rpa

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURSIDICTION

CRIMINAL APPEAL NO.479 OF 1992

Laxman alias Laxmayya Gangaram
Zinna, C/o. Zinna Narsaiah
Sathearam Mondal Masalpur,
Taluka Mitapilli District-Karimnagar,
Andhra Pradesh.
(At present imrpisoned at
Central Prison, Yeravada, Pune) .. Appellant

V/s.

The State of Maharashtra .. Respondent

.....

Mr. Mukesh Modi with Mr. V. I. Pajwani i/b. Mr. H. H. Ponda for the Appellant.
Mr. K. V. Saste, A. P. P for the Respondent – State.

.....

CORAM : A.S.OKA &
SHRIHARI P. DAVARE, JJ.

DATE ON WHICH JUDMENT IS RESERVED : MARCH 22, 2012
DATE ON WHICH THE JUDGMENT IS PRONOUNCED : MAY 9, 2012.

(Signed Judgment pronounced by Shrihari P. Davare, J. as per Rule 1(i) of Chapter XI of Appellate Side Rules as A.S. Oka, J. is sitting at Aurangabad.)

JUDGMENT (PER A.S. OKA, J) :

By this Appeal, the Appellant-Accused has taken an exception to the Judgment and order dated 24th February, 1992,

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

passed by the learned Additional Sessions Judge, Mumbai by which he has been convicted for the offence punishable under Section 302 of the Indian Penal Code.

2. Briefly stated, the case of the prosecution is that the complainant Dilip Ramdhar Yadav (P.W.No.3) and his father were employed by M/s. Royal Security to guard a hill property known as Talzan Hill in the creek of Charkop village at Mumbai. The said Talzan Hill is an island in Charkop creek and it is un-inhabited and it is full of trees and bushes. It is alleged that during high tides, it is not possible to walk up to the said hill but only when the high tide is over, it is possible to walk to the hill.

3. In the morning at about 11.00 a.m. on 31st March, 1989, the complainant made a round of the hill and came back at 1.00 p.m. At that time, nothing unusual was noticed by him. On 3rd April, 1989 at about 10.00 a.m, the complainant was sitting under a tree on the shore of the creek. At about 11.00 a.m., he noticed that some women were moving on the Northen side of the hill. He suspected that they would cut the trees. Therefore, he crossed the creek, went to the hill and was successful in driving the women out. After some time, when he came to the foot of the hill and started crossing muddy area, he noticed that

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

a person was lying there. Initially he thought that someone had consumed liquor and was sleeping there under the influence of liquor. But, after he went near the person he found that the person was dead. His age was 30 to 35 years and his height was 5.5 inches. The complainant found that his tongue had come out of the mouth. The shirt on the person of the deceased was soaked in blood. There was a cut in his stomach and intestine had come out. The complainant found that the body was decomposed. After seeing the body, he got frightened and he contacted Ramesh Pradhumana Pandey, his security supervisor. The said Ramesh Pandey is P.W. No.9. On the advice of Ramesh Pandey, the complainant proceeded to Kandivali Police Station and lodged the report on the basis of which the FIR was registered. P.S.I. Aba Nanasaheb Jadhav (P.W.No.14) visited the spot and recorded the inquest panchanama. The dead body was found to be of one Bhumayya, son of the Appellant. The dead body was sent for post-mortem. On 13th April, 1989, PSI Jadhav arrested the Appellant and seized the blood stained Dhoti recovered at the instance of the Appellant. The seized muddemal property was sent for the Chemical Analysis. The charge sheet was filed for the offence punishable under Section 302 of the Indian Penal Code. The case was committed to the Court of Sessions. Accordingly, the charge for the offence under

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

Section 302 of the Indian Penal Code was framed. Plea of the Appellant was recorded and he pleaded not guilty. The prosecution has examined 16 witnesses. After the prosecution evidence was closed, statement of the Appellant under Section 313 of the Code of Criminal Procedure, 1973 was recorded. In the said statement, the Appellant purportedly confessed of having committed the offence. From the cross-examination of the prosecution witness made by the advocate for the Appellant, it appears that the defence of the Appellant was of complete denial. The trial Court held that, chain of circumstances namely (a) last seen together, (b) finding of blood stains of blood group of the deceased on the dhoti of the Appellant recovered at the instance of the Appellant and (c) after the incident, the Appellant left for native place, have been established. The Trial Court also relied upon the incriminatory statement of the Appellant under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the said Code") and held the Appellant guilty of the offence punishable under Section 302 of the Indian Penal Code.

4. With a view to appreciate the submissions, it will be necessary to make a reference to the evidence of material witnesses. Complainant Dilip Ramdhar Yadav (P.W.No.3) stepped into the witness box. He deposed as to how he found

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

decomposed body of the deceased. He stated that intestine had come out and the tongue was out. He stated that he was afraid and started running away. He stated that his security supervisor Ramesh Pradhumana Pandey (P.W.No.9) advised him to lodge a report in the police station at about 4.00 p.m. He identified the clothes on the person of the deceased. It must be noted here that at the end of the paragraph No.2 of his deposition, the learned Judge after observing the demeanor of the witness has recorded the following:

> *"(Note : The witness does not appear normal. He looks little lunatic.)"*

5. P.W.No.9 Ramesh Pradumana Pandey stated that he was the security supervisor of the Real Security Agency. He stated that one Resham Singh had engaged the security agency for guarding the said Talzan hill. He gave description of the said Talzan Hill. He stated that P. W. No.3 Dilip Yadav and his father Ramdhar Yadav were the security guards employed by the agency who were posted on the said plot. He stated that at about 3.30 to 4.00 on 3rd April, 1989, the said Dilip Yadav approached him and informed him that one dead body was lying below the hill which was decomposed. He instructed P.W.No.3 Dilip Yadav to lodge a complaint and accordingly a report was lodged. In the cross-examination, he pleaded ignorance as to

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

whether there was high tide during 31st March, 1989 to 3rd April, 1989. He stated that P.W.No.3 Dilip Yadav and his father were on duty on these dates. He stated that till 3rd April, 1989, nobody had informed him about the dead body. He stated that his statement was not recorded by the police.

