

HIGH COURT OF JAMMU & KASHMIR AND LADAKH  
AT SRINAGAR

...

CRA no.09/2015

*Pronounced on: 22.07.2024*

1. Nazir Ahmad Mir S/o Gh. Nabi Mir
  2. Showkat Ahmad Mir S/o Gh. Qadir Mir
  3. Mohd Younis Mir S/o Ab. Aziz Mir
- All residents of Ratnipora Pulwama

.....Appellant(s)

Through: Mr S. N. Ratanpuri, Advocate with  
Ms Fiza Khursheed, & Ms Minsha, Advocates

**Versus**

State of J&K through SHO Pulwama

.....Respondent(s)

Through: Mr Zahid Qais Noor, GA  
Mr R. A. Jan, Senior Advocate with  
Mr Suhail Mehraj, Advocate

**CORAM:**

**HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE**

**JUDGEMENT**

1. This appeal is directed against the judgement of conviction dated 9<sup>th</sup> May 2015 and Order of sentence dated 30<sup>th</sup> May 2015, passed by Principal Sessions Judge, Pulwama, (hereinafter referred to as "Trial Court") in a case bearing FIR no.147/2002 titled as *State v. Nazir Ahmad Mir and others* and for setting-aside the same on the grounds made mention of therein.
2. I have heard learned counsel for parties and considered the matter.
3. The prosecution case, as is apparent from perusal of the file as also Trial Court record, is that on 31<sup>st</sup> May 2014 police station Pulwama

received an information through reliable sources that at 2:00 PM at Rantipora, the acid was sprinkled upon the face of one Gulzar Ahmad S/o Ghulam Ahmad Mir R/o Ratnipora, which burnt his face and caused injuries as well. He was shifted to SMHS Hospital, Srinagar, for treatment. Consequently FIR no.147/2002 under Section 307, 326, 34/2021 RPC was lodged. Investigation was conducted. Medical Certificate was obtained by I.O., which reveals that offence under Section 307, 326, 34 RPCV were made out. Accused persons were arrested and lodged in judicial lockup. Challan was produced before Chief Judicial Magistrate, Pulwama, who committed it to Trial Court. Accused were charged under section 307, 326, 201 RPC. Prosecution adduced evidence. 15 prosecution witnesses were produced and examined. Impugned judgement reveals that accused did not want to lead any evidence in their defence and to this extent the signature on the margin of the order dated 29<sup>th</sup> November 2019 had been obtained.

4. Mr S. N. Ratanpuri, learned counsel appearing for appellants, would contend that even though appellants had not committed any crime, yet after registration of FIR, appellants 1&2 were arrested on 15<sup>th</sup> June 2002 and appellant no.3 on 16<sup>th</sup> June 2002. The challan was filed against appellants on 8<sup>th</sup> June 2002. According to him, after framing charge, to which appellants pleaded not guilty, prosecution was directed to adduce evidence. The prosecution, out of 43 listed witnesses in the Challan, examined only 15 witnesses in support of its case. Learned counsel for appellants has also stated that the Trial Court has not appreciated the evidence led by prosecution in its right and proper perspective inasmuch as there were inconsistencies,

contradictions and exaggerations in the statements of witnesses produced by prosecution before the Trial Court. He further avers that the Trial Court has not recorded the statement under Section 342 Cr.P.C. correctly. It is stated that when statement under Section 342 Cr.P.C. is not recorded in the manner provided by law and incriminating evidence, if any, existing on record is not put to the accused, the net result is that the accused is entitled to acquittal. In support of his submissions, learned counsel for appellants has placed reliance on various judgements, which includes judgement dated 17<sup>th</sup> July 2008, passed in *Asraf Ali v. State of Assam*, reported in *AIR 2009 SC (Supp) 654*; judgement dated 26<sup>th</sup> August 2019 passed in *Samsul Haque v. State of Assam*, reported in *AIR 2019 SC 4163*; judgement dated 14<sup>th</sup> December 2022 in *Kalicharan and others v. State of U.P.*, reported in *2022 Livelaw SC 1027 : (2023) 2 SCC 583*; judgement dated 11<sup>th</sup> May 2023 in *Raj Kumar @ Suman v. State (NCT of Delhi)* reported in *2023 LiveLaw (SC) 434 : 2023 SCC Online (SC) 609*; judgement dated 19<sup>th</sup> October 2023 in *Indra Kunwar v. The State of Chattisgarh*, reported in *2023 LiveLaw (SC) 932 :2023 SCC Online (SC) 1364*; judgement dated 24<sup>th</sup> November 2023 *Nababuddin @ Mallu @ Abhimanyu v. State of Haryana* reported in *2023 Livelaw (SC) 1014 : AIR Online 2023 (SC) 941*.

