

**Naresh Kumar**

v.

**State of Delhi**

(Criminal Appeal No.1751 of 2017)

08 July 2024

**[C.T. Ravikumar\* and Sandeep Mehta, JJ.]**

#### **Issue for Consideration**

Non-questioning the appellant convicted u/s.302 r/w s.34, Penal Code, 1860 on the twin incriminating circumstances during his examination u/s.313, Code of Criminal Procedure, 1973, if caused material prejudice to him vitiating the trial qua him.

#### **Headnotes<sup>†</sup>**

**Code of Criminal Procedure, 1973 – s.313 – Penal Code, 1860 – s.302 r/w s.34 – Non-compliance of s.313 – Non-questioning on the twin incriminating circumstances to the appellant convicted u/s.302 r/w s. 34, IPC during his examination u/s.313, when the finding of common intention was based on the aforesaid twin incriminating circumstances, if caused material prejudice vitiating the trial qua him:**

**Held:** Yes – Non-questioning or inadequate questioning on incriminating circumstances to an accused by itself would not vitiate the trial qua the accused concerned and to hold that the trial qua him is vitiated it is to be established further that it resulted in material prejudice to the accused – Examination of the appellant u/s.313 reveals that both the incriminating circumstances appearing against the appellant in the prosecution evidence viz., exhortation to do away with the lives of the deceased and others in his family and the evidence that the appellant had caught hold of the hands of the deceased to enable his brother-co-accused to stab him repeatedly with knife, were not directly or even indirectly put to him while being examined u/s.313 – The conclusion that the appellant had shared the common intention to commit murder of the deceased was based only on the aforesaid two incriminating circumstances which were not put to him while being questioned u/s.313 – There was no charge of commission of an offence u/s. 300, IPC, punishable u/s. 302, IPC, simplicitor

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against the appellant, he was charged thereunder with the aid of s.34, IPC – Thus, when the finding of common intention was based on the twin incriminating circumstances and when they were not put to the appellant while he was being questioned u/s.313, and when they ultimately culminated in his conviction u/s.302 with the aid of s.34, IPC, and when he was awarded with the life imprisonment, the appellant was materially prejudiced and it had resulted in blatant miscarriage of justice – The failure is not a curable defect and it is a patent illegality vitiating the trial qua the appellant – Appellant's conviction cannot be sustained, acquitted – Impugned judgments set aside qua the appellant. [Paras 20, 21, 24, 26, 27]

**Code of Criminal Procedure, 1973 – s.313 – Non-questioning/inadequate questioning on incriminating circumstances – Prejudice or miscarriage of justice – Onus to establish:**

**Held:** Onus to establish the prejudice or miscarriage on account of non-questioning or inadequate questioning on any incriminating circumstance(s), during the examination u/s. 313 is on the convict concerned. [Para 21]

**Code of Criminal Procedure, 1973 – s.313 – Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009) – s.313(5) – “actus curiae neminem gravabit” – Contention as regards the non-examination/inadequate examination u/s.313 causing material prejudice to the appellant was not appropriately raised and argued before the High Court and was raised for the first time before Supreme Court – Said contention if can be maintained at this stage:**

**Held:** s.313 would reveal the irrecusable obligation coupled with duty on Court concerned to put the incriminating circumstances appearing in the prosecution evidence against accused concerned facing the trial providing him an opportunity to explain – Sub-Section (5) of Section 313 inserted under 2008 Amendment Act lends support to this view – Also, the act of court shall prejudice no one – In a charge for commission of a serious offence where extreme penalty alone is imposable in case the accused is found guilty, procedural safeguards ensuring protection of right(s) of accused must be followed and at any rate, in such cases when non-compliance of the mandatory procedure capable of vitiating trial qua the convict concerned is raised and revealed from records,

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irrespective of the fact it was not raised appropriately, it must be considered lest the byproduct of consideration of the case would result in miscarriage of justice – Being the Court existing for dispensation of justice, this Court is bound to consider and correct the mistake committed by the Court by looking into the question whether non-examination or inadequate examination of accused concerned caused material prejudice or miscarriage of justice. [Paras 15, 16]

