IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE
HON'BLE SHRI JUSTICE PREM NARAYAN SINGH
CRIMINAL REVISION No. 3266 of 2023

BETWEEN:-

1. **CHETAN SONI**
S/O SHREE VISNUPRASAD SONI,
AGED ABOUT 26 YEARS,
OCCUPATION: BUSINESS
R/O.KANKALI CHAUK, BAROD,
P.S. BAROD,
DISTRICT AGAR (M.P.)

.....PETITIONER

(SHRI GOURAV SHRIVASTAVA – ADVOCATE)

AND

THE STATE OF MADHYA PRADESH
STATION HOUSE OFFICER
THROUGH POLICE STATION BAROD
DIST.:AGAR (MADHYA PRADESH)

.....RESPONDENTS

(SHRI PRASHANT JAIN – GOVT. ADVOCATE)

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Reserved on - 01.08.2023

Delivered on - 09.08.2023

This revision coming on for hearing this day, the court passed the following:

ORDER

Invoking the revisional jurisdiction under Section 397 read with Section 401 of Cr.P.C., the petitioner has filed this revision being aggrieved of the judgment dated 19.07.2023 passed by learned First Additional Sessions Judge, Agar District Shajapur, in Criminal Appeal No.414/2016 whereby learned appellate Court has set aside the judgment dated 04.12.2015 passed by Judicial Magistrate First Class, Agar, in RCT No.991/2014 and remitted the case back to the trial Court for re-examining the accused under Section 313 and to pass a reasoned and cogent order.

2. In order to decide this criminal revision, brief facts of the case is that the petitioner was tried by the Judicial Magistrate First Class, Agar, District Shajapur and after considering the evidence available on record he was convicted for offence under Section 304(A) of IPC, 1860 and sentenced to undergo 1 year R.I and fine of Rs.1,000/- with default stipulations. Being aggrieved by the aforesaid judgment, the petitioner has filed an appeal before First Additional Sessions Judge, Agar, District Shajapur, wherein learned Appellate Court in compliance of law laid down by this Court in the Case of ***Sunil vs. State of M.P.*** reported in ***2023 (1) MPLC 356*** or ***2023 Lawsuit (MP)68*** remanded the matter to the trial Court for re-examining the accused under Section 313 of Cr.P.C and to pass a reasoned and cogent order after affording the opportunity of defence evidence. Being dissatisfied by the impugned order, the petitioner has knocked the portal of this Court by filing this revision petition submitting that the impugned judgment passed by learned appellate Court is neither legal nor proper.

3. The petitioner in his revision memo and arguments submitted that the impugned judgment of the learned appellant Court is against the fact and also against the settled principle of law. It is submitted that first and foremost, it is visualized from the bare perusal of the impugned judgment that learned appellate Court has remitted back the matter for the purpose of filling up the loop holes in the prosecution case, which is wrong and illegal, therefore not sustainable in the eyes of law. The learned appellate Court has misinterpreted the law laid down by this Court in the case of ***Sunil vs. State of M.P.,*** vide order dated ***08.02.2023*** passed in ***Cr.A. No.859/2010***. It is also submitted that in case, if the incriminating piece of evidence is available against accused and opportunity to explain that evidence has not been afforded to the accused, then on that basis conviction cannot be carried out.

4. In the course of arguments, learned counsel for the appellant relied upon the Full Bench judgment passed in the case of ***Nasib Singh vs. State of Punjab*** reported as ***(2022)2 SCC 89*** and ***Rajkumar vs. State (NCT of Delhi)*** reported in ***2023 Lawsuit (SC) 533.*** On that basis, the petitioner has expostulated that since the appellant was not confronted to incriminating circumstances produced by the prosecution, the conviction of the appellant stands vitiated. On these grounds learned counsel for the petitioner requested to set aside the order of the appellate Court as well as the order of the trial Court.

5. On the contrary, learned Govt. Advocate remonstrated that it is duty of the Court to examine the accused properly. If the appellate Court has remanded back the case for additional examination of the

accused, it cannot be regarded against law. Ample evidence against the appellant are available on record hence the order of trial Court and first appellate Court cannot be turned down.

6. In the back drop of the rival submissions, the conundrum of the case is as to whether the order of Appellate Court remitting back the case to trial Court for additional re-examination of accused is incorrect in the eyes of law and facts.

7. On this aspect I have gone through the judgment of appellate Court and trial Court as well as the prosecution evidence recorded before the trial Court and examination of accused. In para-10 of the judgment, the learned appellate Court has clearly mentioned that in examination of accused, no question was raised to the accused as to whether the accused was driving the vehicle or whether the said incident was caused by the accused. After going through the examination of accused the aforesaid observation of the learned appellate Court is found correct. In all 16 questions nothing was enquired with regard to who was driving the vehicle, whereas in the depositions of the prosecution witnesses, this was clearly frescoed that the said jeep was driven by accused Chetan. On this aspect, statement of Jakir (P.W.4) can be taken into account. It is also revealed from the perusal of para -10 of the judgment that the appellant has raised the contention that on account of not taking his explanation, his defence has been affected, under such circumstance, there are only two courses available to the appellate Court either to acquit the accused or remit the case for giving him opportunity to explain the matter.