5. Although plethora of submissions have been made by Mr S. N. Ratanpuri, learned counsel appearing for appellants, yet threshold contention of learned counsel is germane to be taken up at first instance. It is contended by learned counsel for appellants that requirements of Section 342 Cr.P.C. have not been followed and

complied with by the Trial Court in its letter and spirit, and impugned judgement shows and suggests contrary to the record. In this regard, he has invited attention of this Court to page 4&5 of impugned judgement; relevant portion whereof for ready reference is reproduced hereunder:

“.....The prosecution evidence was closed on 10<sup>th</sup> of Sep. 2012. After the court recorded fifteen witnesses out of 27 listed witnesses, prosecution failed to produce further evidence in this regard and a dilated order has been passed on 10<sup>th</sup> of September 2012. The statements of the accused witnesses u/s 342 Cr.P.C were recorded on 4<sup>th</sup> of Feb. 2012 and the file was posted for arguments. On perusal of the statements recorded u/s 342 Cr.P.C. it appears that the accused have never been informed that they have the right of defence and are free to lead the evidence in their defence because it is the duty of the trial court to educate the accused u/s 273 Cr.P.C in case the benefit of section 273 Cr.P.C is not given to the accused. Once the court gets satisfaction that benefit of section 273 Cr.P.C. cannot be given to the accused in view of the evidence available on record, the accused have to be informed and educated about their right to lead the evidence or to file any document or written statement in support of their defence. However, today the accused in the open court were informed that in case they want to lead evidence in their defence or want to file any document in their defence they have a right to do the same but the counsel of the accused submitted that the matter may be posted for arguments as the accused do not want to lead any evidence in their defence. The signature of the counsel for the accused was also taken on the margin of the order dated 29<sup>th</sup> of Nov. 2014.”

6. As is evident from bare perusal of supra reproduced portion of impugned judgement, the Trial Court mentions that statements of accused under Section 342 Cr.P.C. had not been recorded in a proper way and manner as was required in terms of Section 342 inasmuch as accused persons had not been informed that they had right of defence and were free to lead evidence in their defence as it was the duty of the Trial Court to educate accused under Section 273 Cr.P.C. in case

the benefit of Section 273 was not given to accused. It is also mentioned in impugned judgement that once the court gets satisfaction that benefit of Section 273 could not be given to accused in view of evidence available on record, the accused persons had to be informed and educated about their right to lead evidence or to file document or written statement in support of their defence. The Trial Court mentions in impugned judgement that counsel for accused persons stated that accused persons did not want to adduce evidence or file any document in their defence and in this regard order dated 29<sup>th</sup> November 2014 was passed and signature of counsel for accused persons was obtained on the margin of the said order dated 29<sup>th</sup> November 2014.

7. Taking into consideration this aspect of the matter, I have gone through the Trial Court record, as also Order dated 29<sup>th</sup> November 2019, and statement of accused persons recorded under Section 342 Cr.P.C. which reflects that provisions of Section 342 read with Section 294 Cr.P.C. have not been complied with.
8. Section 273 Cr.P.C. provides that if after taking evidence for prosecution examining accused and hearing prosecution and defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal. However, where accused is not acquitted under Section 273, he (accused) shall be under Section 274 Cr.P.C. called upon to enter on his defence and adduce any evidence he may have in support thereof. Subsection (2) of Section 274 envisages that if accused puts in any written statement, the Judge shall file it with the record.

