Supreme Court of India
Gian Chand & Ors vs State Of Haryana on 23 July, 2013
Author: . B Chauhan
Bench: B.S. Chauhan, S.A. Bobde

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2302 of 2010

Gian Chand & Ors.
Appellants

Versus

State of Haryana
Respondent

J U D G M E N T

Dr. B.S. Chauhan, J.

1. This appeal has been filed against the judgment and order dated 4.11.2008 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 392-SB of 2001, by which it has affirmed the judgment and order dated 2.2.2001 passed by the trial court, Sirsa by which the appellants were convicted under the provisions of Section 15 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act). By that order, they were sentenced to undergo RI for a period of 10 years each and to pay a fine of rupees 1 lakh each, and in default of payment of fine, to undergo further RI for a period of one year.

2. Facts and circumstances giving rise to this appeal are that: A. On 5.9.1996, at about 2.15 a.m., Bhan Singh, ASI of Police Station, Rania alongwith other police officials was present in the village Chakka Bhuna in an official jeep. The police party saw a jeep coming at high speed from the opposite direction and asked the said jeep to stop. However, instead of stopping, the driver accelerated the speed of the jeep. This created suspicion in the minds of the police officials. Thus, they chased the jeep. The occupants of the jeep took a U-turn and in that process the jeep struck the wall of a house in the village. The three occupants of the jeep tried to run away but they were caught by the police. The said three occupants were later identified as the appellants. They were asked whether they

would like to be searched before a Gazetted officer or a Magistrate, however, they chose the former. The Deputy Superintendent of Police was called and a search was conducted in his presence. The vehicle had 10 bags containing 41 kg poppy husk each. The police party took samples of 200 grams of poppy husk from each bag and the same was sealed by the Dy.S.P.

B. On the basis of same, an FIR was lodged on 5.9.1996 itself at 3.15 a.m. at the Rania Police Station against the appellants-accused. After investigation, a chargesheet was filed against them and the appellants claimed trial. Hence, the trial commenced.

C. The prosecution led the evidence in support of its case and also produced the case property in the court alongwith the damaged jeep in which the appellants were carrying 410 kg. poppy husk. In the FSL report all positive results were shown. Appellants did not lead any evidence in defence and pleaded that they had falsely been implicated in the crime.

D. After conclusion of the trial, the appellants were convicted and sentenced as referred to hereinbefore vide judgment and order dated 2.2.2001, and the said judgment and order has been affirmed by the High Court vide its judgment and order dated 4.11.2008.

Hence, this appeal.

3. Mr. J.P. Dhanda, learned counsel appearing for the appellants has submitted that no independent witness was examined by the prosecution in the case, though a large number of people had gathered at the place of the alleged incident which led to the appellants- accused being apprehended. No independent witness was involved in preparation of the panchnama of the recovered substances. Further, the prosecution failed to prove that the appellants-accused were in conscious possession of the contraband material. This incriminating circumstance had not even been put to the appellants-accused while recording their statements under Section 313 of Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.). The appellants have already served about 8 years of sentence. Thus, the appeal deserves to be allowed.

4. Per contra, Mr. Brijender Chahar, learned senior counsel appearing for the State has opposed the appeal contending that even if some persons had gathered at the place of occurrence when the appellants were apprehended, nobody was willing to become a witness. Therefore, the prosecution could not examine any independent witness. The case of the prosecution does not deserve to get disbelieved simply because police officials themselves are the witnesses, nor there is any requirement in law that in every case an independent witness should be examined. Further all incriminating material was put to the appellants-accused while recording their statements under Section 313 Cr.P.C. Once it is established that an accused is in possession of contraband substance, the burden to prove that he had no knowledge of the same, shifts to the accused to prove the same. More so, the accused is supposed to explain his conduct while making his statement under Section 313 Cr.P.C. particularly where there are certain presumptions against him under Section 35 of the Act. There are concurrent findings of fact recorded by the courts below. Thus, no interference is called for and the appeal is liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

6. No dispute has been raised regarding the poppy husk recovered from the jeep or the damaged jeep. Further, the appellants did not challenge the result shown in the FSL report wherein the qualitative tests in respect of Meconic Acid, Morphine, Codeine, Thebaine, Papaverine and Narcotine had all been shown as positive.