8. In this regard, full Bench decision rendered by Hon'ble Apex Court in the case of ***Shivaji Sahabrao Bobade vs. State of Maharashtra (1973)2 SCC 793*** is relevant to quote here:

> "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 many 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."

9. Further in the case of **Asraf Ali vs. State of Assam reported in (2008) 16 SCC 328**, Hon'ble Apex Court has held in para 19 to 22 of the aforesaid judgment, Hon'ble Apex Court has held as under:

> "19. 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.
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> 20. 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."

> 21. 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.
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> 22. 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."

10. In the case of ***Sukhjit Singh vs. State of Punjab*** reported as ***(2014)10 SCC 270*** Hon'ble Apex Court endorsing its another judgments, articulated as under:-

> "14. …… **The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand.** A conviction based on the accused's failure to explain what he was never asked to explain

> is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give."

11. On this fact, it is also relevant to quote the following observations made by Hon'ble Supreme Court in the case of ***Samsul Haque vs. State of Assam*** reported in ***(2019) 18 SCC 161*** wherein in para 22 as under:

> "22. It is trite to say that, in view of the judgments referred to by the learned Senior Counsel, aforesaid, the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem.

12. In the case of ***Sunil vs. State of M.P. (Supra),*** while referring and endorsing the aforesaid observations of the Apex Court, the Division Bench of this Court in the judgment has mandated as under:

> "24. Since the Trial Court has not complied with the requirements of Section 313 of Cr.P.C. in its spirit and has not afforded sufficient opportunity for explanation to the appellant against the incriminating evidence which was used to base his conviction, therefore, such conviction and sentence passed by Trial Court cannot be affirmed by this Court. Resultantly, conviction and sentence passed by the Trial Court is hereby set aside.
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> 25. Looking at the statement of Deepchand (P.W.-9), FSL report (Ex.P-22), and other evidence on record, this Court is of the view that the case should be remitted to the Sessions Court for proper examination under Section 313 of Cr.P.C. after giving proper opportunity to produce defence evidence to the appellant and pass fresh judgment after hearing both the parties expeditiously, preferably within 45 days from the receipt of the record."

13. In the conspectus of the aforesaid principles and material on record, it is obvious that if there is significant incriminating evidence on record against the accused, then he should be given sufficient

opportunity to explain it, otherwise it would vitiate the trial. In order to comply with the principles of natural justice, the appellate Court is competent to remand the case for additional examination of accused under Section 113 of Cr.P.C.

14. Now coming to the law laid down by Hon'ble Supreme Court in the case of ***Rajkumar vs. State (NCT of Delhi)***, certainly in this case, Hon'ble Supreme Court has held that since the incriminating circumstances have not been put to the accused during the examination of accused the conviction of the appellant stands vitiated but the facts of that case are much different to the case in hand. In order to express the said difference para – 20 of ***Rajkumar vs. State(Supra)*** is worth reproduce here:-

> "Even assuming that the defect or irregularity was curable, the question is whether today, the appellantaccused can be called upon to explain the said circumstance. **More than 27 years have passed since the date of the incident.** Considering the passage of time, we are of the view that it will be unjust now at this stage to remit the case to the Trial Court for recording further statement of the appellant under Section 313 of CrPC. In the facts of the case, the **appellant cannot be called upon to answer something which has transpired 27 years back**. There is one more aspect of the matter which persuaded us not to pass an order of remand. The said factor is that the appellant has already undergone **incarceration for a period of 10 years and 4 months.**"

15. In view of the aforesaid circumstances, Hon'ble Apex Court found that option of remand will be unjust. However, in the case at hand the said incident took place on 27.09.2014, the case is less than 9 years old and the appellant has not suffered any sentence. In addition to that the appellant himself raised the point before the First Appellate Court regarding not asking question with regard to incriminating facts.

Therefore, owing to variance of facts, the petitioner cannot be benefitted by the law laid down by the Hon'ble Apex Coust in the case of ***Rajkumar vs. State(Supra)***.