**Code of Criminal Procedure, 1973 – s.313 – Object:**

**Held:** s.313 embodies salutary principle of natural justice viz., audi alteram partem and empowering the Court to examine the accused thereunder is to give the accused concerned an opportunity to explain the incriminating circumstances appearing against him in the prosecution evidence – The general position is that if any incriminating circumstance, appearing against an accused in the prosecution evidence, is not put to him it should not be used against him and must be excluded from consideration – At the same time, it is a well-settled position that non-examination or inadequate examination u/s.313 on any incriminating circumstance, by itself, would not vitiate a trial qua the convict concerned unless it has resulted in material prejudice to him or in miscarriage of justice. [Para 11]

**Practice and Procedure – Judgment not containing discussion on a particular point – Said point is to be prima facie assumed not to have been argued unless contrary is shown – Contention of the appellant as regards non-examination/inadequate examination u/s.313 causing material prejudice to him, if was argued before the High Court:**

**Held:** Normally, it has to be presumed that all the arguments actually pressed at the hearing in the High Court were noticed and appropriately dealt with and if the judgment of the High Court does not contain discussion on a point, then that point should be assumed prima facie not to have been argued at the bar unless the contrary is specifically shown – In the present case, though grounds A to Z and AA to GG were taken in this appeal, there was absolute absence of any contention in any one of them to the effect that despite being pressed into, the contention as regards non-examination u/s. 313 was not taken into consideration and appropriately dealt with by the High Court – Hence, the conclusion can only be that it was not argued. [Para 12]

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### Case Law Cited

*V.K. Sasikala v. State* [2012] 10 SCR 641 : (2012) 9 SCC 771; *Suresh Chandra Bihari v. State of Bihar* [1994] Supp. 1 SCR 483 : AIR 1994 SC 2420; *Wariyam Singh & Ors. v. State of U.P.* [1995] Supp. 3 SCR 807 : AIR 1996 SC 305; *Amanullah v. State of U.P.*, AIR 1973 SC 1370; *Shobit Chamar & Anr. v. State of Bihar* [1998] 2 SCR 117 : AIR 1998 SC 1693; *Oil and Natural Gas Company Limited v. Modern Construction and Company* [2013] 10 SCR 466 : (2014) 1 SCC 648; *Raj Kumar @ Suman v. State (NCT of Delhi)* [2023] 5 SCR 754 : 2023 SCC OnLine SC 609; *State of Punjab v. Swaran Singh* 2005 Supp. 1 SCR 786 : (2005) 6 SCC 101 – referred to.

### List of Acts

Code of Criminal Procedure, 1973; Penal Code, 1860; Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009).

### List of Keywords

Section 313 of Code of Criminal Procedure, 1973; Questioning under clause (b) Section 313 of Code of Criminal Procedure, 1973 is mandatory; Conviction under Section 302 read with Section 34, Penal Code, 1860; Examination under Section 313 of Code of Criminal Procedure, 1973; Incriminating circumstances; Non-questioning/inadequate questioning on incriminating circumstances; Material prejudice or blatant miscarriage of justice; Procedural safeguards; Protection of rights of accused; non-compliance of the mandatory procedure; Finding of common intention based on the incriminating circumstances; Exhortation; Non-curable defect; Patent illegality; Trial vitiated; Principle of natural justice viz., “audi alteram partem”; “actus curiae neminem gravabit”; Act of court shall prejudice no one; Contention not argued before the High Court; Contention not raised appropriately.

### Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1751 of 2017

From the Judgment and Order dated 20.12.2016 of the High Court of Delhi at New Delhi in CRLA No. 540 of 2000

**Digital Supreme Court Reports****Appearances for Parties**

S. D. Singh, Ms. Bharti Tyagi, Ms. Shweta Sinha, Ram Kripal Singh, Dhiraj Kumar, Siddharth Singh, Advs. for the Appellant.

Ms. Sonia Mathur, Sr. Adv., Shreekant Neelappa Terdal, Ms. Ruchi Kohli, Ms. Swarupama Chaturvedi, Ms. Noor Rampal, Shantnu Sharma, Mukesh Kumar Maroria, Advs. for the Respondent.