6. It will be necessary to make a reference to the evidence of the other witnesses. P.W. No.1 Narayan Govind Bhandare is a panch witness to the inquest panchanma. He described the clothes on the person of the deceased. He stated that his clothes were having blood stains. He stated that there was some blood fallen on the spot and there was blood stained earth. He stated that in his presence, a sample of plain earth was taken and a sample of blood stained earth was also taken. He stated that blood had fallen on the grass near the dead body and even sample of blood stained grass and plain grass was taken by the police. He proved the seizure panchanma in evidence. There was hardly any cross-examination of the said witness.

7. P.W.No.2 Sada Shakharam Katkar is the witness to the alleged voluntary statement made by the Appellant. The Appellant disclosed that he was willing to show the place of murder of his son. Accordingly, a memorandum was drawn

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

which was proved by the said witness. He stated that thereafter all of them were taken by the police together to the Charkop village. The Appellant led them to the Hill and showed the place. He stated that blood was seen on the leaves. He stated that the Appellant took them ahead and took out a dhoti which was in a bush and blood stains were found on the dhoti. There was also some chilli powder on the dhoti which was separated and was packed separately. The witness stated that knife was not found. He stated that labels signed by him and the other panchas were affixed on the packets. The memorandum was marked as Exhibit-9 and the panchamana was marked as Exhibit-10. He stated that the panchanama was recorded after coming back to Charkop Village. He stated that the Panchanama at Exhibit-10 was not read over to him.

In the cross-examination, as far as the memorandum of disclosure at Exhibit-9 is concerned, he stated that the memorandum at Exhibit-9 was being written when he reached the police station and he was unable to remember the extent to which it was already written. He stated that the panchanma was written on the hill. He stated that dhotis like the said dhoti were available in the market and chilli powder is also available. He stated that after coming back to the police station, he did not

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

sign any papers.

8. P.W.No. 4 Vazir Mohamed Shaik, is again a panch witness. He stated that on 14th April, 1989, he was called by police at Kandivli police station to act as a panch. The accused disclosed that he was ready to show the place where he and his son consumed liquor. He stated that he was ready to show the man from whom they had purchased liquor. Accordingly, a memorandum was drawn and he proved his signature on the memorandum. He stated that he along with the co-panch witness, police officers and the Appellant proceeded by a police jeep. The Appellant asked to stop the jeep near Hanuman Temple at Parle. He showed a hut and the person who sold the liquor. Accordingly, a panchanama was drawn and his signature was obtained. In the cross-examination, he denied that when he reached the police station, memorandum was not written and it was written subsequently.

9. P.W.No.5 Gangubai Rajaram Goraye has been examined on the question of last seen together. She stated that she was having a house at Rajaram Wadi, Western Express High Way, Vile Parle, Bombay. She stated that she knew the Appellant who was her tenant and was residing in her tenement for a period of four years with his son Bhumayya (deceased). She deposed

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

about the incident which took place 3-4 years earlier on the first date of a month. She stated that at about 9.00 a.m., the Appellant took Bhumayya with him. She stated that the Appellant came back at about 5.00 p.m. At that time, he was alone and on enquiry, he told her that he has kept his son with an agent at Worli. She stated that Appellant had stated that he had a fever. She stated that on the next day, the Appellant was carrying a big trunk and stated that he wanted to go to Hyderabad. The witness stated that her son kept the trunk on a bicycle and accompanied the Appellant to Vile Parle Railway Station. She stated that when the Appellant came back at 5.00 p.m., one Laxmibai was also present. She stated that after few days, the Appellant was brought by the police and she along with Laxmibai and Hanumant were taken to the police station. They were shown the photographs at the police station which were of the dead body of Bhumayya. All of them identified the photograph of Bhumayya. She stated that she was shown clothes on the person of the deceased. Except shirt, she identified the other clothes. She stated that subsequently she was called to the police station and was shown a dhoti (Article-9) which was blood stained. She stated that the said dhoti (Article 9) was of the Appellant. She stated that the deceased Bhumayya was not doing any work and the Appellant did not

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

complain to her against his son. She stated that the Appellant informed her that he wanted to improve his son. In the cross-examination, she admitted that she came to the Court and she was brought by policeman to the Court in a car. She stated that the clothes on the person of Bhumayya which she identified are available in the market. She stated that from the colour of the clothes she was able to say that the same were of the deceased Bhumayya. She stated that on two occasions her thumb impression was taken by the police on her statement. She stated that dhoti which was shown to her in the police station is available in the market. She stated that only one dhoti was shown to her in police station. She stated that statement of Laxmibai was also recorded by the police. She stated that she came to the police station on two occasions. She stated that in the evening of the first day of the month, the Appellant was not wearing the dhoti Article 9 and he was wearing another dhoti like Article 9. In the cross-examination, an omission was proved as she admitted that while recording of her statement by the police, she did not state that in the afternoon, the Appellant was saying that he was having fever and that he wanted to go to his native place. By inviting attention of the witness of portions mark A, B and C of her statement, certain contradictions were brought on record.

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

10. P.W.No. 6 is Laxmbai Ramlu Turala. She stated that she was residing at Rajaram Wadi, Hanuman Road, Vile Parle, Mumbai. She stated that she was a tenant of P.W.No. 5 Gangubai Rajaram Goraye. She stated that she knew the Appellant who was also a tenant of P.W. No.5 Gangubai. She also stated that his hut was near her hut. She stated that his son by the name Bhumayya used to live with him. She stated that though his son's name was Bhumayya, they used to call him as Bhumanna. She stated that the Appellant was desirous of sending his son to a foreign country. She stated that three years earlier, on the first day of a particular month in the morning, the Appellant took his son to Worli. She stated that she did not know when he returned in the afternoon and she was not sure whether he returned in the afternoon. She stated that eight days thereafter police called her to the police station and she was shown a photograph of Bhumauyya. She stated that the shirt and trouser shown to her was on the person of Bhumayya on the first day of the month. She is stated that one month thereafter she was shown a dhoti which is Article 9 which was having blood stains. She stated that the clothes of Bhumayya were stained with blood. At that stage, permission was granted to the learned A.P.P to contradict the witness by showing her

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

police statement. She stated that the portion mark A of her statement was not correct and she was not present when the Appellant told Gangubai that he had left Bhumayya at Worli because Bhumayya was going to Dubai for work. An omission is brought on record in the cross-examination as she admitted that she had not stated before the police that Bhumayya was wearing the clothes which were shown to her by the police. She stated that the clothes were wrapped in the paper and the bundle was opened before her in the police station. She stated that even the bundle of dhoti was opened before her and thereafter, again it was wrapped.

