against them under Sections 302/307/34, IPC. The trial proceeded and as many as 19 witnesses were examined by the prosecution in support of their case. The accused were, then, examined u/s 313, Cr. P.C. and in their

examination aforementioned, the accused-respondents denied that they had committed the offences alleged to have been committed by them, the case of the defence being, in brief, thus. While the accused-respondent Nos. 2 to 4 took the plea that one of the occupants of the Maruti Zen had opened fire at them and on a signal received from accused-respondent No. 1 namely, Shri Lipok Ao, SI of Police, they too opened fire from their firearms, the accused No. 5 took the plea that he merely drove the vehicle and while he was reversing the vehicle, shooting took place, he went underneath the vehicle and he thus, did not participate in the firing at the occupants of the car and was, therefore, innocent. As far as accused No. 1, Shri Lipok Ao is concerned, his defence was that he had not directed anyone to open fire, but they all retaliated, because of the fact that one of the occupants had opened fire. No evidence was, however, adduced by the defence.

5. The learned trial Court held that the accused had acted in discharge of their official duty, that they had acted in self-defence and also under grave and sudden provocation. Because of the conclusions, so reached, the learned trial Court acquitted all the accused-respondents. Aggrieved by the acquittal of the accused-respondents, the State has, now, preferred this appeal.

6. We have heard Mr. B. N. Sharma, learned senior counsel, appearing on behalf of the appellant, and Mr. C.T. Jamir, learned counsel, for the accused respondent No. 1. We have also heard Mr. Kikheto Sema, learned counsel, appearing on behalf of the accused-respondent No. 5, and Mr. E. Y. Renthungo, learned Counsel who has appeared as Amicus Curiae.

7. Presenting, with all earnestness, the case of the appellant, Mr. B. N. Sharma, learned Senior Counsel, has pointed out that the sole surviving occupant of the said Maruti Zen, namely, Pangertemsu was examined as P.W. 1 and his evidence, according to Mr. Sharma, clearly reveals that the accused-respondents had fired bullets, injured and killed the occupants of the Maruti Zen without provocation and without any imminent danger posed to anyone's life. The entire evidence of P.W. 1 has remained, contends Mr. Sharma, wholly unshaken and was sufficient to warrant conviction of the accused-respondents.

8. Drawing out attention to the evidence of P.W. 7, namely, Shri I. Imkong, the then Minister, Mr. Sharma has pointed out that though, according to the evidence of P.W. 7, the accused-respondents had reported to him that one of the occupants of the car had opened fire, the fact remains that while P.W. 1, who was, admittedly, one of the occupants of the Maruti Zen, was being cross-examined by the defence, the defence made no endeavour to elicit evidence from him to show that the occupants of the Maruti Zen had opened fire. Far from this, points out Mr. Sharma, the defence did not even suggest to P.W. 1 that it was because of the provocation received by the occupants of the said car or because of the bullet(s), which had been fired by one of the occupants of the said car, that the escort party, in, their defence, had to open fire. Mr. Sharma contends that the plea of self-defence, which the accused-respondents have, thus tried to

take at the trial, is wholly false and no foundation for such a plea was laid, when the witnesses for the prosecution were being cross-examined. This apart, points out Mr. Sharma, the evidence of P.W. 7 (the then Minister) clearly shows that when the accused-respondent, particularly, accused-respondent No. 1, namely, Shri Lipok Ao, had reported the occurrence to P.W. 7, they had not asserted that they had acted in self-defence.

9. Mr. Sharma submits that the case of the defence, as projected by the accused-respondents in their examination u/s 313, Cr. P.C. is that it was for reasons of security of their Minister that they wanted to find out as to who were the occupants of the said, Maruti Zen. As against this version of the defence, what the accused-respondent No. 1 had initially reported to P.W. 7 (the then Minister) was, points out Mr. Sharma, that they had gone to Chumukidema gate to see some of their friends, whom they had seen at the gate. Furthermore, submits Mr. Sharma, the version of the occurrence reported to P.W. 7 by accused-respondent No. 1 was that when they had stopped, at Chumukidema gate, to enquire as to why they were being threatened by gun, one of the occupants of the Maruti Zen fired and, thereafter, reversed the Maruti Zen and tried to run away, but while so reversing the Maruti Zen and trying to run away, one of the bodyguards was hit by the Maruti Zen and it was at this point of time that the police party had opened fire. This clearly shows, submits Mr. Sharma, that the version of the defence subsequently projected at the trial that they had acted in self-defence is a result of afterthought and a completely false version, for, points out Mr. Sharma, according to what the accused-respondents had reported to P.W. 7 was that the police party had not opened fire in answer to the shot having been fired by one of the occupants of the Maruti Zen, but only after one of the security personnel had been hit by the Maruti Zen, while the Maruti Zen was being reversed. There was, thus, contends Mr. Sharma, no element of imminent danger posed to the lives of the security personnel and, hence, present one is a case of cold-blooded murder.

