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Court : Mumbai

Decided On : Feb-15-2006

Reported in : 2006CriLJ2017; 2006(2)AIRBom.R.457(DB)

Judge : B.H. Marlapalle and ;R.S. Dalvi, JJ.

Acts : Code of Criminal Procedure (CrPC) - Sections 313, 366, 367(1), 368 and 386; Indian Penal Code (IPC) - Sections 302

Appeal No. : Side No. 4 of 2005

Appellant : The State of Maharashtra

Respondent : Najir Ahmad Mohid Khan Alias Mohammad Najir Mohiddin

Advocate for Def. : S.N. Bhosale, Adv.

Advocate for Pet/Ap. : A.S. Gadkari, APP

Judgement :

B.H. Marlapalle, J.

1. This is a reference under Section 366 of Cr.P.C. for confirmation of the death sentence ordered by the learned Additional Sessions Judge at Kalyan vide his

Judgment and Order dated 10/9/2004 in Sessions Case No. 10 of 2002. The Respondent-accused Najir Ahmad Mohid Khan alias Mohammad Najir Mohiddin has been sentenced to death on the charges of committing the murder of his three minor children begotten from Smt. Hafizunnisa Najir Shaikh (P.W.2) and the convict has also challenged the said order of conviction and sentence in Criminal Appeal No. 350 of 2005. The broad matrix of events leading to the order of conviction and sentence would be stated, as presented by the prosecution before the trial court, as under.

2. On 1/3/2001 Police Constable Sawant attached to Dombivali Railway Police Station informed on telephone to Shri Babaram Raghoji Bhosale (P.W.1), Police Station In-charge, PI (Dombivali Railway Police Station) that near Kalyan Patri Pool and close to the railway track he saw dead bodies of three small children lying and, therefore, P.W.1 rushed to the spot along with his staff immediately. He found that the dead bodies of three children were wrapped in one bed-sheet and two dead bodies were of female (around the age of 8 years and 5 years respectively) and the third dead body was of a male child, aged about years. Spot Panchanama at Exh.9, Seizure Panchanama at Exh.10, Inquest Panchanamas of all the three dead bodies at Exhs.12, 15 and 19 were prepared and thereafter all the dead bodies were sent for post mortem along with Police Constable Ghale with a requisition letter to the Medical Officer, Rukminibai Municipal Hospital. P.W.1 registered these three deaths as A.D. Case No. 26 of 2001. On the basis of the post mortem report received from Dr. Sushma Ashok Baswant (P.W.5). He reduced the complaint in writing in the presence of ACP Shri Patel (F.I.R. Exh.20) for an offence punishable under Section 302 of IPC as he was satisfied that the children could not have committed suicide, there were no external injuries on their bodies as per the post mortem report which also indicated that the cause of death could be possibly strangulation or by administering some poison. prepared three separate post mortem reports i.e. Exh.14 in respect of Tabarak Hasan Mahamad Najir Shaikh, aged about 3 years and Exh.17 in respect of Faimida Johar Mahamad Najir Shaikh. Viscera was preserved and sent for chemical analysis. On receiving the result of C.A., P.W.5 confirmed the cause of death as Asphyxia. As the place of incident was within the territorial jurisdiction of Ram Nagar Police Station, it came to be transferred to the said Police Station as per the report at

Exh.21 and the seized articles were sent to the Ram Nagar Police Station for further investigation on 2/3/2001 and thereafter Prakash Adhar Saindane (P.W.6), PI Dombivali Police Station took over the investigation and he registered the Crime No. 66 of 2001 on 5/3/2001 for the first time.