**Judgment / Order of the Supreme Court****Judgment**

**C.T. Ravikumar, J.**

1. Births of crimes and culprits concerned, occur together. Yet, under the criminal justice delivery system only on concluding findings on commission of the crime concerned in the affirmative, the question whether the accused is its culprit would arise. Culpability can be fixed, if at all it is to be fixed, on the accused upon conclusive proof of the same established by the prosecution only after following various procedural safeguards recognizing certain rights of an accused. Failure to comply with such mandatory procedures may even vitiate the very trial, subject to the satisfaction of conditions, therefor. Foremost among one such right is embedded in Section 313 of the Code of Criminal Procedure, 1973 (for short the 'Cr.PC'). Though questioning under clause (a) of sub-Section (1) of Section 313, Cr.PC, is discretionary, the questioning under clause (b) thereof is mandatory. Needless to say, a fatal non-compliance in the matter of questioning under Clause (b) of sub-section (1) thereof, in case resulted in material prejudice to any convict in a criminal case the trial concerned, qua that convict should stand vitiated. This prelude becomes necessary as in the captioned appeal the main thrust of the argument advanced is founded on fatal, non-compliance in the matter of questioning under Section 313, Cr.PC, qua the appellant who is a life convict. We will dilate on this a little later.
2. The appellant, who was accused No.4 in Sessions Case No.3/97 is challenging the confirmation of his conviction under Section 302, IPC, with the aid of Section 34, IPC, under the impugned judgment in Criminal Appeal No.540/2000 dated 20.12.2016 passed by the High Court of Delhi. As per the prosecution, an argy-bargy over spilling of drops of water over the roof of the appellant's house

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while Laxmi, the sister of the deceased-Arun Kumar was cleaning the *chajja* (parapet) of their house resulted in the accurst incident, where the said Arun Kumar lost his life on 14.06.1995 at 08.45 pm. The case of the prosecution is that enraged by the dropping of water over the roof, the wife of the appellant, namely, Meena, hurled filthy words at Laxmi. Then the appellant came out and he, too, started abusing. Thereupon, the deceased asked him to stop abusing his sister and then the appellant exhorted his brother Mahinder Kumar to come out and finish them. Soon, Mahinder came out with a knife and the appellant-Naresh Kumar caught hold of Arun Kumar and Mahinder stabbed on his chest repeatedly with the knife. The necroscopic evidence in this case consists of the oral testimony of PW-17, Dr. LK Baruah and the postmortem report Ext.PW7/A, which disclosed that the deceased had sustained the following antemortem injuries:

- "1. *Incised wound size 1.3 cm x 0.5 cm. On the left side front of chest. There is 1-1/2 medial to the left nipple placed obliquely.*
  2. *Incised wound size .3 cm x 0.5 cm.x? on the middle of chest situated 1.5 cm. Right to the mid line and below a line drawn between two nipples.*
  3. *Two incised wounds size 1.3 cm. And other 1.5 cm. In the right epigastric region.*
  4. *Incised wounds left side lower part of chest 9 cm. Below left nipple size 1.4 cm x 2.3 cm.*
  5. *Abrasions on the dorsum left forearm and hand*
  6. *Abrasions seen below left eye."*
3. Taking note of the said necroscopic evidence corroborating the events unfolded through the oral testimonies of the eye-witnesses viz., Anil Kumar (PW-7), Smt. Prem Devi (PW-8), Sanjay (PW-20), who are respectively the brother, mother and one cousin of the deceased and Smt. Madhu (PW-19) and Anand Kumar (PW-22) besides the other evidences, the trial Court found that the homicidal death of Arun Kumar amounts to murder and culpability was fixed on Mahinder Kumar, the first accused. We make it clear that we are not going to make any observation in respect of Sri Mahinder Kumar in this

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appeal and reference about him was made solely for the purpose of disposing this appeal.

4. As noticed earlier, the conviction of the appellant under Section 302, IPC, was then made with the aid of Section 34, IPC, and upon which he was awarded imprisonment for life. The conviction of the appellant herein was confirmed under the impugned common judgment dated 20.12.2016 in Criminal Appeal No.540/2000 (filed by the appellant herein), and Criminal Appeal No.764/2000 (filed by Mahinder Kumar).
5. Heard Sh. S.D. Singh, learned counsel appearing for the appellant and Ms. Sonia Mathur, learned senior counsel appearing for the respondent State.
6. As noticed earlier, the thrust of the argument for the appellant was founded on prejudicial non-compliance of Section 313, Cr.PC, during the examination thereunder, qua the appellant. Before going into its details, we think it appropriate to consider whether the appellant is raising this contention for the first time before this Court. In this context, it is to be noted that there is nothing on record which would reveal that specific contention in this regard was raised before the High Court in the appeal. True, that in the appeal before the High Court a ground in this regard was raised as 'ground No.13' as hereunder: -

*"13. That has been no proper examination of the appellant u/s. 313 Cr.P.C. which has caused material prejudice to the appellant."*