Subsection (3) of Section 274 Cr.P.C. stipulates that if accused applies for issue of any process for compelling attendance of any witness or production of any document or thing, the Judge shall issue such process unless he considers for reasons to be recorded that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.

9. Section 342 Cr. P.C. (J&K), which is *pari materia*, to Section 313 Cr.P.C. (Central), provides that in order to enable accused person 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 prosecution are examined and before he is called on for his defence.

10. The need of law for examining the accused with reference to incriminating circumstances appearing against him in prosecution evidence is not for observance of a ritual in a trial, nor is it a mere formality as it enables the court to be apprised of what the accused person has to say about the circumstances pitted against him by prosecution.

11. It is trite law, nonetheless, fundamental that accused person'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. Section 342 Cr.P.C. itself declares the object in explicit language that is "*for the*

*purpose of enabling the accused to explain any circumstances appearing in the evidence against him". The ultimate test in determining whether or not the accused has been fairly examined under Section 342 Cr.P.C. 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 examination of accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity. Thus, it is well settled that the provision is mainly intended to benefit the accused and as it is corollary to benefit the court in reaching the final conclusion.*

12. *In the case in hand, it is evident from perusal of the Trial Court record that accused persons have not been properly examined as was required under and in terms of provisions of Section 342 Cr.P.C., which suggest that examination of the accused persons was defective thereby a prejudice has been caused to them, which is a serious infirmity. The statements recorded under Section 342 Cr.P.C. do not reflect that the Trial Court put in the form of questions all the incriminating circumstances to the accused persons and asked them to answer all those questions in such a manner and way which would show and suggest that accused persons had been able to explain their position clearly and lucidly. As can be seen and gathered from the statements recorded under Section 342 Cr.P.C. by the Trial Court, just a procedural formality has been undertaken, causing prejudice to the accused persons and thereby impeding the process of arriving at a fair decision.*

13. It is worthwhile to mention here that the object of Section 342 Cr.P.C. is to establish a direct dialogue between the court and accused. If a point in the evidence is important against accused and conviction is intended to be based upon it, it is a right and proper that accused should be questioned about the matter and be given an opportunity of explaining it.

14. The Supreme Court in *Raj Kumar @ Suman* (supra) has summarized that it is the duty of the trial court to put each material circumstance appearing in the evidence against accused specifically, distinctively and separately and the material circumstance means the circumstance or the material on the basis whereof the prosecution is seeking his conviction. The object of examination of the accused under Section 313 Cr.P.C. which is *pari materia* to Section 342 Cr.P.C., is to enable accused to explain any circumstance appearing against him in the evidence. 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. 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. In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him; In a particular matter, the case can be remanded to Trial Court from the stage of recording the supplementary statement of the concerned accused under Section 313 of Cr.P.C. 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.

15. The Supreme Court in *Indrakunwar* (supra) has said that the object, evident from the Section 313 Cr.P.C., is to enable accused persons to themselves explain any circumstances appearing in the evidence against them. The intent of Section 313 Cr.P.C. is to establish a dialogue between the Court and the accused. This process benefits the accused and aids the Court in arriving at the final verdict. The process enshrined is not a matter of procedural formality but is based on the cardinal principle of natural justice, i.e., *audi alterum partem*. The ultimate test when concerned with the compliance of the Section 313 Cr.P.C. is to enquire and ensure whether the accused got the opportunity to say his piece. In such a statement, the accused may or may not admit involvement or any incriminating circumstance or may even offer an alternative version of events or interpretation. The accused may not be put to prejudice by any omission or inadequate questioning. The right to remain silent or any answer to a question which may be false shall not be used to his detriment, being the sole reason. This statement cannot form the sole basis of conviction and is neither a substantive nor a substitute piece of evidence. It does not discharge but reduces the prosecution's burden of leading evidence to prove its case. They are to be used to examine the veracity of the prosecution's case. The statement is to be read as a whole. One part cannot be read in isolation. Such a statement, as not on oath, does not qualify as a piece of evidence under Section 3 of the Indian Evidence

