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NAR SINGH

v.

STATE OF HARYANA

(Criminal Appeal No. 2388 of 2014)

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NOVEMBER 11, 2014

[T.S. THAKUR AND R. BANUMATHI, JJ.]

Code of Criminal Procedure, 1973:

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s.313 – Non-compliance of mandatory provisions of s.313 whether vitiate of trial and conviction of the appellant – Held: The provisions of s.313 are mandatory and cast a duty on the court to afford an opportunity to the accused to explain each and every circumstance and incriminating

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evidence against him – The examination of accused u/ s.313(1)(b) is not a mere formality – s.313 merely prescribes a procedural safeguard for an accused – Objection as to s.313 statement should be taken at the earliest stage – Any omission on the part of the Court to question the accused on

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any incriminating circumstance would however not ipso facto vitiate the trial, unless some material prejudice is shown to have been caused to the accused – Insofar as non-compliance of mandatory provisions of s.313, it is an error essentially committed by the Sessions Judge – Since justice

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suffers in the hands of the Court, the same can be corrected or rectified in the appeal.

s.386 – Power of appellate court – Scope of – Discussed.

Disposing of the appeal, the Court

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HELD: 1. The object of Section 313(1)(b) Cr.P.C. is to bring the substance of accusation to the accused to enable him to explain each and every circumstance appearing in the evidence against him. The provisions of

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this section are mandatory and cast a duty on the court to afford an opportunity to the accused to explain each and every circumstance and incriminating evidence against him. The statutory provision of Section 313, Cr.P.C. is based on the rules of natural justice for an accused, who must be made aware of the circumstances being put against him so that he can give a proper explanation to meet that case. If an objection as to Section 313 Cr.P.C. statement is taken at the earliest stage, the Court can make good the defect and record additional statement of the accused as that would be in the interest of all. When objections as to defective Section 313 Cr.P.C. statement is raised in the appellate court, then difficulty arises for the prosecution as well as the accused. [Paras 11, 16] [228-B; 230-H; 231-A-B]

State of Punjab v. Hari Singh & Ors. 2009 (2) SCR 470:(2009) 4 SCC200; *Usha K. Pillai v. Raj K. Srinivas & Ors.* 1993 (3) SCR 467:(1993) 3 SCC 208; *Paramjeet Singh alias Pamma v. State of Uttarakhand* 2010 (11) SCR 1064:(2010) 10 SCC 439; *Basava R. Patil & Ors. v. State of Karnataka & Ors.* 2000 (3) Suppl. SCR 658: (2000) 8 SCC 740 – relied on.

2. The question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance of Section 313 Cr.P.C. has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under Section 313 Cr.P.C., it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When such objection as to omission to put the question under Section 313 Cr.P.C. is raised by the accused in the appellate court and prejudice is also shown to have been caused to the accused, then the appellate court may

- A examine the convict or 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 under Section 313 Cr.P.C. and the said answer can be taken into consideration. [Paras 20, 23]
- B [232-G-H; 234-C-D]

Avtar Singh & Ors. v. State of Punjab 2002 (2) Suppl. SCR 482; (2002) 7 SCC 419; *Wasim Khan v. The State of Uttar Pradesh* 1956 SCR 191; AIR 1956 SC 400; *Bhoor Singh & Anr. v. State of Punjab* AIR 1974 SC 1256; *Santosh Kumar Singh v State through CBI* 2010 (13) SCR 901; (2010) 9 SCC 747; *State of Punjab v Hari Singh & Ors.* 2009 (2) SCR 470; (2009) 4 SCC 200; *Kuldip Singh & Ors. V. State of Delhi* (2003) 12 SCC 528; *Alister Anthony Pareira v. State of Maharashtra* 2012 (1) SCR 145; (2012) 2 SCC 648;

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D *Shivaji Sahabrao Bobade & Anr. vs. State of Maharashtra* 1974 (1) SCR 489; (1973) 2 SCC 793; *State (Delhi Administration) vs. Dharampal* 2001 (4) Suppl. SCR 448; (2001) 10 SCC 372 – relied on.