3. On 22/3/2001 Hafizunnisa (P.W.2), the wife of the accused, went to the Dombivali Police Station and stated that on reading the newspaper reports she had come to the police station to enquire about her three children. She was shown the photographs, garments and footwears of the three children whose dead bodies were recovered on 1/3/2001. She identified the photographs to be of her three children, namely, Faimida, Jainabi and Tabarak Hasan along with the garments and footwears and further stated that all the three children were missing along with her husband from 28/2/2001. She was taken to the Central Hospital, Ulhasnagar where the dead bodies were preserved and she identified the dead bodies to be of her three children, as named earlier. In her statement recorded, she alleged to have suspected the involvement of her husband, as per P.W.6 Prakash Saindane. On 22/3/2001, the I.O. (PW 6) recorded the statement of both the parents of P.W.2 and her daughter (from the first husband) Fatima P.W.3. The accused came to be arrested for the first time on 16/4/2001 from his house. Thereafter the statements of some neighbours etc. including P.W.7 Amina Sajidali Shaikh and P.W.8 Mehejabin Shaikh were recorded on 19/4/2001 and on completion of investigation, charge-sheet came to be submitted on 30/7/2001. The prosecution submitted the list of witnesses at Exh.47 on 20/2/2003. The accused was charged by the Sessions Court as under:-

That you in between the night of 28.2.2001 and 1.3.2001 near Patri Pool at Dombivali, adjoining to Railway kms. No. 5113 within the jurisdiction of Dombivali Police Station, committed murder by intentionally causing the death of Jainabi Shaikh, Tabaraq Shaikh and Haimida Shaikh and thereby committed an offence punishable Under Section 302 of the IPC.

4. The prosecution supported its case by examining in all seven witnesses and P.W.3 Fatima is the daughter of Hafizunnisa (P.W.2) from her first husband and was claimed to be of 15 years of age when she was examined before the trial

court on 7/7/2003. Hafizunnisa (P.W.2) was earlier married to Gulam Gilani, the father of P.W.3 and was subsequently divorced. She was married to the accused sometimes in 1992-93 and the accused is stated to be hailing from the State of Bihar. The learned Additional Sessions Judge held that the testimony of P.W.2 Hafizunnisa was supported and corroborated by the testimony of P.W. 7 Amina Sajidali Shaikh and P.W.8 Mehejabin Shaikh along with the testimony of P.W.6 Prakash Adhar Saindane I.O. and by relying upon the evidence of P.W.5 Dr. Sushma Baswant and these four witnesses, namely, P.W.2, P.W.6, P.W.7 and P.W.8, the trial court held in the impugned order that the charge of causing the murder of his own three minor children was proved beyond doubt against the accused. The trial court further held that the said murder was pre-planned in view of the attending circumstances and the site of the incident, it was cold blooded murder of three minor children in the custody of the accused as the natural father and the murder was committed in a heinous and dastardly manner. As per the trial court, the murder committed by the accused fell in the category of 'rarest of rare' and, therefore, he has been sentenced to death penalty.

5. On the basis of the evidence of P.W.5 Dr. Sushma Baswant, the trial court held that the three kids met with homicidal death and by Asphyxia. The case of the prosecution based on the circumstantial evidence has been accepted, as noted earlier, solely on the basis of the evidence of P.W.2 Hafizunnisa, P.W.6 Prakash Saindane, IO, P.W.7 Amina Shaikh and P.W.8 Mehejabin Shaikh (claimed to be neighbours). As per the trial court the chain of circumstances was unerringly proved against the accused. The first circumstance of a quarrel between the accused and his wife P.W.2 had taken place on 28/2/2001 on account of the accused insisting upon the wife and children to drink some liquid he had brought as holy water. On account of the quarrel, the wife left her matrimonial house between 5 to 5.30 p.m. and proceeded to her parents' house in the same locality by leaving behind her three minor children in the custody of the accused. On reaching her parents' house, the wife described the incident of the quarrel which had resulted in her leaving the house and the father told her that she should go back to her matrimonial home and such a quarrel cannot be a reason for her to be away from her family. The wife (P.W.2), therefore, went back to her matrimonial house at about 8 p.m. and noticed that the house was locked. She made inquiry