7. There is nothing in the impugned judgment to reveal that this point was argued with specific details establishing prejudice, before the High Court. The innumerable grounds (grounds A to Z and AA to GG) raised in this appeal would reveal that neither directly nor indirectly, this core contention was taken in any of them. At any rate, no ground was raised to the effect that despite raising this ground, the High Court had failed to consider it. Be that as it may, the order dated 21.07.2017 of this Court would reveal that the learned counsel for the appellant argued before this Court that while recording the statement of the appellant under Section 313, Cr.PC, no incriminating circumstances appearing in the prosecution evidence against him, were put to him and that vitiated the whole trial. Obviously, thereupon notice was issued in the Special Leave Petition from which this appeal arose. Later, only in the first application for bail, a contention

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on the following lines was taken and it was reiterated in the second application for bail as well:

*"7. That on completion of the evidence statement of accused under Section 313 Cr. PC have been recorded on 6.6.2000 and the mere perusal of the statement would show that no incriminating evidence which had been subsequently considered for the conviction of the appellant by the Ld. Trial Court as well as Hon'ble High Court had been put to the Appellant. Therefore, the entire trial against the Appellant is vitiated."*

8. During the course of the arguments by the learned counsel for the appellant submitted that this contention is based on non-questioning on two incriminating circumstances appeared against the appellant in the prosecution evidence viz., exhortation to do away with their lives (*aaj inko jaan se hi khatam karde*) and the evidence that 'the appellant had caught hold of the hands of the deceased Arun Kumar to enable Mahinder Kumar to stab him repeatedly with knife' and they formed the foundation for holding that the appellant had shared common intention with the first accused and ultimately, for holding the appellant guilty with the aid of Section 34, IPC, for the offence under Section 300, IPC, punishable under Section 302, IPC.
9. In view of the aforementioned core contentions, we are of the considered view that we need to consider the other grounds taken up in the appeal on the merits only if the appellant could not succeed based on non-examination under Section 313, Cr.PC, qua the appellant. We may consider any other relevant aspect, circumstance or evidence if we find that it is required for a proper consideration and appreciation of the above-mentioned core contention.
10. We have taken note of the absence of materials to show that the aforesaid core contention was appropriately raised and argued before the High Court. In the captioned appeal, it was not taken at all. In view of the circumstances the contention is resurrected, we are of the considered view that to entertain the same, it is essential to have a short survey on the authorities on the scope of maintaining such a contention at this stage in the aforementioned circumstances. Subject to its answer, we may also have to consider the question of prejudice or miscarriage of justice due to the non-compliance with mandate for questioning under Section 313, Cr.PC.

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11. In the context of the issues thus involved, it is only proper to look into the very object of Section 313, Cr.PC. This aspect has been considered many a times by this Court to hold that it embodies one salutary principle of natural justice viz., *audi alteram partem* and empowering the Court to examine the accused thereunder is to give the accused concerned an opportunity to explain the incriminating circumstances appearing against him in the prosecution evidence. In the decision in V.K. Sasikala v. State<sup>1</sup>, this Court held that examination of an accused under Section 313, Cr.PC, would not only provide an opportunity to him to explain the incriminating circumstances appearing in evidence against him, but also would permit him to forward his own version with regard to his alleged involvement in the crime. Furthermore, it was held that such an examination would have a fair nexus with a defence he might choose to bring and, therefore, any failure in such examination might take the effect of curtailing his right in the event he took up a specific defence. The general position is that if any incriminating circumstance, appearing against an accused in the prosecution evidence, is not put to him it should not be used against him and must be excluded from consideration. At the same time, we may hasten to add that it is a well-neigh settled position that non-examination or inadequate examination under Section 313, Cr.PC, on any incriminating circumstance, by itself, would not vitiate a trial qua the convict concerned unless it has resulted in material prejudice to him or in miscarriage of justice. In the decision in Suresh Chandra Bihari v. State of Bihar<sup>2</sup> and in Wariyam Singh & Ors. v. State of U.P.<sup>3</sup>, this Court held that mere defective/improper examination under Section 313, Cr.PC, would be no ground to set aside a conviction of the accused unless it has resulted in prejudice to the accused. In view of the said position which is being followed with alacrity we do not think it necessary to multiply the authorities on it.
12. We have already noted that 'ground No.13' raised in the appeal before the High Court was too vague, in the sense without clarity whatsoever, as to what were the incriminating circumstances that

