Topic NO. 4

SCOPE AND SIGNIFICANCE OF EXAMINATION OF ACCUSED U/S. 313 CR.P.C

The accused is examined in every inquiry or trial, enabling him or her to personally explain the circumstances appearing in evidence against them. Section 313 of the CrPC. empowers the court to examine the accused to fulfill the principle of natural justice - ***audi alteram partem*** (no one should be condemned unheard). The purpose is to give the accused an opportunity to explain incriminating circumstances. However, such statements cannot be used as a basis for conviction. In circumstantial evidence cases, it is crucial for assessing the completeness of the evidence chain. This paper elaborates on the scope, significance, and evidentiary value of examination under Section 313 CrPC.

I. **Introduction: Scope and Object of Section 313 Cr. PC (Section- 351 of BNSS)**

- Section 313 Cr. PC places a duty on courts to question the accused during inquiry/trial about each material circumstance in the prosecution's evidence.
- These questions must be specific and clear; failure to do so may vitiate the trial if prejudice is shown.
- The purpose is a direct dialogue between the court and the accused, ensuring a fair trial.
- Courts must not use the accused's statement as sole evidence for conviction.

- Case Reference: ***Tanviben Pankaj Kumar Divetia v. State of Gujarat*** **(1997) 7 SCC 156 (Para 47)** conviction was vitiated due to not drawing the accused's attention to specific incriminating facts.

II. Procedure for Recording Examination under Section 313 Cr. PC:

- **Section 313(1)(a)**: Court *may* question the accused at any stage.
- **Section 313(1)(b)**: Court *shall* question after prosecution evidence and before defence.
- **Proviso**: In summons cases, personal appearance/examination can be dispensed.
- No oath is administered during this process.
- Accused is not liable for punishment for refusing to answer or for false answers.
- Answers can be used in the current or other proceedings, but not as substantive evidence.
- The court may seek assistance from the prosecutor/defence in preparing questions.
- **Key Considerations for the Court:**
  - Questions must be based on prosecution evidence.
  - Must be clear, unambiguous, and account for the accused's literacy and understanding.
  - Incriminating evidence must be individually addressed per accused.
  - Each question and answer must be recorded separately.

III. Evidentiary Value of 313 Cr. PC Examination:

- Accused is not under oath; thus, statements are not *evidence* under Section 3 of the Evidence Act.

- Court can use them to assess truthfulness or contradictions in prosecution's case.

- **Case References:**
  - *Sanatan Naskar v. State of West Bengal* (AIR 2010 SC 3507): 313 Cr. PC is not a mere formality.
  - *Mohan Singh v. Prem Singh* (AIR 2002 SC 3582): Accused's statement is not substantive evidence.
  - *Dehal Singh v. State of H.P.* (AIR 2010 SC 3594): Accused can't be cross-examined; thus, statement is not evidence.
  - *State of M.P. v. Ramesh* (2011) 4 SCC 786: Conviction cannot rest solely on 313 Cr. PC statement.

IV. Effect of Non-Compliance:

- Non-examination under Section 313 Cr. PC does *not* automatically vitiate trial unless prejudice is shown.
- Appellate court can remedy omissions.
- Accused must demonstrate how non-examination caused failure of justice.
- **Case References:**
  - *State (NCT) of Delhi v. Dharampal* (AIR 2001 SC 2924)
  - *Gyan Chand v. State of Haryana* (AIR 2013 SC 3395)
  - *Maheshwar Tigga v. State of Jharkhand* (2020) 10 SCC 108

V. When Examination under Section 313 Cr. PC is Not Necessary

- **Not required when:**
  - No incriminating evidence exists.
  - Accused pleads guilty.
  - Accused has admitted facts voluntarily.

- Improper or irrelevant questions may be ignored.

VI. Conclusion:

- Section 313 Cr. PC is based on principles of fairness and natural justice.
- Incriminating evidence must be clearly put to the accused.
- Although the accused's statement is not substantive evidence, it assists in assessing prosecution evidence.
- Courts must not use such statements to fill in prosecution gaps.
- Statements can support, but not substitute, prosecution evidence.

(2010) 8 Supreme Court Cases 249 : (2010) 3 Supreme Court Cases (Cri) 814 : 2010 SCC OnLine SC 710

(BEFORE DR B.S. CHAUHAN AND SWATANTER KUMAR, JJ.)

SANATAN NASKAR AND ANOTHER . . Appellants;

Versus

STATE OF WEST BENGAL . . Respondent.

Criminal Appeal No. 686 of 2008[±], decided on July 8, 2010

A. Criminal Procedure Code, 1973 — S. 313 — Scope and object, restated — Admissibility of statement made under, in evidence — Extent and factors — Held, scope of S. 313 is wide and it is not a mere formality — Answers given thereunder by accused are relevant for finding truth and examining veracity of prosecution case but are not strictly evidence and can be used within permissible limits envisaged by CrPC — Courts may rely on portion of statement of accused and find him guilty on consideration of other evidence against him led by prosecution, however, such statements should not be considered in isolation but in conjunction with evidence adduced by prosecution — Accused cannot be convicted merely on basis of

S. 313 statement as it is not substantive evidence — Object of S. 313 is to put all incriminating evidence to accused so as to provide him opportunity to explain the same and also to permit him to put forward his own version — Option lies with accused to maintain silence coupled with simpliciter denial or, in the alternative, to explain his version and reasons for his alleged involvement in commission of crime — However, if statements made are false, court is entitled to draw adverse inferences and pass consequential orders — On facts held, accused failed to offer any explanation as regards alleged circumstances and bare denial or lack of knowledge cannot tilt verdict in their favour — Rather, their answers supported prosecution version or reflected element of falsehood — Hence, court entitled to draw adverse inference against them — Evidence Act, 1872 — S. 114 Ill. (g) — Criminal Trial — Circumstantial evidence — Failure to explain incriminating circumstances

(Paras 19 to 25 and 29)

Vijendrajit Ayodhya Prasad Goel v. *State of Bombay*, (1953) 1 SCC 434 : AIR 1953 SC 247 : 1953 Cri LJ 1097, *relied on*

B. Evidence Act, 1872 — S. 27 — Admissibility of recoveries in evidence

made pursuant to disclosures by accused — Contention that confessions extracted by police officers being illegal and inadmissible, alleged recoveries made in furtherance thereto were also inadmissible — Held, no confessional statement made to police was relied upon by courts below to convict accused but only objects recovered in furtherance of statement of accused were relied upon to complete chain of events — Moreover, said objects were duly identified by owners during investigation as well as during trial — Hence, recovered objects were admissible — Criminal Trial — Circumstantial evidence — Recovery of crime articles/incriminating articles/other articles

(Paras 12 to 14)

Anter Singh v. *State of Rajasthan*, (2004) 10 SCC 657 : 2005 SCC (Cri) 597; *Salim Akhtar* v. *State of U.P.*, (2003) 5 SCC 499 : 2003 SCC (Cri) 1149, *relied on*

C. Criminal Trial — Circumstantial evidence — Absence of eyewitnesses — Effect — Held, doctrine of circumstantial evidence is brought into aid where there are no eyewitnesses to the occurrence and it is for prosecution to establish complete chain of circumstances leading to definite conclusion pointing towards guilt of accused — Accused not entitled to acquittal merely because there were no eyewitnesses to occurrence

(Paras 1 and 27)

Sharad Birdhichand Sarda v. *State of Maharashtra*, (1984) 4 SCC 116 : 1984 SCC (Cri) 487; *Anant Chintaman Lagu* v. *State of Bombay*, AIR 1960 SC 500 : 1960 Cri LJ 682; *Dayanidhi Bisoi* v. *State of Orissa*, (2003) 9 SCC 310 : 2003 SCC (Cri) 1798, *relied on*

Sudama Pandey v. *State of Bihar*, (2002) 1 SCC 679 : 2002 SCC (Cri) 239, *distinguished on facts*

Hanumant Govind Nargundkar v. *State of M.P.*, (1952) 2 SCC 71 : AIR 1952 SC 343 : 1953 Cri LJ 129; *Tufail* v. *State of U.P.*, (1969) 3 SCC 198 : 1970 SCC (Cri) 55; *Ram Gopal* v. *State of Maharashtra*, (1972) 4 SCC 625; *Shivaji Sahabrao Bobade* v. *State of Maharashtra*, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033, *cited*

D. Penal Code, 1860 — Ss. 302/34 — Murder with robbery — Circumstantial evidence — Conviction justified

(Paras 16, 32 and 33)

E. Criminal Trial — Circumstantial evidence — Clues and Tell-Tale Signs — Fingerprints and footprints — Inconclusive forensic report regarding footprints of accused near place of occurrence — Held, insignificant, since IO had clearly stated that at place of occurrence, which

was later sealed by him, there were lot of footprints as many persons had gathered there — Such small discrepancy cannot be of much advantage to appellants inasmuch immaterial contradictions or variations are bound to arise in the investigation and trial of the case for various factors attributable to none

(Para 18)

State of Haryana v. *Ram Singh*, (2002) 2 SCC 426 : 2002 SCC (Cri) 350, *relied on*

Appeal dismissed

P-D/A/46484/CR

Advocates who appeared in this case:

B.S. Malik, Senior Advocate (Mehtab Ahmed and Aftab Ali Khan, Advocates) for the Appellants;

Avijit Bhattacharjee, Advocate, for the Respondent.