with one neighbour by name Kashmiri who told her that her husband borrowed Rs.1000/-from him before leaving with the children and the said neighbour called upon her to repay the money or give charge of her room or hand over the keys of her house to him. Thereafter she went back to her parents' house and obviously did not return to the matrimonial house. Continuing the sequence of events, the wife met one Noorjaha in the neighborhood on 17/3/2001 and learnt from her that the newspapers had published about the death of her children at Kalyan. She, therefore, went to the police station on 17/3/2001 and lodged complaint, identified the photographs of her kids as well as the garments, the dead bodies of the children were shown to her. On the basis of the evidence of P.W.6 Prakash Saindane, IO, the trial court recorded that P.W.2 Hafizunnisa went to the police station on 22/3/2001. The evidence of P.W.7 Amina Shaikh and P.W.8 Mehejabin Shaikh has been accepted and they have been treated as star witnesses in support of the depositions of P.W.2 and, therefore, the trial court held that the accused was seen with his three children on 28/2/2001 and he subsequently offered them food, boarded a train and reached the spot of incident about 60 kms. away from his place of residence and while they were perhaps asleep, killed them between 10 p.m. in the night of 28/2/2001 to 4 a.m. in the morning of 1/3/2001. On the basis of the depositions of P.W.7 the trial court held that the accused was seen taking his kids from the house and passing through the locality in the evening time, she heard the quarrel between the accused and his wife and the accused and the kids never returned to the locality. As per P.W.8 Hafizunnisa left the house after quarrelling with the accused and thereafter the accused was saying that he would kill the kids so that the relationship between him and Hafizunnisa would come to an end. She further stated that the accused was saying that he would kill the kids while going along with the children after leaving the house and thereafter the accused and kids never returned.

6. The moot issue before us is whether the accused could be held, beyond doubt, as the sole author of his minor children's murder solely on the basis of the evidence of P.W.2, P.W.7 and P.W.8 along with P.W.6 and on considering the depositions of all these three witnesses, as recorded by the trial court, we are at pains to record that the evidence of these three witnesses even if read together does not take the prosecution case anywhere close to prove the charge against

the accused. The trial court has committed gross errors in reading the evidence of these witnesses. In fact, it is not known how the investigation, after it was taken over by P.W.6, raised a finger against the accused and though P.W.6 stated in his depositions before the trial court that he recorded the complaint of P.W.2 on 22/3/2001 when she had visited the Dombivali Police Station, the said complaint has not been exhibited, though it appears to have been put to P.W.2 in her cross-examination. On one hand P.W.2 stated that she went to the police station on 17/3/2001 and lodged the complaint, whereas on the other hand P.W.6 stated that P.W.2 lodged her complaint on 22/3/2001 and if this complaint was the basis for raising a finger of suspicion against the accused, it ought to have been a part of the evidence placed by the prosecution before the trial court, more so when the FIR at Exh.20 registered by P.W.1 was against the unknown persons. Even if one goes by the evidence of P.W.6 that Hafizunnisa suspected the involvement of the accused in the crime in her complaint on 22/3/2001, it is not known why the IO did not take steps to take the accused in custody. It was not the case of the prosecution that the accused was absconding and, admittedly, he was taken in custody on 16/4/2001 from his house. The learned Judge of the trial court recorded that the police was searching the accused and this observation is not even supported by the testimony of P.W.6 and as per him the accused was taken in custody by the Shivaji Nagar Police Station, Govandi on 16/4/2001 and a police team of his police station went to the Govandi Police Station and arrested him in Crime No. 66 of 2001. The statements of the witnesses and more particularly the star witnesses P.W.7 and P.W.8 came to be recorded for the first time on 19/4/2001 i.e. almost after one month from the identification of the dead bodies by P.W.2 and her suspicion that her husband was involved. No explanation has come forward from the prosecution for this delay and more particularly when P.W.7 and P.W.8 are claimed to be the neighbours of the accused.

