



2) On 22<sup>nd</sup> May 2001, Assistant Sub Inspector Dhian Singh (PW-10), along with other police officials, was on patrolling duty in Ambala Cantonment. They received secret information in the afternoon that three parcels on platform no. 4 and two on platform no. 6 of Ambala Cantonment station contained contraband. The destination of the parcels was Kurail Railway Station. Therefore, a letter was addressed to the Chief Parcel Supervisor about the information with a request to arrange for an inspection. The inspector in charge of the Railway Protection Force (R.P.F) was summoned, and the parcel was shifted to the office of the Chief Parcel Supervisor. The parcels were opened. A total of ten bags were found in five parcels, five bags containing 20 Kilograms of poppy straw each and the other five bags containing 21 Kilograms each. Necessary formalities of drawing panchnama, drawing samples, sealing the parcels, etc., were done. After that, on 28<sup>th</sup> May 2001, Inspector Ram Phal (PW-11) and Dhian Singh (PW-10) visited railway station Kurail, the destination of the parcels. Krishan Dev Joshi (PW-2), the station supervisor, was apprised of the facts of the case. After that, accused no. 2 – Rahish *alias* Munna, approached PW-2 with a railway receipt concerning the parcels in question. As per the instructions of the Police, he was asked to wait. PW-2 immediately informed the police. After some time, the appellant–Nababuddin *alias* Mallu *alias* Abhimanyu, approached PW-2 and enquired about the same parcels. The accused no. 2, and the appellant were asked to wait. They were arrested. Subsequently, on 31<sup>st</sup> May 2001, accused no. 1 was arrested at railway station Ambala Cantt.

It is alleged that accused no. 1 had got the parcel booked. The prosecution examined 10 witnesses. The Special Court recorded a finding that though the contraband was recovered during transit, the persons possessing railway receipt of the parcels shall be deemed to have control over the contraband and, thus, in conscious possession thereof. The High Court has confirmed the conviction.

### **SUBMISSIONS**

**3)** The submission of the learned counsel appearing for the appellant is that he is a rikshaw puller like the accused no. 2. According to the appellant, accused no. 2 had gone to enquire about the arrival of parcels on behalf of the owner to the railway station, and when he failed to return, the appellant went to the railway station to enquire about him. His submission is that even the railway receipt of the parcels was not produced by the appellant but by the accused no. 2. He submitted that the case made out by the prosecution that the railway receipt stood in the name of the appellant had not been put to the appellant in his examination under Section 313 of the Code of Criminal Procedure, 1973 (for short, 'CrPC'). He submitted that even the allegation that the appellant approached the station supervisor to enquire about the parcel was not put to the appellant in his examination under Section 313 of CrPC.

**4)** The learned counsel appearing for the respondent urged that both the material circumstances about which the appellant has made grievance were put to the appellant as

can be seen from question nos. 7 and 15. Her submission is that the railway receipts stood in the name of the appellant (as Abhimanyu), and the very fact that he visited the railway station along with the accused no. 2 to enquire about the parcels containing contraband shows not only his involvement but also constructive possession of the contraband as the railway receipt was in his name. She would submit that there is no reason to find fault with the concurrent findings of fact recorded by the Courts.

**CONSIDERATION OF SUBMISSIONS**

5) We have considered the submissions and perused the notes of evidence of the material prosecution witnesses. PW-2, Krishan Dev Joshi was the station superintendent at the Kurail railway station. On 28<sup>th</sup> May 2001, according to his version, accused no. 2 approached him at the railway station. He was carrying a parcel bilty (railway receipt of parcel booking). He enquired about the arrival of the parcels. He stated that as per the instructions of the police, he told accused no. 2 to sit and wait. After that, the appellant came there and enquired about the same parcels. He has not stated that the appellant either showed or produced the railway receipt. In fact, according to his version, the railway receipt was with accused no.2. In the cross-examination, he was confronted with the suggestion that the appellant was plying a rikshaw. He responded by stating that he was unable to deny the suggestion. However, he volunteered and stated that the appellant had been doing business in selling bed sheets, etc., on his bicycle. PW-10, Dhian Singh stated that the

accused no. 2 came to the railway station with a railway receipt to enquire about the consignment. Meanwhile, the appellant arrived to enquire about the same parcels. In the First Information Report of PW-10, Dhian Singh stated that the railway receipt was produced by accused no. 2. Thus, the incriminating circumstances brought on record against the appellant were:

- a)** The railway receipt of parcels containing contraband was in his name (as Abhimanyu); and
- b)** He, along with the accused no. 2, enquired about the parcels containing contraband.

The finding of the courts is that as the railway receipt was in the name of the appellant, he shall be deemed to be in the custody of the contraband.

**6)** The material prosecution witnesses did not depose that the appellant produced the railway receipt. On the contrary, the said witnesses consistently say that accused no. 2 came to the railway station with the railway receipt.