11. P.W.No.7, Nagmalesh Rajaram Gore was also examined on the point of last seen together. He is the son of Gangubai P.W. No.5. He stated that the Appellant came in the month of October 1988 and he had brought his son Bhumayya who was unemployed. He stated that Bhumayya was not doing any work and, therefore, his mother by giving some amount to Bhumayya sent him back to the native place. He states that again in the month of December 1988, the Appellant brought back Bhumayya as he wanted to send Bhumayya to Dubai. He stated that in the month of March 1989, the Appellant and Bhumayya came to his place. He stated that on 1st April, 1989 in the

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

morning, the Appellant and Bhumayya had gone for work and in the afternoon only the Appellant returned. He stated that his mother asked the Appellant about his son and he replied that he had kept him with an agent in Worli for sending him out of India. He stated that the Appellant informed that Bhumayya is likely to go Dubai in April 1989. He stated that on 2nd April, 1989, on instructions of his mother, he accompanied the Appellant up to the railway station as the Appellant was not feeling well. He stated that he had put luggage of the Appellant on his bicycle. He stated that after 10 days, he had been to his native place as his grand mother was sick. He stated that on 13th May, 1989, the police came to his house and took his mother, Laxmibai and he himself to the police station where photographs of Bhumayya were shown to them. He stated that dhoti (Article 9) was shown to him which was having stains of blood and chilli powder. In the cross-examination, he stated that Bhumayya used to drink liquor but he had not seen him quarreling with anybody. He was also shown the clothes of Bhumayya on 13th May, 1989. He stated that the type of dhoti shown to him is available in the market, but the same dhoti is not available in market. He admitted that there is no specific mark of identification on dhoti. He stated that in the evening of 1st April, 1989, he did not see the Appellant but he heard the

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

Appellant talking to his mother.

12. Pandhari Sakha Kamble (P.W.No.8) is a panch witness to the seizure of the clothes on the person of the deceased. He stated that the clothes were separately wrapped in four bundles and labels signed by the panch witnesses were affixed on the bundles. He stated that the bundles were sealed and labels were affixed. He stated that clothes were wrapped in four wrappers.

13. P.W.No.10 is Narayan Madhavji Sampt who is a photographer who was called on 3rd April, 1989 at Kandivli police station for taking the photographs of a dead body which was decomposed. In the cross-examination he stated that in the last week the police demanded negatives of the photographs which were not found with him. He stated that his statement was recorded on 15th May, 1989. He stated that clothes on the person of the deceased were not wet.

14. P.W.No.11 is Mahendra Shivram Bhosale who was attached to Kandivli police station from April, 1988 onwards. He stated that he alongwith another constable reached village Jagatiyar, District Karimnagar in Andhra Pradesh on 5th April, 1989. He stated that on 6th April, 1989 from the name on the

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

label on the shirt (Article 2), he traced the tailor of the shirt (Article 2) which he carried with him. He stated that the tailor identified the shirt having blood stains. He stated that he proceeded to village Satharam where the said tailor was found. He stated that the Sarpanch of village called the Appellant and his wife who identified the shirt. He stated that he brought the Appellant with him to Bombay. He stated that he along with other police persons brought the Appellant to Bombay. In the train, the police informed the Appellant that his son had met with an accident and he was serious. The witness stated that the Appellant said something abnormal and, therefore, on suspicion they brought the Appellant to the Kandivli police station on 13th April, 1989 and he was arrested.

15. Dr. Preetesh Shivajirao Jalgaonkar (P.W.No.12) was working as medical officer attached to BEST. He stated that on 4th April, 1989 he performed the post-morten on the body of the deceased. In paragraph No.3 of the deposition, he has described four external injuries on the person of the deceased which were incise wounds. Only one internal injury was noticed i.e. Haemorrhage in peritoneum (Haemoporitonitis). The doctor opined that the cause of death was haemorrhagic shock due to multiple stab injury. Post- mortem was performed on 4th April,

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

1989. The medical officer opined that the death might have occurred before 3 to 5 days before the post-mortem. He stated that the external injury Nos.1 and 2 namely incised wound below umbilicus and incised wound on left size of abdomen were individually sufficient to cause death in ordinary course of nature. He stated that blood sample of the Appellant was sent for grouping and analysis to the Chemical Analyzer. He produced the report of the Chemical Analyzer. In the cross-examination, he stated that the measurement of the injuries was possible and with the help of a thread, the wounds were measured. He stated that the injury Nos.3 and 4 were not sufficient to cause death. He proved the post-mortem notes in evidence.

16. P.W. No.13 is Mahendra Parsuram More, is a police constable attached to Kandivali Police Station. Accompanied with P.W.No. 11 Mahendra Bhosale, he went to the village of the Appellant in Andhra Pradesh. On this aspect his evidence is similar to the evidence of P.W. No.11. The witness was cross-examined wherein he stated that the statements were recorded in the gram panchayat office at Satharam.

17. P.W.No.14 is Aba Nanasaheb Jadhav who was attached to

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

Kandivli Police Station as a PSI. The witness stated that P.W. No.3 came to the police station and he gave information that one dead body was lying at the base of Talzan Hill at Charkop village Kandivali (West). He stated that he along with other police officers went to the Charkop village along with the complainant. He stated that the photographs of the dead body were taken. The next witness is Pandurang Ramji More (P.W.No.15). According to this witness, the Appellant stated that he was ready to show the spot where he had kept dhoti and knife. Thereafter, he called two panchas. In their presence, the Appellant stated that he was ready to show the place and the person from whom they purchased the liquor. The said witness has been cross examined at length.

