Supreme Court of India
Basavaraj R. Patil And Others vs State Of Karnataka And Others on 11 October, 2000
Bench: S.N.Variava, K.T.Thomas

PETITIONER:
BASAVARAJ R. PATIL AND OTHERS

Vs.

RESPONDENT:
STATE OF KARNATAKA AND OTHERS

DATE OF JUDGMENT: 11/10/2000

BENCH:
S.N.Variava, K.T.Thomas

JUDGMENT:

L.....I.....T.....T.....T.....T.....T.....T..J J U D G M E N T THOMAS, J. Leave granted. When a criminal court completes prosecution evidence (other than in summons cases) is it indispensably mandatory that the accused himself should be questioned? Can not the court allow the advocate to answer such questions on behalf of the accused at least in some exigent conditions? A two Judge Bench of this Court has held in Usha K. Pillai vs. Raj K. Srinivas & ors. {1993(3) SCR 467} that there is no alternative to it permissible under law. When such an issue arose in this case before this Court, a Bench of two Judges made a reference to a larger Bench for reconsideration of the legal position stated in Usha K. Pillai (supra).

The aforesaid question arose in this case from the following factual background: First appellant a software engineer (now stationed in USA) is the husband of second respondent Ms. Arundathi. Their marriage was solemnised in November 1992 and a female child was born to them. But eventually their connubial life passed through bad weather and the situation reached a stage when Arundathi moved a Judicial Magistrate of First Class for maintenance allowance from her husband. An order in her favour was passed by the said magistrate under Section 125 of the Code of Criminal Procedure (for short the Code).

On 10.3.1993, Arundathi lodged a complaint with the police alleging, inter alia, that her husband and his sister (Kumari Jaya second appellant) and their parents had ill-treated Arundathi for not bringing more dowry; and that she was pestered with persistent demand for more amount of dowry. The police conducted investigation on the said complaint and laid a charge-sheet against both the appellants and their parents. The trial court discharged the mother of the appellants at the initial stage itself and framed a charge against the appellants and their father for offences under Section 3 and 4 of the Dowry Prohibition Act and also under Section 498-A of the Indian Penal Code.

Prosecution examined five witnesses and closed the evidence. When the next stage for examination of the accused under Section 313 of the Code reached the trial court passed the following proceedings:

Evidence closed and statement under Sec/313 Cr.P.C. was kept ready to give opportunity to the accused as prescribed under Sec.313 Cr.P.C. Statement of A-2 father recorded who denied every circumstance, but did not add any further statement. The counsel for the accused filed application for dispensing with the questioning of A-1 & A-4. As A-1 is in America and A-4 is a student studying in Gadag, the counsel has endorsed on their statement that A-1 and A-4 have nothing to say by way of their statements. Considering the reality, A-1 has to come from America the case will unnecessarily be delayed. Hence, on the said endorsement the counsel for the accused was given the opportunity to make statement for A-1 and A-4 and their physical presence is dispensed with. The case is posted for argument.

The trial magistrate thereafter proceeded to hear the arguments and finally passed a judgment acquitting all the accused of the offences charged. Arundathi then filed a revision before the High Court challenging the aforesaid order of the acquittal. A Single Judge of the High Court heard the revision and learned Judge found that as per the decision of this Court in Usha K. Pillai (1993 (3) SCR

467), trial court has no other alternative and has no discretion to dispense with the examination of the accused personally under Section 313 of the Code. Hence the learned Single Judge set aside the order of acquittal passed by the trial court and remitted the case to the trial court with a direction to dispose it of afresh after examining the three accused under Section 313 of the Code.

The father of the appellants passed away in the meanwhile. Hence this appeal was filed by the remaining accused who are the husband and sister-in-law of Arundathi. One of the contentions raised by the appellants is that if the court did not put questions under Section 313 of the Code there is no reason for the complainant to be aggrieved thereof because the prejudice can be caused only to the accused due to non-compliance with the said provision. Next contention is more important and that was pressed into service here, that no criminal court can be rendered absolutely powerless to deal with a situation like this, i.e. if the accused is in such a far away country and when he has to incur a whopping expenditure and undertake a tedious long distance journey solely for the purpose of answering the court questions he himself pleaded that his counsel may be allowed to answer such questions on his behalf.