**7)** In his examination under Section 313 of CrPC, the appellant came out with the following explanation:

“I never got booked any parcel through railways. I have got nothing to do with any parcels. No RR or builty was ever recovered from me. In fact Rahish being rickshaw puller had gone to enquire about the arrival of luggage on behalf of the owner. On his failure to return after 15 minutes I had gone to verify about Rahish, I also being rickshaw puller. Thereafter, I was also made to sit by the police and implicated falsely in the

present case and on seeing us apprehended owner fled from the spot. I am poor and is meeting two times meals with great difficulty.”

**8)** We have carefully perused the examination of the appellant under Section 313 of CrPC. The circumstance against the appellant that he visited the railway station and enquired with the station supervisor about the contraband parcels has not been put to the appellant during his examination under Section 313 of Cr.P.C. Question no. 6 asked to the appellant reads thus:

“Q.6 That on 28.5.2001, Ram Phal Inspector took the investigation of this case in his hand. He also alongwith other police officials went to Railway Station, Kurali, in Punjab and contacted Station Supervisor, Krishan Dutt Joshi there. Meanwhile, your co-accused Rahish alias Munna arrived at Railway Station in the office of station Supervisor and he produced a built Ex.PC to the said station Supervisor and inquired whether their parcels had reached or not. The said station supervisor disclosed the fact to the police. Meanwhile your co accused also came there, what you have to say?

Ans:- It is incorrect.”

Even the alleged circumstance that the railway receipt was in the appellant's name has not been put to him in his statement under Section 313 of CrPC.

**9)** The learned counsel appearing for the respondent relied upon question no. 7, which reads thus:

“Q.7 That station Supervisor produced RR receipt No.732118 to the police, the same

was taken into possession vide recovery memo Ex.PB. You were arrested by the police, what have you to say?

Ans:-It is incorrect, However, police arrested us and planted a false case upon us.”

Even in question no. 7, it is not put to the accused that the railway receipt of the parcel was in his name or that the consignment of parcels containing contraband was booked in his name. Even this material circumstance is not put to the accused.

**10)** Thus, both the circumstances on which the prosecution relied upon against the appellant were not put to him in his examination under Section 313 of CrPC. Even the question no.15 does not incorporate any specific circumstance against the accused.

**11)** Regarding the importance of the examination of the accused under Section 313 of CrPC, we may refer to a judgment of this Court in the case of **Raj Kumar v. State (NCT of Delhi)**<sup>1</sup>. In paragraph 17, this Court has summarised the law on the aspect which reads thus:

“**17.**The law consistently laid down by this Court can be summarised as under:

- (i) It is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction;

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- (ii) The object of examination of the accused under Section 313 is to enable the accused to explain any circumstance appearing against him in the evidence;
- (iii) The Court must ordinarily eschew material circumstances not put to the accused from consideration while dealing with the case of the particular accused;
- (iv) The failure to put material circumstances to the accused amounts to a serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused;
- (v) If any irregularity in putting the material circumstance to the accused does not result in failure of justice, it becomes a curable defect. However, while deciding whether the defect can be cured, one of the considerations will be the passage of time from the date of the incident;
- (vi) In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him; and
- (vii) In a given case, the case can be remanded to the Trial Court from the stage of recording the supplementary statement of the concerned accused under Section 313 of CrPC.
- (viii) While deciding the question whether prejudice has been caused to the accused because of the omission, the delay in raising the contention is only one of the several factors to be considered.”

**12)** Thus, the two circumstances alleged against the appellant will have to be kept out of consideration. There is no other material on record to connect the appellant with the



offence. The incident is of May 2001, and therefore, it will be unjust to subject the appellant to further examination under Section 313 of CrPC at this stage, nearly twenty-two and half years from the date of the alleged recovery of the contraband. As the only material circumstances pleaded by the prosecution against the appellant were not put to him, a serious prejudice has been caused to the appellant's defence. Indeed, the appellant may not have earlier raised the issue regarding the inadequacy of examination under Section 313 of CrPC. However, in this case, the omission goes to the root of the matter as far as the appellant is concerned. According to us, it is a serious and material illegality committed by the Court as the examination of the appellant was not made under Section 313 of CrPC on the aforesaid circumstances.

**13)** The appellant has undergone incarceration of five and a half years. If, after the lapse of more than twenty-two years, he is again subjected to examination under Section 313 of CrPC, it will cause prejudice to him. Therefore, the failure to put two relevant circumstances to the appellant in his examination under Section 313 CrPC will be fatal to the prosecution case. Hence, on this ground, we hold that the appellant's conviction cannot be sustained.

**14)** Therefore, the appeal must succeed, and the impugned judgments of the Trial Court and High Court are set aside only in so far as the present appellant is concerned. We are not disturbing the conviction of the other two accused. The

appellant is acquitted of the offence alleged against him. His bail bonds stand cancelled.

**15)** The appeal is allowed on the above terms.

.....J.  
(Abhay S. Oka)

.....J.  
(Pankaj Mithal)

**New Delhi;**  
**November 24, 2023.**