10. According to Mr. Sharma, the impression that the accused-respondents were interested only in teaching a lesson to the occupants of the Maruti Zen for the mere reason that the occupants of the Maruti Zen had allegedly shouted at the police personnel, while the latter were escorting the Minister, is transparent from the fact that the accused-respondents did not try to even follow the Maruti Zen and instead reported to the Minister that none had been injured and that they could not chase the vehicle, because of the fact that they had been looking for empty shells. It was, therefore, contends Mr. Sharma, wholly false, when the defence . contended, at the stage of recording of statements u/s 313, Cr. P.C. that they could not chase the fleeing Maruti Zen because of the fact that the engine of the pilot vehicle did not start and it had to be pushed and, in the meanwhile, the Maruti Zen sped away.

11. Mr. Sharma has further submitted that the defence has, at no stage, disputed the fact that the occupants of the Maruti Zen died and sustained injuries as

contended by the prosecution. In such circumstances, the findings of "not guilty" reached by the learned trial Court are nothing, but demonstratively perverse and if such findings are, pleads Mr. Sharma, not interfered with by this Court, it would not only cause serious miscarriage of justice, but would also shake the peoples' confidence in the criminal justice system. The present one, passionately argued Mr. Sharma, is a case, which involves great public interest. Mr. Sharma hastens to add that though public interest cannot be a ground for interfering with a case of acquittal, the fact remains that acquittal of an accused, as in the present case, when the evidence on record is overwhelming and clinching, would send wrong signal to the State of Nagaland for, the people are looking to this Court for justice and it is this public interest, which the State is presenting to this Court in this appeal. The present one is, therefore, submits Mr. Sharma, a fit case for interference with the acquittal of the accused-respondents.

12. Resisting the submissions made on behalf of the appellant, Mr. C. T. Jamir, learned counsel, appearing on behalf of the accused-respondent No. 1, submits that a judgment of acquittal cannot be reversed unless the appellate Court finds that the findings of the trial Court are palpably wrong, manifestly erroneous and demonstratively unsustainable. In the present case, contends Mr. Jamir, there is no evidence on record to show that the accused-respondents shared common intention of causing death or grievous hurt to the occupants of the said Maruti Zen. Far from this, the statements of the accused-respondent, recorded u/s 313, Cr. P.C. show that they had acted in self-defence. Support for his submissions is sought to be derived by Mr. Jamir from the decisions in Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, ; Jaswant Singh Vs. State of Haryana, and Ramesh Babulal Doshi Vs. State of Gujarat,

13. As far as Mr. Kakheto Sema, learned counsel, for the accused-respondent No. 5 is concerned, his submission is that this accused-respondent had acted in his defence, because one of the occupants of the said Maruti Zen had opened fire and this accused-respondent, in order to save his own life, lied underneath the police vehicle and did not participate in the shoot-out. In such circumstances, acquittal of the accused-respondent No. 5 does not, according to Mr. Sema, warrant interference by this Court.

14. Appearing as Amicus Curiae, Mr. E. Y. Renthungu, learned counsel, submits that as far as the accused-respondent Nos. 2, 3 and 4 are concerned, they had merely acted on the directions of the accused-respondent No. 1 and, hence, whatever these accused had done was in discharge of official duty and in order to save their own lives and, in such circumstances, the judgment of acquittal, rendered by the learned trial Court, is in complete conformity with the evidence on record and the laws relevant thereto.