7. The case, as stated by P.W.2 in her depositions before the trial court, is that on 28/2/2001 the accused brought water (and not liquid as recorded in the English translation) and asked her to drink it. She refused to drink the same and thereafter the accused tried to latch the door, but in the meantime the neighbours came to her house and prevented the accused from latching the door. The accused thereafter gave her fist blows on her mouth and as a result two of her teeth from

the upper jaw were dislocated. After this quarrel she went to her mother's house and her father told her to return to her own house to look after the minor children. She went back to her house at about 8 p.m. and saw that the door of the house was locked. She made enquiry with the neighbour by name Kashmiri and he told her that the accused took her children outside. The accused also took Rs.1000/-as hand loan from him and the neighbour demanded the said money from her or asked her to vacate the house. Thereafter, she went to the police station to lodge the complaint but the police told her that her husband may return with the children and, therefore, she went to her father's house. On 17/3/2001 Noorjaha, a neighbour, told her that she learnt from the newspaper reports that her children were killed by poisoning and the dead bodies were lying near the Patri Pool at Kalyan. On this disclosure she immediately went to the police station and lodged the complaint. In the Marathi version of the depositions it has not appeared that the accused insisted that the water offered to P.W.2 must also be consumed by the children. In her cross-examination she stated, inter alia, as under: .I have not stated the police that the accused beat me on my mouth. I have not stated before the police that when accused tried to latch the door the neighbours came to my house. I have stated before police that the neighbours prevented the accused from latching the door of house. I cannot assign any reason why it is not recorded by police in my police statement. I have stated before police that due to assault by fist blows my two incise teeth from upper jaw dislocated. I cannot assign any reason why it is not recorded in my police statement. I do not know the name of police outpost where I went after quarrel with accused. It is not true that I did not go to police outpost after quarreled with accused. I have not stated before Dombivali police that after quarrel when I went to the house of my father, my father told me to go to my house to look after my son. I cannot assign any reason why it is not recorded in my police statement. I have stated before police that the accused had taken hand loan of Rs.1000 from neighbour. cannot assign any reason why it did not recorded in my police statement. I have stated before police that my neighbour then told me that my neighbour required Rs.1000 and also asked me to vacate his house. I cannot assign any reason why it is not recorded in my police statement.' These statements in the cross-examination do not appear reliable unless corroborated by other witnesses.

8. The trial court has accepted the evidence of P.W.7 and P.W.8, as corroborating the evidence of P.W.2. The statements recorded by way of examination-in-chief of these two witnesses and which are reproduced hereinabove cannot be relied upon for corroborating the evidence of P.W.2. The translations of the depositions of examination-in-chief of P.W.7 and P.W.8 made by the official translator read as under:-

(PW 7) 'I know the accused. In the year 2000 he was residing in the chawl opposite our chawl at Govandi Mumbai alongwith his two daughters, 1 son and wife. The name of the accused's wife is Hafizunnisa. Three years back Hafijunisa left the house of accused on account of a quarrel between them. I saw the accused taking his children out of the house. It was evening time. There was no occasion for me to talk with the accused and his wife. I heard the quarrel between accused and his wife but I did not hear what they were talking about. Thereafter the children of accused did not return in the said area. Even the accused did not return. Subsequently I learnt that 3 children of accused were murdered. (PW 8) I know the accused present before the Court. He resides opposite my house. His name is Nazir Ahmed. Similarly I know his wife Hafizunnisa. The accused had 3 children i.e. 1 son and 2 daughters. I know their names but now I have forgot the same. The incident occurred 3 years back. Frequent quarrels used to take place between the accused and his wife. After the quarrel with accused, her elder daughter Fatima left his house. After she left the house, the accused said that he was going to kill his children, which would end the relations between the accused and his wife. Fatima was the daughter of Hafizunnisa but not born from the accused. Fatima used to come to the house occasionally to meet her mother. She used to stay with her mother's mother. While going out of the house the accused was saying that he would kill the children. Thereafter neither the children or accused nor the accused returned to our area nor to the accused's house. Subsequently I learnt that the accused had killed his children.