E 3. 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 has power to order retrial of the case by a court of competent jurisdiction subordinate to such appellate court. If all the relevant questions were

F not put to accused by the trial court and when the accused has shown that prejudice was caused to him, the appellate court has 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

G Section 313 Cr.P.C. and the same cannot be said to be amounting to filling up lacuna in the prosecution case. [Para 27] [236-F-H]

H 4. In the instant case, FSL Report was relied upon

both by the trial court as well as by the High Court. The objection as to the defective 313 Cr.P.C. statement was not raised in the trial court or in the High Court and the omission to put the question under Section 313 Cr.P.C., and prejudice caused to the accused was raised before this Court for the first time. The appellant is in custody for about eight years. While the right of the accused to speedy trial is a valuable one, Court has to subserve the interest of justice keeping in view the right of the victim's family and the society at large. The accused is not entitled for acquittal on the ground of non-compliance of mandatory provisions of Section 313 Cr.P.C. No doubt, the appellant was prejudiced on account of omission to put the question as to the opinion of Ballistic Expert which was relied upon by the courts below. Trial court should have been more careful in framing the questions and in ensuring that all material evidence and incriminating circumstances were put to the accused. However, omission on the part of the Court to put questions under Section 313 Cr.P.C. cannot enure to the benefit of the accused. The conviction of the appellant under Section 302 IPC and Section 25 (IB) of the Arms Act is set aside. The matter is remitted back to the trial court for proceeding with the matter afresh from the stage of recording statement of the accused under Section 313 Cr.P.C. [Paras 32, 34 and 35] [240-B-G]

Asraf Ali vs. State of Assam 2008 (10) SCR 1115:(2008) 16 SCC 328; *Ganeshmal Jashraj vs. Government of Gujarat & Anr.* 1980 (1) SCR 1114: (1980) 1 SCC 363; *Abdul Rehman Antulay and Ors. vs. R.S. Nayak And Anr.* 1991 (3) Suppl. SCR 325:(1992) 1 SCC 225 – relied on.

Case Law Reference:

2009 (2) SCR 470	Relied on	Para 6
1993 (3) SCR 467	Relied on	Para 10

A	2010 (11) SCR 1064	Relied on	Para 12
	2000 (3) Suppl. SCR 658	Relied on	Para 13
	2002 (2) Suppl. SCR 482	Relied on	Para 14
B	1956 SCR 191	Relied on	Para 17
	AIR 1974 SC 1256	Relied on	Para 17
	2010 (13) SCR 901	Relied on	Para 18
	2009 (2) SCR 470	Relied on	Para 21
C	(2003) 12 SCC 528	Relied on	Para 21
	2012 (1) SCR 145	Relied on	Para 22
	1974 (1) SCR 489	Relied on	Para 24
D	2001 (4) Suppl. SCR 448	Relied on	Para 25
	2008 (10) SCR 1115	Relied on	Para 28
	1980 (1) SCR 1114	Relied on	Para 29
E	1991 (3) Suppl. SCR 325	Relied on	Para 31

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 2388 of 2014.

F From the Judgment & Order dated 30.08.2012 of the High
Court of Punjab and Haryana at Chandigarh in CRA-D-960-DB
of 2006.

Sushil Kumar Jain, Khushboo Jain, A. Vikram, Abhinav
Gupta, Pratibha Jain for the Appellant.

G Narender Hooda; AAG, Bano Deswal, Monika Gusain for
the Respondent.

The Judgment of the Court was delivered by

H R. BANUMATHI, J.1. Leave granted.

2. This appeal is directed against the judgment dated 30.08.2012 passed in CrI. Appeal D-960-DB/2006 by the High Court of Punjab and Haryana dismissing the appeal of accused-appellant thereby confirming the conviction of the appellant under Section 302, IPC and sentence of rigorous imprisonment for life and a fine of Rs.20,000/- with default clause and conviction under Section 25 (1B) of the Arms Act, 1959 and sentence of rigorous imprisonment for three years and a fine of Rs.10,000/- with default clause as imposed by the trial court.