Act, 1872; however, the inculpatory aspect as may be borne from the statement may be used to lend credence to the case of the prosecution. The circumstances not put to the accused while rendering his statement under Section 313 are to be excluded from consideration as no opportunity has been afforded to him to explain them. The Court is obligated to put, in the form of questions, all incriminating circumstances to the accused so as to give him an opportunity to articulate his defence. The defence so articulated must be carefully scrutinized and considered. Non-compliance with Section 313 Cr.P.C. may cause prejudice to the accused and may impede the process of arriving at a fair decision.

16. The Supreme Court in the case of *Natasha Singh v. CBI, (2013) 5 SCC 74*, has held that “fair trial entails the interests of the accused, the victim and of the society and, therefore, includes the grant of fair and proper opportunities to the person concerned and the same must be ensured as this is the Constitutional as well as human right”.

17. Mr. S. N. Ratanpuri, learned counsel appearing for appellants, would contend that appellants have fundamental and legal right to place on record all evidences in respect of defence to prove his innocence which he has to establish to the hilt and if he fails to prove this plea of his innocence, this would be additional circumstance which can be read along with proven prosecution evidence to be read against the accused to record his conviction. He has further stated that it is well settled that if no acquittal is passed under Section 273 Cr.P.C., the court has to call upon accused to enter on his defence.

18. Admittedly, in this case, no acquittal has been passed under Section 273 Cr.P.C. Thus, the provisions of Section 274 Cr.P.C. are fully attracted. The accused has a right to be provided an opportunity to adduce any evidence in support of his defence. This right of the accused is a very valuable right which cannot be curtailed in any way. Therefore, a heavy duty is cast upon the Court to see as to whether or not the defence evidence sought to be summoned, is necessary for defending the charge levelled against the accused. If it is so, the trial court has to summon the defence witnesses and has to adopt a reasonable approach in such a matter and should not reject the prayer for summoning defence evidence

19. The important question of law that arises for determination in the present is as to whether it is incumbent on the part of accused to spell out his defence including the plea of innocence at the stage of investigation, framing of charge while prosecution evidence is being recorded and at the stage of recording of statement under Section 342 Cr.P.C.

20. In order to answer aforesaid issues, this Court cannot lose sight of Article 20(3) of the Constitution of India, which constitutes right to silence of accused which has various facets: One is that the burden is on the State or rather the prosecution to prove that the accused is guilty. Another is that an accused is presumed to be innocent till he is proved to be guilty. A third is the right of the accused against self-incrimination, namely, the right to be silent and that he cannot be compelled to incriminate himself.

21. Right to fair trial, presumption of innocence unless proven guilty and proof by the prosecution of its case beyond any reasonable doubt are the fundamentals of our criminal jurisprudence. When we speak of prejudice to an accused, it has to be shown that the accused has suffered some disability or detriment in relation to any of these protections substantially. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused.

22. While passing instant judgement, I have not deliberated upon prosecution story, defence story, merits of the case or for that matter the opinion/views given by the Trial Court in impugned judgement. I have discussed only the right(s) under Section 273, 274 and 432 Cr.P.C. as available to accused.

23. In view of supra-discussion, the Judgement of Conviction dated 9<sup>th</sup> May 2015 and Order of Sentence dated 30<sup>th</sup> May 2015, passed by Principal Sessions Judge, Pulwama, in a case titled as *State v. Nazir Ahmad Mir and others*, are set-aside. The matter is remanded back to the Trial Court with a direction to the Trial Court to proceed in the matter from the stage of Section 342 Cr.P.C. read with Section 274 Cr.P.C. providing appellants the right(s) as are envisaged under Section 342/274 Cr.P.C.

24. Copy of this judgment along with the record be sent down along with the record.

(Vinod Chatterji Koul)  
Judge

Srinagar

22.07.2024

*Ajaz Ahmad, Secy.*

Whether approved for reporting? Yes