1 [2012] 10 SCR 641 : (2012) 9 SCC 771

2 [1994] Supp. 1 SCR 483 : AIR 1994 SC 2420

3 [1995] Supp. 3 SCR 807 : AIR 1996 SC 305

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appeared in the prosecution evidence not being put to the appellant while being examined and what is the material prejudice or miscarriage of justice caused consequent to such failure. To make matters worse, a scanning of the impugned judgment of the High Court would not disclose whether before the High Court, the said contention was pressed into service much-less whether it was argued with precision on quintessential materials to establish that the trial qua the appellant was vitiated. In the contextual situation it is relevant to refer to the decision of this Court in ***Amanullah v. State of U.P.***<sup>4</sup>. Normally, it has to be presumed that all the arguments actually pressed at the hearing in the High Court were noticed and appropriately dealt with and if the judgment of the High Court does not contain discussion on a point, then that point should be assumed *prima facie* not to have been argued at the bar unless the contrary is specifically shown, it was so, held in the said judgment. In the case on hand though grounds A to Z and AA to GG were taken in this appeal, there is absolute absence of any contention in any one of them to the effect that despite being pressed into the said contention was not taken into consideration and appropriately dealt with by the High Court. Hence, the conclusion can only be that it was not argued.

13. This position takes us to the next question as to whether in such circumstances the contention based on non-examination/inadequate examination under Section 313, Cr.PC, causing material prejudice qua the appellant can be maintained at this stage. In this context, it is only appropriate to refer to the decision of this Court in ***Shobit Chamar & Anr. v. State of Bihar***<sup>5</sup>. It was held therein that where the plea as to non-compliance of the provisions of Section 313, Cr.PC, was raised for the first time before the Supreme Court, in case no prejudice had resulted to the accused was proved, the trial could not be held as vitiated. In that case, though the non-compliance was taken for the first time before the Supreme Court, the records showed that the relevant portion of the statement of witnesses were put to the accused in examination under Section 313, Cr.PC, and, thereupon, the plea was rejected. It is to be noted that was also a case of murder.

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4 AIR 1973 SC 1370

5 [1998] 2 SCR 117 : AIR 1998 SC 1693

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14. In the light of the aforesaid question posed for consideration, it is only appropriate to refer to the relevant provisions under Section 313 (1), (4) and (5).

**“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) ...

(3) ...

*(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.*

*(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section.”*

15. A bare perusal of the provisions under Section 313, Cr.PC, extracted above, would undoubtedly reveal the irrecusable obligation coupled with duty on Court concerned to put the incriminating circumstances appearing in the prosecution evidence against accused concerned facing the trial providing him an opportunity to explain. Sub-Section

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(5) of Section 313, Cr.PC, which was inserted under Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009) with effect from 31.12.2009, would lend support to this view. It reads thus: -

***"Section 313. Power to examine the accused.***

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*(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section."*

16. In this context, the maxim "*actus curiae neminem gravabit*" – "the act of court shall prejudice no one", has also to be looked into. In the decision in *Oil and Natural Gas Company Limited v. Modern Construction and Company*<sup>6</sup>, this Court held that the court has to correct the mistake it has done, rather than to ask the affected party to seek his remedy elsewhere. In the context of the decisions referred above, there can be no doubt that in a charge for commission of a serious offence where extreme penalty alone is imposable in case the accused is found guilty, procedural safeguards ensuring protection of right(s) of accused must be followed and at any rate, in such cases when non-compliance of the mandatory procedure capable of vitiating trial qua the convict concerned is raised and revealed from records, irrespective of the fact it was not raised appropriately, it must be considered lest the byproduct of consideration of the case would result in miscarriage of justice. Being the Court existing for dispensation of justice, this Court is bound to consider and correct the mistake committed by the Court by looking into the question whether non-examination or inadequate examination of accused concerned caused material prejudice or miscarriage of justice. We may hasten to add here, that we shall not be understood to have held that always such a mistake has to be corrected by this Court by examining the question whether material prejudice or miscarriage of justice had been caused. In this context, the summarization of law on the subject of consequence of omission to make questioning on incriminating circumstances appearing in the prosecution evidence

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and the ways of curing the same, if it is called for, by this Court in the decision in *Raj Kumar @ Suman v. State (NCT of Delhi)*<sup>7</sup>, assumes relevance. Paragraph 16 of the said decision reads thus:-