7. All three occupants, i.e. the appellants abandoned the vehicle just after it dashed against the wall and made a desperate attempt to escape but were apprehended by the police party. The Trial Court examined the matter elaborately and after appreciating the evidence of the witnesses, came to the conclusion that there were no discrepancies in the statements of the three officials, i.e. prosecution witnesses. Their statements inspired tremendous confidence and thus, there was no reason for the court to discard the testimony of the official witnesses. The grievance had also been raised before the Trial Court that the chit carrying contents of case property was not available on the bags. However, this did not give any benefit to the accused as there was overwhelming evidence on record to prove that the seizure of ten bags had actually been made from the accused. Further the contents of the samples sent for chemical analysis gave positive results on analysis in the laboratory.

8. The High Court dealt with the issue elaborately regarding knowledge i.e. conscious possession, and held as under:

> There were only three occupants in the jeep, at the relevant time. As many as 10 bags, each containing 41 kgs. Poppy husk, were lying in the jeep. It was not a small quantity of poppy husk,..and could escape the notice of the accused. It was a big haul of poppy husk, The accused were having special means of knowledge, with regard to the bags, containing poppy husk, lying in the jeep. It was for the accused to explain, as to how the bags, containing poppy husk, were being transported. Not only this, the conduct of the accused, is also relevant, in this case. They instead of stopping the jeep, when the signal was given, by the policy party, accelerated the speed thereof and sped away towards Village Keharwala. It was only after hot chase, given by the members of the police party, in their jeep, that the driver of the jeep got nervous, could not properly negotiate the turn and lost control, as a result whereof, the said jeep struck against the wall and stopped. In case, there was no contraband, in the jeep, and the accused were not in the knowledge of the same then what was the necessity of speeding away the jeep, was for them to explain. This material circumstance goes against them. Under these circumstances, it could be said that they were in possession of, and in control over the bags, lying in the jeep.
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> Once the possession of the accused, and their control over the contraband, was proved, then statutory presumption under Section 54 and 35 of the Act, operated against them, that they were in conscious possession thereof. Thereafter, it was for them, to rebut the statutory presumption, by leading cogent and convincing evidence. However, the appellants, failed to rebut the said presumption either during the

> course of cross- examination of the prosecution witnesses, or by leading defence evidence. (Emphasis added)

9. Further, in their statement under Section 313 Cr.P.C., the appellants took the plea of false implication only and the appellants miserably failed to rebut the statutory presumption, referred to above. The High Court further held as under:-

> In the instant case, no plea was taken up by the accused, during the course of trial or in their statements, under Section 313 Cr.P.C. that they were not the occupants of the jeep. No plea was taken by the accused that they were not aware of the contents of the bags, lying in the jeep. No plea was taken up by the driver of the jeep that he was taking the bags, containing poppy husk, as per the directions of the owner thereof, and did not know, as to what was contained in the bags. No plea was taken up, by the other occupants, of the jeep, that they were merely labourers engaged for loading and unloading the bags, containing poppy husk, at the destination. No plea was taken up by the accused, other than the driver, sitting in the jeep, that they only took lift therein, and as such were passengers. They did not take up the plea, that the driver of the jeep knew them earlier and since they could not find any public transport, for going to their villages, he gave them lift therein on friendly basis. The facts of the cases, relied upon by the Counsel for the appellants, and referred to, in this paragraph, being distinguishable, from the facts of the instant case, no help can be drawn by the counsel for the appellants therefrom. In this view of the matter, the submission of the counsel for the appellants, being without merit, must fail, and the same stands rejected.

10. So far as the condition of the property is concerned, the court observed that as the witnesses have been examined after four years from the date of recovery. The case property remained lying in the malkhana. On account of shortage of space, in the malkhanas, the case properties cannot be stacked properly and the bags, containing poppy husk, underwent the process of decay, however, did not mean that the case property produced in the court, did not relate to the instant case. There was nothing on record to show that the said case property had been tampered with.

11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors., AIR 2013 SC 1204 observing as under:

> 31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him

> during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses. (Emphasis supplied) (See also: Ravinder Kumar Sharma v. State of Assam & Ors., AIR 1999 SC 3571; Ghasita Sahu v. State of Madhya Pradesh, AIR 2008 SC 1425; and Rohtash Kumar v. State of Haryana, JT 2013 (8) SC 181)

12. The defence did not put any question to the Investigating Officer in his cross-examination in respect of missing chits from the bags containing the case property/contraband articles. Thus, no grievance could be raised by the appellants in this regard.

13. The appellants were found travelling in a jeep at odd hours in the night and the contraband material was found. Therefore, the question arises whether they can be held to have conscious possession of the contraband substances.