3. Briefly stated, case of the prosecution is that on 6.03.2005, Rajbir went to sleep in the street on a cot at about 7.30 p.m. and Daya Nand (PW-7) also went to sleep in his house at about 9.00 p.m. At 11.00 P.M., Daya Nand heard the sound of vomiting of his brother and he came out and found his brother Rajbir crying in pain. PW-7 called his father Chander Bhan and both of them noticed injuries on the forehead of Rajbir with profuse bleeding. PW-7 went to call the doctor but the doctor refused to accompany him. When Daya Nand returned back, Rajbir had already succumbed to injuries. Law was set in motion by PW-7 and FIR was registered under Section 302, IPC. PW-14 had taken up the investigation and inquest was conducted on the body of the deceased Rajbir. Dr. J.K. Bhalla (PW-10) conducted autopsy on the body of deceased Rajbir and a country-made bullet was seized from the occipital area of the brain of deceased Rajbir. Dr. Bhalla opined that the death was due to injury to the brain and he issued Ex P-13-post mortem certificate. Site plan of the scene of occurrence was prepared and material objects were seized. The appellant-accused was arrested on 14.03.2005 and based on his confession statement, a pistol was recovered behind a water tank in the house of the appellant-accused. The bullet (chambered for .315" & .303" caliber firearms) and country-made pistol (chambered for .315" & .303" cartridges) were sent for the Ballistic Expert opinion. The Ballistic Expert opined that the country-made bullet (chambered for .315" & .303" caliber

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A firearms) had been fired from the above-said country-made pistol and not from any other firearm. On receipt of the Ballistic Expert opinion and on completion of the investigation, charge sheet was filed against the appellant under Section 302 IPC, and Section 25(1B) of the Arms Act.

B 4. To bring home the guilt of the accused, the prosecution has examined PWs 1 to 14 and exhibited documents and material objects. Upon consideration of the evidence, trial court convicted the appellant under Section 302 IPC and Section 25(1B) of the Arms Act and sentenced him to undergo imprisonment as aforesaid. On appeal, the High Court affirmed the conviction for both the offences and imposed sentence of imprisonment on the appellant. Being aggrieved, the appellant has preferred this appeal by special leave.

D 5. Being based on circumstantial evidence, prosecution relied on the following circumstances to establish the guilt of the accused:-

E (i) Motive – evidence of PW-8, mother of the deceased, who had spoken about an incident that had happened 18 years ago when Rajbir- the deceased and Hoshiar Singh- father of the accused were bringing 'boorada' from village Satnali in a mechanised cart and that the said cart overturned on the way and Hoshiar Singh died in the accident due to which the appellant and his family had a grudge against Rajbir, as they felt that Rajbir had killed his father. She further stated that about four years back, the accused threatened Rajbir that he would avenge the murder of his father;

G (ii) Evidence of PW-11 'Ranbir Singh, who deposed that on 06.03.2005 when he came out of his house at about 11.00 p.m., he saw the appellant Nar Singh running in the street. PW-11 also claims to have heard the sound of fire-arm shot;

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(iii) Disclosure statement of the appellant which led to the recovery of country-made pistol (chambered for .315" and .303" caliber firearms) from behind the water tank of appellant's house;

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(iv) Exhibit P-13 and evidence of PW-10, Dr. J.K. Bhalla, who conducted post mortem on the body of the deceased Rajbir and recovery of a bullet from occipital area of the brain of deceased Rajbir; and

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(v) Opinion of the Ballistic Expert (Ext. P-12) that the country-made bullet (chambered for .315" & .303" caliber firearms) had been fired from the country-made pistol (chambered for .315 & .303 cartridges) recovered in pursuance of the disclosure statement of the accused and not from any other firearm.