*"17. The law consistently laid down by this Court can be summarized as under:*

- (i) *It is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction;"*
- (ii) *The object of examination of the accused under Section 313 is to enable the accused to explain any circumstance appearing against him in the evidence;*
- (iii) *The Court must ordinarily eschew material circumstances not put to the accused from consideration while dealing with the case of the particular accused;*
- (iv) *The failure to put material circumstances to the accused amounts to a serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused;*
- (v) *If any irregularity in putting the material circumstance to the accused does not result in failure of justice, it becomes a curable defect. However, while deciding whether the defect can be cured, one of the considerations will be the passage of time from the date of the incident;*
- (vi) *In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him; and*

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- (vii) *In a given case, the case can be remanded to the Trial Court from the stage of recording the supplementary statement of the concerned accused under Section 313 of CrPC.*
  - (viii) *While deciding the question whether prejudice has been caused to the accused because of the omission, the delay in raising the contention is only one of the several factors to be considered.”*
- 17.** In view of the circumstances obtained in this case, factually and legally, it is also relevant to refer to paragraph 20 of the decision in Raj Kumar's case (supra) and it reads thus:-
- “21. Even assuming that the defect or irregularity was curable, the question is whether today, the appellant-accused 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.”*
- 18.** In this case, the incident in question occurred on 14.06.1995 and thus, obviously, more than 29 years have passed by. The appellant has already undergone incarceration for a period of more than 12 years. In the circumstances, we are inclined to proceed with the consideration of the contentions bearing in mind the aforesaid authorities laying down the position of law on various aspects of Section 313, Cr.PC.
- 19.** In the case on hand, the appellant was convicted for the offence under Section 300, IPC, punishable under Section 302, IPC, with the aid of Section 34, IPC. In other words, the conviction was not under Section 302, Cr.PC, simpliciter. Upon finding guilty for commission of murder only one of two extreme penalties viz., death or imprisonment for life

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could be imposed on the convict. When this be the consequence of finding an accused to have committed murder or in any other serious offence where extreme punishment of like nature alone is imposable, the failure to comply with the mandatory questioning on incriminating circumstance(s) appearing in the prosecution case, if made out, the plea of non-examination or inadequate examination under Section 313, Cr.PC, whether resulted in material prejudice to the accused or total miscarriage of justice, shall not be ignored or declined to be taken into account by the Court.

20. We have already noted that crucial incriminating circumstances viz., (1) pertaining to the exhortation of the appellant to kill Arun Kumar and others in his family (2) he had caught hold of the deceased to enable Mahinder Kumar to stab on his chest repeatedly, were not allegedly put to the appellant while being examined under Section 313, Cr.PC. The first among the twin incriminating circumstances not to put to the appellant was virtually the charge framed against him to the effect that in furtherance of the common intention of Mohinder Kumar and the appellant caught hold of deceased Arun Kumar and the other accused Mohinder Kumar inflicted knife blows on deceased Arun Kumar and murdered him. The former incriminating circumstance relating to exhortation by the appellant did not form part of the charge against the appellant. There can be no doubt with respect to the position that the question whether the aforementioned twin incriminating circumstances appeared in the prosecution evidence and whether they were put to the appellant while being examined under Section 313, Cr.PC, to enable him an opportunity to offer explanation are not matters of argument as a bare perusal of the materials on record viz., the oral testimonies of the eyewitnesses and Section 313, Cr.PC, examination of the appellant would reveal the verity or otherwise of the said contentions. The oral testimonies of Anil Kumar (PW-7), Smt. Prem Devi (PW-8), Mrs. Madhu (PW-19) and Anand Kumar (PW-22) would reveal that they have deposed regarding the exhortation from the appellant though in slightly different manner, and also about the fact that he had caught hold of the deceased to enable Mohinder Kumar to stab on the chest of the deceased repeatedly. The examination of the appellant under Section 313, Cr.PC, which is available on record, would reveal that both the incriminating circumstances were not directly or even indirectly put to the appellant while being examined

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under Section 313, Cr.PC. The learned counsel appearing for the respondent would fairly admit that the said material on record would reveal the correctness of the contentions of the appellant.