We are not inclined to deal with the first contention in this case because the High Court interfered with the order in exercise of its revisional jurisdiction. Such jurisdiction can be invoked even suo motu and therefore it is immaterial whether the power of the High Court was exercised on a motion made by the complainant. Now, for dealing with the second contention we may extract Section 313 of the Code:

313. Power to examine the accused.- (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary; (b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may dispense with his examination under clause (b). (2) No oath shall be administered to the accused when he is examined under sub- section (1). (3) The accused shall not render himself liable to punishment by refusing to answer such question, or by giving false answers to them. (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.

The forerunner of the said provision in the Code of Criminal Procedure 1898 (for short the old Code) was Section 342 therein. It was worded thus:

342. (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. (2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just. (3) 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. (4) No oath shall be administered to the accused when he is examined under sub- section (1).

Dealing with the position as the Section remained in the original form under the old Code, a three Judge Bench of this Court (Fazal Ali, Mahajan and Bose, JJ) interpreted the section in Hate Singh Bhagat Singh vs. State of Madhya Bharat (AIR 1953 SC 468) that the statements of the accused recorded by committal magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness box; they have to be received in evidence and treated as evidence and be duly considered at the trial.

Parliament, thereafter, introduced Section 342A in the old Code (which corresponds to Section 315 of the present Code) by which permission is given to an accused to offer himself to be examined as a witness if he so chose.

In Bibhuti Bhusan Das Gupta & anr. vs. State of West Bengal {1969(2) SCR 104}, another three Judge Bench (Sikri, Bachawat and Hegde, JJ) dealing with the combined operation of Section 342 and 342A of the old Code made the following observations: Under Section 342A only the accused can give evidence in person and his pleaders evidence cannot be treated as his. The answers of the accused under s.342 is intended to be a substitute for the evidence which he can give as a witness under sec. 342A . The privilege and the duty of answering questions under sec. 342 can not be delegated to a pleader. No doubt the form of the summons show that the pleader may answer the

charges against the accused, but in so answering the charges, he cannot do what only the accused can do personally. The pleader may be permitted to represent the accused while the prosecution evidence is being taken. But at the close of the prosecution evidence the accused must be questioned and his pleader cannot be examined in his place.

The Law Commission in its 41st Report considered the aforesaid decisions and also various other points of view highlighted by legal men and then made the report after reaching the conclusion that-

(i) in summons cases where the personal attendance of the accused has been dispensed with, either under section 205 or under section 540A, the court should have a power to dispense with his examination; and (ii) In other cases, even where his personal attendance has been dispensed with, the accused should be examined personally.

The said recommendation has been followed up by the Parliament and Section 313 of the Code, as is presently worded, is the result of it. It would appear prima facie that the court has discretion to dispense with the physical presence of an accused during such questioning only in summons cases and in all other cases it is incumbent on the Court to question the accused personally after closing prosecution evidence. Nonetheless, the Law Commission was conscious that the rule may have to be relaxed eventually, particularly when there is improvement in literacy and legal aid facilities in the country. This thinking can be discerned from the following suggestion made by the Law Commission in the same Report:

We have, after considering the various aspects of the matter as summarized above, come to the conclusion that section 342 should not be deleted. In our opinion, the stage has not yet come for its being removed from the statute book. With further increase in literacy and with better facilities for legal aid, it may be possible to take that step in the future.

The position has to be considered in the present set up, particularly after the lapse of more than a quarter of a century through which period revolutionary changes in the technology of communication and transmission have taken place, thanks to the advent of computerisation. There is marked improvement in the facilities for legal aid in the country during the preceding twenty-five years. Hence a fresh look can be made now. We are mindful of the fact that a two Judge Bench in Usha K. Pillai (supra) has found that the examination of an accused personally can be dispensed with only in summons case. Their Lordships were considering a case where the offence involved was Section 363 of the IPC. The two Judge Bench held thus:

A warrant case is defined as one relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Since an offence under section 363 IPC is punishable with imprisonment for a term exceeding two years it is a warrant-case and not a summons-case. Therefore, even in cases where the court has dispensed with the personal attendance of the accused under section 205(1) or section 317 of the Code, the court cannot dispense with the examination of the accused under clause (b) of section 313 of the Code because such examination is mandatory.

Contextually we cannot bypass the decision of a three Judge Bench of this Court in Shivaji Sahabrao Bobade & anr. vs. State of Maharashtra & anr. {1973(2) SCC 793} as the Bench has widened the sweep of the provision concerning examination of the accused after closing prosecution evidence. Learned Judges in that case were considering the fallout of omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence. The three Judge Bench made the following observations therein:

It is trite law, nevertheless fundamental, that the prisoners 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 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.

