

(2009) 10 GAU CK 0020

Gauhati High Court (Aizawl Bench)

Case No: None

K. Hrangliana

APPELLANT

Vs

State of Mizoram

RESPONDENT

Date of Decision: Oct. 29, 2009**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 1, 313, 313(1), 314, 342
- Penal Code, 1860 (IPC) - Section 302

Citation: (2010) 2 GLR 459 : (2009) 5 GLT 738**Hon'ble Judges:** H. Baruah, J; A.C. Upadhyay, J**Bench:** Division Bench

Judgement

A.C. Upadhyay, J.

This jail appeal is directed against the judgment and order dated 1.7.2008 passed by learned Addl. District Magistrate (J), Lunglei District, Lunglei in GR Case No. 271/05 registered u/s 302, IPC, whereby the sole accused was convicted and sentenced to undergo imprisonment for life and also to pay a fine of Rs. 1,000, in default, to undergo R.I. for three months.

2. The facts leading to the filing of this appeal may be narrated in brief as follows:

On 12.8.2005 at about 7.30 A.M. the morning, Mr. K. Hrangliana, accused in this case, a resident of Moria Veng, Luangmual, lodged an FIR stating therein that on the previous day, i.e., on 11.8.2005 at about, 7 P.M. in the evening he had an argument with Ms. Zodinpuui, W/o Hrechema (L) in her house at Moria Veng. The accused stated to have beaten her several times on her head by using firewood. Thereafter, considering Ms. Zodinpuui to be dead he came out of her house. At about 3 A.M. in the morning when the accused had gone to the house of Ms. Zodinpuui, the accused found her lying dead.

3. On receipt of the FIR to the effect as aforesaid, the Officer in-Charge of Lunglei P.S. registered a case and launched investigation. During the course where he had the accused led the, I.O., to the place, committed the crime and also showed him the place where dead body of late Zodinpuui was lying. The, I.O., also seized the material used by the accused, such as, broken piece of firewood stained with blood at the place of occurrence in presence of the witnesses. Inquest report was prepared over the dead body of the deceased. The dead body was, thereafter, forwarded to the Civil Hospital of Lunglei for post mortem examination.

4. The Doctor, who conducted the post mortem examination, opined that the death was caused due to cardio-pulmonary failure as, a result of head and spinal cord injury at the cervical region. On completion of the investigation, the, I.O., submitted charge sheet against the accused alleging commission of offence u/s 302, IPC.

5. During the trial, the learned Addl. District Magistrate (J), finding sufficient materials to proceed with the trial against the accused u/s 302, IPC, framed a formal charge and explained the charge framed against him, to which the accused pleaded guilty. The learned Addl. District Magistrate (J) went on to record the testimony of 14 prosecution witnesses, who were duly cross-examined by the learned defence counsel. After closing the prosecution evidence, the learned court below recorded the statement of the accused u/s 313, Cr.PC. The accused, in his statement u/s 313, Cr.PC, admitted the occurrence, but took the stand that the deceased used to get drunk in the night and had also assaulted him in a drunken state. He also alleged to have seen the deceased sleeping with another man. In support of the defence stand, two witnesses were produced and examined in the learned court below. On conclusion of the trial, the learned Addl. District Magistrate (J), after hearing the learned Counsel for the prosecution as well as of the defence, convicted the accused u/s 302, IPC and sentenced him as aforesaid, giving rise to this appeal.

6. Heard Ms. Dinari T. Azyu, learned Addl. P.P. Mizoram, who seriously contested the case, submitted that this is a fit and proved case where the learned trial court rightly convicted the accused/appellant.

7. Mr. A.R. Malhotra, learned amicus curiae appearing on behalf of the accused in this case, on the other hand, submitted that the learned trial court miserably failed to consider and appreciate the necessity of examination of the accused u/s 313, Cr.PC. Learned amicus curiae contended that all such incriminating materials, which were led in evidence by the prosecution were not put to the accused and, thus, causing serious prejudice to the accused in taken appropriate defence stand during the trial. The learned amicus curiae, further, pointed out that the learned court below treated the FIR submitted by the accused as substantive piece of evidence to hold the accused guilty of the offence alleged against him and also submitted that the confessional statement recorded by the learned Magistrate was not in proper form.