18. The learned counsel appearing for the Appellant has made detailed submissions. He pointed out that the learned Judge has believed the evidence of last seen together and has accepted the evidence of recovery of dhoti at the instance of the Appellant. He pointed out that the learned Trial Judge has also relied upon the report of the Chemical Analyzer. The learned Judge has also relied upon the admission of the guilt by the Appellant in the statement under Section 313 of the said Code. His submission is that on plain reading of the evidence, the case of the last seen

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

together has not been established. He submitted that a serious doubt is created regarding the recovery of dhoti (Article 9) at the instance of the Appellant. He submitted that the chain of circumstances leading to the guilt of the accused has not been established. He submitted that a conviction cannot be based solely on inculpatory statement of the accused under Section 313 of the said Code. He submitted that the statement of the accused under Section 313 of the said Code can at the highest lend support to the evidence led by the prosecution and if the other evidence on record is not reliable, the conviction cannot be based on the confessional statement appearing in examination of the accused under Section 313 of the said Code. He submitted that even assuming that conviction can be based only on the statement recorded under Section 313, ultimately it is the discretion of the Court and that the Court has to take in to consideration the entire evidence on record before the conviction is based on the statement under Section 313 of the said Code. He submitted that going by the prosecution evidence, both oral and documentary, the same is not reliable and, therefore, order of acquittal will have to be passed. He has relied upon various decisions in support of his submissions. We have made a reference to the said decisions in the subsequent part of the Judgment. The learned counsel appearing for the

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

Appellant submitted that in any event, in the present case, the conviction cannot be based on the statement under Section 313 of the said Code in as much as before recording the statement, the Appellant was not put to the notice that the statements which will be made by him may be used against him. He submitted that it was the duty of the learned Judge to inform the Appellant about the consequences of making a statement before the same was recorded. He urged that it was also his duty to inform the Appellant that he was not bound to give answers to the questions during his examination under Section 313 of the said Code. He submitted that as the Appellant was not put to the notice that his statement may be used against him, in fact, the entire prosecution has been vitiated as there is a gross illegality committed while recording the statement under Section 313 of the said Code.

19. The learned A. P. P submitted that there is no requirement of law that the accused must be put to notice before recording his statement under Section 313 of the said Code that the statement could be used against him. He submitted that Sub Section (4) of Section 313 itself provides that the statement could be considered against the accused and, therefore, there is no necessity of informing the accused as to what the law is.

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

Relying upon certain decisions, the learned A.P.P submitted that conviction can be based only on admission/confession of an accused recorded in the statement under Section 313 of the said Code. He submitted that in any case, the evidence of last seen together has been rightly accepted by the learned Trial Judge and the entire chain of circumstances pointing at the guilt of the Appellant has been established beyond reasonable doubt.

20. We have carefully considered the submissions. It must be noted here that there is hardly any dispute about the fact that the death of deceased Bhumayya is a homicidal death and it is not a natural death. The only question is whether the Appellant is the author of the injuries sustained by the deceased as reflected from the post-mortem report which ultimately caused his death.

21. Before dealing with the argument based on the statement under Section 313 of the said Code, it will be necessary to advert to the evidence adduced by the prosecution. A reference will have to be made to the evidence of P.W.No.3 Dilip Yadav. At this stage, it may be noted that after noticing the demeanor of the witness, the learned Judge added a note that "*the witness does not appear normal. He looks little lunatic.*" His evidence

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

is that when he was on duty as a watchman, he noticed a decomposed dead body while returning from the Talzan hill. It must be noted here that P.W.No.3 gave information of the dead body found by him to P.W.No.7 Ramesh. The said information was given to the P.W.No.7 Ramesh at about 3.30 to 4.00 p.m. on 3rd April, 1989. The information was given by P.W.No.3 to P.W.No.16 P.I. Anant Desai (Investigating Officer), on 3rd April, 1989. Thus, it can be safely held that the dead body was found for the first time before 3.30 p.m. on 3rd April, 1989. As far as the time of death is concerned, P.W.No.12 Dr. Pretesh Jalgaonkar stated in his evidence that the post-mortem examination was made on 4th April, 1989 between 2.00 p.m. to 3.30 p.m. His opinion reflected from paragraph No. 7 of the examination-in-chief is that the death may have occurred 3 to 4 days before the post-mortem examination. Thus, according to his version, the death may have occurred on 31st March, 1989 or 1st April, 1989.

22. On this background, we will have to appreciate the evidence of last seen together. From the evidence of P.W.No.5 Gangubai, it appears that on 1st April, 1989 at 9.00 a.m, she saw the Appellant taking with him, the deceased Bhumayya. At 5.00 p.m, when Appellant came back, he was alone and he informed her that she has kept his son with an agent at Worli. The place

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

where the deceased was residing along with the Appellant is Rajaram Wadi, Western Express Highway, Vile Parle. The incident has allegedly taken place at Talzen hill near Kandivli which is far away from Vile Parle. The said witness identified the clothes on the person of Bhumayya which according to her he was wearing on the said day. She also identified the dhoti (Article 9) as the dhoti of the Appellant. In the cross-examination, she stated that the Appellant was not wearing this dhoti, but he was wearing some other dhoti which was looking like the dhoti at Article 9. It is not possible to believe that she could identify the dhoti at Article 9 as the dhoti of the Appellant as admittedly she had not seen the Appellant using the said dhoti. The other circumstance brought on record by the Respondent is that on 2nd April, 1989, the Appellant proceeded to his native place. The other witness on the aspect of last seen together is P.W. No.6 Laxmibai. Her evidence is that on 1st day of a month before three years, the Appellant took his son to Worli in the morning time. However, she stated in the examination-in-chief that she was not aware when the Appellant returned and she even did not know whether the Appellant returned in the evening. She identified the clothes on the person of the deceased and the dhoti marked as Article 9. She stated that the dhoti was dirty and it was of the Appellant. She stated that the

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

dhoti was having blood stains. After the A.P.P was permitted to contradict the witness by showing her police statement, she stated that she was not present when the Appellant told P.W. No.5 Gangubai that the deceased was going to Dubai for work. In the cross-examination, she stated that the bundle containing clothes on the person of the deceased was opened before her. Even the bundle containing dhoti was opened before her. She stated that after showing the clothes, the same were wrapped in the paper but she did not state whether the same were again sealed. She admitted that clothes on the person of the deceased and the said dhoti were shown to her at the police station. The witness claims that she had seen the Appellant and the deceased going together in the morning but, she has admitted in the examination-in-chief itself that she was not even aware whether the Appellant came back. As far as the identification of dhoti as Article 9 is concerned, she has stated that the dhoti was of the Appellant. It is impossible to believe that she could have identified the dhoti in as much as it is not her case that she had seen the Appellant wearing the said dhoti either on 1st April, 1989 or any time earlier. In the cross-examination she pleaded ignorance whether such a dhoti is available in the market in Mumbai.