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Trial court as well as the High Court held that the above circumstances are proved by the prosecution and that they form a complete chain establishing guilt of the accused resulting in conviction of the appellant. While doing so, trial court relied upon the Forensic Science Laboratory Report (FSL) (Ex P-12) as a vital piece of evidence against the appellant. The High Court also relied upon FSL report as a material evidence to sustain the conviction of the appellant.

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6. Mr. Sushil Kumar Jain, learned Senior Counsel for the appellant, contended that none of the circumstances relied upon by the courts below had been established beyond reasonable doubt and those circumstances, either cumulatively or individually, were insufficient to establish the guilt of the accused. Learned Senior Counsel mainly contended that the only incriminating circumstantial evidence against the appellant was Ex P-12 FSL report and the same was not put to the appellant while he was being questioned under Section 313 of the Criminal Procedure Code. It was submitted that Section 313 Cr.P.C. makes it mandatory to put all the incriminating evidence

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A and circumstances to the accused and Ex P-12 FSL report, which is the basis for conviction of the appellant, has not been put to the accused and non-questioning of the accused as to the vital piece of evidence is fatal to the prosecution case and vitiates the conviction. Reliance was placed upon *State of Punjab v. Hari Singh & Ors.*, (2009) 4 SCC 200.

7. Mr. Narender Hooda, learned Addl. Advocate General appearing for the State of Haryana, submitted that all the circumstances against the appellant were established by the prosecution and learned courts below recorded concurrent findings as to the guilt of the accused. Learned counsel contended that non-questioning of accused as to Ex P 12 FSL report and expert opinion during questioning under Section 313 Cr.P.C. by itself will not vitiate the trial and the accused has to establish the prejudice caused to him. It was submitted that omission to put the FSL report and expert opinion to the appellant under Section 313 Cr.P.C. and that prejudice being caused to the appellant was neither raised in the trial court nor before the High Court and it is not open to the appellant to raise such a plea in this Court for the first time.

8. As main thrust of argument of the appellant is on the question of non-compliance of Section 313 Cr.P.C., we do not propose to consider the appeal on merits, except on the important question viz. whether non-compliance of the mandatory provisions of Section 313 Cr.P.C. vitiates the trial and conviction of the appellant.

9. The power to examine the accused is provided in Section 313 Cr.P.C. which reads as under:-

“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; A

(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: B

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). C

(3). The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them. D

(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. E

(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." F

10. There are two kinds of examination under Section 313 Cr.P.C. The first under Section 313 (1) (a) Cr.P.C. relates to any stage of the inquiry or trial; while the second under Section 313 (1) (b) Cr.P.C. takes place after the prosecution witnesses are examined and before the accused is called upon to enter upon his defence. The former is particular and optional; but the latter is general and mandatory. In *Usha K. Pillai v. Raj K. Srinivas & Ors.*, (1993) 3 SCC 208, this Court held that the Court is empowered by Section 313 (1) clause (a) to question G H

A the accused at any stage of the inquiry or trial; while Section 313(1) clause (b) obligates the Court to question the accused before he enters his defence on any circumstance appearing in prosecution evidence against him.

B 11. The object of Section 313 (1)(b) Cr.P.C. is to bring the substance of accusation to the accused to enable the accused to explain each and every circumstance appearing in the evidence against him. The provisions of this section are mandatory and cast a duty on the court to afford an opportunity to the accused to explain each and every circumstance and
 C incriminating evidence against him. The examination of accused under Section 313 (1)(b) Cr.P.C. is not a mere formality. Section 313 Cr.P.C. prescribes a procedural safeguard for an accused, giving him an opportunity to explain the facts and circumstances appearing against him in the
 D evidence and this opportunity is valuable from the standpoint of the accused. The real importance of Section 313 Cr.P.C. lies in that, it imposes a duty on the Court to question the accused properly and fairly so as to bring home to him the exact case he will have to meet and thereby, an opportunity is given to him
 E to explain any such point.