15. While considering the present appeal, what may be pointed out, at the very outset, is that it is trite that an appellate Court, while sitting over a judgment of acquittal, shall, first, determine if the findings of the trial Court are palpably wrong, manifestly erroneous or demonstratively unsustainable. If the appellate

Court's findings are in the negative, the order of acquittal cannot be disturbed; but if the appellate Court holds, for reasons to be recorded, that the order of acquittal cannot be sustained in view of any of the infirmities indicated hereinbefore, it can then and then only re-appreciate the evidence to arrive at its own conclusion. We must also point out that even while re-appreciating the evidence on record, the appellate Court must determine if there are two views possible on the basis of the evidence on record and whether the trial Court could have legitimately arrived at the conclusion, which it has reached, and if the appellate Court finds that the view taken by the trial Court is possible on the basis of the evidence on record, then, the appellate Court shall not reverse such a finding of acquittal merely because of the fact that to the appellate Court, the other view appears to be more appealing or plausible. It is the duty of the appellate Court to address itself to the question as to whether the reasons, which the trial Court has recorded in its order of acquittal, are proper or not. Interference would be possible only when the appellate Court finds that the reasons, which the trial Court has assigned for ordering acquittal, are demonstratively against law or against the evidence on record.

16. Bearing in mind the scope of the power and the nature of duty of an appellate Court, while sitting over a judgment of acquittal, we, now, turn to the appeal at hand.

17. In the present case, what attracts our attention, most prominently, is that P.W. 1 is not only an injured in the occurrence, but also the sole surviving eye-witness to the occurrence in such circumstances, his evidence cannot be readily brushed aside or ignored. We also notice that while cross-examining this witness, defence never suggested to him that this witness and/or his companions, who were present in the Maruti Zen, had shot at the accused-respondents and as the acts of the occupants of the Maruti Zen has posed imminent threat to the lives of the accused-respondents, they (i.e. the accused-respondents) had opened fire. This apart, the fact that the accused-respondents took leave of the Minister (P.W. 7) by telling him that they would be going to deposit their arms and ammunitions at the quarter-guard, at Chumukidema, had not been in dispute at the trial nor had it been in dispute, at the trial, that the accused-respondents, instead of depositing arms and ammunitions at quarter-guard, went straight to Chumukidema gate looking for the Maruti Zen. This, in turn, shows that the report, which the accused-respondent No. 1 had first given to the Minister shortly-after the occurrence to the effect that they had gone to see some of their friends at Chumukidema gate, whom they had seen, while escorting the Minister from Kohima to Dimapur, is inconsistent with the subsequent defence taken by the accused-respondents that they had gone to the Chumukidema gate looking for the said Maruti Zen.

18. Moreover, one can also not ignore the fact, as correctly pointed out by Mr. B. N. Sharma, that while reporting the occurrence to the Minister (P.W. 7), accused-respondent No. 1 never told him that the police party had opened fire

immediately after one of the occupants of the Maruti Zen had opened fire on them, rather, what the accused-respondents had reported to the Minister (P.W. 7) was that when the Maruti Zen was being reversed, it had hit one of the police personnel and it was then that the bullets were fired by the police party at the occupants of the Maruti Zen.

19. Coupled with the above, it is also of immense importance to note that as the record reveals, it had also been the case of the accused-respondents that they had fired at the tyres of the Maruti Zen. The evidence on record, however, reveals that despite the fact that such a large number of bullets had been fired and the Maruti Zen was found bullet-ridden, the tyres were left undamaged and did not bear bullet holes.

20. In the face of the evidence so recorded, it is transparent that unless some legally permissible materials were available on record indicating otherwise, it was well-nigh impossible to hold that the accused-respondents had acted in self-defence or under grave and sudden provocation or in discharge of their official duty. In order to, however, positively hold that the accused-respondents are guilty or had no defence to offer, what needs to be pointed out is that u/s 313(1) (a) Cr. P.C. a trial Judge is empowered to put any question to an accused at any stage of the trial, but at the end of the trial, it is, u/s 313(1)(b), mandatory for the trial Judge to put to the accused, facing trial every such piece of evidence, which appears incriminating against the accused and reply of the accused shall be sought thereto.

21. Section 313, Cr. P.C. aims at enabling the accused to personally explain circumstances appearing in the evidence against him. Examination of an accused u/s 313(1)(b), Cr. P.C. is, therefore,, not an empty formality, but a solemn act of every trial Court.