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

23. The third witness on the aspect of last seen together is Nagmalesh Rajaram Gore (P.W.No.7). He stated that he is the son of P.W.No.5 Gangubnai. He stated that on 1st April, 1989 in the morning, the Appellant and Bhumayya had gone for work and in the afternoon, the Appellant came back alone. He deposed that as per the instructions of his mother, on the next day, he accompanied the Appellant up to the Railway station as he was not feeling well. As far as the dhoti marked as Article – 9 is concerned, the same was shown to the witness. He merely stated that it was blood stained and chilli powder was there on the dhoti. Without telling the Court that the dhoti was of the Appellant, in the cross-examination he admitted that such type of dhoti is available in the market. However, he denied in the cross-examination that the dhoti was not of the Appellant. He admitted that there was no special mark of identification on the dhoti. The witness further stated that in the evening of 1st April, 1989, he did not see the Appellant but he heard him talking to his mother. It is pertinent to note that perusal of the evidence of P.W. No.5 Gangubai shows that she has not stated that in the evening or in the afternoon when Appellant came back, her son P.W. No.7 was present there. Therefore, his evidence cannot be accepted as the evidence of the fact that the Appellant along with the deceased were last seen together in the morning of

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

1st April, 1989 and that in the evening the Appellant alone came back.

24. Now a reference will have to be made to the evidence of the prosecution as regards the recovery of the said dhoti (Article 9). It must be noted here that on 3rd April, 1989 when the dead body of the deceased was recovered, the said dhoti was not found. It is pertinent to note that in the inquest panchanama at Exhibit-7 there is a recital that the police minutely examined the surroundings and the situation of the muddy land around the body in the presence of the panch witnesses. At that time, the dhoti was not found. P.W. No.2 Sada Sakharam Katkar stated that the Appellant made a voluntary disclosure at the police station that he would show the place where he killed his son. However, the witness did not tell that the Appellant stated that he would show the place where he had concealed dhoti. The discovery panchanam at Exhibit-9 however records that the Appellant made a voluntary statement to show the place of murder and the place where he had concealed blood stained dhoti. However, this panch witness has stated about the disclosure by the Appellant of only the place of murder. In the examination-in-chief, he stated that the place of incident was shown by the Appellant and there was blood on the place and

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

the blood was also seen on the leaves on the trees. He stated that Appellant took them ahead and took out dhoti stained with blood from a bush. He admitted that chilli powder was also on the dhoti. He stated that knife was not found. He admitted that the panchanama at Exhibit-10 of seizure was not read over when his signature was obtained. In the cross-examination, he admitted that he was unable to remember which clothes the Appellant was wearing. In the cross-examination he stated that the memorandum at Exhibit-9 was being written when he had reached the police station. He stated that he does not remember how much portion of the panchanama was written before he reached there. Therefore, the recovery of the dhoti at the instance of the Appellant is not proved in as much as in the oral testimony the witness merely stated that the accused stated that he would show the place of incident. The dhoti was not recovered at the alleged place of incident shown by the Appellant. As far as the seizure panchanama is concerned, he stated that the same was written after coming back to Charkop village. In the cross-examination, he admitted that such type of dhoti is available in the market. It must be noted here that the recovery is made on 15th April, 1989 in the afternoon. On this aspect, a reference will have to be made to the evidence of P.W.No. 16 Anant Desai, Police Officer. He stated in the

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

examination-in-chief that the Appellant stated that he was ready to show the spot where knife and dhoti have been concealed. He further stated that the Appellant showed the place of offence and then he went ahead and took out one dirty dhoti which was blood stained on which there was chilli powder. In the examination-in-chief he stated that the dhoti was taken out from a bush. It is pertinent to note that there is no recovery of knife at the instance of the Appellant.

25. As far as the dhoti (Article 9) is concerned, none of the witnesses who have been examined on the aspect of last seen together have stated that the Appellant was wearing the said dhoti on 1st April, 1989. It is not known on what basis they have identified the dhoti especially when almost all of them stated that similar dhoti is available in the market. None of the witnesses have stated that on 1st April, 1989 when the Appellant left with the deceased, he was wearing this dhoti. On the contrary, the evidence of the son of the P.W.No.5 is that at that time he was wearing another dhoti. Therefore, none of the eye witnesses have proved that before the incident when the Appellant and the deceased were allegedly last seen together, the Appellant was wearing the said dhoti. The P.W. No.2 Sada even did not state that the Appellant made a voluntary

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

statement of the disclosure of the place where the dhoti was concealed. Thus, in the examination-in-chief, the panch witness has not stated that the Appellant made a voluntary statement that he would show the place where dhoti was concealed. In fact, the substantive evidence of the voluntary disclosure statement is the evidence of the panch witnesses. Thus, the evidence of recovery of dhoti (Article 9) on the basis of alleged voluntary statement of the Appellant is not at all free from doubt. Reliance was placed on the report of the Chemical Analyzer. It is at Exhibit-34. Item No.12 of the report is dhoti. Blood stains of blood group "O" were found on the dhoti. The blood group of the Appellant is "B" however, there is no evidence on record as regards the blood group of the deceased.