F 12. Elaborating upon the importance of a statement under Section 313 Cr.P.C., in *Paramjeet Singh alias Pamma v. State of Uttarakhand*, (2010) 10 SCC 439 (para 22), this Court has held as under:

G “Section 313 CrPC is based on the fundamental principle of fairness. The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Therefore, the court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity
 H to offer an explanation for such incriminatory material

appearing against him. Circumstances which were not put to the accused in his examination under Section 313 CrPC cannot be used against him and have to be excluded from consideration." (vide *Sharad Birdichand Sarda v. State of Maharashtra*(1984) 4 SCC 116 and *State of Maharashtra v. Sukhdev Singh* (1992) 3 SCC 700.

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13. In *Basava R. Patil & Ors. v. State of Karnataka & Ors.*, (2000) 8 SCC 740, this Court considered the scope of Section 313 Cr.P.C. and in paras (18) to (20) held as under:-

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"18. What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is "for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him". In *Jai Dev v. State of Punjab* (AIR 1963 SC 612) Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focussed on the ultimate test in determining whether the provision has been fairly complied with. He observed thus:

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"The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to enquire 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."

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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,

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A 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
 B 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
 C is now well settled that a circumstance about which the
 accused was not asked to explain cannot be used against
 him.”

14. Main contention of the appellant is that since the
 material evidence Ex-P12 and Ballistic Expert opinion was not
 D put to him in his statement under Section 313 Cr.P.C., it must
 be completely excluded from consideration and barring the
 same, there is no other evidence to sustain the conviction and
 reliance was placed upon *Avtar Singh & Ors. v. State of
 Punjab*, (2002) 7 SCC 419.

E 15. In *Avtar Singh's* case, when the accused were
 examined under Section 313 Cr.P.C., the essence of
 accusation, particularly the possession of goods was not
 brought to their notice. It was also noticed that the possibility
 F of the accused persons being labourers of the truck was not
 ruled out by evidence. *Avtar Singh's* case was rendered on
 consideration of several peculiar factual aspects of that case
 and it does not lay down the law of universal application as it
 had been decided on its own facts.

G 16. Undoubtedly, the importance of a statement under
 Section 313 Cr.P.C., insofar as the accused is concerned, can
 hardly be minimised. The statutory provision is based on the
 rules of natural justice for an accused, who must be made
 aware of the circumstances being put against him so that he
 H can give a proper explanation to meet that case. If an objection

as to Section 313 Cr.P.C. statement is taken at the earliest stage, the Court can make good the defect and record additional statement of the accused as that would be in the interest of all. When objections as to defective Section 313 Cr.P.C. statement is raised in the appellate court, then difficulty arises for the prosecution as well as the accused. When the trial court is required to act in accordance with the mandatory provisions of Section 313 Cr.P.C., failure on the part of the trial court to comply with the mandate of the law, in our view, cannot automatically enure to the benefit of the accused. Any omission on the part of the Court to question the accused on any incriminating circumstance would not *ipso facto* vitiate the trial, unless some material prejudice is shown to have been caused to the accused. Insofar as non-compliance of mandatory provisions of Section 313 Cr.P.C., it is an error essentially committed by the learned Sessions Judge. Since justice suffers in the hands of the Court, the same has to be corrected or rectified in the appeal.

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17. So far as Section 313 Cr.P.C. is concerned, undoubtedly, the attention of the accused must specifically be brought to inculpable pieces of evidence to give him an opportunity to offer an explanation, if he chooses to do so. A three-Judge Bench of this Court in *Wasim Khan v. The State of Uttar Pradesh*, AIR 1956 SC 400; and *Bhoor Singh & Anr. v. State of Punjab*, AIR 1974 SC 1256 held that every error or omission in compliance of the provisions of Section 342 of the old Cr.P.C. does not necessarily vitiate trial. The accused must show that some prejudice has been caused or was likely to have been caused to him.

