A INSPECTOR OF CUSTOMS, AKHNOOR J & K

V.

YASH PAL AND ANR.

Criminal Appeal No. 447 of 2009

MARCH 6, 2009

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(DR. ARIJIT PASAYAT, D.K. JAIN AND DR. MUKUNDAKAM SHARMA, JJ.)

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985:

C *Sections 8, 21, 41(2) – Heroin – Smuggling of – Seized by Customs Department – Confession before Customs authorities by accused – Trial Court convicting accused – High Court acquitting them – Correctness of – Held: The alleged confession before Customs authorities not brought to the* D *notice of the accused – No infirmity in the order of the High Court to warrant interference – Customs Act, 1962, S.110.*

CODE OF CRIMINAL PROCEDURE, 1973:

Section 313(1)(b) - The word "shall" to be interpreted as E *obligatory on the court and should be complied with when it is for the benefit of the accused – Words and Phrases.*

The respondents were found guilty of offences punishable under Sections 8 and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985, by the trial court. F **However, the High Court acquitted them. Hence the appeal.**

Dismissing the appeal, the Court

HELD: 1. It is well settled that the provision viz. s.313 G **Cr.P.C. 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**

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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 for it. But if the court fails to put the needed question under clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him.[Paras 21, 22] [130-G-H; 131-A-B]

Jai Dev v. State of Punjab AIR 1963 SC 612 – relied on.

Hate Singh Bhagat Singh v. State of Madhya Bharat AIR 1953 SC 468; Bibhuti Bhusan Das Gupta & Anr. Vs. State of West Bengal AIR (1969) SC 381 = (1969) 2 SCR 1041; Usha K. Pillai v. K. Srinivas & Ors. 1993 (3) SCC 208 and Shivaji Sahabrao Bobade v. State of Maharashtra 1973 (2) SCC 793 – referred to.

2. 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. It is clarified 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

A 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?[Para 23] [131-C-F]

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3. 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 C "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 D 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? E [Para 24] [131-F-H; 132-A]

4.1 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 F 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 Session can also G 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 H accused, hook, line and sinker, why not the answers given

by him, in special contingencies, be afforded the same worth. [Para 25] [131-G-H; 132-A-B] A

4.2 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. [Para 26] [132-E-G] B C D

Basav Raj R Patil v. State of Karnataka 2000 (8) SCC 740 and *Keya Mukherjee v. Magma Leasing Ltd. and Ors.* (2008) 8 SCC 447 – relied on.

5. In the instant case there was no reference to any of the incriminating materials. If the foundation of the prosecution case was the alleged confession before the Customs Authorities, that material was not brought to the notice of the accused persons. Thus, there is no infirmity in the impugned judgment to warrant interference. [Para 28] [133-A-B] E F

Case Law Reference

AIR 1953 SC 468	referred to	Para 12
AIR (1969) SC 381 = (1969) 2 SCR 1041	referred to	Para 14 G
1993 (3) SCC 208	referred to	Para 17
1973 (2) SCC 793	referred to	Para 18 H

A	**AIR 1963 SC 612**	**relied on**	**Para 20**
	2000 (8) SCC 740	**relied on**	**Para 27**
	(2008) 8 SCC 447	**relied on**	**Para 27**

B CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 447 of 2009

From the Judgement and Order dated 11.10.2002 of the High Court of Jammu and Kashmir at Jammu in Criminal Appeal No. 17 of 1999.

C K. Radhakrishnan, Sanjeev K. Bhardwaj, H.R. Rao, Anil Katiyar, B. Krishna Prasad, for the Appellant.

S.K. Bhattacharya, for the Respondent.

The Judgement of the Court was delivered by

D **DR. ARIJIT PASAYAT, J.**

1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division E Bench of the Jammu and Kashmir High Court directing acquittal of the respondents who were found guilty of offences punishable under Sections 8 and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short the 'Act').

3. Background facts in a nutshell are as follows:

F On 1st July, 1995 at about 4.15 a.m. Army Patrolling Party, on the other side of Village, Hamirpur Sidhar near DCB end point, noticed suspicious movement of some infiltrators who on being challenged abandoned some suspicious materials and escaped under the cover of darkness. On receipt of this G information, Customs Staff camping at the other side of the village rushed to the spot. Both the army authorities and Custom staff, found some suspicious materials on spot in two salwars and a plastic bag left abandoned in the field near DCB end point. They called two panchs from the area and the three H packages found lying abandoned in the field were opened in

their presence from which 56 packets of light brown powder, each weighing one kg. were recovered and seized by the Custom staff under Section 110 of the Customs Act, 1962 (in short 'Customs Act'). Apart from that, one pair of Chappal and two pairs of shoes total three footwear were also recovered from the spot. Recovered material appeared to be some Narcotic Drug in packets and in yellow brownish paper kept in polythene bags wrapped in cotton cloth bearing stamp marking in Urdu Khadi No.1, No.858 and 223. It was subjected to drug test by the Custom Staff with U.N. Drug test kit and it was confirmed that the material was contraband Morphine Heroin or its derivative. Recovery-cum-seizure memo of the Heroin was prepared and panchnama was drawn on spot. The samples were taken out of the seized material and sent for chemical analysis to FSL, Jammu who in its report revealed that Diactyl Morphine 'Heroin was found present in the samples taken out of the recovered light brown powder. The identity of infiltrators was established through the secret information report recorded prior to the seizure. It was disclosed that the names of two suspects were Hakikat Singh and Yashpal. Recovery of three packages and three pairs of foot wearings were made from the spot. The recovery of three packages and three pairs of foot wearing indicated that third person was also accompanying the two infiltrators.