22. As observed by the Apex Court, in *State of Maharashtra Vs. Sukhdeo Singh and another Vs. State of Maharashtra Through C.B.I. Vs. Sukhdev Singh alias Sukha and others*, , Section 313, Cr. P.C. is a statutory provision, which embodies the fundamental principle of a fair trial based on the maxim *audi alteram partem* and that attention of the accused must be specifically invited to inculpatory pieces of evidence or circumstances, laid on record, with a view to giving the accused an opportunity to offer his explanation if he chooses to do so. As a matter of fact, as indicated in *Sukhdeo Singh (supra)*. Section 313(1)(b), Cr. P.C. not only casts a solemn duty on the trial Court to elicit the response of the accused to every piece of incriminating circumstance, which may appear against him, but also confers a corresponding right on the accused to receive an opportunity so that he can offer his explanation, if he has any, with regard to such incriminating materials or circumstances as may be appearing against him from the evidence on record. Examination of the accused u/s 313(1)(b), Cr. P.C. is reached after the witnesses of the prosecution have been examined and before the accused is called on to enter upon his defence. At the stage of closure of prosecution"s evidence and before recording statement of the accused u/s 313(1)

(b), Cr. P.C. the trial Judge is not expected to evaluate the evidence for the purpose of deciding whether or not he should question the accused. Before an accused is examined u/s 313(1)(b), Cr. P.C. the trial Judge is not expected to sift the evidence and pronounce whether or not he would accept the evidence regarding any incriminating material against the accused to determine whether or not he would examine the accused on that material. To do so, points out the Apex Court, in Sukhdeo Singh 1992 Cri LJ 3454 (supra), would amount to pre-judging the evidence without hearing the prosecution u/s 314, Cr. P.C. No wonder, therefore, that the Supreme Court, in Sukhdeo Singh (supra), has observed that however weak or scanty the prosecution evidence may be with regard to an incriminating material, it is the duty of the Court to examine the accused and seek his explanation thereto. It is only after that stage is over that the oral arguments have to be heard before the judgment is rendered. It is only where the Court finds that no incriminating material has surfaced that the accused may not be examined u/s 313. In short, if there is material against the accused, he must be examined, u/s 313(1)(b), Cr. P.C. In fact, it is apposite to pointed out, at this stage, that in Sharad Birdhichand Sarda Vs. State of Maharashtra, the Apex Court made it clear that the circumstances, which were not put to an accused, while he was examined u/s 313, Cr. P.C. such circumstances have to be kept excluded from the Court's considering at the time of determining the guilt or otherwise of the accused.

23. What is, now, of utmost importance to notice that if an appellate Court or revisional Court finds that a trial Court has not put any question to the accused even if it was of a vital nature, such omission alone should not be made a ground to set aside the conviction and sentence as an inevitable consequence, rather, efforts should be made to undo or correct the lapse. If it is not possible to correct the lapse by any means, the Court should, then, consider the impact of the lapse on the overall aspect of the case and if after keeping aside that particular item of evidence, which had not been put to the accused, the appellate or revisional Court finds that the remaining evidence is sufficient to bring home the guilt of the accused, the lapse can be justifiably ignored and the conviction can be maintained, but if the lapse is so vital that it would affect the entire case, the appellate or the revisional Court shall elicit response of the counsel for the accused, at the appellate or the revisional stage, to such incriminating piece of evidence. However, only when it is not possible to rectify the defect that the appellate or revisional Court may set aside the conviction and remand the case for trial (See State of Punjab Vs. Naib Din, ; State (Delhi Administration) Vs. Dharampal, ; Mohan Sarma Vs. State of Assam, Md. Somesh Ali Vs. State of Assam,

24. What emerges from the above discussion is that when the prosecution's evidence is closed, it is imperative, on the part of the trial Judge, to examine the accused u/s 313(1)(b), Cr. P.C. In such examination, the Judge has the duty to put to the accused all such circumstances, which appear from the evidence on record incriminating against the accused and solicit the response of the accused

thereto. This would give an opportunity to the accused to explain incriminating materials, which may have surfaced on the record against him. The answer, also given, by the accused may be taken into consideration along with the evidence on record.

25. In the present case, as the discussion held with regard to the evidence on record indicates, there is overwhelming evidence on record against the accused-respondents. The question, however, remains as to whether the evidence, which so exists on record, can be relied upon in order to determine the guilt or otherwise of the accused respondents. This would obviously require a perusal of the answers given by every accused-respondent, while he was examined u/s 313(1)(b), Cr. P.C. However, when we turn to the answers given by the accused-respondents, while they were examined u/s 313(1)(b), Cr. P.C. we are aghast to notice that the learned trial Court has not put to the accused the incriminating pieces of evidence on record and has not sought response thereto of the accused-concerned; rather, the learned trial Court has examined the accused not on the evidence adduced, but, out of curiosity, in a manner as if the accused was under cross-examination by the Court. This approach of the Court is wholly contrary to not only the purpose, which Section 313, Cr. P.C. seeks to serve, but also wholly against the procedural scheme of Section 313, Cr. P.C. The examination of an accused u/s 313, Cr. P.C. one must bear in mind, is not to be used as cross-examination of the accused by the Court as the learned trial Court has done in the present case.