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18. Observing that omission to put any material circumstance to the accused does not *ipso facto* vitiate the trial and that the accused must show prejudice and that miscarriage of justice had been sustained by him, this Court in *Santosh Kumar Singh v State through CBI*, (2010) 9 SCC 747 (Para 92), has held as under:

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A "... the facts of each case have to be examined but the
 broad principle is that all incriminating material
 circumstances must be put to an accused while recording
 his statement under Section 313 of the Code, but if any
 material circumstance has been left out that would not *ipso*
 B *facto* result in the exclusion of that evidence from
 consideration unless it could further be shown by the
 accused that prejudice and miscarriage of justice had
 been sustained by him..."

C 19. In *Paramjeet Singh alias Pamma v State of*
Uttarakhand (supra), this Court has held as under:-

"Thus, it is evident from the above that the provisions of
 Section 313 Cr.P.C. make it obligatory for the court to
 question the accused on the evidence and circumstances
 D against him so as to offer the accused an opportunity to
 explain the same. But, it would not be enough for the
 accused to show that he has not been questioned or
 examined on a particular circumstance, instead, he must
 show that such non-examination has actually and materially
 E prejudiced him and has resulted in the failure of justice. In
 other words, in the event of any inadvertent omission on
 the part of the court to question the accused on an
 incriminating circumstance cannot *ipso facto* vitiate the trial
 unless it is shown that some material prejudice was
 F caused to the accused by the omission of the court."

20. The question whether a trial is vitiated or not depends
 upon the degree of the error and the accused must show that
 non-compliance of Section 313 Cr.P.C. has materially
 prejudiced him or is likely to cause prejudice to him. Merely
 G because of defective questioning under Section 313 Cr.P.C.,
 it cannot be inferred that any prejudice had been caused to the
 accused, even assuming that some incriminating
 circumstances in the prosecution case had been left out. When
 H prejudice to the accused is alleged, it has to be shown that

accused has suffered some disability or detriment in relation to the safeguard given to him under Section 313 Cr.P.C. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The burden is upon the accused to prove that prejudice has been caused to him or in the facts and circumstances of the case, such prejudice may be implicit and the Court may draw an inference of such prejudice. Facts of each case have to be examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused.

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21. We may refer to few judgments of this Court where this Court has held that omission to put the question under Section 313 Cr.P.C. has caused prejudice to the accused vitiating the conviction. In *State of Punjab v Hari Singh & Ors.* (2009) 4 SCC 200, question regarding conscious possession of narcotics was not put to the accused when he was examined under Section 313 Cr.P.C. Finding that question relating to conscious possession of contraband was not put to the accused, this Court held that the effect of such omission vitally affected the prosecution case and this Court affirmed the acquittal. In *Kuldip Singh & Ors. v State of Delhi* (2003) 12 SCC 528, this Court held that when important incriminating circumstance was not put to the accused during his examination under Section 313 Cr.P.C., prosecution cannot place reliance on the said piece of evidence.

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22. We may also refer to other set of decisions where in the facts and circumstances of the case, this Court held that no prejudice or miscarriage of justice has been occasioned to the accused. In *Santosh Kumar Singh v State thr. CBI* (supra), it was held that on the core issues pertaining to the helmet and the ligature marks on the neck which were put to the doctor, the defence counsel had raised comprehensive arguments before the trial court and also before the High Court and the defence was, therefore, alive to the circumstances against the appellant and that no prejudice or miscarriage of justice had

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A been occasioned. In *Alister Anthony Pereira v. State of Maharashtra* (2012) 2 SCC 648, in the facts and circumstances, it was held that by not putting to the appellant expressly the chemical analyser's report and the evidence of the doctor, no prejudice can be said to have been caused to the appellant and he had full opportunity to say what he wanted to say with regard to the prosecution evidence and that the High Court rightly rejected the contention of the appellant-accused in that regard.

C 23. When such objection as to omission to put the question under Section 313 Cr.P.C. is raised by the accused in the appellate court and prejudice is also shown to have been caused to the accused, then what are the courses available to the appellate court? The appellate court may examine the convict or 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 under Section 313 Cr.P.C. and the said answer can be taken into consideration.