9. Dealing with the depositions of P.W.7 Amina Shaikh, she is not the resident of the same chawl where the accused was staying with P.W.2 and in fact, she is the resident of the opposite chawl. She is not the next door neighbour in any case. She knew the accused from the year 2000 as he was residing in the opposite

chawl (Govandi) along with his wife, 2 daughters and a son. Three years back Hafizunnisa left the house of the accused on account of a quarrel with her husband. She had seen the accused leaving the house along with his children when it was evening. She never had any occasion to talk to the accused or his wife but she heard the quarrel between the two and could not hear what they were talking. The children of the accused never returned in that area and so also the accused. Thereafter she came to know that the three children of the accused were killed. This witness at the first instance does not say that she had come near the house of the accused on 28/2/2001 and heard the quarrel between the two. Though she claims to have heard the quarrel three years back, she stated that she did not hear what they were talking. She made a general statement that she had seen the accused leaving with his children when it was evening time but her depositions as to whether she had seen the accused on the date of incident does not appear in her depositions.

10. Now coming to the depositions of P.W.8 in her examination-in-chief, she knew the accused and his wife. They had three children -one son and two daughters. Their names were known to her but could not remember before the court. Incident had taken place three years back. There used to be often quarrels between the accused and his wife. Fatima, the daughter of P.W.2 had left the house of the accused after there was a quarrel with the accused and after she left the house accused had said that he would kill his children so that the relationship between the accused and his wife would come to an end. Fatima is the daughter of P.W.2 from her first husband and not from the accused. On some occasions Fatima used to come to P.W.2 and Fatima was staying otherwise with the parents of P.W.2. While the accused was leaving his house he was saying that he would kill the children and thereafter the accused and his children never returned to his house. Thereafter the witness learnt that the accused had killed his children. This witness was very much a next door neighbour and the distance between her house and the house of the accused was admittedly about 10 ft. P.W.2 did not state before the trial court that after she returned from her father's house on 28/2/2001 at about 8 p.m. she went and met this neighbour. While P.W.2 stated that the accused was trying to latch the door and because neighbours arrived at the scene he could not do so, she did not state that P.W.8 or P.W.7 were one of such neighbours. P.W.2

stated to have met neighbour Kashmiri at 8 p.m. on 28/2/2001 and he has not been examined by the prosecution. Similarly, none of the parents of P.W.2 have been examined before the trial court, notwithstanding the fact that the prosecution had submitted a list of 17 witnesses, including the parents of P.W.2. Thus, by reading the evidence of P.Ws.7 and 8, the last seen theory i.e. the accused was last seen in the company of the deceased children on 28/2/2001 by these two witnesses has not been proved by the prosecution beyond reasonable doubt.

11. We must also deal with another aspect of this case and that is the over enthusiasm exhibited by P.W.6 while in the witness box. It is not known as to how he described the alleged sexual interest of the accused in Fatima (P.W.3), the daughter of P.W.2 from her first husband. He stated before the trial court in the examination-in-chief, 'the accused was intending and asking his wife to give in marriage her daughter from first husband and on that point disputes and quarrels used to take place between the accused and his wife. The name of the daughter is Fatima'. This was not even the case of P.W.2 in her depositions before the trial court and nor was such a case made out in the evidence of P.Ws. 7 and 8, the so called star witnesses. This witness further stated before the trial court, 'I recorded the statement of the neighbours of the accused in the background of disclosure made by the wife of the accused. It revealed during my investigation that on the earlier day of incident there was quarrel between the accused and his wife and on the next day morning he brought some water, he asked his wife and children to drink saying that it was holy water but his wife refused to drink the same. Thereupon the accused assaulted her, so his wife left the house and went to her mother. In the evening the accused took his three kids and went away from the house and was murmuring that he would kill the kids. The wife of the accused returned at about 8 to 8.30 p.m. at the house and came to know that the accused left with three kids from the house and was whispering to kill them'. Apart from P.Ws.7 and 8 no other witnesses whose statement this I.O. claimed to have recorded, were examined by the prosecution and by reading the depositions of P.Ws.7 and 8 recorded in their examination-in-chief these statements were required to be put to further probe and, therefore, rightly the defence advocate made an application on 15/6/2004 to recall this witness. The said application was allowed by the order dated 1/7/2004. Unfortunately for the accused, his earlier