26. Only the P.W.No.5 Gangubai has clearly deposed that in the morning the deceased was with the Appellant and that in the afternoon the deceased came alone. The dead body was found far away from the place where the Appellant was residing with the deceased and where they were allegedly last seen together. There is no evidence to show that the Appellant was found with the deceased at any place in close proximity where the dead body was found. Therefore, the evidence of prosecution witnesses regarding the theory of last seen together is not free

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

from doubt. As stated above, even the recovery of dhoti which is marked as Article-9 is not at all free from doubt. Thus, if we keep aside the statement under Section 313 of the said Code, the evidence on record does not prove the guilt of the Appellant beyond reasonable doubt.

27. Now, it will be necessary to make a reference to the statement recorded under Section 313 of the said Code. For that purpose, it will be necessary to make a reference to Section 313 of the said Code which reads thus:

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

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

(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, any other offence which such answers may tend to show he has committed.

[(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.]"

28. It is well established that the object of recording the examination of accused under Sub Section (1) of Section 313 of the said Code is to give an opportunity to the accused, if he so desires, to tender any explanation on the case presented against him. It is well settled that the provision of Section 313 has been enacted for the benefit of the accused. Therefore, Sub Section (2) provides that no oath shall be administered to the accused when he is examined under Sub Section (1). Sub Section (3) makes it very clear that the accused is not in a position of a witness while his examination under Sub Section (1) of Section 313 is recorded, and, therefore, Sub Section (3) provides that the accused does not render himself liable for punishment by refusing to answer the questions or by giving false answers. What is important is Sub Section (4) which provides that the answers given by the accused may be taken in to consideration by the Court in the trial in which he is examined and may be put in evidence for or against him in any other trial for any other

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

offence which such answers may tend to show he has committed.

29. The learned counsel appearing for the Appellant has urged that there is a serious prejudice to the Appellant as prior to recording of the statement, he was not put to notice that he is not bound to answer the questions and that the answers given by him in his examination may be taken into consideration by the Court in the Trial. Before dealing with this submission. It will be necessary to deal with the submissions made by the learned counsel appearing for the Appellant that a conviction cannot be based solely on the admission/confession of the accused in the statement under Sub Section (1) of Section 313 of the said Code. In this behalf it will be necessary to make a reference to the decision of the Apex Court in the case of *Dharnidhar V/s. State of Uttar Pradesh [(2010) 7 SCC 759]*. In paragraph No.28 of the decision, there is some discussion regarding the use of the statements made by the accused in his examination under Sub Section (1) of Section 313 of the said Code. Paragraph 28 reads thus:

> *" It is a settled principle of law that the statement made by the accused under Section 313 CrPC can be used by the court to the extent that it is in line with the case of the prosecution. The same cannot be the sole basis for convicting an accused. In the present case, the statement of the accused before the Court, to some*

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

extent, falls in line with the case of the prosecution and to that extent, the case of the prosecution can be substantiated and treated as correct by the Court. The legislative intent behind this section appears to have twin objects. Firstly, to provide an opportunity to the accused to explain the circumstances appearing against him. Secondly, for the court to have an opportunity to examine the accused and to elicit an explanation from him, which may be free from the fear of being trapped for an embarrassing admission or statement."

Thereafter, in paragraph No.31, the Apex Court has considered its earlier decision of Bench of three Hon'ble Judges in the case of *Narain Singh V/s. The State of Punjab [1964 (1) Cri. L. J. 730]*. After considering the said decision, the Apex Court also considered its earlier decision in the case of State of *Maharashtra V/s. Sakhdev Singh [(1992) 3 SCC 700]*. Paragraphs No.31 and 32 read thus:

"31. In Narain Singh V. State of Punjab a three-Judge Bench of this Court held as under : (Cri. LJ p. 733, para4)

"4....Under Section 342 of the Code of Criminal Procedure by the first sub-section, in so far as it is material, the Court may at any stage of the enquiry or trial and after the witnesses for the prosecution have been examined and before the accused is called upon for his defence shall put questions to the accused person for the purpose of enabling him to explain any circumstance appearing in the evidence against him. Examination under Section 342 is primarily to be directed to those matters on which evidence has been led for the prosecution, to ascertain from the accused his version or explanation, if any, of the incident which forms the subject-matter of the charge and his defence. By sub-section

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

> *(3), the answers given by the accused may 'be taken into consideration' at the enquiry or the trial. If the accused person in his examination under Section 342 confesses to the commission of the offence charged against him the court may, relying upon that confession, proceed to convict him, but if he does not confess and in explaining circumstances appearing in the evidence against him sets up his own version and seeks to explain his conduct pleading that he has committed no offence, the statement of the accused can only be taken into consideration in its entirety."*

32. Following the law laid down in Narain Sing case the Apex Court in State of Maharashtra v. Sukhdev Singh further dealt with the question whether a statement recorded under Section 313 CrPC can constitute the sole basis for conviction and recorded a finding that the answers given by the accused in response to his examination under Section 313 CrPC of 1973 can be taken into consideration in such an inquiry or trial though such a statement strictly is not evidence and observed in para 52 thus: (Sukhdev Singh case1-10, SCC p.744)

> *"5. Even on first principle we see no reason why the Court could not act on the admission or confession made by the accused in the course of the trial or in his statement recorded under Section 313 of the Code."*

It is thus well established in law that admission or confession of the accused in the statement under Section 313 CrPC recorded in the course of trial can be acted upon and the court can rely on these confessions to proceed to convict him."

(Underline added)

The larger bench of the Apex Court in the case of *Narain Singh (Supra)* considered the provision of Section 342 of the said Code of Criminal Procedure, 1898 which is *pari materia*

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

with Section 313 of the said Code. The larger bench has clearly held that if the accused person in his examination under Section 342 confesses to the commission of an offence charged against him, the Court may, relying upon that confession, proceed to convict him. After considering the decision in the case of *Narain Singh*, the Apex Court in the case of *Dharindhar (Supra)* reiterated that relying upon admission or confession of the accused in the statement under Section 313 of the said Code, the Court can proceed to convict the accused. On this aspect, it will be necessary to make a reference to the decision of the Apex Court in the case of State of *Maharashtra V/s. Sukhev Singh & Anr. (Supra)*. In paragraph No.50, the Apex Court has considered Section 313 of the said Code. The paragraph No.50 of the said decision reads thus:

> *"5. Section 313 of the Code is a statutory provision and embodies the fundamental principle of fairness based on the maxi audi alteram partem. It is trite law that the attention of the accused must be specifically invited to inculpatory pieces of evidence or circumstances laid on record with a view to giving him an opportunity to offer an explanation if he chooses to do so. The section imposes a heavy duty on the court to take great care to ensure that the incriminating circumstances are put to the accused and his response solicited. The words "shall question him" clearly bring out the mandatory character of the clause and cast an imperative duty on the court and confer a corresponding right on the accused to an opportunity to offer his explanation for such incriminating material appearing against him. It is, therefore, true that the purpose of the examination of the accused*

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

under Section 313 is to give the accused an opportunity to explain the incriminating material which has surfaced on record."

