REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 174 OF 2001

Asraf Ali .....Appellant

Versus

State of Assam .....

Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. In this appeal challenge is to the judgment of a learned Single Judge of the Guwahati High Court partially allowing the appeal filed by the appellant. Learned District and Sessions

Judge, Kamrup in Sessions Case No.15/K-G/88 convicted the appellant for offence punishable under Section 304 Part I of the Indian Penal Code, 1860 (in short the 'IPC') and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.200/- with default stipulation.

2. By the impugned judgment, learned Single Judge altered the conviction to Section 304 Part II IPC and sentenced the appellant to undergo RI for 5 years.

3. Background facts in a nutshell are as follows:

On 14.9.1986 at about 8.00 p.m. an FIR was lodged by one Abbash Ali (PW-1) before the Officer-in-Charge, Bharalumukh Police Station mentioning therein that about 9.30 a.m. on that day the accused Asraf Ali assaulted Khairul Hoque, son of Nazim Ali with a piece of wood as a result of which said Khairul Hoque (hereinafter referred to as the 'deceased') sustained injuries on his head. The injured was removed to the Gauhati Medical College Hospital where he

succumbed to injuries at about 5.30 p.m. Police registered a case and after completion of the investigation submitted charge sheet under Section 302 IPC. On committal, learned trial Court framed charges under Section 302 IPC. During the trial prosecution examined 10 witnesses including the doctor and the Investigation Officer. Accused also examined 3 witnesses to substantiate its plea of innocence. P.W.1 is the informant who reported about the incident and attended Gauhati Medical College Hospital. He was present during the inquest. PW-2 Md. Nurul Islam deposed that he was not in Gauhati and when he was contacted by police he informed the police that he knew both accused and deceased. Police took his help to identify the accused but accused could not be found. On the day of occurrence, PW-3 Mustt. Nurjahan Begum, was informed by Mozaraf that her husband was assaulted by Asraf and the victim had been admitted in the Gauhati Medical College Hospital. She saw the dead body on the next day when it was brought to her place. According to this witness some clash had been going on between her husband and accused. PW-4 in his deposition only mentioned

about some quarrel which took place between the deceased and accused's family, but he did not specifically indicate when such occurrence took place. PW-5 Md. Talmizur Rehman was examined by the prosecution as eye witness and in his deposition he stated that occurrence took place one morning in 1986. According to this witness, one day he found one Sarma had engaged two laborers for repairing the walls of Khairul's house. Accused Asraf Ali forbade from Sarma working there. He heard their words only from outside. He advanced to Khairul's house and on going there he found Khairul in his house and accused was standing at doorstep with a stick in his hand. He did not see Khairul as to what he had been doing inside the house. About that time he saw Khairul coming out of the house and then moving towards the road. Asraf ran after Khairul taking a lathi in his hand. Moving towards the road he found Khairul lying on the road. Asraf was standing at his doorstep holding the lathi some five or six metres away from the spot where Khairul was lying. Approaching Khairul he saw the injury on the head and bleeding from the injury. He went to call a rickshaw to carry

Khairul to hospital and in the meantime Mazafar Hussain (PW-8) had taken the injured to Kumarpara Nursing Home by another rickshaw. He and Maniruddhin went to the Nursing Home and doctor of the Nursing Home advised them to take the injured to the Medical College Hospital and accordingly he and Maniruddin took the injured to the Gauhati Medical College Hospital. PW-6 is a school teacher who spoke about the seizure of wooden stick from accused Asraf's house. Ext.4 is the seizure list, Ext. 4(1) is his signature. The stick was 2/2½ feet long. PW-7 is doctor. S.I. Barbhuyan who conducted the autopsy found the following injuries on the deceased:

> "…Injury No.1-Lacerated injury 7 C.M. length present in the right parietal region transversely placed and extending posteriorly. There are 8 stitches with black silk. After removal of the stitches the gap is 0.6 cm wide and is bone deep.
>
> Injury no.2- Lacerated injury in the scalp 5 cm x 0.5 cm in the left temporal region – transversely placed and slightly carving upwards to the parietal region and bone deep.
> No ligature mark on the neck on dissection, next tissues are healthy.