lawyer Mr. R.D. Desai stopped appearing in the trial and on 1st July 2004 one Mr. K.V. Joshi filed Vakilpatra on behalf of the accused and on 26/7/2004 this Mr. Joshi wrote on the said application dated 15/6/2004 ' application to recall IO not pressed'. Consequently, P.W.6 was not called for further cross-examination by the trial court. This sketchy cross-examination of P.Ws.7 and 8 was also conducted by Mr. Joshi who, as stated across the bar, had a very short standing of about two years at the bar. We have also noticed that P.W.3 was not subjected to cross-examination as the defence counsel was absent and the accused could not go ahead with the cross-examination of the said witness. There has been a serious miscarriage of justice in the failure to cross-examine P.W.6 afresh and also the other witnesses, namely, P.Ws.7 and 8, including P.W.3 and on the basis of such major defects in the trial the accused cannot be allowed to be sent to the gallows.

12. Another important facet of this case is the failure of the trial court to put the testimony of the so called star witnesses, namely, P.W.7 and P.W.8 to the accused while recording his statement under Section 313 of Cr.P.C. It is evident from the statement recorded by the trial court under Section 313 of Cr.P.C. that the depositions/evidence of these two witnesses was not put to the accused. The trial court has mainly relied upon these two witnesses to hold that (a) the evidence of P.W.2 was corroborated by the evidence of these two witnesses; (b) the last seen theory has been proved by the testimony of these two witnesses and (c) the accused, while leaving with the children on 28/2/2001 was saying that he would kill the children so as to bring to an end his relationship with P.W.2. These two witnesses are the foundation for the last seen theory as well as the motive alleged to have been attributed to the accused. Examination under Section 313 of Cr.P.C. is not an empty formality. The purpose is to bring to the notice of the accused the materials brought on record by the prosecution to substantiate its accusations. An opportunity is granted to the accused to explain incriminating circumstances against him and have his say in the background of the evidence brought on record by the prosecution. It is also well settled that mere failure to bring to the notice of the accused the materials brought on record against him would not by itself vitiate the case of the prosecution, unless it is shown that the said materials/evidence has caused prejudice to the accused. In the case of Narendra Singh and Anr. v. State of M.P. reported in AIR 2004 SC 3249 the Apex Court explained the

circumstances of causing prejudice to the accused on account of failure to put the evidence of the prosecution to the accused while recording his statement under Section 313 of Cr.P.C. in the following words:-

It also does not appear that the attention of the appellants had been drawn by the Sessions Judge to any piece of evidence seeking their explanation thereabout in their examination under Section 313 of the Code of Criminal Procedure. Had it been the prosecution case that the appellant No. 1 after throttling the deceased and setting her on fire escaped through one of the two open places mentioned by the High Court, it was obligatory on the part of the Court to give an opportunity to the appellants to explain thereabout. Such a circumstance, had it been put to the appellant No. 1, could have been explained away by him. The appellants were, therefore, prejudiced by not being given a chance to explain the said purported material against him. It is not a case where no prejudice can be said to have been caused to the appellants.

13. We have also noted from the evidence of P.W.5 Dr. Sushma Baswant that she did not elaborate the homicidal death by Asphyxia in as much as whether it was by strangulation, throttling or suffocation. P.W.4 Jayant Chaudhary was not a witness to any of the panchanamas drawn by P.W.1 and his name was not shown in the list of 17 witnesses placed before the trial court. It is not known why and how he was examined as a prosecution witness. P.W.2 claims to have met the wife of one Mehboob panpattiwala -a next door neighbour to her parents and the police had recorded the statement of Smt. Amana w/o Mehboob Sheikh but she was not shown as one of the prosecution witnesses before the trial court. The behaviour of the accused and P.W.2 has not been free from suspicion. The accused merely denied the charge. It is not known what steps he had taken to search for his missing children from 28/2/2001 till he was arrested on 16/4/2001. Similarly, P.W.2, being the natural mother, did not disclose what efforts she took to enquire about her children. She also did not state whether she ever visited her house between 1-3-2001 to 22-3-2001 while she was staying with parents in the same locality and at a walking distance, during that period. As natural parents, the behaviour of the accused and P.W.2 raises many doubts which require to be unfolded to support the prosecution case.