Chronological list of cases cited ***on page(s)***

1. (2004) 10 SCC 657 : 2005 SCC (Cri) 597, *Anter Singh* v. *State of Rajasthan* 256*b-c*, 256*d*

2. (2003) 9 SCC 310 : 2003 SCC (Cri) 1798, *Dayanidhi Bisoi* v. *State of Orissa* 262*c-d*

3. (2003) 5 SCC 499 : 2003 SCC (Cri) 1149, *Salim Akhtar* v. *State of U.P.* 257*a*

4. (2002) 2 SCC 426 : 2002 SCC (Cri) 350, *State of Haryana* v. *Ram Singh* 257*g*

5. (2002) 1 SCC 679 : 2002 SCC (Cri) 239, *Sudama Pandey* v. *State of Bihar* 262*e*

6. (1984) 4 SCC 116 : 1984 SCC (Cri) 487, *Sharad Birdhichand Sarda* v. *State of Maharashtra* 260*e*

7. (1973) 2 SCC 793 : 1973 SCC (Cri) 1033, *Shivaji Sahabrao Bobade* v. *State of Maharashtra* 261*c-d*

8. (1972) 4 SCC 625, *Ram Gopal* v. *State of Maharashtra* 260*f-g*

9. (1969) 3 SCC 198 : 1970 SCC (Cri) 55, *Tufail* v. *State of U.P.* 260*f*

10. AIR 1960 SC 500 : 1960 Cri LJ 682, *Anant Chintaman Lagu* v. *State of Bombay* 262*a-b*

11. (1953) 1 SCC 434 : AIR 1953 SC 247 : 1953 Cri LJ 1097, *Vijendrajit Ayodhya Prasad Goel* v. *State of Bombay* 259*e*

12. (1952) 2 SCC 71 : AIR 1952 SC 343 : 1953 Cri LJ 129, *Hanumant Govind Nargundkar* v. *State of M.P.* 260*f*, 260*f-g*

The Judgment of the Court was delivered by

SWATANTER KUMAR, J.— This case is a typical example where conviction is entirely based upon circumstantial evidence. It is a settled principle of law that doctrine of circumstantial evidence is brought into aid where there are no witnesses to give eye version of the occurrence and it is for the prosecution to establish complete chain of circumstances and events leading to a definite conclusion that will point towards the involvement and guilt of the accused.

2. The challenge in the present appeal is to the concurrent judgments of conviction passed by the learned Sessions Judge as well as the High Court, primarily, on the ground that the prosecution has (*sic* not) been able to establish by leading cogent and reliable evidence and the chain of circumstances leading to the commission of the offence by the accused persons. The challenge, primarily, is that findings of the Court are erroneous in law and on the facts of the case.

3. According to the appellant-accused, the prosecution has not been able to establish the guilt beyond reasonable doubt. Secondly, it is submitted that the confessions, alleged to have been recorded by the police officer on the basis of which recoveries were effected are contrary to law and, therefore, could not be the basis of the conviction of the appellants. For these reasons the appellants claim acquittal from

charge.

4. To examine the merits of these contentions reference to the case of the prosecution and the facts, as they emerged from the record, would be necessary. On 28-4-1999 at Police Station Jadavpur, a case was registered under Sections 302/34 of the Penal Code, 1860 (hereinafter referred to as "IPC") against unknown miscreants for causing death of one Smt Phool Guha, wife of Dr. Ashim Guha, resident of 11/1, East Road within Jadavpur Police Station. This case was registered on the basis of the complaint made by Dr. Ashim Guha (Ext. P-1) which reads as under:

"To

The Officer-in-charge

Jadavpur PS

Distt. South 24 Parganas

Sir,

This is to inform you, that on 28-4-1999 at around 2015 hrs myself along with my son Debmalya and daughter-in-law Indira left for Gariahat for some personal work. My wife Smt Phool Guha was in the house alone. At 2135 hrs we all returned home and noticed a large gathering in front of our house. I found my wife lying dead inside the room of my daughter-in-law having her tongue protruded and some marks of bruises could be detected on her body and blood was seen trickling out of the right angle of her mouth. It was also noticed that the assailants after (illegible) the murder of my wife, ransacked both the rooms and the household articles were scattered.

It appeared that the assailants entered through the main door after obtaining the keys and the lock along with the key was found in the staircase.

I, therefore, request you to kindly take necessary action and do the needful to (illegible) the miscreants.

Yours faithfully,

sd/-

Asim Kumar Guha"

5. As is evident from the above complaint that Dr. Ashim Guha, husband of the deceased, his son Debmalya and daughter-in-law Indira had left for Gariahat on 28-4-1999 at about 8.15 p.m. The deceased was all alone at home. When they returned home at about 9.30 p.m. they found a large gathering in front of the house. Upon entering the house, they found that Phool Guha was lying dead inside the room of her daughter-in-law with tongue protruded and with some marks of bruises on her body and blood

trickling out of her mouth. It transpired that the assailants committed the murder of his wife and had ransacked both the rooms as the household articles were lying scattered.

6. Mrinal Kanti Roy, the investigating officer, who was later examined as PW 13, commenced his investigation. He called for experts including dog squad. The photographs were taken. The dog squad was brought to the place of occurrence. After sniffing the place of occurrence, taking the round of the house and also sniffing the handkerchief lying on the face of the deceased, the dogs could not identify anyone present there. Thereafter inquest of the deceased was taken with the help of the relatives. The body was taken to Mominpur Police Morgue by the constable where the post-mortem of the deceased was conducted and the report is Ext. 8. From the place of occurrence certain articles were recovered and seizure memos were prepared whereafter both the rooms at the upper floor of the house were locked. The saliva and bloodstains, where the body was found, were also seized by scraping the floor and separate seizure memo was prepared and marked as Ext. 3.

7. After some enquiry and investigation, the investigating officer arrested Sanatan Naskar, Appellant 1, on 8-7-1999 from Village Khasiara. He admitted his guilt in commission of the crime as well as identified the handkerchief recovered as his own. During investigation this appellant made a statement which led to the recovery of wristwatches which were allegedly looted from the house of the deceased. He also informed about the involvement of accused Mir Ismile, Appellant 2, who was arrested on 11-7-1999 from Jugi Battala and he also, during investigation, made a statement leading to the recovery of two wristwatches as well as camera. The watches were recovered vide recovery memo, Ext. 6. The camera was recovered on the statement of the said accused from Village Jhijrait for which the seizure memo, Ext. 5 was also prepared. An attempt was made to recover jewellery from the shop, which was raided, but nothing could be recovered. The investigating officer then recorded the statements of number of witnesses, but in particular Jahar Chatterjee @ Kakuji (PW 5), Indira Guha (PW 6), Ali Anam (PW 8) and Biplab Talukdar (PW 9) respectively and after completion of the investigation, a charge-sheet under Sections 302/411/34 IPC was filed before the court of competent jurisdiction.

8. The case was committed to the Court of Session by the learned Magistrate vide order dated 28-11-1999. After trial and recording of the

statements of the accused under Section 313 of the Criminal Procedure Code (hereinafter referred to as "CrPC") the learned Sessions Judge, by a detailed judgment, convicted both the accused and punished them as under:

> "Both the convicts are produced from JC. They are given hearing with regard to question of sentence under Section 235(2) CrPC. The convicts are informed that the sentence under Sections 302/34 IPC which has been established yesterday is life imprisonment or death penalty and the sentence for committing robbery under Section 392 IPC is imprisonment for 10 years and the sentence for having possession of the

looted property under Section 411 IPC is 3 years. The convicts plead mercy. Heard learned Pubic Prosecutor and learned defence counsel in this regard.

> As the convicts are found guilty under Sections 302/34 IPC the minimum punishment is imprisonment for life and this is not a case of the rarest of the rare case and as such the death penalty is not called for. Accordingly, both the convicts are sentenced to RI for life. With regard to offence of robbery under Section 392 IPC the convicts are sentenced to rigorous imprisonment for five years. With regard to offence under Section 411 IPC for possessing the looted properties the convicts are sentenced to rigorous imprisonment for one year. All the sentences shall run concurrently."

9. Aggrieved from the judgment of guilt and order of sentence dated 6-12-2000, the appellants filed an appeal before the High Court. The High Court declined to interfere with the judgment of the learned trial court. Even on the question of sentence the High Court found that adequate and just sentence had been awarded. In other words, the High Court even declined to interfere on the question of quantum of sentence and dismissed the appeal vide order dated 7-2-2005 giving rise to the filing of the present appeal under Article 136 of the Constitution.

10. Since we have noticed, at the very opening of the judgment, that it is a typical case of circumstantial evidence and the entire challenge to the concurrent judgments is based on the facts that the chain of events has not been completely proved by the prosecution beyond reasonable doubt. Thus, the appellants are entitled to the benefit of doubt on the facts of the present case. Besides challenging the recoveries alleged to have been made from and/or at the instance

of the accused, it was contended that the same are hit by the provisions of Section 27 of the Evidence Act (hereinafter referred to as "the Act"). That being the sole and paramount circumstance, which had weighed with the courts for convicting the appellants, the judgment under appeal is liable to be set aside.

11. We are of the considered view that the chain of events and circumstances has been quite aptly stated by the trial court in its judgment which are as follows:

> "Thus, therefore, it is now settled that the deceased died in between 8.15 p.m. to 9.00 p.m. No other hypothesis in the alternative can be drawn.
>
> In this regard the chain of circumstances rests on the following clues:
>
> (*1*) Presence of a handkerchief with an empty packet of Capstan tobacco pouch beside the dead body;
>
> (*2*) Seizure of camera with cover and two lady's wristwatches from the hideout as laid by both accused separately; and
>
> (*3*) Presence of accused persons near the PO house at the approximate time of murder;

> (*4*) Medical evidence by the autopsy surgeon (PW 10) who suggested that the death of the deceased might be resulted from suffocation caused by this handkerchief (produced to him) if pressed against the mouth and nasal cavity with sufficient force and that the scuffling might be due to force applied by more than one person;
>
> (*5*) Result of chemical examination of the handkerchief.
>
> Regarding time no. 1 the handkerchief was sent for chemical examination and the report is marked as Ext. 14 with objection. It appears from the said report that traces of saliva were detected in Item A (handkerchief) and Item B (floor scrapings) and floor swab in cotton wool. Blood was detected in Items A and B. Regarding the blood group of these items report of the serologist was called for. The report of serologist is marked Ext. 14/9. It appears from the said report that the handkerchief cuttings, floor scraping and blood soaked in filter paper were stained with human blood but the blood group of those human blood could not be determined as the sample was not sufficient for test for the first two items and Item 4 viz.

blood-soaked filter paper was stained with B group blood.

