A JAI PRAKASH TIWARI

v.

STATE OF MADHYA PRADESH

(Criminal Appeal No. 704 of 2018)

B AUGUST 04, 2022

[N. V. RAMANA, CJI, KRISHNA MURARI AND HIMA KOHLI, JJ.]

Code of Criminal Procedure, 1973: s. 313 – Power to examine
C *the accused – Object and scope of – Held: s. 313 confers a valuable right upon an accused to establish his innocence – Purpose of s. 313 is to provide the accused a reasonable opportunity to explain the adverse circumstances which have emerged against him during the course of trial – Non-fulfilment of the true spirit of s. 313 may ultimately cause grave prejudice to the accused and the court may*
D *not have the benefit of all the necessary facts and circumstances to arrive at a fair conclusion – Such an omission does not ipso facto vitiate the trial, unless the accused fails to prove that grave prejudice has been caused to him – On facts, prosecution case that accused fired a gunshot at the complainant, who escaped the injury and the*
E *accused fled the spot – Accused convicted and sentenced u/s.307 IPC and ss. 25 and 27 of the Arms Act, 1959 by the courts below – Courts below failed to scrutinize the defence version put forward by the appellant-accused in his statement u/s. 313– Furthermore, the burden of proving the guilt of the accused beyond reasonable doubt is upon the prosecution – Where an accused sets up a defence*
F *or offers an explanation, he is not required to prove his defence beyond a reasonable doubt but only by preponderance of probabilities – It is the solemn duty of the courts below to consider the defence of the accused, with caution and must be scrutinised by application of mind by the judge – However, the courts below dealt*
G *with the evidence of the accused in a casual manner – Furthermore, in absence of independent evidence corroborating the statements made by complainant, serious doubts regarding the recovery of the alleged motorcycle and the country made pistol, no connection proved between the alleged recovered items and the alleged incident, and the plausible version put forward by the accused-appellant in*
H *his s. 313 statement not been satisfactorily responded to by the*

prosecution, the case against the accused cannot be sustained – Prosecution case based on mere conjectures and surmises – Evidence brought on record by the prosecution insufficient to prove the case beyond reasonable doubt – Thus, the order passed by the courts below set aside – Penal Code, 1860 – s. 307 – Arms Act, 1959 – ss. 25, 27.

Allowing the appeal, the Court

HELD: 1.1 From the evidence on record, it is clear that, apart from the complainant and his mother, the other independent witnesses namely PW1, PW10 and PW11 have denied witnessing the incident. Even, the Sub-Inspector PW9, in his cross examination, stated that the said witnesses during their police statements under Section 161 Cr.P.C, had indicated that they had not seen the accused-appellant firing the shot. Under the above circumstances, the only evidence available to prove the presence of the accused at the scene, apart from the testimony of the complainant himself, is that of PW3, his mother. Although, it was submitted that the testimony of the said witness should not be taken into consideration as she is an "interested" witness, it is an established principle of law that a close relative cannot automatically be characterized as an "interested" witness. However, it is trite that even related witness statements need to be scrutinized more carefully. [Para 9, 10][205-D-G]

1.2 The complainant clearly stated that his mother came to the spot after the incident. On the other hand, in the chief examination, his mother stated that she followed the complainant when he went outside and therefore, she witnessed the incident. In her cross-examination, she stated that she came outside when she heard the gunshot. However, she saw the incident from the verandah. Contradictions aside, it must be noted that the incident took place at around 10:30 pm in the night. It is no-where mentioned that the accused and PW3 were familiar to the extent that she could recognize him in a fleeting moment while he was speeding away on his bike. She also failed to provide any discernable features of the accused-appellant. In fact, she specifically stated that she was not acquainted with the accused persons. It seems highly improbable that the mother of the

complainant, PW3 instantly recognized the appellant-accused at night. No effort has been made to conduct an identification test, to associate the accused-appellant with the alleged incident. After closely scrutinizing the statement of PW3, mother of the complainant, does not inspire confidence. [Para 12, 13][207-B-F]

1.3 The High Court and the trial Court have laid great emphasis on the recovery of a motorcycle and a country-made pistol from the possession of the accused-appellant. [Para 14][207-F]