Ms. Dinari T. Azyu, learned Addl. P.P., on the other hand, strenuously submitted that the evidence laid by the prosecution during trial relating to extrajudicial confession made by the accused and the evidence leading to discovery at the instance of the accused established the charge u/s 302, IPC against the accused beyond all-reasonable doubts.

8. On careful perusal of the materials on record, we are confronted with the statement of the accused recorded u/s 313 of the Cr.PC wherein it appears that the statements of the accused were not meticulously recorded. In order to appreciate the argument advanced by the learned Counsel for the accused-appellant as aforesaid, we would like to quote the statements of the accused recorded u/s 313, Cr.PC by the learned Addl. District Magistrate (J), which runs as follows:

(1) From the Document and evidence it appears that you have beaten Zodinpuii on the night of 11.8.2005 at around 7.00 P.M. You thought that she had died but she was not, she died later on and you went to the Police and submitted the FIR.

Ans: That is right. The police wrote in the FIR what I have said to them, but I did give my signature. Ex- P6 was the FIR and 6(a) was my signature.

(2) Isn't this woman your brother's wife?

Ans: Yes, she is.

(3) How come you have beaten her ?

Ans: She used to get drunk, that night also (11.8.2005) she along with Hmangaihzualla took liquor. She had beaten me, she then again tried to beat me and due to my anger I had beaten her and I do not know how many times I beat her. I saw that they were sleeping together.

Sd/-

(HRANGLIANA)

(Signature of the accused)

9. The learned Counsel for the appellant pointed out that all the incriminating materials, which were recorded during the course of the trial, were not put to the accused person when his statement was recorded u/s 313, Cr.PC by the learned trial court. Ex facie as it appears that the learned court below, except putting a few questions perfunctorily, has not put to the accused all those incriminating materials reveal ad by the witnesses against the accused-appellant and relied on by the learned court below to record the conviction.

10. Examination of accused u/s 313, Cr.PC is mainly for the purpose of enabling accused-appellant to personally explain any incriminating circumstance appearing in the evidence against him. This provision is mainly incorporated to benefit the accused and in turn to benefit the court in arriving at a correct decision. The object of the provision is to give an. opportunity to the accused to explain his own stand

against the prosecution evidence. The provision is intended not to nail the accused to any situation but to comply with the statutory principles of natural justice enshrined in the maxim audi alteram partem. Therefore, a duty is cast on the trial court to put all such questions to the accused properly and clearly in simple language to meet each material point that is sought to be made against him by affording him an adequate opportunity to explain. If any incriminating circumstance is not put to the accused, such a fact cannot be taken into consideration to nail the accused person for commission of the offence. If the prosecution relies on some circumstances, such as confession or admission of the guilt to sustain such conviction, such confession of the guilt must be put to the accused person for his explanation, if not, such evidence cannot be relied on.

11. The importance of, examination of an accused u/s 313, Cr.PC has been emphasised by the hon"ble Supreme Court in a number of cases. In the case of [Lattu Mahto and Another Vs. The State of Bihar \(Now Jharkhand\)](#), hon"ble Supreme Court held that it is now well settled that any circumstance over which accused was not asked to explain cannot be used against him. The relevant part of which reads as follows:

17. Section 313 Cr.PC 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.

18. 9. The forerunner of the said provision in the Code of Criminal Procedure, 1898 (the old Code) was Section 342 therein. It was worded, thus:

342. Power to examine the accused.- (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 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 accused when he is examined Section 1.

10. 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 Vs. State of Madhya Bharat](#),

8. ...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.

16. Contextually we cannot bypass the decision of a three-Judge Bench of this Court in [Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra](#), 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 evidenced. The three-Judge Bench made the following observations therein: (SCC p. 806, para (6)

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.

18. What is the object of examination of an accused u/s 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 circumstance appearing in the evidence against him". In [Jai Dev Vs. The State of Punjab](#), Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focused on the ultimate test in determining whether the provision has been fairly complied with. He observed, thus: (AIR p. 620 para 21)

21. ...The ultimate test in determining whether or not the accused has been fairly examined u/s 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.

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.

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.