It however appears from the said report that the blood of the deceased belongs to Group B. So the report of FSL and the serologist do not help the prosecution. So I shall have to rely on the other evidence on record."

12. The provisions of Section 27 of the Act clearly state that when any fact is deposed to as discovered in consequence of the information received from a person accused of any offence, in the custody of the police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. In the present case the handkerchief, that was recovered from the place of occurrence, was subsequently owned by the accused. The fact recorded that he admitted his guilt was not admissible and could not be proved and has rightly been rejected by the learned trial court in the impugned judgment. The wristwatches and the camera, which were recovered after the statement of the accused was recorded, while in custody, cannot be faulted with, as those items have not only been recovered but duly identified by the owners during investigation as well as at the trial stage. PW 13, the investigating officer, in his statement has referred to the recording of the statements of the accused after they were taken into custody and resultant recoveries of the articles.

13. The contention is that the confessions extracted by the police officer are illegal and inadmissible, the alleged recoveries made in furtherance thereto and preparation of seizure memos are also unsustainable. In other words, these exhibits cannot be admitted or read in evidence. We may notice, on the contrary, that even the learned trial court has specifically dealt with this objection. While referring to the cross-examination of PW 13, efforts were made to involve the local witnesses, which he did not succeed and later when the seizure memos were prepared PW 8 and PW 9 were present.

Ext. 18 clearly shows their presence and nothing contrary was suggested to them in their cross-examination. Their presence during search and seizure of the house of the accused on two occasions has been completely established by the prosecution. No confessional statement made to the police, as alleged, has been relied upon by the courts. It is only the objects recovered, in furtherance to the statement of the accused while in police custody like wristwatches, camera, etc. that has been relied upon to by the Court to complete the chain of events relating to the crime in question. Thus, any of these acts are not

hit by the provisions of Section 27 of the Act.

14. Usefully, reference can also be made to the judgments of this Court enunciating the principles under Section 27 of the Act. The Court in *Anter Singh* v. *State of Rajasthan*[1] has held that : (SCC p. 664, para 14)

> "*14.* ... the first condition necessary for bringing [Section 27] into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that, only 'so much of the information' as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded."

15. The Court further held as under : (*Anter Singh case*[1], SCC p. 665, para 16)

> "*16.* The various requirements of the section can be summed up as follows:
>
> (*1*) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.
>
> (*2*) The fact must have been discovered.
>
> (*3*) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.
>
> (*4*) The person giving the information must be accused of any offence.
>
> (*5*) He must be in the custody of a police officer.
>
> (*6*) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.
>
> (*7*) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible."

Similar view was taken by this Court in *Salim Akhtar* v. *State of U.P.*[2]

16. Now let us examine certain material facts which would help in understanding the chain of events in its correct perspective. PW 8 and PW 9 have specifically stated that on the date of occurrence they had seen the accused near the place of occurrence. PW 5 and PW 6 have also stated that the accused were known to the family of the deceased.

17. The most important statement pointing towards the normal practice of the house and likely involvement of the accused is pointed out in the statement of PW 6, Smt Indira, the daughter-in-law of the deceased. Besides referring to their departure from the house along with others and returning back to the house at about 9.30 p.m., she also stated that she found her mother-in-law, the deceased, lying on the floor and blood coming out of her mouth from the right side. The house was ransacked. She specifically stated that she would be able to identify the wristwatches and the camera and she gave the make of wristwatches and camera i.e. HMT and Titan wristwatches and Paintax camera. All the articles were identified by her as Exts. P-4 and P-5, respectively. About the accused knowing the family as well as how they used to open the entrance door she stated as under:

> "These two accused persons in the lock-up were occasionally engaged by us as hired labours for watering the flower tubs at rooftop and cleaning the cars and for carrying drinking water. My mother-in-law also used their rickshaw for visits. The accused are identified.
>
> The upper storey is used for our residence. The accused persons during their call rang a doorbell. The inmate of the house used to come to balcony to identify the caller and in case he appears to be known man, the key in usually lowered by a string when the coler opens then door and on his entering recock the same and returned the key. We observed this system as a safety measure."

18. The forensic experts had taken the footprints but the report was not definite as to whether the footprints found at the site were the footprints of the accused, however, this fact loses significance for the reason that the investigating officer had clearly stated in his evidence that at the place of occurrence, which was later on sealed by him, there were lot of footprints as number of persons had gathered there. This small discrepancy cannot be of much advantage to the appellants inasmuch immaterial contradictions or variations are bound to arise in the investigation and trial of the case for various factors attributable to none. Reliance was placed by the Court on the judgment in *State of Haryana* v. *Ram Singh*[3] to say that in serious offences it is not fair to extend the rule relating to burden of proof to this extent that justice is the casualty. The appreciation of evidence by the court can hardly be

faulted with.

19. At this stage, reference to the statements of the accused under Section 313 CrPC would also be significant. Accused Sanatan Naskar in answer to Question 3 completely denied the knowledge of murder and death of Phool

Guha despite the fact that he was known to the family and he was being engaged for different works at the same place. In relation to Question 13 he answered that this was not his handkerchief and in contradiction to the same we may refer to Question 16 and answer thereof:

> "*Q. 16.* Officer-in-charge stated that dog of police first sniffed the hanky and then showed you and he became sure that the handkerchief was yours. What do you say?
>
> *A. 16.* There were lots of people along with the police dog. They wiped the sweat of my armpit and gave that to the 'dog'. It came and stated before me."

20. In relation to recovery of the items from him he was questioned by the court to which he offered the following answer:

> *Q. 27.* That witness had stated that on that day at about 1.30 o'clock in the afternoon he along with the Officer-in-charge Anu Alam and you went to the house of Kartick Naskar at Gangaduara Village boarding in a police jeep and you recovered two wristwatches, one HMT and one Titan wristwatch all tied in a packet. Inspector prepared the seizure list in front of this witness and Anu Alam and you took a copy of the by putting your thumb impression. What do you say?
>
> *A. 27.* He did not give me any copy and he also did not go with me. I only put my thumb impression in a plain paper at the office."

He further stated that he had been implicated and does not wish to offer any defence.

21. The answers by an accused under Section 313 CrPC are of relevance for finding out the truth and examining the veracity of the case of the prosecution. The scope of Section 313 CrPC is wide and is not a mere formality. Let us examine the essential features of this section and the principles of law as enunciated by the judgments which are the guiding factors for proper application and consequences which shall flow from the provisions of Section 313 CrPC.

22. As already noticed, the object of recording the statement of the accused under Section 313 CrPC is to put all incriminating evidence to

the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the court and, besides ensuring the compliance therewith, the court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simpliciter denial or, in the alternative, to explain his version and reasons for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the court is entitled to draw

adverse inferences and pass consequential orders as may be called for in accordance with law. The primary purpose is to establish a direct dialogue between the court and the accused and to put every important incriminating piece of evidence to the accused and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.

23[*]. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313 (4) CrPC explicitly provide that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence for or against the accused in any other enquiry into or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution.

24. Another important caution that Courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 CrPC as it cannot be regarded as a substantive piece of evidence. In *Vijendrajit Ayodhya Prasad Goel* v. *State of Bombay*[4] the Court held as under : (AIR p. 248, para 3)

> "*3.* ... As the appellant admitted that he was in charge of the godown, further evidence was not led on the point. The Magistrate was in this situation fully justified in referring to the statement of the accused under Section 342 as supporting the prosecution case concerning the possession of the godown. The contention that the Magistrate made use of the inculpatory part of the accused's statement and excluded the exculpatory part does not seem to be correct. The statement under Section 342 did not consist of two portions, part inculpatory and part exculpatory. It concerned itself with two facts. The accused admitted that he was in charge of the godown, he denied that the rectified spirit was found in that godown. He alleged that the rectified spirit was found outside it. This part of his statement was proved untrue by the prosecution evidence and had no intimate connection with the statement concerning the possession of the godown."

25. In the light of the abovestated principles it was expected of the accused to provide some reasonable explanation in regard to various circumstances leading to the commission of the crime. He was known to the

family along with other accused and by giving just a bare denial or lack of knowledge he cannot tilt the case in his favour. Rather their answers either support the case of the prosecution or reflect the element of falsehood in the statement recorded under Section 313 CrPC. In both these circumstances the Court would be entitled to draw adverse inference against the accused.

26. As already noticed, this is a case of circumstantial evidence. We are not able to accept the contention that the appellants have been falsely implicated in the present case. The articles have been duly identified which were recovered from the possession of the accused at their instance. It is also not correct that the Court has relied upon the confessions made to the police. Only that much of the relevant fact has been taken into consideration which has resulted in the recovery of the articles i.e. wristwatches, camera, etc. and the statement, to the extent

they admitted their crime, has not been referred much less relied upon by the courts. In the case of circumstantial evidence, law is now well settled.

27. There cannot be any dispute to the fact that it is a case of circumstantial evidence as there was no eyewitness to the occurrence. It is a settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt complete chain of events and circumstances which definitely points towards the involvement and guilt of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eyewitness in the case. It is also equally true that an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of the accepted principles in that regard.

28. A three-Judge Bench of this Court in *Sharad Birdhichand Sarda* v. *State of Maharashtra*[5] held as under : (SCC pp. 184-85, paras 152-54)

> "*152.* Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is *Hanumant Govind Nargundkar* v. *State of M.P.*[6] This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of *Tufail* v. *State of U.P.*[7] and *Ram Gopal* v. *State of Maharashtra*[8]. It may be useful to extract what Mahajan, J. has laid down in *Hanumant case*[6] : (AIR pp. 345-46, para 10)
>
> > '*10.* ... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and

they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be

such as to show that within all human probability the act must have been done by the accused.'

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(*1*) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra*[9] where the observations were made : [SCC p. 807, para 19 : SCC (Cri) p. 1047]

'*19.* ... Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.'