1.4 The sub-Inspector stated in his evidence that the alleged motorcycle and the country made pistol were seized from the complainant's house based on the disclosure statement of the accused-appellant. However, the witnesses to the seizure, PW5 and PW8 have given varying statements regarding the same. In fact, PW5 clearly stated that there was no recovery of bike, and he was, thus, declared hostile by the prosecution. Moreover, although PW8 stated that no other thing other than the pistol was seized, he contradicts himself by stating that indeed a black coloured splendor motorcycle was seized. The said contradiction in the statement of PW8 cannot be stated to be minor. The same, thus, does not inspire confidence. [Para 16][208-F-H]

1.5 There has been no recovery of any pellet, empty cartridge, or any remains of the gunpowder from the spot. In the absence of a ballistic report, there is no clear connection between the seized weapon and the alleged incident. Moreover, even the complainant had given a vague description of the motorcycle. Neither the license number nor the colour or any other distinguishing features have been indicated by the complainant. Even here, there is no linking factor between the seized vehicle and the alleged incident. [Para 17][209-A-B]

1.6 The accused while being examined had stated himself that he had gone to his village on the date of the incident. To support his case, he produced two defence witnesses who have corroborated his presence in the village. Furthermore, the

accused claimed to be falsely implicated in the case owing to political rivalry. The alternate version put forth by the appellant-accused could not be ignored. Section 313 CrPC confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right, as a constitutional right to a fair trial under Article 21 of the Constitution. [Para 19, 22][209-E-F; 211-E-F]

1.7 The courts below failed to scrutinize the defence version put forward by the appellant-accused in his Section 313 statement. The object of Section 313 is to establish a direct dialogue between the court and the accused. [Para 25][212-G-H]

1.8 The purpose of Section 313 CrPC is to provide the accused a reasonable opportunity to explain the adverse circumstances which have emerged against him during the course of trial. A reasonable opportunity entails putting all the adverse evidences in the form of questions so as to give an opportunity to the accused to articulate his defence and give his explanation. [Para 26][213-A-B]

1.9 If all the circumstances are bundled together and a single opportunity is provided to the accused to explain himself, he may not able to put forth a rational and intelligible explanation. Such, exercises which defeats fair opportunity are nothing but empty formality. Non-fulfilment of the true spirit of Section 313 may ultimately cause grave prejudice to the accused and the Court may not have the benefit of all the necessary facts and circumstances to arrive at a fair conclusion. Such an omission does not *ipso facto* vitiate the trial, unless the accused fails to prove that grave prejudice has been caused to him. Although the counsel on behalf the accused has not proved any serious prejudice caused to him due to failure of the Court in framing individual circumstances; however, considering the long pendency of the matter and the right of the accused to have a fair and expeditious trial, the matter is decided on its own merit. [Para 27, 28][213-B-E]

1.10 It is an established principle of criminal law that the burden of proving the guilt of the accused beyond reasonable

doubt is upon the prosecution. Where an accused sets up a defence or offers an explanation, it is well-settled that he is not required to prove his defence beyond a reasonable doubt but only by preponderance of probabilities. Moreover, it is the solemn duty of the courts below to consider the defence of the accused. The same must be considered with caution and must be scrutinised by application of mind by the judge. The Court may accept or reject the same, however it cannot be done cursorily. The reasoning and the application of mind must be reflected in writing. However, it is clear that the courts below have failed to undertake this solemn duty. Rather, the evidence of the accused has been dealt by the Court in a casual manner. [Para 29, 30][213-E-F, G-H]

1.11 When there is absence of independent evidence corroborating the statements made by complainant, serious doubts regarding the recovery of the alleged motorcycle and the country made pistol, no connection proved between the alleged recovered items and the alleged incident, and the plausible version put forward by the accused-appellant in his Section 313 statement has not been satisfactorily responded to by the prosecution, the case against the accused-appellant cannot be sustained. [Para 31][214-A-B]

1.12 It is the duty of the Court to extract the truth from the mass of evidence. The case of the prosecution is based on mere conjectures and surmises. The High Court and the trial court failed to consider the above-mentioned circumstances while rendering the judgment convicting the accused. The evidence brought on record by the prosecution is insufficient to prove the case against the appellant beyond reasonable doubt. [Para 32][214-C-D]