Cranium and Spinal Canal:-

Scalp- As described in injury No.1 and injury No.2 clotted blood present underneath the whole of the scalp except in the frontal region.

Skull- Featured fracture of the skull 16 cm long involving the frontal and right parietal bone extending from above the right orbit backwards and posteriority and ending in the landoid suceer. …"

4. According to the doctor the cause of death was due to coma resulting from head injury. The injuries were ante-mortem and caused by blunt weapon and consistent to be homicidal in nature. PW-8 is Mozafar Hussain, who at the relevant time was clearing the jungle of the well of his rented house at Santipur and at that time he saw Khairul run past behind him. He saw accused Asraf Ali going five feet behind him. He saw and found Khairul lying on the road some 25 yards away from the well. Khairul sustained injury on his head. He also saw blood coming out of his head. He did not see accused Asraf Ali there. According to this witness he helped the deceased to get admission at the Medical College

Hospital. Khairul died in the hospital. PW-9 Maniruddin was declared hostile by the prosecution. PW-10 is the investigating officer who stated about the seizure of the lathi. According to his evidence the weapon used by the accused was a piece of wood.

5. The accused was examined under Section 313 of the Code of Criminal Procedure, 1973 (in short the 'Code') who denied his involvement in the offence. Three witnesses were examined by the accused to support his plea of alibi. The trial Court on consideration of evidence on record did not accept the plea of alibi. He found seven circumstances to be clinching in nature which proved and established the guilt of the accused. They were as follows:

> ".....The proved circumstances in the case have established that (i) that the accused person had a quarrel with the deceased regarding sale of land and house; (ii) that the accused had threatened the deceased with assault; (iii) that just prior to the incident the accused was seen standing outside the house of the deceased with a lathi in hand; (iv) that the accused was seen chasing the deceased

> with a lathi in hand; (v) that soon thereafter the deceased was found lying on the road with injuries on head; (vi) that soon after the crime the accused absconded; and (vii) that the accused led police and produced the weapon of assault. Each of these circumstances has been proved beyond reasonable doubt and taken collectively leads to only on conclusion that it was accused Asraf Ali and accused Asraf Ali alone who had killed the deceased Khairul Hoque…."

6. As noted above, the trial Court found the accused guilty and convicted him. One of the main planks of arguments before the High Court in appeal was that the questions put to the accused in the examination under Section 313 of the Code did not focus on the evidence on record and the accused was therefore prejudiced because no definite accusations or statement of any witness was brought to his notice. Though the High Court found that the circumstances relied upon by the prosecution were not specifically brought to the notice of the accused it observed that the object of questioning an accused person under Section 313 of the Code is to provide an opportunity to the accused of explaining the circumstances that appear against him in evidence. It was further noted that

the evidence against the accused consisted of circumstantial evidence only and the circumstances should have been brought to his notice and his explanation called for. It was noted that the trial Court faltered in its duty in the examination. But the High Court felt that no material prejudice was caused to the accused and the accused was found to be absconding for long time and rancorous relationship between the deceased and the accused was established. However, the High Court found that the proper conviction would be under Section 304 Part II IPC.

7. Learned counsel for the appellant submitted that the true purpose and import of Section 313 of the Code has not been kept in view by the High Court. It is pointed out that none of the witnesses were really eye witnesses. But the Court proceeded on the basis as some persons had seen the incidence.

8. Learned counsel for the respondent on the other hand submitted that the questions though broadly formulated covered the basic features.

9. Section 313 of Code reads as follows:

> "313. *Power to examine the accused.*—(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the court—
>
> (*a*) may at any stage, without previously warning the accused, put such questions to him as the court considers necessary;
>
> (*b*) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:
>
> Provided that in a summons case, where the court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (*b*).
>
> (2) No oath shall be administered to the accused when he is examined under sub-section (1).
>
> (3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed."

10. The forerunner of the said provision in the Old Code was Section 342 therein. It was worded thus:

"342. (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) 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.

(4) No oath shall be administered to the accused when he is examined under sub-section (1)."