(emphasis in original)

(*2*) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(*3*) the circumstances should be of a conclusive nature and tendency,

(*4*) they should exclude every possible hypothesis except the one to be proved, and

(*5*) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

29. So, the first and the foremost question that this Court has to examine in the present case is, whether the prosecution has been able to establish the chain of event and circumstances which certainly points out towards the involvement and guilt of the accused. Even, before we enter upon adjudicating this aspect of the case, it will be appropriate to narrow down the controversy keeping in view the admissions, if any, made by the appellants. The accused, after having known the entire case of the prosecution, is required to be examined under Section 313 CrPC. All the material evidence has to be put to the accused and he has to be awarded the fair opportunity of

answering the case of the prosecution, as well as to explain his version to the court without being subjected to any cross-examination. As already noticed, the answers given by the accused can be used against him in the trial insofar as they support the case of the prosecution.

30. In the cases of circumstantial evidence, this Court has even held accused guilty where the medical evidence did not support the case of the prosecution. In *Anant Chintaman Lagu* v. *State of Bombay*[10], where the deceased died of poison, the Court held that there were various factors which militate against a successful isolation of the poison and its recognition. It further noticed that : (AIR p. 523, para 68)

> "*68.* ... While the circumstances often speak with unerring certainty, the autopsy and the chemical analysis taken by [them] may be most misleading. No doubt, due weight must be given to the negative findings at such examinations. But, bearing in mind the difficult task which the man of medicine performs and the limitations under which he works, his failure should not be taken as the end of the case, for on good and probative circumstances, an irresistible inference of guilt can be drawn."

31[**]. Similar view was taken by a Bench of this Court in *Dayanidhi Bisoi* v. *State of Orissa*[11], where in a case of circumstantial evidence the Court even confirmed the death sentence as being the rarest of the rare case. The Court clearly held that it is not a circumstance or some of the circumstances which by itself, would assist the Court to base a conviction; but if all circumstances put forth against the accused are once established beyond reasonable doubt then conviction must follow and all the inordinate circumstances would be used for corroborating the case of the prosecution.

32. This Court in *Sudama Pandey* v. *State of Bihar*[12] has stated the principle that circumstances shall form a chain which should point to the guilt of the accused. The evidence led by the prosecution should prove particular facts relevant for that purpose and such proven facts must be wholly consistent with the guilt of the accused. Though in that case the Court, as a matter of fact, found that the prosecution had failed to prove the chain of circumstances pointing towards the guilt of the accused and gave the benefit of doubt to the accused. This judgment cannot be of any assistance to the case of the appellants. In fact, the principle of law stated in that case has been completely satisfied in the present case. The prosecution, in the case in hand, has been able to establish and prove complete chain of circumstances and

events, which if collectively examined, clearly points to the guilt of the accused.

33[**]. We have already noticed that the statement of PW 6 along with other prosecution witnesses is of definite significance. It is in evidence that the entrance door of the house used to be locked. It was opened only when the visitor to the house press the call bell and such person was duly identifiable

to the member of the family, watching from the first floor and that the keys were sent down with the help of a thread to enable the visitor to open the outside lock and then to enter the house. Keeping this routine practice adopted by the family of the deceased, it is clear that both the accused could enter the house only by the process indicated above or by breaking open the lock of the entrance door. This is nobody's case before the Court that the lock or the door itself was broken by the miscreants who entered the house of the deceased. The only possible inference is that these accused were known to the family, as stated by the witnesses including PW 6 and they entered the house in the manner aforestated and upon entering the house they ransacked the house and committed the murder of Phool Guha and fled away with articles stolen. The stolen articles were subsequently recovered from them and duly identified during investigation and trial. All these circumstances established the case of the prosecution beyond any reasonable doubt.

34. For the reasons aforestated the appeal is dismissed.

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† From the Judgment and Order dated 7-2-2005 of the High Court of Calcutta in Crl. A. No. 55 of 2001

[1] (2004) 10 SCC 657 : 2005 SCC (Cri) 597

[2] (2003) 5 SCC 499 : 2003 SCC (Cri) 1149

[3] (2002) 2 SCC 426 : 2002 SCC (Cri) 350 : AIR 2002 SC 620 : 2002 Cri LJ 987

[*] **Ed.:** Para 23 corrected vide Official Corrigendum No. F.3/Ed.B.J./102/2010 dated 18-9-2010.

[4] (1953) 1 SCC 434 : AIR 1953 SC 247 : 1953 Cri LJ 1097

[5] (1984) 4 SCC 116 : 1984 SCC (Cri) 487

[6] (1952) 2 SCC 71 : AIR 1952 SC 343 : 1953 Cri LJ 129

[7] (1969) 3 SCC 198 : 1970 SCC (Cri) 55

[8] (1972) 4 SCC 625

[9] (1973) 2 SCC 793 : 1973 SCC (Cri) 1033

[10] AIR 1960 SC 500 : 1960 Cri LJ 682

** **Ed.:** Paras 31 and 33 corrected vide Official Corrigendum No. F.3/Ed.B.J./102/2010 dated 18-9-2010.

[11] (2003) 9 SCC 310 : 2003 SCC (Cri) 1798 : AIR 2003 SC 3915

[12] (2002) 1 SCC 679 : 2002 SCC (Cri) 239

7. Thus, having considered the judgment of the courts below as also the material on record and having heard the counsel, we are in agreement with the courts below in accepting the circumstantial evidence and we find no infirmity in the same.

8. In the reasons stated above the appeal fails and the same is dismissed.

(2002) 10 Supreme Court Cases 236

(BEFORE U.C. BANERJEE AND D.M. DHARMADHIKARI, JJ.)

MOHAN SINGH .. Appellant;

Versus

PREM SINGH AND ANOTHER .. Respondents.

Criminal Appeals Nos. 792-93 of 1994† with Nos. 794-95 of 1994, decided on October 1, 2002

A. **Penal Code, 1860 — Ss. 302/34 and 324 — Appreciation of evidence — Acquittal by High Court — Propriety — Several infirmities in prosecution case — Interpolations made in hospital records — Delay in recording FIR sought to be explained on lame excuses — Presence of eyewitnesses at the alleged date and time of incident highly doubtful — Appellant A-2 not having any motive to commit the murder of the deceased — He alleged to have caused one simple injury — Defence plea taken by A-2 appearing to be plausible — Further, defence set up by Appellant A-1, held, could not be discarded as wholly improbable — Version of alleged eyewitnesses, evidence of extra-judicial confession and recoveries of weapons, held, untrustworthy — Thus, prosecution failed to prove its case — Weighing the total evidence on record, held, acquittal of A-1 and A-2 by High Court was justified — Criminal Procedure Code, 1973, Ss. 386 and 374(2) — Acquittal recorded by High Court, held on facts, was proper**

B. **Criminal Procedure Code, 1973 — S. 313 — Statement made by accused under — Nature of — Held, not a substantive piece of evidence or a substitute for the evidence of the prosecution — It could certainly be taken aid of to lend credence to the evidence led by the prosecution — But only a part of such statement cannot be made the sole basis of conviction — Statement under S. 313 can either be relied in whole or in part — Where the prosecution evidence disbelieved and the exculpatory part of the statement of the accused under S. 313 not rejected outright as false, held, the inculpatory part of the statement of the accused under S. 313 could not be the sole basis of his conviction**

C. **Criminal Trial — Appreciation of evidence — Reaction/Conduct/Behaviour of witness — Deceased was attacked on the way — Where the eyewitnesses were following the deceased on that way, their subsequent conduct in not intervening in the attack or rushing to the village for help, held, was unnatural**

Dismissing the appeals, the Supreme Court

† From the Judgment and Order dated 24-9-1993 of the Punjab and Haryana High Court in Crl. As. Nos. 34-DB of 1992 and 475-DB of 1991

Held :

At some places, in the impugned judgment of acquittal the reasoning of the High Court may not be sound but on weighing the total evidence on record, the High Court committed no error in acquitting both the accused. (Para 23)

There are several infirmities in the prosecution case. The version of the alleged eyewitnesses is that at about 8 o'clock in the night, they were following the deceased on the way to the village. Their subsequent conduct in not intervening in the attack or rushing to the village for help is unnatural. The entry in the register of the Outdoor Patients Department of the hospital has been found to have been tampered which supports the defence case that only in order to prove the presence of the two eyewitnesses, interpolations were made in the hospital records. The prosecution is guilty of fabricating false evidence of extra-judicial confession and recovery of the weapons used by the accused. Further, the delay in recording of FIR has been explained on lame excuses such as the Head Constable carrying the report to the Magistrate was held up because of the breakdown of his motorcycle and the Magistrate was asleep when he contacted him at his residence. These circumstances clearly indicate that there was no prompt lodging of the report of the incident by the two witnesses PW 6 and PW 7. Hence their presence at the alleged date and time of incident is highly doubtful. (Paras 23 and 24)

Appellant A-2 had no motive of committing murder of the deceased. He is alleged to have caused one simple injury to the deceased. The defence plea taken by him that he was falsely implicated because of some pending civil dispute with PW 7 concerning use of a path, appears to be plausible. (Para 24)

The statement made in defence by the accused under Section 313 CrPC can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 CrPC cannot be made the sole basis of his conviction. The law on the subject is almost settled that statement under Section 313 CrPC of the accused can either be relied on in whole or in part. It may also be possible to rely on the inculpatory part of the statement of the accused if the exculpatory part is found to be false on the basis of the evidence led by the prosecution. The statement of the accused under Section 313 CrPC is not a substantive piece of evidence. It can be used for appreciating evidence led by the prosecution to accept or reject it. It is, however, not a substitute for the evidence of the prosecution. If the exculpatory part of the statement of the accused is found to be false and the evidence led by the prosecution is reliable, the inculpatory part of his statement can be taken aid of to lend assurance to the evidence of the prosecution. If the prosecution evidence does not inspire confidence to sustain the conviction of the accused, the inculpatory part of his statement under Section 313 CrPC cannot be made the sole basis of his conviction. In the present case, the exculpatory part of the statement of the accused A-1 under Section 313 CrPC 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 CrPC, therefore, to the extent of admission of his presence in the compound of *A* when the deceased was attacked, cannot form the sole basis of his conviction. (Paras 27, 30 and 31)