Bhaskarrao v. State of Maharashtra **(2018) 6 SCC 591 : [2018] 4 SCR 751;** *State of Rajasthan v. Madan* **(2019) 13 SCC 653 : 2018 (14) SCALE 748;** *Reena Hazarika v. State of Assam,* **(2019) 13 SCC 289 : [2018] 13 SCR 1108;** *Satbir Singh v. State of Haryana* **(2021) 6 SCC 1 : [2021] 5 JT 532;** *Asraf Ali v. State of Assam* **(2008) 16 SCC 328 : [2008] 10 SCR 1115;** *M. Abbas v. State of Kerala,* **(2001) 10 SCC 103 : 2001 (4) JT**

92; *Parminder Kaur v. State of Punjab* **(2020) 8 SCC 811 : [2020] 6 SCR 508 – referred to.**

Case Law Reference

[2018] 4 SCR 751	**referred to**	**Para 10**
[2018] 13 SCR 1108	**referred to**	**Para 19**
[2021] 5 JT 532	**referred to**	**Para 20**
[2008] 10 SCR 1115	**referred to**	**Para 25**
[2020] 6 SCR 508	**referred to**	**Para 29**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 704 of 2018.

From the Judgment and Order dated 26.05.2017 of the High Court of Madhya Pradesh Principal Seat at Jabalpur in CRA No. 1870 of 2005.

Kaustubh A., Ashwin Kumar Nair, Vikas Upadhyay, Advs. for the Appellant.

Pashupathi Nath Razdan, Mirza Kayesh Begg, Prakhar Srivastav, Ms. Sneh Bairwa, Advs. for the Respondent.

The Judgment of the Court was delivered by

N. V. RAMANA, CJI

1. The present appeal arises from the judgment dated 26.05.2017 passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 1870/2005. The High Court dismissed the appellant's appeal against judgment dated 18.08.2005 passed by the First Additional Sessions Judge, Sidhi in Sessions Trial No. 119/2003, confirming his conviction under Section 307 of the Indian Penal Code, 1860 ('IPC') and Sections 25 and 27 of the Arms Act, 1959 ('Arms Act').

2. The appellant was sentenced to undergo three years of rigorous imprisonment with fine of Rs.500/- under Section 307 IPC. He was further sentenced to undergo three years of rigorous imprisonment with fine of Rs.1,000/- under Section 27 of the Arms Act and one year of rigorous imprisonment with fine of Rs.500/- under Section 25 of the Arms Act. Appellant has undergone approximately 1 year, 7 months of his sentence and was released on bail by this Court during the pendency of the present appeal.

A 3. The factual matrix as per the prosecution is that, on 14.02.2003 at about 10:30 p.m., the appellant and co-accused went to the complainant's house and called him outside. When the complainant came out, the appellant fired at him with a country-made pistol. The complainant (PW2) is stated to have run into the house and escaped injury while the appellant and co-accused fled from the spot on their motorcycle. The B complainant's mother (PW3) was allegedly present in the house at the time of the incident and the complainant's neighbours (PW1, PW10, PW11) arrived upon hearing the sound of gunfire. The firearm used in the alleged incident is stated to have been recovered from the appellant, along with an empty cartridge.

C 4. The prosecution charged the appellant and co-accused under Section 307/34 IPC and Sections 25(1B) (a) and Section 27(1) of the Arms Act. After perusal of evidence on record and examination of witnesses, the trial Court convicted and sentenced the appellant as specified above while acquitting the co-accused, as the prosecution had D failed to prove the charges against him. By way of impugned order dated 26.05.2017, the Madhya Pradesh High Court confirmed the appellant's conviction and sentence. Aggrieved, the appellant approached this Court in appeal by way of special leave.

5. The learned counsel for the appellant has contended that the E entire case of the prosecution is based on the testimony of the complainant (PW2) and the hearsay evidence of his mother (PW3), who is an interested witness, and there is no corroborative evidence or independent witness to support their testimonies. He has submitted that the prosecution witnesses to both the incident as well as the alleged recovery of the firearm have turned hostile. He has also relied on the testimony of the F IO (PW9) to state that no empty cartridges or pellets were recovered from the place of incident, which casts a doubt upon the prosecution's case. Learned counsel for the appellant has submitted that the complainant has a close nexus with the police department as his father is a retired Inspector and his brother and sister are also police officers. He also G submits that besides the complainant, no witness has been produced by the prosecution who had seen the appellant at the site of the incident.