E 24. In *Shivaji Sahabrao Bobade & Anr. vs. State of Maharashtra* (1973) 2 SCC 793, this Court considered the fallout of the omission to put a question to the accused on vital circumstance appearing against him and this Court has held that the appellate court can question the counsel for the accused as regards the circumstance omitted to be put to the accused and in para 16 it was held as under:-

G " ... 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 H 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. In such a case, the Court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342, Cr.P.C., the omission has not been shown to have caused prejudice to the accused...."(underlining added)

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25. The same view was reiterated by this Court in *State (Delhi Administration) vs. Dharampal*, (2001) 10 SCC 372, wherein this Court has held as under:-

"Thus it is to be seen that where an omission, to bring the attention of the accused to an inculpatory material has occurred that does not ipso facto vitiate the proceedings. The accused must show that failure of justice was occasioned by such omission. Further, in the event of an inculpatory material not having been put to the accused, the appellate Court can always make good that lapse by calling upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against the accused but not put to him.

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This being the law, in our view, both the Sessions Judge and the High Court were wrong in concluding that the omission to put the contents of the certificate of the Director, Central Food Laboratory, could only result in the accused being acquitted. The accused had to show that some prejudice was caused to him by the report not being

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A put to him. Even otherwise, it was the duty of the Sessions
 Judge and/or the High Court, if they found that some vital
 circumstance had not been put to the accused, to put those
 questions to the counsel for the accused and get the
 answers of the accused. If the accused could not give any
 B plausible or reasonable explanation, it would have to be
 assumed that there was no explanation. Both the Sessions
 Judge and the High Court have overlooked this position
 of law and failed to perform their duties and thereby
 wrongly acquitted the accused."

C 26. This Court has thus widened the scope of the provisions
 concerning the examination of the accused after closing
 prosecution evidence and the explanation offered by the
 counsel of the accused at the appeal stage was held to be a
 sufficient substitute for the answers given by the accused
 D himself.

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
 E 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-
 F 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
 G 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.

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28. In *Asraf Ali vs. State of Assam* (2008) 16 SCC 328, this Court has examined the scope and object of examination of accused under Section 313 Cr.P.C. and in para (24) it was observed that in certain cases when there is perfunctory examination under Section 313 of the Code, the matter could be remitted to the trial court with a direction to retry from the stage at which the prosecution was closed.

29. In *Ganeshmal Jashraj vs. Government of Gujarat & Anr.*, (1980) 1 SCC 363, after closure of evidence of the prosecution and examination of accused under Section 313 Cr.P.C. was completed, the accused admitted his guilt presumably as a result of plea bargaining and the accused was convicted. Pointing out that the approach of the trial court was influenced by the admission of guilt made by the accused and that conviction of the accused cannot be sustained, this Court has remanded case to trial court to proceed afresh from the stage of examination under Section 313 Cr.P.C.

30. Whenever a plea of omission to put a question to the accused on vital piece of evidence is raised in the appellate court, courses available to the appellate court can be briefly summarised as under:-

(i) Whenever a plea of non-compliance of Section 313 Cr.P.C. is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer;

(ii) In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the

A appellate court will hear and decide the matter upon merits.

B (iii) If the appellate court is of the opinion that non-compliance with the provisions of Section 313 Cr.P.C. 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 Cr.P.C. and the trial Judge may be directed to examine the accused afresh and defence witness if any and dispose of the matter afresh;

D (iv) The appellate court may decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused.

E 31. On the question of remitting the matter back to the trial court on the ground of non-compliance of mandatory provisions of Section 313 Cr.P.C., learned counsel for the appellant contended that in the present case, the accused is in custody for more than eight years and the accused person cannot be kept under trial indefinitely and that the accused has a right to speedy trial. The learned counsel placed reliance upon the judgment of this Court in *Abdul Rehman Antulay And Ors. vs. R.S. Nayak And Anr.*, (1992) 1 SCC 225. In paras (63) and (64) of the said judgment it was held as under:-

G "63. In *Machander v. State of Hyderabad* (1955) 2 SCR 524 this Court observed that while it is incumbent on the Court to see that no guilty persons escapes, it is still more its duty to see that justice is not delayed and accused

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persons are not indefinitely harassed. The scales, the Court observed, must be held even between the prosecution and the accused. In the facts of that case, the Court refused to order trial on account of the time already spent and other relevant circumstances of that case.