Nishi Kant Jha v. *State of Bihar*, (1969) 1 SCC 347 : AIR 1969 SC 422, *followed*

The alternative submission of the complainant that on the basis of the statement of the accused A-1 under Section 313 CrPC, he is liable to be convicted for exceeding his right of private defence under Section 304 IPC, cannot be accepted for the reasons mentioned above. (Para 32)

So far as case against the co-accused A-2 is concerned, since the evidence of the prosecution that the two co-accused had made a joint assault on the deceased, is not reliable, he cannot be convicted under Section 302 with the aid of Section 34 IPC for his alleged common intention with A-1. (Para 33)

W-M/AZT/26818/SR

Advocates who appeared in this case :

Jaspal Singh, Senior Advocate (Vipin Gogia, Ms Jaspreet Gogia, Sushil Kr. Jain, Bimal Roy Jad, R.K. Rathore, P.N. Puri, Sanjay Sarin and Ashok Mathur, Advocates, with him) for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. (1969) 1 SCC 347 : AIR 1969 SC 422, *Nishi Kant Jha* v. *State of Bihar* 244*g*, 245*f-g*

The Judgment of the Court was delivered by

DHARMADHIKARI, J.— These two appeals have been filed by the complainant and the State of Punjab against the judgment of the High Court of Punjab and Haryana dated 24-9-1993 whereby the two accused (the respondents herein), by reversal of the judgment of the Sessions Judge, Hoshiarpur, have been acquitted of the charges under Section 302 read with Sections 34 and 324 of the Indian Penal Code.

2. The case of the prosecution against the two accused is that at 8.40 on the night of 26-8-1990 in Village Bassi Umar Khan, near the courtyard of Atma Singh, the two accused viz. Prem Singh, Accused 1 and Deepinder Singh, Accused 2 inflicted injuries on deceased Ravinder Singh, son of Mohan Singh, PW 6 and caused his death. The prosecution case, as sought to be proved in the court in necessary details, is as under:

The motive of the crime is stated to be a pending civil litigation between the father of the deceased in the capacity of holder of power of attorney on behalf of one Joginder Singh Mahant on one side and Sampuran Singh, father of Accused 1 Prem Singh on the other, regarding the possession of a piece of land in Village Bassi Umar Khan.

3. The alleged offence of murder of the deceased is alleged to have been committed on 28-6-1990 at about 8.40 p.m. when the deceased was returning from his field to his house. It is stated that Mohan Singh, PW 6, father of the deceased and Sardara Singh, PW 7 were also following the deceased on their way back from the field to the house. At that time, Accused 1 Prem Singh, armed with *datar* and Deepinder Singh, Accused 2 armed with *gandasi* waylaid the deceased. Accused 1 shouted that Mohan Singh, father of the deceased would be "taught a lesson" for pursuing a case against the father of Prem Singh. After such declaration Accused 1 Prem Singh gave a datar-blow to the deceased which the latter warded off but it hit him on his right hand. The deceased then in a bid to escape started running towards the village. The two accused chased him. After covering about forty paces, the deceased

stumbled down and fell on the heap of earth lying in the courtyard of the house of one Atma Singh. When the deceased had fallen down, Accused 1 Prem Singh inflicted a datar-blow on the left side of the neck of the deceased while Accused 2 Deepinder Singh inflicted a gandasi-blow on his left knee. The abovenamed two eyewitnesses raised alarm whereupon the two accused ran away with their weapons. The villagers then gathered there. The deceased was taken in a tractor-trolley to Civil Dispensary, Haryana where Dr Chaman Lal, PW 5, after examining the deceased, declared him dead. The doctor then sent an intimation at about 9.30 p.m. to Police Station Haryana which is stated to be at a distance of about 200 yards from the hospital.

4. The further case of the prosecution is that thereafter leaving the dead body of the deceased in the hospital in the care of Sardara Singh, PW 7, Mohan Singh, PW 6, while proceeding to Police Station Haryana for making a report, met on the way, ASI Santokh Singh, PW 10. A report of the incident was lodged with him (marked as Ext. PN) at 10.30 p.m. It is not disputed that the formal first information report Ext. PN, under Sections 302/34 of the Indian Penal Code was registered at the police station at 10.30 p.m. on 28-6-1990 by ASI Nirmal Singh. Special report of the FIR was conveyed to the Magistrate at Hoshiarpur through Head Constable Kapur Singh, PW 4 on 29-6-1990 at 4.45 a.m.

5. Santokh Singh, ASI, PW 10 undertook the investigation of the crime. After preparing inquest memo Ext. PC, the investigating officer inspected the spot and seized bloodstained earth from near the courtyard of Atma Singh. A pair of *chappals* Ext. P-7/1-2 of the deceased which was found lying near the spot at the place shown in the site plan Ext. PT was seized.

6. Autopsy on the dead body of the deceased was conducted by Dr Avinash Sood, PW 1 at Civil Hospital, Hoshiarpur at 12 noon on 29-6-1990. The doctor found the following ante-mortem injuries on the person of the deceased, which according to him were sufficient in the ordinary course of nature, to cause his death:

> "*1.* A spindle-shaped incised wound with inverted margins measuring 6.3 cm on the nape of neck on its left, laterally. Underlying muscles and major blood vessels cut. The wound started 2 cm away from midline towards left, laterally.
>
> *2.* A continuous wound on the right-hand fingers. The wound was incised in nature with inverted margins and underlying muscles cut and the bones of all the fingers exposed as if in gripping a sharp weapon.
>
> *3.* An incised wound with inverted margins size 2 x 1 cm over the left knee joint superiority. The wound was skin-deep."

7. The further case of the prosecution is that the two accused made an extra-judicial confession to Puran Singh, PW 8, Lambardar of the village when they contacted him on 30-6-1990 and sought his help for their production before the police. It is stated that the Lambardar instructed them to contact him on the next day. The accused contacted him much thereafter

on 6-7-1990 and they were then produced before ASI Santokh Singh who arrested them.

8. It is also the case of the prosecution that on the disclosure statements of the two accused, the alleged weapons used, described as *datar* Ext. P-6 and *gandasi* Ext. P-5, were recovered and seized after digging out the earth from the corner of the tubewell room.

9. Accused 2 Deepinder Singh abjured his guilt and stated that he had been falsely implicated. Prem Singh, Accused 1, however, after the trial, in his examination under Section 313 of the Code of Criminal Procedure took the following specific defence which reads as under:

> "Atma Singh does not live in the village. The compound of his house is open. I was sitting on a cot in his compound. Ravinder Singh armed with *takua*, Amarjeet Singh, son of Sardara Singh, armed with a *dang*, came there and attacked me and caused injuries. I raised alarm. Neighbours came and inflicted injuries on Ravinder Singh in order to rescue me from Ravinder Singh. I went to Civil Dispensary, Haryana and got myself medically examined. Dr Chaman Lal informed the police. ASI Santokh Singh came to the hospital and I informed him of the occurrence. He arrested me and took me to the police station, detained till 5-7-1990 and framed me in the case. Mohan Singh does not reside in Village Bassi Umar Khan. Sardara Singh is inimical to me and the members of my family."

10. Dr Chaman Lal, PW 5 had medically examined accused Prem Singh on 28-6-1990 at 9.45 p.m. and found the following four injuries on his person:

> "*1.* An incised wound 3.5 cm x 0.25 cm x muscle-deep present on the inner aspect of the right thumb. It was lying obliquely. Upper end was 5 cm from the tip of the thumb. Fresh bleeding from the wound was present.
>
> *2.* An abrasion 2 cm in length x linear present on the palmar aspect of the right hand, 2 cm in front of Injury 1.
>
> *3.* An abrasion 2 cm in length x linear present on the back of ring finger lying obliquely and in the middle of the finger of left hand.
>
> *4.* An abrasion 2 cm x linear lying on the back of ring finger of left hand, 2 cm below Injury 3."

11. The trial court believed the eyewitnesses' account given by Mohan Singh, PW 6 and Sardara Singh, PW 7. It also relied on the evidence of extra-judicial confession made to Puran Singh, PW 8. The trial court, however, doubted the genuineness of the recovery of the weapons. After appreciating the evidence on record by its judgment dated 6-12-1991 the trial court convicted Prem Singh, Accused 1 under Section 302 IPC and sentenced him to life imprisonment. Deepinder Singh, Accused 2 was convicted under Section 302 with the aid of Section 34 IPC and was also sentenced to life imprisonment.

12. The High Court in appeal, however, acquitted the accused. On the question of alleged motive, the High Court found that civil litigation was against Mohan Singh, PW 6 and not against his son deceased Ravinder Singh. In its opinion, the case of the prosecution is highly improbable that the deceased alone was attacked, and Mohan Singh against whom the accused had actual grudge, was allowed to go unhurt.

13. The High Court found that the entries in the OPD register of the hospital, where the dead body is alleged to have been carried by the two alleged eyewitnesses, contains interpolation. There was a subsequent insertion of entry of dead body of the deceased in the register. The said tampering with the hospital record indicates that false evidence was created to prove the presence of the two alleged eyewitnesses at the time of the incident. The High Court also found that evidence of recovery of the alleged weapons made on 6-7-1990 was a fabrication as was also found by the trial court.

14. The High Court totally discarded the alleged extra-judicial confessions made to Puran Singh, PW 8. It is held that there was no possibility of the accused reposing any confidence in Puran Singh, the Lambardar of the village and confessing their involvement before him. The conduct of Puran Singh is also unnatural. On such alleged confession he instructed them to contact him the next day but the accused contacted him on 6-7-1990 on which date they were formally arrested. The High Court observed that Puran Singh is Lambardar of the village and being in close contact with the police has been set up as a witness to prove a false extra-judicial confession.

15. The High Court came to the conclusion that there is unexplained delay in lodging the FIR. The High Court found that the FIR was antetimed. Kapur Singh, Head Constable in that regard was disbelieved. His explanation that he left Police Station Haryana on a motorcycle at 12.00 in the midnight but could not carry the report to the Judicial Magistrate the same night because his motorcycle developed some problem on the way, has been disbelieved. The explanation for further delay, by stating that the Magistrate was asleep has also been found by the High Court to be false. The conduct of the police constable is held to be contrary to the provisions of the Punjab Police Manual which contains instructions how FIRs are to be promptly recorded and reported to the Magistrate.