6. Learned counsel for the respondent-State, on the other hand, has supported the concurrent judgments of conviction given by the courts below. He has stated that there is no error in relying on the statements

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of the complainant (PW2) and his mother (PW3), whose testimony is corroborated by ballistic evidence and seizure of the firearm and empty cartridge from the appellant.

7. Heard the learned counsel on merits and perused the material on record.

8. The prosecution strongly relies upon the statement of the complainant and his mother. A perusal of the statement of the complainant reveals that the accused-appellant had come in front of his house and upon asking as to why they were here, the accused-appellant and his companion kept quiet. The complainant asked them to leave. Thereafter, the accused allegedly took out his country made pistol and fired a shot at the complainant. The accused and his companion then sped away on their bike. The complainant had already run inside the house and was, therefore, unharmed. Subsequently, the mother of the complainant and his three neighbours came to the scene of the occurrence.

9. From the evidence on record, it is clear that, apart from the complainant and his mother, the other independent witnesses namely Rajat Shukla (PW1), Amit Bhasin (PW10) and Vikas Shukla (PW11) have denied witnessing the incident. Even, the Sub-Inspector-Rahul Sharma (PW9), in his cross examination, has stated that the abovementioned witnesses during their police statements under Section 161 of the Cr.P.C, had indicated that they had not seen the accused-appellant firing the shot.

10. Under the above circumstances, the only evidence available to prove the presence of the accused at the scene, apart from the testimony of the complainant himself, is that of PW3, his mother. Although, the counsel on behalf of the accused has argued that the testimony of the aforesaid witness should not be taken into consideration as she is an "interested" witness, it is an established principle of law that a close relative cannot automatically be characterized as an "interested" witness. However, it is trite that even related witness statements need to be scrutinized more carefully. [See ***Bhaskarrao v. State of Maharashtra*, (2018) 6 SCC 591**; ***State of Rajasthan v. Madan*, (2019) 13 SCC 653**]

11. In the above context it is pertinent to note the statement of the complainant (PW2) and the mother of the complainant (PW3):

A **Deposition of PW2**

In Examination-in-Chief, it is stated by PW2 that:

> "… On 14th February 2003 at 10.30 pm, I was at my home. At that very time, Jaiprakash and Pintu had come in front of my house on motorcycle and blew horn twice whereupon I had come outside. When I had come outside my house I had seen Pintu Dubey on driving seat and Jaiprakash as pillion rider, Motorcycle was on. I asked Pintu that-what is the purpose of coming, whereupon he replied that-Jaiprakash has brought me with him, so ask him. So, I had asked Jaiprakash but he did not reply. It felt like Jaiprakash was intoxicated So I asked them to leave and that I will talk to them later. Then Pintu raced the bike. As soon as Pintu raced the bike, at that very time Jaiprakash had taken out the Country made pistol and fired on me and they had gone away abusing. By that time, I had run and entered the house.
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> **Thereafter, two three people from the locality had come. My mother also had come.** My neighbours named Amit Bhasin, Vikas Shukla, Rajat Shukla had come there. My mother asked me that-what had happened, so I told her about the incident."

Deposition of PW3

In Examination-in-Chief, it is stated by PW3 that:

> "… the incident is of 14th February, 2003 at about 10.30 pm. I was at my home. The voice of boys had come from outside, sound of motorcycle also had come. Sound was coming from outside that – Sandeep come outside, whereupon Sandeep had gone outside. **I had followed him as well.** Two boys were sitting on motorcycle, motorcycle was start. It was sounding as if someone was abusing in loud voice and they had fired during conversation itself. So Sandeep had come inside immediately when fired."

In cross-examination, it is stated by PW3 that:

> "I was in the verandah first. **I had come outside when I heard sound of gunshot**. The verandah is open from where

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> the outer scene is visible. It is not true to say that I had merely heard the bang…… and even I had witnessed it."

Then again in cross-examination, it is stated:

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> "…. **I was not acquainted with the accused persons beforehand**. It is not true to say that I have not seen the incident…"

(emphasis supplied)

12. It must be noted that the complainant clearly states that his mother came to the spot after the incident. On the other hand, in the chief examination, his mother states that she followed the complainant when he went outside and therefore, she witnessed the incident. In her cross-examination, she states that she came outside when she heard the gunshot. However, she saw the incident from the verandah.