In paragraph No.51, the Apex Court specifically considered the question whether such a statement recorded under Section 313 of the said Code can constitute the sole basis of conviction in as much as the oath is not administered and that the statement made by the accused will not be an evidence in the strict sense. The Apex Court has answered the question in paragraph No.51. The Apex Court has held thus:

"51.....
That is why sub-section (3) says that the accused shall not render himself liable to punishment if he gives false answers. Then comes sub-section (4) which reads:

"313.(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."

Thus the answers given by the accused in response to his examination under Section 313 can be taken into consideration in such inquiry or trial. This much is clear on a plain reading of the above sub-section. Therefore, though not strictly evidence, sub-section (4) permits that it may be taken into consideration in the said inquiry or trial. See State of Maharashtra v. R. B. Chowdhari 7. This Court in the case of Hate Singh Bhagat Singh v. State of M.B. held that an answer given by an accused under Section 313 examination can be used for proving his guilt as much as the evidence given by a prosecution witness. In Narain Singh V. State of Punjab this Court held that if the accused confesses to the commission of the offence

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

> *with which he is charged the Court may, relying upon that confession, proceed to convict him. To state the exact language in which the three Judge bench answered the question it would be advantageous to reproduce the relevant observations at pages 684-685:"*

Thereafter, the Apex Court proceeded to reproduce the relevant part of its decision in the case of Narain Singh (Supra) which we have quoted earlier.

30. After quoting Narain Singh (Supra), the Apex Court proceeded to hold thus:

> *Sub-section (1) of Section 313 corresponds to sub-section (1) of Section 342 of the old Code except that it now stands bifurcated in two parts with the proviso added thereto clarifying that in summons cases where the presence of the accused is dispensed with his examination under clause (b) may also be dispensed with. Sub-section (2) of Section 313 reproduces the old sub-section (4) and the present sub-section (3) corresponds to the old sub-section (2) except for the change necessitated on account of the abolition of the jury system. The present sub-section (4) with which we are concerned is a verbatim reproduction of the old sub-section (3). Therefore, the aforestated observations apply with equal force."*
>
> *(Underline added)*

Therefore, the Apex Court specifically reiterated the view taken by the earlier decision of its larger bench in the case of *Narain Singh (Supra)*. The learned counsel appearing for the Appellant relied upon the decision of the Apex Court in the case

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

of *Mohan Singh v. Prem Singh & Another [2003 CRI.L.J.11]*. This decision is rendered by a Bench of two Hon'ble Judges. In paragraph No.32 of the decision, the Apex Court has held thus:

> *"32. In the present case, the exculpatory part of statement of the accused under Section 313 of Cr.P.C. in which he stated that he was attacked by the deceased and his associate, whereupon the villagers rushed for his help and inflicted injuries on the deceased, cannot be outright rejected as false. The inculpatory part of his statement under Section 313 of Cr.P.C., therefore, to the extent of admission of his presence in the compound of Atma Singh when the deceased was attacked, cannot form sole basis of his conviction."*
>
> *(Underline added)*

Thus, the Apex Court was dealing with a case where a part of the statement under Section 313 was an exculpatory statement. It is pertinent to note that in the said decision, the Apex Court has not referred to the Judgment of the larger bench in the case of *Narain Singh (Supra)*. However, the Apex Court has made a reference to another decision of the Constitution Bench in the case of *Nishi Kant Jha v. State of Bihar [1969 Cri. L.J. 571]*. We have perused the said decision of the Apex Court in the case of *Nishi Kant Jha v. State of Bihar (Supra)*. Perusal of the said Judgment shows that the issue whether conviction can be based only on confession of guilt in the statement under Section 342 of the Code of Criminal Procedure, 1898 did not arise for consideration before the Apex Court. In fact, in the said

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

decision, the Apex Court considered its earlier decision in the case of *Narain Singh (Supra)*. The Apex Court held that the Court cannot accept the inclupatory part of the statement of the accused and reject the exculpatory part of his statement. In that context, the Apex Court has considered the law laid down in the case of *Narain Singh (Supra)*. A part of the Judgment in the case of *Narain Singh (Supra)* has been already quoted above while we have dealt with the case of *Dharindar (Supra)*. The relevant part of the paragraph 4 of the said decision in the case of *Narain Singh (Supra)* reads thus:

> *"(4)...*
> *Examination under S-342 is primartly be directed to those matters on which evidence has been led for the prosecution, to ascertain from the accused his version or explanation, if any, of the incident which forms the subject-matter of the charge and his defence. By sub-s(3), the answers given by the accused may "be taken into consideration" at the enquiry or the trial. If the accused person in his examination under S. 342 confesses to the commission of the offence charged against him commission of the offence charged against him the court may, relying upon the confession, proceed to convict him, but if he does not confess and in explaining circumstances appearing in the evidence against him sets up his own version and seeks to explain his conduct pleading that he has committed no offence, the statement of the accused can only be taken into consideration in its entirety. It is not open to the Court to dissect the statement and to pick a part of the statement which may be incriminative, and then to examine whether the explanation furnished by the accused for his conduct is supported by the evidence on the record. If the accused admits to have done an act which would but*

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

for the explanation furnished by him be an offence, the admission cannot be used against him divorced from the explanation."
(Underline supplied)

Thus, the position of law which emerges as stated in the case of *Dharindar (Supra),* is that admission or confession of the accused in the statement under Section 313 of the said Code can be acted upon and the Court can rely on this confession and proceed to convict him. But, the conviction can be based solely on such admission or confession provided the entire statement is inculpatory. Moreover, there is a discretion given to the Court under Sub-Section (4) of Section 313 to the Court to take into consideration the answers as is clear from the use of word "may" in the Sub-Section. Whether the Court can base the conviction solely on such confession depends on the facts of each case. However, while doing so, it is not open to the Court to rely upon the part of the statement which may be inculpatory and then to examine whether the explanation furnished by the accused in the statement is supported by the evidence.