Yash Pal was summoned by Superintendent, Customs under Section 108 of the Customs Act. He appeared before him and made confessional statement on 27.7.1995 involving himself in smuggling of Heroin and was thereupon arrested. In his voluntary statement of confession, he disclosed the names of two accomplices, namely, Hakikat Singh and Paramjeet Singh and narrated the sequence of events of fetching fifty six Kg. Heroin at Indo Pak border and its carriage upto village Hamirpur Sidhar and on its detection by the Army Patrol, it led to his escape from the scene after abandoning the material and three pairs of foot wear. He also confessed that he was being paid Ra.2000/- by Hakikat Singh @ Kiti and Paramjit Singh

A alias Pamma for carriage of contraband articles. Similarly, on 23rd August, 1995 accused Hakikat Singh also came to be intercepted by the Custom staff, Jammu and he made voluntary statement to the same effect. He confessed that he was being paid Rs.10,000/- for carriage of the material. Paramjit Singh
B did not appear before the Custom authorities. Evidence was collected and complaint was presented before Sessions Judge (Special Judge) by the Inspector of Customs. Accused pleaded not guilty to the charge and were put to trial. The third accused was proceeded against separately. The learned trial Court after
C appreciating the evidence led by the parties came to the conclusion that accused have committed the offences punishable under Sections 8 and 21 of the Act and recorded conviction and sentence.

4. The trial Court as noted above found the accused
D respondents guilty and recorded the conviction and imposed sentence.

5. In appeal two stands were taken. First related to non-compliance of Section 41(2) of the Act and the other related to not putting the alleged incriminating materials to the accused
E while the statement was recorded under Section 342 of the old Code of Criminal Procedure (in short 'the Old Code') or Section 313 of the new Code of Criminal Procedure (in short 'the New Code'). The High Court found substance in the second plea and directed acquittal.

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6. In support of the appeal learned counsel for the appellant submitted that though minor errors and omissions in bringing to the notice of the accused the incriminating materials are not vulnerable, in this case a very specific plea relating to the
G foundation of the prosecution case and the evidence on which the reliance was placed was put to the accused. That being so, the High Court is in error by directing acquittal.

7. Stand of the learned counsel for the appellant further that the approach was hyper-technical and was not in line with
H the true intent of Section 342 or Section 313 of the Code.

8. Learned counsel for the respondents on the other hand supported the judgment.

9. It is to be noted that the High Court did not accept the stand relating to non compliance of Section 41(2) of the Act. It only interfered on the ground that the relevant incriminatory materials were not put to the accused when they were being examined.

10. Section 313 Cr.P.C. reads as follows :

"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 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.

(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."

A 11. The forerunner of the said provision in 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
B 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.
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> (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
D 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
E has committed.
> (4) No oath shall be administered to the accused when he is examined under sub-section (1)."

12. Dealing with the position as the section remained in
F the original form under the Old Code, a three-Judge Bench of this Court in *Hate Singh Bhagat Singh v. State of Madhya Bharat* (AIR 1953 SC 468) that :

> "The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are
G 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."

13. Parliament, thereafter, introduced Section 342-A in the
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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.

14. In *Bibhuti Bhusan Das Gupta's* case (supra) another three-Judge Bench dealing with the combined operation of Sections 342 and 342-A of the Old Code made the following observations:

> "Under Section 342-A only the accused can give evidence in person and his pleader's evidence cannot be treated as his. The answers of the accused under Section 342 is intended to be a substitute for the evidence which he can give as a witness under Section 342-A. The privilege and the duty of answering questions under Section 342 cannot 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."

15. 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 540-A, 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.

16. The said recommendation has been followed up by

A 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 B 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 C Commission in the same report:

> "We have, after considering the various aspects of the matter as summarised above, come to the conclusion that Section 342 should not be deleted. In our opinion, the stage has not yet come for it being removed from the D 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."

17. The position has to be considered in the present set-up, particularly after the lapse of more than a quarter of a century E 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 F are mindful of the fact that a two-Judge Bench in *Usha K. Pillai* (1993 (3) SCC 208) 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 IPC. The two-Judge Bench held thus: (SCC G pp.212-13, para 4)

> "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 H

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."

18. Contextually we cannot bypass the decision of a three-Judge Bench of this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* (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: (SCC p. 806, para 16)

"It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of 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

A 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."

19. The above approach shows that some dilution of the rigour of the provision can be made even in the light of a B 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.

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20. 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 D the evidence against him". In *Jai Dev* v. *State of Punjab (AIR1963 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:

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

21. Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit G the court in reaching the final conclusion.

22. 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*) H

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 for it. But if the court fails to put the needed question under clause (*b*) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him.

23. 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?

24. 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

A 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
B deserving such a help?

25. 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.
C 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 Session can also exercise such a right to put in written statements (Section 233(2) of the Code). It is common knowledge that most
D 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
E worth.

26. 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
F 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
G 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 could this be achieved?

27. The above position was indicated in *Basav Raj R Patil*
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v. State of Karnataka (2000 (8) SCC 740) and *Keya Mukherjee* A
v. Magma Leasing Ltd. and Ors. (2008) 8 SCC 447.

28. It is to be noted that in the instant case there was no reference to any of the incriminating materials. If the foundation of the prosecution case was the alleged confession before the Customs Authorities, that material was not brought to the notice B of the accused persons.

29. Above being the position, there is no infirmity in the impugned judgment to warrant interference. The appeal is dismissed.

G.N. Appeal dismissed.