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13. Contradictions aside, it must be noted that the incident took place at around 10:30 pm in the night. It is no-where mentioned that the accused and PW3 were familiar to the extent that she could recognize him in a fleeting moment while he was speeding away on his bike. She also failed to provide any discernable features of the accused-appellant. In fact, she specifically states that she was not acquainted with the accused persons. It seems highly improbable that the mother of the complainant, PW3 instantly recognized the appellant-accused at night. No effort has been made to conduct an identification test, to associate the accused-appellant with the alleged incident. After closely scrutinizing the statement of PW3, mother of the complainant, we must state that the same does not inspire confidence.

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14. The High Court and the trial Court have laid great emphasis on the recovery of a motorcycle and a country-made pistol from the possession of the accused-appellant.

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15. In this context, it is pertinent to note the statements of PW5 and PW8, the witnesses to the seizure:

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Deposition of PW5

In Examination-in-Chief, it is stated that:

> "Police had caught Jaiprakash and found one country made pistol while searching him….. I do not remember whether any documentation had been done or not. Then Jaiprakash had been

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A held in the lockup and I had returned back. Police had not seized any vehicle before me.

It is important to note that at this stage, the AGP sought permission to ask leading question to the witness declaring him hostile…… I do not remember this today that whether a B motorcycle had been seized from accused Jaiprakash before me or not."

In Cross-Examination, it is stated that:

"I know Sandeep Upadhyaya. I have good terms with him…. The neighbours of Jaiprakash were not present when the Police C had done proceedings, then said that people were there but he did not know them. No neighbours of Jaiprakash had signed the documents. Police had not called the neighbours of Jaiprakash."

Deposition of PW8

D In Examination-in-Chief:

Police had seized one country made pistol from accused. **No other thing other than pistol had been seized before me nor had the accused stated to seize the same in my presence.**

It is not true to say that one black coloured Splendor motorcycle E wherein MP 17 MB 9735 was written had not been seized from accused Jaiprakash before me."

(emphasis supplied)

16. The sub-Inspector-Rahul Sharma (PW9) has stated in his evidence that the alleged motorcycle and the country made pistol were F seized from the complainant's house based on the disclosure statement of the accused-appellant. However, the witnesses to the seizure (PW5 and PW8) have given varying statements regarding the same. In fact, PW5 clearly stated that there was no recovery of bike, and he was, therefore, declared hostile by the prosecution. Moreover, although PW8 G has stated that no other thing other than the pistol was seized, he contradicts himself by stating that indeed a black coloured splendor motorcycle was seized. The aforesaid contradiction in the statement of PW8 cannot be stated to be minor. The same, therefore, does not inspire confidence.

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17. It also needs to be noted that there has been no recovery of any pellet, empty cartridge, or any remains of the gunpowder from the spot. In the absence of a ballistic report, there is no clear connection between the seized weapon and the alleged incident. Moreover, even the complainant had given a vague description of the motorcycle. Neither the license number nor the colour or any other distinguishing features have been indicated by the complainant. Even here, there is no linking factor between the seized vehicle and the alleged incident.

18. Another important issue that merits consideration in the present appeal is that the accused-appellant, in his Section 313 statement, stated that he and the complainant belonged to opposing student parties. The accused-appellant claimed that owing to the animosity pertaining to the elections, the accused-appellant was falsely implicated in the matter. He also produced two witnesses to prove his alibi. DW1 and DW2 have stated that the accused appellant was in his village as his mother was unwell. Moreover, the accused-appellant also pointed out to the Court that the father, sister and brother of the complainant were all a part of the police department. The accused-appellant also brought to the notice of the Court the fact that the complainant had also registered another criminal case against the accused-appellant in which he already stands acquitted.