31. In the facts of the present case, it will be necessary to make a reference to the Statement of the Appellant under Section 313 of the said Code. It will be necessary to make a reference to question Nos.10, 13, 17, 19, 35 and the answerers

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

given by the Appellant. The said questions and answers read thus:

> *Q.10: He stated that sample of blood stained earth, the blood stained leaves of Palm tree, sample of plain earth, the dhoti art.9 and chilli powder art.11 all were seized under the panchanama Ex.10. What have you to say about it ?*
> *Ans: All these articles were there.*
>
> *Q.13: P.W.5 Gangubai Gore stated that on the day of the incident at or about 9 a.m. you took your son Bhumayya saying that you were sending him to Dubai. What have you to say about it ?*
> *Ans: I do not know.*
>
> *Q.17: She stated that Photos art. 12 are of your son Bhumayya. What you to say about it ?*
> *Ans: I cannot identify the photos.*
>
> *Q.18: She stated that the full pant Art.5 and Banian Art.3 are of Bhumayya. What have you to say about it ?*
> *Ans: Yes. They are of my son Bhumayya.*
>
> *Q.19: She stated that dhoti Art.9 is of yours. What have you to say about it ?*
> *Ans: Yes. It is true.*
>
> *Q.35: Do you want to say anything more about the incident ?*
> *Ans: I took Bhumayya towards the creek for the purpose of fishing. I killed him there. Then I went to my native place. Bhumayya used to beat his wife and tear clothes. He also used to throw away the foods."*

Perusal of the statement of the Appellant shows that the entire statement is inculpatory.

32. The learned counsel appearing for the Appellant relied

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

upon a decision of the Full Bench of Madras High Court in the case of *Kannammal alias Maunammal [27 Cr.L.J.1926]*. The Full Bench has observed thus:

> *" It seems to us that it would be a salutary amendment of the Indian Law if it were not compulsory to put in such a statement. If there were any danger of prosecutors unfairly keeping back a statement that helped the accused, the Judge is there to insist on its being put in. further, we think it is extremely desirable that some such form of caution as is prescribed by 11 & 12 Victoria should be introduced into the Cr.P.C. The form in which this woman was invited to make a statement by the Committing Magistrate in this case was as follows:-*
>
> *"You have heard all the statements of the prosecution witnesses; you have heard read all the records filed in Court on the side of the prosecution. What explanation do you offer for it."*
>
> *That seems to us a most undesirable method of inviting the accused person to make a statement. He is not warned that it will be usable in evidence against him; he is not warned that, if he does not wish, he need not offer any explanation whatever. We think it is extremely desirable that Magistrates should follow the practice of warning accused persons when they invite their explanation under s. 342 of the Code that they are not obliged to say anything unless they desire to. The object of the section should be to give them an opportunity if they so desire, to explain their conduct and further warn them that anything they say will be put in evidence against them at their trial."*
>
> *(Underline added)*

As the law is that the answers given admitting the guilt in the examination of the accused under Section 313 can form the basis of the conviction, surely before the accused is examined,

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

he must be informed that he can decline to give answers to the questions put to him and that he will not render himself liable for punishment in case he refuses to answer the questions or he gives false answers. The accused has to informed that inculpatory statements made by him may be taken into consideration in the trial. The Court is under an obligation to put the accused to the notice as aforesaid before recording his statement. We find that most of the Sessions Courts in Maharashtra have consistently followed the practice of putting the accused to warning in terms of Sub-Sections (3) and (4) of Section 313 of the said Code before recording the examination of the accused. If the accused is not given the said warning or notice, in a given case, a serious prejudice may be caused to the accused in as much as till Sub-Section (5) of Section 313 was brought on the statute book by Act No.5 of 2009, the advocate appointed by the accused was not entitled to play any role while the statement of the accused is being recorded. Whether prejudice is caused to the accused or not will depend on facts of each case. In the present case, no such warning or notice was given to the Appellant before his examination under Section 313 of the said Code. The statement and the roznama are silent on this aspect. In the present case, we find that the Appellant pleaded as not guilty and, thereafter, his advocate has

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

extensively cross-examined all the witnesses and, therefore, this is a case where serious prejudice has been caused to the Appellant as he was not put to notice that the statements made by him in his examination under Section 313 can be used against him.

33. We have already pointed out that in the facts of the case, the prosecution case which rests only on circumstantial evidence is not at all free from doubt. The circumstances forming the chain have not been established beyond reasonable doubt. Therefore, it is very unsafe to base the conviction on such confessional statement especially when the Appellant was not warned that the statement may be used against him.

34. We have also considered the question of passing a limited order of remand for re-examination of the Appellant under Section 313 of the said Code. However, we may note that the incident is of March/April 1989 which has occurred 23 years back and the evidence of all the witnesses has been recorded in December 1991 and January, 1992. It will be very unjust and unfair to the Appellant if after a span of 20 years, he is required to explain the evidence adduced against him regarding the incident which has occurred 23 years back. In any event, the other evidence which is essentially a circumstantial evidence

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::

does not inspire confidence and the same is not at all free from doubt. The Trial Court has committed an error in relying upon the circumstantial evidence and the confessional statement. Hence, Appeal must be succeed and we pass the following order:

:: O R D E R ::

i. The conviction and sentence of the Appellant for the offence punishable under Section 302 of the Indian Penal Code under the impugned Judgment and order dated 24th February, 1992 is quashed and set aside and the Appellant accused is acquitted of the offence with which he was charged.

ii. Appeal is allowed on the above terms.

iii. The bail bond of the Appellant stands cancelled.

(SHRIHARI P. DAVARE, J.) (A.S. OKA, J.)

Bombay High Court

::: Downloaded on - 07/07/2015 10:30:41 :::