14. There is no doubt that three minor children were done to death in a very heinous and dastardly manner and perhaps while they were asleep in the night of 28/2/2001, the place of incident is quite secluded and was perhaps deliberately selected. The children were fed and taken from their normal done to death. whether they were in to a distance of more than 60 kms. place of residence before they were It is not established clearly as to the custody of the accused or the P.W.2 or both of them in the night of 28/2/2001. The learned trial Judge is right in describing the seriousness of the offence and, therefore, though we are satisfied that the prosecution evidence did not prove the culpability of the accused in the said offence beyond reasonable doubt, this is not a fit case to bring the trial to an end by an order of acquittal. The accused also did not have the benefit of proper legal assistance in cross-examining the main witnesses, for the reasons noted hereinabove. He appears to be an illiterate person and migrated from Bihar to Mumbai before he was married to P.W.2. His right to defend was seriously affected before the trial court and in fact this was a fit case where the trial court ought to have appointed a defence counsel for the accused when his first counsel Mr. R.D. Desai withdrew or stopped appearing in the trial. On the basis of the last seen theory by accepting the evidence of P.W.7 and P.W.8, the trial court shifted the burden on the accused to prove his innocence and to explain how his minor children were done to death in the night of 28/2/2001. Thus the failure to put to the accused the evidence of these two star witnesses while recording his statement under Section 313 of Cr.P.C. has caused serious prejudice to his right of a fair trial. The order of conviction and sentence cannot be upheld in these obtaining circumstances and the trial court's finding that the prosecution proved its case beyond reasonable doubts, is a grave error and hence unsustainable.

15. Section 367(1) of Cr.P.C. states that when confirmation proceedings are submitted, if the High Court thinks fit that a further inquiry should be made into or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself or direct it to be made or taken by the Court of Session. Section 368 of Cr.P.C. deals with the power of the High Court to confirm the sentence or annul conviction. Under the said section the High Court has the powers to order a new trial on the same charges or amended charges. Section 386 of Cr.P.C. deals with the powers

of the Appellate Court and in a given case the Appellate Court has the powers to direct the re-trial of the accused. Of course this power is required to be invoked sparingly and in a rare case. Having considered the flaws/inadequacies and/or the prejudice caused to the accused in recording his statement under Section 313 of Cr.P.C., we are of the considered opinion that Sessions Case No. 10 of 2002 ought to be directed for re-trial and such a re-trial is to be completed within a fixed period. This is a rare case fit for re-trial by re-examining the four witnesses i.e. P.W.3, P.W.6, P.W.7 and P.W.8.

16. In the premises, we hereby reject this reference made to us under Section 366 of Cr.P.C. and set aside the impugned order of conviction and sentence recorded by the learned Additional Sessions Judge, Kalyan against the accused in Sessions Case No. 10 of 2002. We direct that Sessions Case No. 10 of 2002 be tried afresh, by recalling P.W.3 Fatima, P.W.6 I.O., P.W.7 Amina Shaikh and P.W.8 Mehejabin Shaikh for cross-examination on behalf of the accused. If the prosecution examines any new witness from the list of witnesses already on record (Exh.32 & 39), the same shall be subject to cross-examination on behalf of the accused. After recording the evidence, supplementary statement of the accused under Section 313 of Cr.P.C. shall be recorded. The accused was an undertrial detenu and he shall continue to be so till the completion of the fresh trial. The re-trial shall be completed as expeditiously as possible and in any case within a period of three months from the date of receipt of R & P from this court. R & P be returned forthwith to the learned Additional Sessions Judge, Kalyan. The learned Addl. Sessions Judge shall appoint a defence lawyer for the accused from the panel of the District Legal Services Authority or in the alternate request Mr. R.D. Desai, Advocate to continue in the re-trial.

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