19. In the case at hand, the alternate version put forth by the appellant-accused could not be ignored. Section 313 CrPC confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right, as a constitutional right to a fair trial under Article 21 of the Constitution.[See ***Reena Hazarika v. State of Assam***, (2019) 13 SCC 289]

20. This Court in the case of ***Satbir Singh v. State of Haryana***, (2021) 6 SCC 1, while emphasising upon the significance of Section 313 CrPC, has delineated the duty of the trial Court and held thus:

> **"22.** It is a matter of grave concern that, often, trial courts record the statement of an accused under Section 313 CrPC in a very casual and cursory manner, without specifically questioning the accused as to his defence. **It ought to be noted that the examination of an accused under Section 313 CrPC cannot be treated as a mere procedural formality, as it is based on the fundamental principle of fairness. This provision**

A **incorporates the valuable principle of natural justice — "*audi alteram partem*", as it enables the accused to offer an explanation for the incriminatory material appearing against him. Therefore, it imposes an obligation on the part of the court to question the accused fairly, with care and caution. The court must put incriminating circumstances before the accused and seek his response.** A duty is also cast on the counsel of the accused to prepare his defence, since the inception of the trial, with due caution…"

(emphasis supplied)

C 21. In the context of the abovementioned precedents, it is imperative to have a look at the evidence of the defence:

"EXAMINATION OF ACCUSED NO.1

Q3 On dated 14.2.03 at about 10:30 O' clock in the night you accused and co-accused Pintu @ Padamdhar Dubey had come to house of complainant Sandeep Upadhyay (PW2) situated at Arjun Nagar, Uttar Karodiya by Hero Honda Motorcycle bearing number MP 17B/9795. What do you say?

Ans: **It is incorrect. I had gone to village**.

E **DEFENCE PLEA OF ACCUSED**

When accused Jaiprakash Tiwari s/o Girija Prasad Tiwari has been called upon to enter his defence, then he states that:-

I had not casted vote in the favour of Sandeep's candidate in the election of college. Sandeep was in favour of N.S.U.I. I was in favour of *Vidhyarthi Parishad* (Student Council). **Due to this reason, I have been falsely implicated**.

On asking from the accused that whether he has to give defence evidence, then he states that :- I have to give defence evidence.

G **DEPOSITION OF DW1**

EXAMINATION-IN-CHIEF

1. I know accused Jaiprakash and his parents. Their house is at Maata; at Karaudia in Sidhi; at village Amahatola and Hanumangarh, Veldah as well. On 14.02.2003, I had reached the house of the accused at 9-9:15 hours at North Karaudia

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and taken him to his house at village Maata on motorcycle as his mother had fallen sick at village Maata. We had reached Maata at 11-11.30 hours. Then Jaiprakash Tiwari had called the Jan Swasthya Rakshak at about 12 hours and got his mother treated. Drip had been applied to his mother till morning on 15th and at that time two to four people were there along with Jaiprakash.

Deposition of DW2

EXAMINATION-IN-CHIEF

1. I know accused Jaiprakash. His house is in Sidhi and at Maata as well. On 14.2.2003, Jaiprakash was at village Maata. Mother of Jaiprakash was suffering from vomiting and diarrhea and therefore as per my information Jaiprakash has been at village Maata from 11.00am till 8 am the other day on 15.2.2003.

2. I had myself seen Jaiprakash going to his house. I am neighbour of Jaiprakash. Jaiprakash had been called from Sidhi to Maata by Shankardayal as mother of Jaiprakash was not well. I had heard after 4-6 days that Jaiprakash had been arrested for some incident of the said date."

(emphasis supplied)

22. In the present case, the accused while being examined had stated himself that he had gone to his village on the date of the incident. To support his case, he produced two defence witnesses who have corroborated his presence in the village. Furthermore, the accused claimed to be falsely implicated in the case owing to political rivalry. However, without scrutinizing the aforesaid plea of the defence, the trial Court observes:

"10. **The accused Jayprakash Tiwari has not stated anything in his examination that he has been falsely implicated in the case by the. prosecution witnesses or any other reason or motive for his false implication.** The evidence of the complainant Sandeep is corroborated by the evidence of Amit Bhasin_PW_10 and Vikash -PW-11 who had reached the place of occurrence immediately after the incident and in such situation the evidence of the complainant Sandeep Upaddhyay and other

A prosecution witnesses is believable and it is proved from their evidence that on the date of incident the accused Jayprakash Tiwari had fired upon the complainant Sandeep Upaddhay from firearm katta with knowledge and intention under such circumstances that if the complainant had died then the accused Jayprakash Tiwari would be guilty of murder."