This Court dealt with this issue in Madan Lal & Anr. v. State of Himachal Pradesh AIR 2003 SC 3642, observing that Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences and penalties for possession of such articles. Undoubtedly, in order to bring home the charge of illicit possession, there must be conscious possession. The expression possession has been held to be a polymorphous term having different meanings in contextually different backgrounds. Therefore, its definition cannot be put in a straitjacket formula. The word conscious means awareness about a particular fact. It is a state of mind which is deliberate or intended. Possession in a given case need not be actual physical possession and may be constructive i.e. having power and control over the article in case in question, while the person to whom physical possession is given holds it subject to that power or control. The Court further held as under:

> Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act. (Emphasis added)

14. From the conjoint reading of the provisions of Section 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have

committed the offence under the relevant provisions of the Act until the contrary is proved. According to Section 35 of the Act, the court shall presume the existence of mental state for the commission of an offence and it is for the accused to prove otherwise.

Thus, in view of the above, it is a settled legal proposition that once possession of the contraband articles is established, the burden shifts on the accused to establish that he had no knowledge of the same.

15. Additionally, it can also be held that once the possession of the contraband material with the accused is established, the accused has to establish how he came to be in possession of the same as it is within his special knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Evidence Act, 1872 (hereinafter referred to as `the Act 1872).

16. In State of West Bengal v. Mir Mohammad Omar & Ors. etc. etc., AIR 2000 SC 2988, this Court held that if the fact is specifically in the knowledge of any person, then the burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused.

(See also: Shambhu Nath Mehra v. The State of Ajmer AIR 1956 SC 404; Gunwantlal v. The State of Madhya Pradesh AIR 1972 SC 1756; Sucha Singh v. State of Punjab AIR 2001 SC 1436; Sahadevan @ Sagadevan v. State rep. by Inspector of Police, Chennai AIR 2003 SC 215; Durga Prasad Gupta v. The State of Rajasthan thr. CBI, (2003) 12 SCC 257; Santosh Kumar Singh v. State thr. CBI, (2010) 9 SCC 747; Manu Sao v. State of Bihar (2010) 12 SCC 310; Neel Kumar alias Anil Kumar v. State of Haryana (2012) 5 SCC 766).

17. Learned counsel for the appellants has placed much reliance upon the judgment of this Court in State of Punjab v. Hari Singh & Ors., AIR 2009 SC 1966, wherein placing reliance upon the earlier judgment in Avtar Singh & Ors. v. State of Punjab, AIR 2002 SC 3343, it was held that if the incriminating material i.e., the issue relating to possession had not been put to the accused under Section 313 Cr.P.C. the principles of natural justice stand violated and the judgment stands vitiated.

18. So far as the judgment in Avtar Singh (supra) is concerned, it has been considered by this Court in Megh Singh v. State of Punjab AIR 2003 SC 3184. The Court held that the circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases or between two accused in the same case. Each case depends on its own facts and a close similarity between one case and another is not enough because a single significant detail may alter the entire aspect. It is more pronounced in criminal cases where the backbone of adjudication is fact

based. In Avtar Singh (supra), the contraband articles were being carried in a truck. There were several persons in the truck. Some of them fled and it could not be established by evidence that anyone of them had conscious possession. While the accused was examined under Section 313 Cr.P.C. the essence of accusations was not brought to his notice, particularly with respect to the aspect of possession. It was also noticed that the possibility of the accused persons being labourers of the truck was not ruled out by evidence. Since the decision was rendered on special consideration of several peculiar factual aspects specially noticed in that case, it cannot be of any assistance in all the cases.

19. Therefore, it is evident that Avtar Singh (supra) does not lay down the law of universal application as it had been decided on its own facts.

20. So far as Section 313 Cr.P.C. is concerned, undoubtedly, the attention of the accused must specifically be brought to inculpable pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. A three-Judge Bench of this Court in Wasim Khan v. The State of Uttar Pradesh, AIR 1956 SC 400; and Bhoor Singh & Anr. v. State of Punjab, AIR 1974 SC 1256 held that every error or omission in compliance of the provisions of Section 342 of the old Cr.P.C. does not necessarily vitiate trial. The accused must show that some prejudice has been caused or was likely to have been caused to him.

21. In Asraf Ali v. State of Assam, (2008) 16 SCC 328, a similar view has been reiterated by this Court observing that all material circumstances appearing in the evidence against the accused are required to be put to him specifically and failure to do so amounts to serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22. In Shivaji Sahebrao Bobade & Anr. v. State of Maharashtra, AIR 1973 SC 2622, a three-Judge Bench of this Court held that basic fairness of a criminal trial 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.