12. In another decision hon^{ble} Supreme Court, in the case of [State of Maharashtra Vs. Sukhdeo Singh and another Vs. State of Maharashtra Through C.B.I. Vs. Sukhdev Singh alias Sukha and others](#), held that a learned trial judge is not expected before he examines the accused u/s 313 of the Code, to sift the evidence and pronounce on whether or not he would accept the evidence regarding any incriminating material to determine whether or not to examine the accused on that material. The relevant portion of the above decision reads as follows:

Section 313 of the Code is a statutory provision and embodies the fundamental principle of fairness based on the maxim audi alteram partem. It is trite law that the attention of the accused must be specifically invited to inculpatory pieces of evidence or circumstances laid on record with a view to giving him an opportunity to

offer an explanation if he chooses to do so. The section imposes a heavy duty on the court to take great care to ensure that the incriminating circumstances are put to the accused and his response solicited. The words "shall question him" clearly bring out the mandatory character of the clause and cast an imperative duty on the court and confer a corresponding right on the accused to an opportunity to offer his explanation for such incriminating material appearing against him. It is, therefore, true that the purpose of the - examination of the accused u/s 313 is to give the accused an opportunity to explain the incriminating material which has surfaced on record. The stage of examination of the accused under Clause (b) of Sub-section (1) of Section 313 is reached only after the witnesses for the prosecution have been examined and before the accused is called on to enter upon his defence. At the stage of closure of the prosecution evidence and before recording of statement u/s 313, the learned Judge is not expected to evaluate the evidence for the purpose of deciding whether or not he should question the accused. After the Section 313 stage is over he has to hear the oral submissions of counsel on the evidence adduced before pronouncing on the evidence. The learned trial Judge is not expected before he examines the accused u/s 313 of the Code, to sift the evidence and pronounce on whether or not he would accept the evidence regarding any incriminating material to determine whether or not to examine the accused on that material. To do so would be to pre-judge the evidence without hearing the prosecution u/s 314 of the Code. Therefore, no matter how weak or scanty the prosecution evidence is in regard to a certain incriminating material, it is the duty of the court to examine the accused and seek his explanation thereon. 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 of the Code. If there is material against the accused he must be examined.

13. In the instant case, the prosecution stand is also based on circumstantial evidence. Therefore, it is of immense importance that all such circumstances which are relevant for proper adjudication of the case are required to be put to the accused seeking his explanations as per provision of Section 313, Cr.PC. A duty is heaved upon the learned court below to question the accused meticulously to enable him to explain all such material circumstances intended to be used against him. It may not be lost sight of that in the process the accused should not be subjected to cross-examination and the accused should also not be examined to fill up a gap in the prosecution evidence. The court is to act strictly in conformity of the statute to dispense justice.

14. After thoughtful consideration on the entire gamut of affairs and after having seen the form of recording of the accused u/s 313, Cr.PC by the learned court below and after having indicated the infirmity in examination of the accused u/s 313 Cr.PC, we are of the considered opinion that on this count alone the judgment of conviction and sentence of the accused appellant is required to be set aside and the matter is

required to be remanded to the court of learned Addl. District Magistrate (J), Lunglei District Lunglei, with a direction to proceed with the trial of the accused from the stage of examination of the accused u/s 313, Cr.PC. We accordingly do so.

15. After completion of examination of the accused u/s 313, Cr.P.C., the learned trial court shall, thereafter, call upon the accused to enter on his defence and adduce any evidence he may have in support thereof. Accordingly, the judgment of the learned Addl. District Magistrate (J), Lunglei District, Lunglei passed on 1.7.2008 in G.R. No. 271 of 2005 is hereby set aside with direction to proceed with the trial of the accused from the stage of examination of the accused u/s 313, Cr.PC.

16. Since the accused is in jail custody, it is expected that the learned Addl. District Magistrate (J), Lunglei District, Lunglei shall conclude the trial within a period of two months from the date of receipt of the records of the case.

Before parting with this appeal, we have consciously avoided discussing the merit of the appeal and/or the credibility or otherwise on the evidence adduced by the prosecution in the trial court, so as to enable the trial court to remain absolutely free to come to its own independent finding.

17. Send down the case records to the learned trial court forthwith by a special messenger together with a copy of this judgment and order.

18. Before parting with this case we would like to put on record our appreciation to Mr. A.R. Malhotra, the learned amicus curiae, for rendering his valuable assistance in arriving at the aforesaid decision, for which he is entitled to get his professional fees, which is quantified at Rs. 3,500 (Rupees three thousand five hundred only).

This criminal appeal stands disposed of.