26. u/s 313(1)(b), Cr. P.C. as already indicated hereinabove, the Court has to put to the accused every such piece of evidence, which appears incriminating against him, and the Court should ask the accused as to whether he has any comment to make or explanation to offer with regard to such incriminating piece of evidence. The accused shall be kept free to answer or not to answer the questions put to him. Depending, however, on the fact as to whether the accused has given his answer to the questions so put to him and if he has given answers, what would be the effect of the answers, so given, is a question, which the Court has to decide, while considering the evidence against the accused, for the purpose of determining whether the accused is or, is not guilty. In the present case, the examination of the accused, u/s 313(1)(b), Cr. P.C. has been wholly perfunctory inasmuch as none of the incriminating materials was. If we may repeat, put to the accused-respondent by the learned trial Court, while examining him u/s 313(1)(b), Cr. P.C.

27. While considering the above aspect of the case, we are also conscious of the fact that mere omission to put to an accused the incriminating circumstances, appearing against him, would not ipso facto vitiate the proceedings and that prejudice, occasioned by such defect, must be established by the accused (See Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, If any incriminating material has not been put to the accused, the Court shall, ordinarily, eschew such material from its consideration. It is, at the same time,

open to the appellate Court to call upon the counsel of the accused to show as to what explanation, if any, the accused has as regard the circumstances established against him, but not put to him and if the accused is unable to offer any explanation to the question so put by the appellate Court, the appellate Court may assume that no acceptable answer from the end of the accused exists and that even if the accused had been questioned by the trial Court at the appropriate stage u/s 313(1)(b), Cr. P.C. the accused would not have been able to furnish any good reason to get out of the circumstances, which appear incriminating against him. In a case of this nature, the Court, in fact, proceeds on the principle that notwithstanding the irregularity in putting to the accused the incriminating circumstances appearing against him, the accused has not been prejudiced. In *Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra*, a three-Judge Bench, speaking through Krishna Iyer, J. on this aspect of law, observed and held as follows (para 16):

However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentially material not being put to the accused, the Court must ordinarily eschew such material from consideration. It is also open to the appellate Court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstance established against him but not put to him and if the accused is unable to offer the appellate Court any plausible or reasonable explanation of such circumstance, the Court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial Court he would not have been able to furnish any good ground to get out of the circumstances on which the trial Court had relied for its conviction. In such a case, the Court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342, Cr. P.C. the omission has not been shown to have caused prejudice to the accused. In the present case, however, the High Court, though not the trial Court has relied upon the presence of blood on the pants of the blood group of the deceased. We have not been shown what explanation the accused could have offered to this chemical finding particularly when we remember that his answer to the question regarding the human blood on the blade of the knife was "I do not know". Counsel for the appellants could not make out any intelligent explanation and the blood testimony takes the crime closer to the accused. However, we are not inclined to rely over much on this evidentiary circumstance, although we should emphasise how this inadvertence of the trial Court had led to a relevant fact being argued as unavailable to the prosecution. Great care is expected of Sessions Judges who try grave cases to collect every incriminating circumstance and put it to the accused even though at the end of a long trial the Judge may be a little fagged out.

28. It may also be pointed out that when the omission to put to an accused a piece of incriminating evidence does not show failure of justice, such a failure of the trial Court cannot make a Court interfere with the finding of guilt reached

against the accused, particularly, when the accused raises no objection, at the trial, on the ground of imperfect or inadequate examination u/s 313, Cr. P.C. In fact, in *State of Punjab Vs. Naib Din*, it was held by the appellate Court as follows:

If any appellate Court or revisional Court comes across that the trial Court had not put any question to an accused even if it is of a vital nature, such omission alone should not result in setting aside the conviction and sentence as an inevitable consequence. Effort should be made to undo or correct the lapse. If it is not possible to correct it by any means the Court should then consider the impact of the lapse on the overall aspect of the case. After keeping that particular item of evidence aside, if the remaining evidence is sufficient to bring home the guilt of the accused, the lapse does not matter much, and can be sidelined justifiably. But if the lapse is so vital as would affect the entire case, the appellate or revisional court can endeavour to see whether it could be rectified.