21. We have already held that whether non-questioning or inadequate questioning on incriminating circumstances to an accused by itself would not vitiate the trial *qua* the accused concerned and to hold the trial *qua* him is vitiated it is to be established further that it resulted in material prejudice to the accused. True that the onus to establish the prejudice or miscarriage on account of non-questioning or inadequate questioning on any incriminating circumstance(s), during the examination under Section 313, Cr.PC, is on the convict concerned. We say so, because if an accused is ultimately acquitted, he could not have a case that he was prejudiced or miscarriage of justice had occurred owing to such non-questioning or inadequate questioning.
22. In the light of the above view of the matter, we are inclined to consider the further question whether the non-questioning on the aforesaid twin incriminating circumstances to the appellant during his examination under Section 313, Cr.PC, had caused material prejudice to him. The decision of this Court in *State of Punjab v. Swaran Singh*<sup>8</sup>, constrain us to consider one another factor while considering the question of prejudice. In *Swaran Singh's* case (supra), this Court held that where the evidence of the witnesses is recorded in the presence of the accused who had the opportunity to cross examine them but did not cross examine them in respect of facts deposited, then, omission to put question to the accused regarding the evidence of such witnesses would not cause prejudice to such an accused and, therefore, could not be held as grounds vitiating the trial *qua* the convict concerned. We have already found that Anil Kumar (PW-7), Smt. Prem Devi (PW-8), Mrs. Madhu (PW-19) and Anand Kumar (PW-22) have deposed about the said circumstances. A scanning of their oral testimonies, available on record, would undoubtedly reveal that on both the points, on behalf of the appellants they were cross examined.
23. The position, as above, would take us to the last question whether material prejudice was caused to the appellant on account of non-

8 [2005] Supp. 1 SCR 786 : (2005) 6 SCC 101

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questioning him on the aforesaid incriminating circumstances and thereby depriving him an opportunity to explain. This question can better be considered by referring to paragraph 31 of the judgment of the Trial Court, which virtually got confirmation from the High Court under the impugned judgment. It reads thus:-

*"31. As far the part played by accused Naresh is concerned, this has come in the evidence of PWs that he (Naresh) is the man, who called his brother Mahinder and exhorted "Mahender came out and kill them today" and thereafter his taking part in the incident, by catching hold of deceased Arun Kumar, clearly goes to show the common intention of the two, i.e. Naresh and Mahinder and even the Learned Defence Counsel, cannot be benefited from the above noted authorities."*

24. It is evident from the afore-extracted paragraph from the judgment of the Trial Court that the said conclusion that appellant had shared the common intention to commit murder of the deceased Arun Kumar was based only on the aforesaid two incriminating circumstances which were not put to the appellant while being questioned under Section 313, Cr.PC. When the very charge framed against him, as referred as above, would reveal that there was no charge of commission of an offence under Section 300, IPC, punishable under Section 302, IPC, simplicitor against the appellant whereas the said charge thereunder with the aid of Section 34, IPC. In such circumstances, when the finding of common intention was based on the twin incriminating circumstances and when they were not put to the appellant while he was being questioned under Section 313, Cr.PC, and when they ultimately culminated in his conviction under Section 302, IPC, with the aid of Section 34, IPC, and when he was awarded with the life imprisonment consequently, it can only be held that the appellant was materially prejudiced and it had resulted in blatant miscarriage of justice. The failure as above is not a curable defect and it is nothing but a patent illegality vitiating the trial qua the appellant.
25. Once, the upshot of the discussion is above, we do not think it proper to deal with the innumerable grounds raised by the appellant, not only because it has become unnecessary but also such consideration may adversely affect the co-accused whose appeal was also decided under the very same common judgment impugned in this appeal.

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26. As noticed hereinbefore, the incident in question occurred more than 29 years ago and the appellant had already undergone incarceration more than 12 years. In such circumstances, if he is again subjected to examination under Section 313, Cr.PC, it would cause further prejudice to him in view of the patent illegality occurred *qua* the appellant. Hence, the conviction of the appellant could not be sustained.
27. For the aforesaid reasons, the appeal must succeed. Accordingly, the impugned judgment of the trial Court and the High Court are set aside *qua* the appellant. We make it clear that this judgment would not disturb the conviction of the other accused. We also make it clear that this observation shall not be taken as confirmation of his conviction as it is a matter which may be dealt with in an appeal, if any, filed by him. The appellant herein stands acquitted of the offences alleged against him. If his detention is not required in connection with any other case, he shall be released, forthwith.
28. The appeal is allowed on the above terms.
29. Pending application(s), if any, are disposed of.

*Result of the case:* Appeal allowed.

<sup>†</sup>*Headnotes prepared by:* Divya Pandey