16. The High Court also came to the conclusion that the two eyewitnesses Mohan Singh, PW 6 and Sardara Singh, PW 7 have been falsely set up to depose that they had actually witnessed the assault made by the accused. The High Court has recorded more than one reason to reject the testimony of the alleged eyewitnesses. It is observed that if one of the accused had a serious grudge against Mohan Singh, PW 6 who was present on the spot, instead of attacking him, there was no cause to open attack on his son, the deceased. According to the High Court, the conduct of the alleged eyewitnesses is highly unnatural so also of the deceased. When suddenly

attacked the deceased did not turn towards the eyewitnesses for help. The two eyewitnesses did not intervene, render any help or raise a hue and cry to attract the villagers. If the incident took place near the village in the courtyard of Atma Singh, independent witnesses could have been examined from the village. The version of the eyewitnesses that they had carried the deceased in injured condition to the hospital has been disbelieved because there was no recovery and seizure of any bloodstained clothes of the eyewitnesses. The investigating party also did not collect any bloodstained earth from the place where the accused are alleged to have first opened the attack and inflicted injuries on the deceased.

17. Keeping all the above evidence and circumstances in view, the High Court acquitted both the accused.

18. We have heard learned counsel appearing for the complainant Mohan Singh and learned counsel appearing for the State of Punjab. On behalf of the appellant, the judgment of acquittal passed by the High Court has been assailed and criticized severely on several grounds. It is argued that as the deceased was walking ahead of the eyewitnesses, it was not possible for the accused to have opened attack on the eyewitnesses. It is submitted that after receiving a blow the deceased, as a natural response ran away for his life. It was not necessary for him to have turned for help towards the eyewitnesses. For non-recovery of bloodstained earth from the place where the attack was first opened, it is submitted that the place might have been trampled by cattle to leave no trace of blood. So far as non-examination of independent witnesses is concerned, it is stated that it is only after the attack was over that the villagers rushed to the spot on hearing an alarm raised by the eyewitnesses. The learned counsel also severely criticized the reasoning of the High Court that the *chappals* of the deceased were found near the courtyard of Atma Singh when they would have been left by the deceased at the place where he was first attacked. On the question of unexplained delay in reporting the FIR to the Magistrate, it is submitted that the explanation given by the Head Constable Kapur Singh that his vehicle had developed spark plug problem, on the way to the Magistrate, ought to have been believed. On the other reasoning of the High Court that as the deceased had died immediately after the assault, there was no reason to carry his body to the hospital, it is urged that it was natural for the father to have carried the body to the hospital, as he would not have known that there could have been no chance of revival of the life of his son. It is also argued that it was not necessary for the prosecution to explain the injuries found on the person of the accused Prem Singh as they were very minor or superficial injuries and according to the doctor would have been even self-inflicted.

19. On behalf of the complainant in the appeal, the learned counsel laid much emphasis on the statement of accused Prem Singh in his examination under Section 313 CrPC wherein he admitted the incident to have taken place in the compound of Atma Singh. It is argued that the accused took a false plea that the deceased and one Amarjeet Singh, S/o PW 7 Sardara Singh had

attacked him whereupon the villagers rushed to his help and caused injuries to the deceased. On behalf of the complainant, learned counsel further argues that the High Court having rejected the defence version of accused Prem Singh made by him in his statement under Section 313 of the Code of Criminal Procedure, ought to have held that story of assault by the villagers was false. On his own defence plea the accused Mohan Singh had exceeded the right of private defence making him liable to be convicted and sentenced under Section 304 IPC.

20. As against Accused 2 Deepinder Singh, it is argued that since he accompanied Accused 1 Prem Singh and participated with him in assaulting the deceased he should have been convicted under Section 302 or 304 with the aid of Section 34 IPC.

21. We have heard learned counsel appearing for Deepinder Singh. It is argued that there was no motive nor is there evidence against him for his conviction with the aid of Section 34 IPC. Accused 2 Deepinder Singh has been attributed to have caused one injury which is found to be only skin-deep. He did not cause any injury on any vital part of the body of the deceased.

22. The evidence of extra-judicial confession and recovery of weapons was rightly rejected by the High Court. There was no other evidence to hold that Deepinder Singh had common intention with the co-accused Prem Singh to commit murder. It is submitted that Accused 2 has rightly been acquitted on justifiable reasons. He has by this time already suffered imprisonment for six months during trial and after his conviction.

23. Having gone through the evidence on record and considering the submissions made by the learned counsel, we have come to the conclusion that there is no case made out for this Court to interfere with the judgment of acquittal passed by the High Court. At some places, in the impugned judgment of acquittal the reasoning of the High Court may not be sound but on weighing the total evidence on record, in our considered opinion, the High Court committed no error in acquitting both the accused. There are several infirmities in the prosecution case. The evidence of the alleged eyewitnesses does not inspire confidence. At about 8 o'clock in the night, their version is that they were following the deceased on the way to the village. Their subsequent conduct in not intervening in the attack or rushing to the village for help is unnatural. Their testimony has rightly been found unreliable. The entry in the register of the Outdoor Patients Department of the hospital has been found to have been tampered which supports the defence case that only in order to prove the presence of the two eyewitnesses, interpolations were made in the hospital records. The delay in recording of FIR has been explained on lame excuses such as the Head Constable carrying the report to the Magistrate was held up because of the breakdown of his motorcycle and the Magistrate was asleep when he contacted him at his residence. These circumstances clearly indicate that there was no prompt lodging of the report

of the incident by the two witnesses PW 6 and PW 7. Hence their presence at the alleged date and time of incident is highly doubtful.

24. The prosecution is guilty of fabricating false evidence of extra-judicial confession and recovery of the weapons used by the accused. So far as Deepinder Singh, Accused 2 is concerned, he has been falsely implicated. He had no motive of committing murder of the deceased. He is alleged to have caused one simple injury to the deceased. There is no evidence why he should join the co-accused in opening a brutal attack on the deceased. The defence plea taken by him that he was falsely implicated because of some pending civil dispute with PW 7 Sardara Singh concerning use of a path, appears to be plausible.

25. To seek conviction of Accused 1 Prem Singh, much emphasis has been laid on his inculpatory statement given under Section 313 of the Code of Criminal Procedure. This argument advanced on behalf of the complainant deserves some serious consideration.

26. By a careful reading of the statement of Accused 1 Prem Singh (reproduced above) which is recorded during his examination under Section 313 CrPC his defence plea has to be appreciated. According to him, when he was sitting on a cot in the open compound of Atma Singh, the deceased armed with *takua* and Amar Singh (son of Sardara Singh, PW 7) armed with a *dang* came there and attacked him causing him injuries. On his raising alarm, neighbours rushed and inflicted injuries on the deceased to save the accused. Thereafter, Prem Singh went to Civil Dispensary, Haryana and got himself examined by Dr Chaman Lal. In the above statement of accused Prem Singh given under Section 313, the inculpatory part is his admission of an incident of assault on the deceased in his presence in the compound of the house of Atma Singh. The accused has categorically denied to have attacked the deceased or caused him any injuries. His specific defence plea is that in order to save him, villagers from the neighbourhood rushed and assaulted the deceased.

27. The statement made in defence by the accused under Section 313 CrPC can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 of the Code of Criminal Procedure cannot be made the sole basis of his conviction. The law on the subject is almost settled that statement under Section 313 CrPC of the accused can either be relied in whole or in part. It may also be possible to rely on the inculpatory part of his statement if the exculpatory part is found to be false on the basis of the evidence led by the prosecution. See *Nishi Kant Jha* v. *State of Bihar*[1]: (SCC pp. 357-58, para 23)

> "23. In this case the exculpatory part of the statement in Exhibit 6 is not only inherently improbable but is contradicted by the other evidence. According to this statement, the injury which the appellant received was caused by the appellant's attempt to catch hold of the hand of Lal Mohan

1 (1969) 1 SCC 347 : AIR 1969 SC 422

Sharma to prevent the attack on the victim. This was contradicted by the statement of the accused himself under Section 342 CrPC to the effect that he had received the injury in a scuffle with a herdsman. The injury found on his body when he was examined by the doctor on 13-10-1961 negatives both these versions. Neither of these versions accounts for the profuse bleeding which led to his washing his clothes and having a bath in River Patro, the amount of bleeding and the washing of the bloodstains being so considerable as to attract the attention of Ram Kishore Pandey, PW 17 and asking him about the cause thereof. The bleeding was not a simple one as his clothes all got stained with blood as also his books, his exercise book and his belt and shoes. More than that the knife which was discovered on his person was found to have been stained with blood according to the report of the Chemical Examiner. According to the post-mortem report this knife could have been the cause of the injuries on the victim. *In circumstances like these there being enough evidence to reject the exculpatory part of the statement of the appellant in Exhibit 6 the High Court had acted rightly in accepting the inculpatory part and piercing the same with the other evidence to come to the conclusion that the appellant was the person responsible for the crime.*"

(emphasis supplied)

28. In the case in hand, we have agreed with the conclusion of the High Court that the prosecution has failed to prove the genesis of the crime and the nature of the incident. The version of the alleged eyewitnesses, the evidence of extra-judicial confession and recoveries of weapons have been found to be untrustworthy.

29. The statement of Accused 1 Prem Singh recorded in his examination under Section 313 CrPC constitutes his defence plea. He stated that he was attacked by the deceased along with his associate whereupon the villagers rushed and caused injuries to the deceased. The evidence led by the prosecution having been rejected by this Court, the defence set up by accused Prem Singh cannot be discarded as wholly improbable.