11. Dealing with the position as the section remained in the original form under the Old Code, a three-Judge Bench of this Court in Hate Singh Bhagat Singh v. State of Madhya Bharat (AIR 1953 SC 468) that:

> "The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness-box. They have to be received in evidence and treated as evidence and be duly considered at the trial."

12. In Sharad Birdhichand Sarda v. State of Maharashtra (1984 (4) SCC 116) it was inter-alia noted as follows:

> "143- Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court viz., circumstances Nos. 4, 5, 6, 8, 9, 11, 12, 13, 16 and 17. As these circumstances were not put to the appellant in his statement under Section 313 of the Criminal Procedure Code, 1973 they must be completely excluded from consideration because the

> appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of Hate Singh Bhagat Singh v. State of Madhya Pradesh (AIR 1953 SC 468) this Court held that any circumstance in respect of which an accused was not examined under Section 342 of the Criminal Procedure Code cannot be used against him. Ever since this decision, there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under Section 342 of the old Code (corresponding to Section 313 of the Criminal Procedure Code, 1973), the same cannot be used against him. In Shamu Balu Chaugule v. State of Maharashtra (1976 (1) SCC 438) this Court held thus: (SCC para 5, p. 440)
>
> > The fact that the appellant was said to be absconding, not having been put to him under Section 342, Criminal Procedure Code, could not be used against him."

13. Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the

evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced. The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial Court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed similar view in S. Harnam Singh v. The State (AIR 1976 SC 2140), while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facets by the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused

under Section 313 is not a purposeless exercise.

14. Contextually we cannot bypass the decision of a three-Judge Bench of this Court in Shivaji Sahabrao Bobade v. State of Maharashtra (1973 (2) SCC 793) as the Bench has widened the sweep of the provision concerning examination of the accused after closing prosecution evidence. Learned Judges in that case were considering the fallout of omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence. The three-Judge Bench made the following observations therein: (SCC p. 806, para 16)

> "It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. 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 evidentiary 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 circumstances 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 circumstances, 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."

15. What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is "for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him". In *Jai Dev* v. *State of Punjab (AIR1963 SC 612)* Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focussed on the ultimate test in determining whether the provision has been fairly complied with. He observed thus:

> "The ultimate test in determining whether or not the accused has been fairly examined

> under Section 342 would be to inquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity."

16. Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion.

17. At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim *audi alteram partem*. The word "may" in clause (*a*) of sub-section(1) in Section 313 of the Code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under clause (*b*) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain,

can be used against him. It is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him.

18. In certain cases when there is perfunctory examination under Section 313 of the Code, the matter is remanded to the trial Court, with a direction to re-try from the stage at which the prosecution was closed.

19. In the instant case, the questions put to the accused in his examination under Section 313 read as follows:

> "The witnesses have stated in their evidence that at about 9.30 a.m. on the day of occurrence you caused severe injuries to Khairul Hoque by assaulting him on the head from behind with a piece of timber and that in the evening on the very day he succumbed to the injuries in Guwahati Medical College Hospital. You may say if you have any regarding the evidence.
>
> P.W.10 Ahindra Kumar Kalita (S.I. of Police) has stated in his evidence that during his investigation into this case when you produced a piece of timber he seized it through Ext.4. You may say if you have any regarding this evidence.

> You may say if you have any as regards allegation of committing murder leveled against you and other evidence.
>
> You may adduce evidence in defence if you have any. Summon witnesses."

20. As rightly contended by learned counsel for the appellant no witness has stated that on the date of occurrence the accused had caused severe injury to the deceased by assaulting him on the head from behind. The circumstances which were relied upon by the trial Court to find the accused guilty were not specifically brought to the notice of the accused. Therefore, in essence, his examination under Section 313 of the Code was rendered an empty formality. On that count alone, the impugned judgment of the High Court cannot be sustained and is set aside. The conviction recorded stands set aside. The bail bond of the appellant who is on bail shall stand discharged.

21. The appeal is allowed.

.....J.
(Dr. ARIJIT PASAYAT)

.....J.
(P. SATHASIVAM)

New Delhi,
July 17, 2008