The above approach shows that some dilution of the rigor of the provision can be made even in the light of a contention raised by the accused that non questioning him on a vital circumstance by the trial court has caused prejudice to him. The explanation offered by the counsel of the accused at the appellate stage was held to be a sufficient substitute for the answers given by the accused himself.

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 vs. 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:

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.

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.

At the same time it should be borne in mind that the provision is not intended to nail him to any position, 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 accused cannot raise any grievance of 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 is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him.

But the situation to be considered now is whether, with the revolutionary change in technology of communication and transmission and the marked improvement in facilities for legal aid in the country, is it necessary that in all cases the accused must answer by personally remaining present in Court. We clarify that this is the requirement and would be the general rule. However, if remaining present involves undue hardship and large expense, could the Court not alleviate the difficulties. If the court holds the view that the situation in which he made such a plea is genuine, should the court say that he has no escape but he must undergo all the tribulations and hardships and answer such questions personally presenting himself in court. If there are other accused in the same case, and the court has already completed their questioning, should they too wait for long without their case reaching finality, or without registering further progress of their trial until their co-accused is able to attend the court personally and answer the court questions? Why should a criminal court be rendered helpless in such a situation?

The one category of offences which is specifically exempted from the rigour of Section 313(1)(b) of the Code is Summons cases. It must be remembered that every case in which the offence triable is punishable with imprisonment for a term not exceeding two years is a summons case. Thus, all other offences generally belong to a different category altogether among which are included offences punishable with varying sentences from imprisonment for three years up to imprisonment for life and even right up to death penalty. Hence there are several offences in that category which are far less serious in gravity compared with grave and very grave offences. Even in cases involving less serious offences, can not the court extend a helping hand to an accused who is placed in a predicament deserving such a help?

Section 243(1) of the Code enables the accused, who is involved in the trial of warrant case instituted on police report, to put in any written statement. When any such statement is filed the Court is obliged to make it part of the record of the case. Even if such case is not instituted on police report the accused has the same right (vide Section 247). Even the accused involved in offences exclusively triable by the Court of sessions can also exercise such a right to put in written statements [Section 233(2) of the Code]. It is common knowledge that most of such written statements, if not all, are prepared by the counsel of the accused. If such written statements can be treated as statements directly emanating from the accused, hook, line and sinker, why not the answers given by him in the manner set out hereinafter, in special contingencies, be afforded the same worth.

We think that a pragmatic and humanistic approach is warranted in regard to such special exigencies. The word shall in clause (b) to Section 313(1) of the Code is to be interpreted as obligatory on the Court and it should be complied with when it is for the benefit of the accused. But

if it works to his great prejudice and disadvantage the Court should, in appropriate cases, e.g., if the accused satisfies the court that he is unable to reach the venue of the court, except by bearing huge expenditure or that he is unable to travel the long journey due to physical incapacity or some such other hardship relieve him of such hardship and at the same time adopt a measure to comply with the requirements in Section 313 of the Code in a substantial manner. How this could be achieved?

If the accused (who is already exempted from personally appearing in the Court) makes an application to the court praying that he may be allowed to answer the questions without making his physical presence in court on account of justifying exigency the court can pass appropriate orders thereon, provided such application is accompanied by an affidavit sworn to by the accused himself containing the following matters: (a) A narration of facts to satisfy the court of his real difficulties to be physically present in court for giving such answers. (b) An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during such questioning. (c) An undertaking that he would not raise any grievance on that score at any stage of the case.

If the court is satisfied of the genuineness of the statements made by the accused in the said application and affidavit it is open to the court to supply the questionnaire to his advocate (containing the questions which the court might put to him under Section 313 of the Code) and fix the time within which the same has to be returned duly answered by the accused together with a properly authenticated affidavit that those answers were given by the accused himself. He should affix his signature on all the sheets of the answered questionnaire. However, if he does not wish to give any answer to any of the questions he is free to indicate that fact at the appropriate place in the questionnaire [as a matter of precaution the Court may keep photocopy or carbon copy of the questionnaire before it is supplied to the accused for answers]. If the accused fails to return the questionnaire duly answered as aforesaid within the time or extended time granted by the court, he shall forfeit his right to seek personal exemption from court during such questioning.

In our opinion, if the above course is adopted in exceptional exigency it would not violate the legislative intent envisaged in Section 313 of the Code.

In the present case the trial court can pass appropriate orders if an application is made by the accused relating to the examination under Section 313 of the Code, in the light of the legal principles stated above. This criminal appeal is disposed of accordingly.