30. The statement of the accused under Section 313 CrPC is not a substantive piece of evidence. It can be used for appreciating evidence led by the prosecution to accept or reject it. It is, however, not a substitute for the evidence of the prosecution. As held in the case of *Nishi Kant*[1] by this Court, if the exculpatory part of his statement is found to be false and the evidence led by the prosecution is reliable, the inculpatory part of his statement can be taken aid of to lend assurance to the evidence of the prosecution. If the prosecution evidence does not inspire confidence to sustain the conviction of the accused, the inculpatory part of his statement under Section 313 CrPC cannot be made the sole basis of his conviction.

31. In the present case, the exculpatory part of the statement of the accused under Section 313 CrPC 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 CrPC, therefore, to the extent of admission of his presence in the compound of Atma Singh when the deceased was attacked, cannot form the sole basis of his conviction.

32. The alternative submission made by the learned counsel on behalf of the complainant that on the basis of the statement of the accused Prem Singh under Section 313 CrPC, he is liable to be convicted for exceeding his right of private defence under Section 304 IPC, cannot be accepted for the reasons mentioned above.

33. So far as case against the co-accused Deepinder Singh is concerned, since we have not relied on the evidence of the prosecution that the two co-accused had made a joint assault on the deceased, he cannot be convicted under Section 302 with the aid of Section 34 IPC for his alleged common intention with the co-accused Prem Singh.

34. We thus, find no ground to interfere with the verdict of acquittal passed by the High Court in favour of both the accused. In the result, we dismiss both the appeals. Bail bonds furnished by the respondent-accused are discharged.

(2002) 10 Supreme Court Cases 246

(BEFORE S.N. PHUKAN AND B.N. AGRAWAL, JJ.)

HARYANA STATE ELECTRICITY BOARD .. Appellant;

Versus

KRISHNA DEVI .. Respondent.

Civil Appeal No. 6304 of 1995, decided on March 19, 2002

Service Law — Compassionate appointment — Object of, and condition precedent for grant of — The main object of granting compassionate appointment, held, is to provide immediate relief to the deceased employee's family — Moreover, such appointment cannot be granted in the absence of rules or instructions issued by the Government or any public authority — Hence, where at the time of death of a work-charged employee of State Electricity Board there was no rule or scheme for such appointment, although such a scheme was framed about one year later, and the application seeking compassionate appointment of the deceased's son was made still seven long years later, held, High Court erred in directing the Board to give employment to the deceased's son

Appeal allowed H-M/CFLNST/26614/SL

ORDER

1. In this appeal, by special leave, appellant Haryana State Electricity Board (hereinafter referred to as the Board) has impugned the judgment of the Punjab and Haryana High Court dated 21-9-1994 passed in Civil Writ Petition No. 4172 of 1994.

2. The writ petition was filed by the wife of one Sunder Dass, who was working as a "Work-charged T-mate" under the appellant. Sunder Dass died

(2010) 9 Supreme Court Cases 85

(BEFORE H.S. BEDI AND C.K. PRASAD, JJ.)

Criminal Appeal No. 1215 of 2005†

DEHAL SINGH .. Appellant;

Versus

STATE OF HIMACHAL PRADESH .. Respondent.

With

Criminal Appeal No. 1216 of 2005

DINESH KUMAR .. Appellant;

Versus

STATE OF HIMACHAL PRADESH .. Respondent.

Criminal Appeals No. 1215 of 2005 with No. 1216 of 2005, decided on August 31, 2010

A. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 50 — Requirements — When attracted — Whether complied with — Officer giving option to accused to be searched before a gazetted officer or nearest Magistrate but they were not apprised of their right to be searched in said manner — Effect — Giving said option, held, is tantamount to communication of the right — Therefore S. 50 was complied with — But as search was conducted only of vehicle and not person of accused, even giving of said option was not required** (Paras 16 to 21)

B. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 50 — Search, when attracts provisions of — Search in police station not for narcotic drugs and psychotropic substances but for purpose of finding out articles possessed by accused before lodging them in lock-up — If such search attracted S. 50** (Para 18)

Dilip v. *State of M.P.*, (2007) 1 SCC 450 : (2007) 1 SCC (Cri) 377, *referred to*

C. **Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 35, 54 and 20 — Presumption of conscious possession — Whether rebutted — Accused travelling in private car with a known co-accused, in his S. 313 CrPC statement trying to rebut presumption by stating that he was simply a passenger unconnected with contraband seized i.e. he had just taken a "lift" — He not examining said co-accused person under S. 315 CrPC nor producing any other evidence in support of his plea — Noticing fact of vehicle concerned being a private car (as distinguished from a public transport vehicle) and there being no admissible evidence, plea rejected — Therefore, presumption of conscious possession not rebutted and conviction of appellants under S. 20, held, justified** (Paras 24 and 23)

Madan Lal v. *State of H.P.*, (2003) 7 SCC 465 : 2003 SCC (Cri) 1664, *followed*

D. **Criminal Procedure Code, 1973 — Ss. 313 and 315 — Relative evidentiary value of statements under, compared — As S. 313 statement is recorded without administering oath and without witness being**

† From the Judgment and Order dated 18-10-2004 of the High Court of Himachal Pradesh at Shimla in Crl. A. No. 603 of 2003

cross-examined same, held, cannot be treated as evidence under S. 3, Evidence Act — But if an accused is examined under S. 315, said statement, held, relevant — Evidence Act, 1872 — S. 3 — Evidence — Ambit (Para 23)

Madan Lal v. *State of H.P.*, (2003) 7 SCC 465 : 2003 SCC (Cri) 1664, *relied on*

E. **Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 52-A — Discrepancy in weight of contraband taken in laboratory with weight taken by officer making seizure — When not fatal to prosecution case — (1) Discrepancy being only 15 gm, (2) grocery shop weighing machine being used by officer to weigh seized sample, and (3) there being no other infirmity on part of prosecution — Said discrepancy, held, is not significant enough to affect prosecution case (Paras 12 to 14)**

Noor Aga v. *State of Punjab*, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748; *Rajesh Jagdamba Avasthi* v. *State of Goa*, (2005) 9 SCC 773 : (2006) 1 SCC (Cri) 150, *distinguished on facts*

Appeals dismissed SS-D/46703/CR

Advocates who appeared in this case :

P.S. Mishra and Nagendra Rai, Senior Advocates (J.S. Bhasin, D.K. Pandey, Upendra Mishra, T. Mahipal, Shantanu Sagar, Smarhar Singh, J.S. Bhasin, S. Chandra Shekhar and Naresh K. Sharma, Advocates) for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748, *Noor Aga* v. *State of Punjab* 88*b-c*, 89*d-e*, 89*g-h*
2. (2007) 1 SCC 450 : (2007) 1 SCC (Cri) 377, *Dilip* v. *State of M.P.* 91*a*, 91*g*
3. (2005) 9 SCC 773 : (2006) 1 SCC (Cri) 150, *Rajesh Jagdamba Avasthi* v. *State of Goa* 88*e*, 90*b-c*
4. (2003) 7 SCC 465 : 2003 SCC (Cri) 1664, *Madan Lal* v. *State of H.P.* 93*b*

The Judgment of the Court was delivered by

C.K. PRASAD, J.— Both the appeals arise out of the same judgment and as such they were heard together and are being disposed of by this common judgment.

2. The case unfolded by the prosecution and accepted by both the courts i.e. the trial and the appellate courts is that on 18-10-2002 at 9.20 a.m. PW 16, Brijesh Sood, Station House Officer, Police Station Sundernagar along with PW 8, Madan Lal, Assistant Sub-Inspector of Police and other police personnel were present for a routine check at Lalit Chowk at Sundernagar in the district of Mandi. Brijesh Sood received a secret information that a car bearing Registration No. HP 34 7700 is coming from Mandi side in which two persons are carrying huge quantity of "charas". The aforesaid information was reduced into writing and intimation to the said effect was sent to the Additional Superintendent of Police, Mandi.

3. At about 10 a.m., one Maruti Esteem car bearing Registration No. HP 34 7700 came from Mandi side which was stopped by PW 16 Brijesh Sood and he found two persons sitting in the car, including the driver. Brijesh Sood made enquiry from the person who was driving the car and he disclosed his name as Dehal Singh (the appellant in Criminal Appeal No. 1215 of 2005) and the other person sitting on the front seat by the side of the driver seat disclosed his name as Dinesh Kumar, resident of Goa (the appellant in Criminal Appeal No. 1216 of 2005). Brijesh Sood gave option in writing to

the accused persons, whether they want to give personal search or search of the vehicle before a Magistrate or a gazetted officer. Both the appellants gave their consent for being searched by him. Accordingly PW 16 Brijesh Sood searched the car and luggage lying inside the car but nothing incriminating was found either in the car or the luggage. A mechanic was called by PW 3, Churamani, who opened the shields of the windows/doors when packets of brown colour were found concealed between the shields and doors wrapped with black and red adhesive tape. On opening the packets, "charas" in the shape of stick and chappatis was detected. Churamani was asked by PW 16 Brijesh Sood to bring weighing scale and weight. He brought the weighing scale from the grocery shop of PW 5, Ram Lal and on weighment 27 kg 800 gm of charas was found. Two samples of 50 gm each were taken out after mixing the entire charas. It was duly sealed.

4. Appellant Dehal Singh produced the registration certificate along with driving licence and other papers concerning the vehicle. The appellants and seized charas along with the samples were taken to the police station where the personal search of the appellants was conducted. The samples of the charas and other articles recovered from the personal search of the appellants were deposited with PW 8, Additional Malkhana Head Constable, Rajinder Kumar for safe custody. A first information report was thereafter drawn and a special report sent to the Superintendent of Police. PW 8 Rajinder Kumar sent one parcel of the sample to the chemical examiner, who in his report opined that it contained charas. After usual investigation charge-sheet was submitted against the two appellants and ultimately they were put on trial. They pleaded not guilty and claimed to be tried.

5. The prosecution in support of its case has all together examined 16 witnesses, besides various other documentary evidence was also brought on record. In their statements, under Section 313 of the Code of Criminal Procedure the appellants pleaded false implication and both of them have stated that the appellant Dinesh Kumar had taken lift in the car from Kullu to Delhi.