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(emphasis supplied)

23. In a similar manner, the trial Court refused to weigh in the evidence of alibi. The trial Court while disbelieving the defense witnesses observes:

C "14. **In such a situation the defence plea of the accused appears to be an afterthought**. From the perusal of the evidence of the defence witnesses Shankerdayal Mishra_DW_l and Krushnakumar Tiwari_PW-2 it is clear that both ·the witnesses are the neighbours of the accused and residents of same village. Being farmers and after a gap of two years they have remembered D the date of incident. **It appears that these witnesses are trying to save the accused by stating his presence in their village**."

(emphasis supplied)

24. The High Court without independently analyzing the aforesaid E statements and evidence, upholds the finding of the Trial Court. The High Court observes that:

"22. This Court is in agreement with the findings of learned trial Court that, defence taken by the appellant has not been suggested any prosecution witness, nor stated by the appellant during his F accused statement under Section 313 of the Code of Criminal Procedure. The plea of *alibi* has been taken by the appellant is after thought. Hence, no benefit is granted in favour of the appellant with regard to plea of *alibi.* Thus, the conviction of the appellant under Section 307 of IPC, is hereby maintained."

G 25. In the present case, the courts below failed to scrutinize the defence version put forward by the appellant-accused in his Section 313 statement. The object of Section 313 of the Code is to establish a direct dialogue between the court and the accused. (See ***Asraf Ali v. State of Assam*****,** (2008) 16 SCC 328)

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26. The purpose of Section 313 CrPC is to provide the accused a reasonable opportunity to explain the adverse circumstances which have emerged against him during the course of trial. A reasonable opportunity entails putting all the adverse evidences in the form of questions so as to give an opportunity to the accused to articulate his defence and give his explanation.

27. If all the circumstances are bundled together and a single opportunity is provided to the accused to explain himself, he may not able to put forth a rational and intelligible explanation. Such, exercises which defeats fair opportunity are nothing but empty formality. Non-fulfilment of the true spirit of Section 313 may ultimately cause grave prejudice to the accused and the Court may not have the benefit of all the necessary facts and circumstances to arrive at a fair conclusion.

28. Such an omission does not *ipso facto* vitiate the trial, unless the accused fails to prove that grave prejudice has been caused to him. Although the counsel on behalf the accused has not proved any serious prejudice caused to him due to failure of the Court in framing individual circumstances; however, considering the long pendency of the matter and the right of the accused to have a fair and expeditious trial, we propose to proceed and decide the matter on its own merit.

29. It is an established principle of criminal law that the burden of proving the guilt of the accused beyond reasonable doubt is upon the prosecution. Where an accused sets up a defence or offers an explanation, it is well-settled that he is not required to prove his defence beyond a reasonable doubt but only by preponderance of probabilities. [See ***M. Abbas v. State of Kerala*, (2001) 10 SCC 103**]. Further, it has been held by this Court in ***Parminder Kaur v. State of* Punjab, (2020) 8 SCC 811** that "*once a plausible version has been put forth in defence at the Section 313 CrPC examination stage, then it is for the prosecution to negate such defence* plea".

30. Moreover, it is the solemn duty of the courts below to consider the defence of the accused. The same must be considered with caution and must be scrutinised by application of mind by the judge. The Court may accept or reject the same, however it cannot be done cursorily. The reasoning and the application of mind must be reflected in writing. However, from the observations extracted above, it is clear that the courts below have failed to undertake this solemn duty. Rather, the evidence of the accused has been dealt by the Court in a casual manner.

A 31. In the above circumstances, when there is absence of independent evidence corroborating the statements made by complainant, serious doubts regarding the recovery of the alleged motorcycle and the country made pistol, no connection proved between the alleged recovered items and the alleged incident, and the plausible version put forward by the accused-appellant in his Section 313 statement has not been satisfactorily responded to by the prosecution, the case against the accused-appellant cannot be sustained.

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32. It is the duty of the Court to separate the grain from the chaff and to extract the truth from the mass of evidence. In our opinion, the case of the prosecution is based on mere conjectures and surmises. The High Court and the trial Court failed to consider the abovementioned circumstances while rendering the judgment convicting the accused. The evidence brought on record by the prosecution is insufficient to prove the case against the appellant beyond reasonable doubt.

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33. For these reasons, the appeal is, therefore, allowed. The conviction and sentence passed against the appellant are set aside. The appellant is on bail. The appellant stands discharged from the bail bonds.

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Nidhi Jain Appeal allowed.
(Assisted by : Shashwat Jain, LCRA)