16. Shri Gaurav Shrivastava, learned counsel for the petitioner has drawn attention of this Court to the law laid down by Hon'ble Apex Court in para 33 of ***Nasib Singh vs. State of Punjab (Supra)*** wherein Hon'ble Apex Court has discussed the formulation of principles of retrial which is reproduced as under:

> 33.The principles that emerge from the decisions of this Court on retrial can be formulated as under:
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> (i) The Appellate Court may direct a retrial only in 'exceptional' circumstances to avert a miscarriage of justice;
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> (ii) Mere lapses in the investigation are not sufficient to warrant a direction for re-
> trial. Only if the lapses are so grave so as to prejudice the rights of the parties, can a retrial be directed;
> (iii) A determination of whether a 'shoddy' investigation/trial has prejudiced the party, must be based on the facts of each case pursuant to a thorough reading of the evidence;
> (iv) It is not sufficient if the accused/ prosecution makes a facial argument that there has been a miscarriage of justice warranting a retrial. It is incumbent on the Appellant Court directing a retrial to provide a reasoned order on the nature of the miscarriage of justice caused with reference to the evidence and investigatory process;
> (v) If a matter is directed for re-trial, the evidence and record of the previous trial is completely wiped out; and
> (vi) The following are some instances, not intended to be exhaustive, of when the Court could order a retrial on the ground of miscarriage of justice:
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> a) The trial court has proceeded with the trial in the absence of jurisdiction;
> b) The trial has been vitiated by an illegality or irregularity based on a misconception of the nature of the proceedings; and
> c) The prosecutor has been disabled or prevented from adducing evidence as regards the nature of the

> charge, resulting in the trial being rendered a farce, sham or charade.

17. Stressing on the aforesaid findings regarding re-trial learned counsel Shri Shrivastava submitted that if the matter is directed for re-trial the findings and the record of the previous trial is completely wiped out. However, the procedure of re-trial is used here regarding "shoddy" investigation/trial, and it is not with regard to only asking question to accused regarding incriminating circumstances. On this aspect Hon'ble Apex Court in Full Bench decision rendered in ***Nasib Singh (Supra)*** has endorsed the enunciation of its judgment passed in ***Nar Singh vs. State of Haryana*** reported in ***(2015)1 SCC 496*** in para-29 as under:

> " 26. In Nar Singh v. State of Haryana, this Court was considering the question whether the Appellate Court can direct a retrial if all the relevant questions are not put to the accused by the trial court as required under Section 313 CrPC. **This Court answered the question in the affirmative, holding that the Appellate Court may direct a retrial in such circumstances from the stage of questioning the accused because non-compliance of Section 313 CrPC had caused prejudice to the accused.**
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> "30.3. If the appellate court is of the opinion that non-compliance with the provisions of Section 313 CrPC has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 CrPC and the **trial Judge may be directed to examine the accused afresh and defence witness, if any, and dispose of the matter afresh.**"

18. It means that in course of trial, if all the relevant questions are not put to the accused by the trial Court and when the accused has shown that prejudice was caused to him, the appellate Court is competent to remand the case to examine the accused again under Section 313 of

Cr.P.C. The learned trial Judge may be directed to examine the accused and defence witnesses, if any, afresh and dispose of the case afresh. As such, the retrial will be commenced from the stage of questioning the accused under Section 313 of Cr.P.C. Since the aforesaid principle laid down in ***Nar Singh (Supra)*** has been endorsed by Full Bench of Hon'ble Apex Court in the case of ***Nasib Singh (Supra)*** the aforesaid contentions of the learned counsel for the defence is not substantiated.

19. So far as the arguments regarding filling up of loop holes or lacuna is concerned, the fault of not examining the accused properly cannot be attributed to the prosecution but rather it would be attributed to the learned trial Court, hence the question of filling up of lacuna does not arise. On this point in ***Nar Singh (Supra)*** Hon'ble Supreme Court has enunciated the following view, which is relevant to the context of this case:-

> "27. The point then arising for our consideration is, if all relevant questions were not put to accused by the trial court as mandated under Section 313 Cr.P.C. and where the accused has also shown that prejudice has been caused to him or where prejudice is implicit, whether the appellate court is having the power to remand the case for re- decision from the stage of recording of statement under Section 313 Cr.P.C. Section 386 Cr.P.C. deals with power of the appellate court. As per sub-clause (b) (i) of Section 386 Cr.P.C., the appellate court is having power to order retrial of the case by a court of competent jurisdiction subordinate to such appellate court. Hence, if all the relevant questions were not put to accused by the trial court and when the accused has shown that prejudice was caused to him, the appellate court is having power to remand the case to examine the accused again under Section 313 Cr.P.C. and may direct remanding the case again for re-trial of the case from that stage of recording of statement under Section 313 Cr.P.C. **and the same cannot be said to be amounting to filling up lacuna in the prosecution case**."

20. Since the aforesaid law laid down by the Hon'ble Apex Court in ***Nar Singh (Supra)*** is neither overruled, nor distinguished; it holds the field and therefore, the argument of the petitioner regarding filling up of lacuna/loopholes is also found unsustainable.

21. In view of the aforesaid discussions and observations, this Court is of the view there is no illegality or perversity in the impugned order and no case for interference is warranted in this revision petition, therefore, the same is dismissed as devoid of merits.

22. A copy of this order be sent to the concerned Court for necessary information.

Certified copy, as per rules.

(PREM NARAYAN SINGH)
JUDGE

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