64. In *Veerabadrán Chettiar v. Ramaswami Naicker* (1959) SCR 1211 this Court refused to send back proceedings on the ground that already a period of five years has elapsed and it would not be just and proper in the circumstances of the case to continue the proceedings after such a lapse of time. Similarly, in *Chajoo Ram v. Radhey Shyam* ((1971) 1 SCC 774 the Court refused to direct a re-trial after a period of 10 years having regard to the facts and circumstances of the case. In *State of U.P. v. Kapil Deo Shukla* ((1972) 3 SCC 504, though the Court found the acquittal of the accused unsustainable, it refused to order a remand or direct a trial after a lapse of 20 years".

32. While we are of the view that the matter has to be remitted to the trial court for proceeding afresh from the stage of Section 313 Cr.P.C. questioning, we are not oblivious of the right of the accused to speedy trial and that the courts are to ensure speedy justice to the accused. While it is incumbent upon the Court to see that persons accused of crime must be given a fair trial and get speedy justice, in our view, every reasonable latitude must be given to those who are entrusted with administration of justice. In the facts and circumstances of each case, court should examine whether remand of the matter to the trial court would amount to indefinite harassment of the accused. When there is omission to put material evidence to the accused in the course of examination under Section 313 Cr.P.C., prosecution is not guilty of not adducing or suppressing such evidence; it is only the failure on the part of the learned trial court. The victim of the offence or the accused should not suffer for laches or omission of the court. Criminal justice is not

A one-sided. It has many facets and we have to draw a balance between conflicting rights and duties.

B 33. Coming to the facts of this case, FSL Report (Ex-P12) was relied upon both by the trial court as well as by the High Court. The objection as to the defective 313 Cr.P.C. statement has not been raised in the trial court or in the High Court and the omission to put the question under Section 313 Cr.P.C., and prejudice caused to the accused is raised before this Court for the first time. It was brought to our notice that the appellant is in custody for about eight years. While the right of the accused to speedy trial is a valuable one, Court has to subserve the interest of justice keeping in view the right of the victim's family and the society at large.

D 34. In our view, accused is not entitled for acquittal on the ground of non-compliance of mandatory provisions of Section 313 Cr.P.C. We agree to some extent that the appellant is prejudiced on account of omission to put the question as to the opinion of Ballistic Expert (Ex- P12) which was relied upon by the trial court as well as by the High Court. Trial court should have been more careful in framing the questions and in ensuring that all material evidence and incriminating circumstances were put to the accused. However, omission on the part of the Court to put questions under Section 313 Cr.P.C. cannot enure to the benefit of the accused.

F 35. The conviction of the appellant under Section 302 IPC and Section 25 (IB) of the Arms Act by the trial court in Sessions Case No. 40/2005 and the sentence imposed on him as affirmed by the High Court is set aside. The matter is remitted back to the trial court for proceeding with the matter afresh from the stage of recording statement of the accused under Section 313 Cr.P.C. The trial court shall examine the accused afresh under Section 313 Cr.P.C. in the light of the above observations and in accordance with law. The trial Judge is directed to marshal the evidence on record and put specific and separate questions to the accused with regard to incriminating evidence

and circumstance and shall also afford an opportunity to the accused to examine the defence witnesses, if any, and proceed with the matter. Since the occurrence is of the year 2005, we direct the trial court to expedite the matter and dispose of the same in accordance with law preferably within a period of six months from the date of receipt of this judgment. Since we are setting aside the conviction imposed upon the appellant-accused, the appellant-accused is at liberty to move for bail, if he is so advised. On such bail application being moved by the appellant-accused, the trial court shall consider the same in accordance with law. We make it clear that we have not expressed any opinion on the merits of the matter.

36. The appeal is disposed of as above.

Devika Gujral

Appeal disposed of.