13. How is it possible to rectify or undo the lapse if it pertains to a vital piece of evidence ?

14. A three-Judge Bench of this Court has observed in *Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra*, that such an omission does not ipso facto vitiate the proceedings unless prejudice was established by the accused. If the accused succeeds in showing any prejudice it is open to the appellate Court to call upon the counsel for the accused to show what explanation the accused has got regarding the circumstances not put to him.

15. In *Basavaraj R. Patil and Others Vs. State of Karnataka and Others*, a three-Judge Bench has followed the aforesaid observation and stated thus (para 17):

17. The above approach shows that some dilution of the rigour of the provision can be made even in the light of a contention raised by the accused that non-questioning him on a vital circumstance by the trial Court has caused prejudice to him. The explanation offered by the counsel of the accused at the appellate stage was held to be a sufficient substitute for the answers given by the accused himself.

16. If such objection was not raised at the appellate stage the revisional Court should not normally bother about it. At any rate, the omission to put the question concerning evidence which is purely of a formal nature, is too insufficient for holding that the proceedings were vitiated. The evidence sought to be advanced through the affidavits in this case is, no doubt, only of a formal nature.

29. Conscious of the fact that an appellate or revisional Court shall make serious endeavour to rectify the defect of the trial Court's omission to put to the accused incriminating pieces of evidence appearing against him by asking the counsel for the accused, even at the appellate stage, to say as to what explanation, if any, the accused has to offer to such incriminating pieces of materials on record,

when we concentrate on the case at hand, we are confronted with a wholly undesirable situation inasmuch as we notice, as we have already indicated above, that the learned Court below has not put to any of the accused any of the incriminating pieces of evidence appearing against him. Thus, though there is an examination under Section 313, Cr. P.C. there is really no legally permissible examination u/s 313, Cr. P.C. In such circumstances, if we consider the evidence on record, which appear incriminating against the accused-respondents, the accused-respondents would suffer serious prejudice. When the attention of Mr. Sharma was drawn by us to this aspect of the case, Mr. Sharma has not, in his usual fairness, disputed the fact that there was virtually no examination of the accused-respondents u/s 313, Cr. P.C. as is warranted by law.

30. What crystallizes from the above discussion is that the finding of acquittal, recorded by the learned trial Court, is completely against the evidence on record. At the same time, in order to judge as to whether or not the evidence on record was sufficient to hold the accused-respondents guilty of the charges framed against them, this Court has the duty to look into the examination of the accused concerned, u/s 313(1)(b), Cr. P.C. to find out as to what explanation the accused-respondents | had offered. When we turn to the examination of the accused-respondents u/s 313(1)(b), Cr. P.C. we find ourselves facing a situation, wherein there is no explanation offered by the accused-respondents to the incriminating pieces of evidence appearing against them, for, the learned trial Court has not put to the accused-respondents any of the circumstances, which appear incriminating against the accused-respondents. In such circumstances, while the acquittal of the accused-respondents cannot be maintained, it is also not permissible to reverse the finding of acquittal into a finding of guilt. The only remedy left before us is to remand the case for trial from the stage of examination of the accused-respondents u/s 31(1)(b)3, Cr. P.C.

31. With the above end in view, we hereby set aside the impugned judgment and order, whereby the accused-respondents stand acquitted, and remand the case for examination of the accused-respondents u/s 313(1)(b), Cr. P.C. Considering, however, the fact that we have found that the learned Additional District Magistrate, who had presided over the trial, has shown complete ignorance of the procedure of criminal trial, particularly, the procedure of that of a sessions triable case and also revealed complete lack of knowledge of the fundamental principles of criminal jurisprudence, we direct that the case shall stand remanded to the Deputy Commissioner (Judicial), Dimapur, who shall examine the accused-respondents himself in terms of the provisions of Section 313(1)(b), Cr. P.C. and, then, dispose of the case in accordance with law.

32. In order to avoid any further delay in the disposal of the case, it is hereby directed that the accused-respondents shall appear in the Court of the Deputy Commissioner (Judicial), Dimapur, on 18-6-2007 and the learned Deputy Commissioner (Judicial), Dimapur, shall, thereafter, dispose of the case within two months and for this purpose, the trial shall, if needed, be held on day-to-day

basis.

33. With the above observations and directions, this appeal shall stand partly allowed.

34. Let a copy of this judgment and order be served on the officer, who had presided over the trial of the case, and the observations made by this Court against him to the effect-that he has betrayed knowledge of even the fundamental principles of criminal jurisprudence and procedure of law governing criminal trial be entered into his service record.

35. Send back the LCR forthwith.