23. In Paramjeet Singh @ Pamma v. State of Uttarakhand, AIR 2011 SC 200, after considering large number of cases on the issue, this Court held as under:-

> Thus, it is evident from the above that the provisions of Section 313 Cr. P.C make it obligatory for the court to question the accused on the evidence and circumstances against him so as to offer the accused an opportunity to explain the same. But, it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance, instead he must show that such non-examination has actually and materially prejudiced him and has resulted in the failure of justice. In other words, in the event of an inadvertent omission on the part of the court to question the accused on any incriminating circumstance cannot ipso facto vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the court (Emphasis added)

24. In the instant case the issue relating to non-compliance of the provisions of Section 313 Cr.P.C. has not been raised before the High Court, and it is raised for the first time before this Court. Learned counsel for the appellants could not point out what prejudice has been caused to them if the fact of conscious possession has not been put to them. Even otherwise such an issue cannot be raised in the existing facts and circumstances of the case wherein the burden was on the accused to show how the contraband material came to be found in the vehicle which was driven by one of them and the other two were travelling in that vehicle.

25. The next question for consideration does arise as to whether it is necessary to examine an independent witness and further as to whether a case can be seen with doubt where all the witnesses are from the police department.

In Rohtash v. State of Haryana JT 2013 (8) SC 181, this court considered the issue at length and after placing reliance upon its earlier judgments came to the conclusion that where all witnesses are from the police department, their depositions must be subject to strict scrutiny. However, the evidence of police officials cannot be discarded merely on the ground that they belong to the police force, and are either interested in the investigating or the prosecuting agency. However, as far as possible the corroboration of their evidence on material particulars should be sought. The Court held as under:

> Thus, a witness is normally considered to be independent, unless he springs from sources which are likely to be tainted and this usually means that the said witness has cause, to bear such enmity against the accused, so as to implicate him falsely.

In view of the above, there can be no prohibition to the effect that a policeman cannot be a witness, or that his deposition cannot be relied upon. (See also: Paras Ram v. State of Haryana, AIR 1993 SC 1212; Balbir Singh v. State, (1996) 11 SCC 139; Akmal Ahmad v. State of Delhi, AIR 1999 SC 1315; M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence, AIR 2003 SC 4311; and Ravinderan @ John v. Superintendent of Customs, AIR 2007 SC 2040).

26. In State, Govt. of NCT of Delhi v. Sunil & Anr. (2001) 1 SCC 652, this Court examined a similar issue in a case where no person had agreed to affix his signature on the document. The Court observed that it is an archaic notion that actions of the police officer should be viewed with initial distrust. At any rate, the court cannot begin with the presumption that police records are untrustworthy. As a proposition of law the presumption should be the other way around. The wise principle of presumption, which is also recognised by the legislature, is that judicial and official acts are regularly performed. Hence, when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe that version to be correct if it is not otherwise shown to be unreliable. The burden is on the accused, through cross-examination of witnesses or through other materials, to show that the evidence of the police officer is unreliable. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume that police action is unreliable to start with, nor to jettison such action merely

for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions.

27. In Appabhai & Anr. v. State of Gujarat AIR 1988 SC 696, this court dealt with the issue of non-examining the independent witnesses and held as under:

> The prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether -in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties.

28. The principle of law laid down hereinabove is fully applicable to the facts of the present case. Therefore, mere non-joining of an independent witness where the evidence of the prosecution witnesses may be found to be cogent, convincing, creditworthy and reliable, cannot cast doubt on the version forwarded by the prosecution if there seems to be no reason on record to falsely implicate the appellants.

29. In the instant case at the time of incident some villagers had gathered there. The Investigating Officer in his cross-examination has made it clear that in spite of his best persuasion, none of them were willing to become a witness. Therefore, he could not examine any independent witness.

Section 114 of the Act 1872 gives rise to the presumption that every official act done by the police was regularly performed and such presumption requires rebuttal. The legal maxim omnia praesumuntur rite it dowee probetur in contrarium solenniter esse acta i.e., all the acts are presumed to have been done rightly and regularly, applies. When acts are of official nature and went through the process of scrutiny by official persons, a presumption arises that the said acts have regularly been performed.

In view of the above, the submissions of the learned counsel for the appellants in this regard, are held to be without any substance.

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30. In view of the above, the appeal does not present special features warranting any interference by this court. Appeal is devoid of any merit and is, accordingly, dismissed.

.....J. (DR. B.S. CHAUHAN)

.....J.

(S.A. BOBDE) NEW DELHI;

July 23, 2013