6. On appreciation of the evidence the trial court held both the appellants guilty under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced them to undergo rigorous imprisonment for a period of 10 years each and to pay a fine of ₹1,00,000 each and in default of payment of fine to suffer rigorous imprisonment for a further period of four years.

7. The appellants preferred separate appeals against the judgment and order of conviction and sentence and the High Court of Himachal Pradesh by its common judgment dated 18-10-2004 passed in Criminal Appeals Nos. 600 and 603 of 2003 dismissed both the appeals. Both the appellants assail the aforesaid order by grant of special leave to appeal.

8. Mr Nagendra Rai, learned Senior Counsel appears on behalf of the appellant in Criminal Appeal No. 1215 of 2005, whereas the appellant in Criminal Appeal No. 1216 of 2005 is represented by Mr P.S. Mishra, learned Senior Counsel.

9. Mr Rai submits that according to the prosecution two samples of 50 gm each were taken and sent to the forensic science laboratory for examination, but net weight of the sample received in the laboratory was 65.5606 gm. This discrepancy in weight of sample, in the submission of Mr Rai, casts serious doubt on the credibility of the prosecution case and this is enough to reject the case of the prosecution. Credibility of the recovery proceedings, in his submission, is eroded if the quantity found by the analyst is more than the quantity sealed and sent to him.

10. Mr Rai points out that taking into consideration the discrepancy in the weight of the samples at the time when it was taken and in the laboratory, this Court in *Noor Aga* v. *State of Punjab*[1] held the case of the prosecution to be not trustworthy. Our attention has been drawn to para 97 of the judgment which reads as follows: (SCC p. 464)

> "*97.* The fate of these samples is not disputed. Although two of them were kept in the malkhana along with the bulk, but were not produced. No explanation has been offered in this regard. So far as the third sample, which allegedly was sent to the Central Forensic Science Laboratory, New Delhi is concerned, it stands admitted that the discrepancies in the documentary evidence available have appeared before the court, namely:
>
> (*i*) *While original weight of the sample was 5 gm, as evidenced by Exts. PB, PC and the letter accompanying Ext. PH, the weight of the sample in the laboratory was recorded as 8.7 gm.*
>
> (*ii*) Initially, the colour of the sample as recorded was brown, but as per the chemical examination report, the colour of powder was recorded as white." (underlining* is ours)

11. Reliance has also been placed on a decision of this Court in *Rajesh Jagdamba Avasthi* v. *State of Goa*[2] and our attention has been drawn to para 14 of the judgment which reads as follows: (SCC pp. 777-78)

> "*14.* We do not find it possible to uphold this finding of the High Court. The appellant was charged of having been found in possession of charas weighing 180.70 gm. The charas recovered from him was packed and sealed in two envelopes. When the said envelopes were opened in the laboratory by the Junior Scientific Officer, PW 1, he found the quantity to be different. While in one envelope the difference was only minimal, in the other the difference in weight was significant. The High Court itself found that it could not be described as a mere minor discrepancy. Learned counsel rightly submitted before us that the High Court was not justified in upholding the conviction of the appellant on the basis of what was recovered only from envelope *A* ignoring the quantity of charas found in envelope *B*. This is because there was only one search and seizure, and whatever was recovered from the appellant was packed in two envelopes. The credibility of the recovery proceeding is considerably

1 (2008) 16 SCC 417

* **Ed.**: Herein italicised.

2 (2005) 9 SCC 773 : (2006) 1 SCC (Cri) 150

eroded if it is found that the quantity actually found by PW 1 was less than the quantity sealed and sent to him. As he rightly emphasised, the question was not how much was seized, but whether there was an actual seizure, and whether what was seized was really sent for chemical analysis to PW 1. The prosecution has not been able to explain this discrepancy and, therefore, it renders the case of the prosecution doubtful."

12. We do not find any substance in the submission of Mr Rai and the decisions relied on are clearly distinguishable. The vehicle was intercepted and searched on a highway and it has come in the evidence of PW 16 Brijesh Sood that he had sent PW 3 Churamani to bring weighing scale and weight from the grocery shop of PW 5 Ram Lal. From the evidence of PW 3 Churamani and PW 5 Ram Lal, the grocery shop owner it is evident that the weighing scale and the weight came from the grocery shop. It is common knowledge that the weighing scale and the weight kept in the grocery shop are not of such standard which can weigh articles with great accuracy and therefore difference of 15 gm in weight, in the facts and circumstances of this case, is not of much significance. Sample was taken by a common weighing scale and weight found in a grocery shop, whereas the weight in the laboratory was recorded with precision scale. This would be evident from the fact that the weight of the sample recorded in the laboratory was 65.5606 gm. In this background, small difference in weight loses its significance, when one finds no infirmity in other part of the prosecution story.

13. Now referring to the decision of this Court in *Noor Aga*[1] the difference in the weight at the time of taking samples and at the laboratory was considered material as in the said case the sample was taken by the Customs officials at the airport and the Court came to the conclusion that weight was taken with a precision scale. Further it is not only the discrepancy in the weight which led this Court to reject the case of the prosecution but had taken into consideration several other discrepancies to come to the said conclusion. This shall be evident from para 98 of the judgment, which reads as follows: (SCC p. 464)

> "*98.* We are not oblivious of the fact that a slight difference in the weight of the sample may not be held to be so crucial as to disregard the entire prosecution case as ordinarily an officer in a public place would not be carrying a good scale with him. Here, however, the scenario is different. The place of seizure was an airport. The officers carrying out the search and seizure were from the Customs Department. They must be having good scales with them as a marginal increase or decrease of quantity of imported articles whether contraband or otherwise may make a huge difference under the Customs Act."

14. Further in *Noor Aga case*[1] it has been observed that discrepancy in weight individually may not be fatal. It is apt to reproduce paras 119(3) and (4) of the said judgment in this regard: (SCC p. 470)

> "*119.* Our aforementioned findings may be summarised as follows:
>
> *1.-2.* * * *

3. There are a large number of discrepancies in the treatment and disposal of the physical evidence. There are contradictions in the statements of official witnesses. Non-examination of independent witnesses and the nature of confession and the circumstances of the recording of such confession do not lead to the conclusion of the appellant's guilt.

4. Finding on the discrepancies, although if individually examined, may not be fatal to the case of the prosecution but if cumulative view of the scenario is taken, the prosecution's case must be held to be lacking in credibility."

15. Now, we proceed to consider the decision of this Court in *Rajesh Jagdamba Avasthi*[2] relied on by the appellants and find the same clearly distinguishable. In the said case on fact the Court found the recovery proceeding to be suspicious and further there was every possibility of the seized substance being tampered. Those infirmities led this Court to doubt the truthfulness of the prosecution case. This is evident from para 15 of the judgment which reads as follows: (SCC p. 778)

"*15*. This is not all. We find from the evidence of PW 4 that he had taken the seal from PSI Thorat and after preparing the seizure report, panchnama, etc. he carried both the packets to the police station and handed over the packets as well as the seal to Inspector Yadav. According to him on the next day, he took back the packets from the police station and sent them to PW 3 Manohar Joshi, Scientific Assistant in the Crime Branch, who forwarded the same to PW 1 for chemical analysis. In these circumstances, there is justification for the argument that since the seal as well as the packets were in the custody of the same person, there was every possibility of the seized substance being tampered with, and that is the only hypothesis on which the discrepancy in weight can be explained. The least that can be said in the facts of the case is that there is serious doubt about the truthfulness of the prosecution case."

16. Mr Rai, then submits that though option was given to the appellant to be searched before a gazetted officer or nearest Magistrate but they were not apprised of their right to be searched in their presence and hence the procedure followed does not fulfil the requirement of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act"). He emphasised that the accused is not to be given an option to be searched in the presence of the gazetted officer or the Magistrate but to be apprised of his right to be searched in their presence. According to him conveying option and apprising the right are distinct. According to him, this does not satisfy the mandate of Section 50 of the Act and once its violation is established the search and seizure is rendered illegal and on this ground alone the appellants' conviction is vitiated. He points out that the charas was not recovered from the possession of the appellants but from the vehicle, but nonetheless the appellants were also searched and thus it was obligatory to follow the provisions of Section 50 of the Act.

17. Mr Rai finds support to the aforesaid submission from the decision of this Court in *Dilip* v. *State of M.P.*[3] and our attention has been drawn to para 16 of the judgment which reads as follows: (SCC p. 456)

> "*16.* In this case, the provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but, keeping in view the fact that the person of the appellants was also searched, it was obligatory on the part of PW 10 to comply with the said provisions. It was not done."

18. The abovesaid submission of Mr Rai does not commend us at all. In the present case the vehicle was searched and the charas was recovered from the vehicle and the persons of the appellants were not searched. As the recovery has been from the vehicle the provision of Section 50 of the Act, in our opinion, was not required to be complied with. It is relevant here to mention that the appellants were not searched at the place where the vehicle was intercepted and searched but after they were arrested, and brought to the police station, their search was made to find out the articles possessed by them before lodging them in lock-up. Not only this, the prosecution has also claimed compliance with Section 50 of the Act.

19. Section 50(1) of the Act, which is relevant for the purpose, reads as follows:

> "50. *Conditions under which search of persons shall be conducted.*—(1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate."

From a plain reading of the aforesaid provision it is evident that it comes into play only when search of a person other than vehicle, etc. is taken. Further the authorised officer is to apprise the person about to be searched to be taken to the nearest gazetted officer or to the Magistrate, if the person about to be searched so requires. Such an option was given to the appellants and, in our opinion, it is nothing but apprising them of their right. Option to choose is given to an accused when he has the right to choose. It is communication of the right either to accept or reject. Therefore, in our opinion giving the appellants option to be searched satisfied the requirement of Section 50 of the Act.

20. In *Dilip*[3] relied on by the appellants the question which fell for consideration was as to whether Section 50 of the Act if at all required to be complied with and in the background of the fact that before search and seizure of the contraband from the scooter, personal search of the accused was carried out, this Court held that it was so required. This would be evident from para 12 of the judgment which reads as follows: (SCC p. 453)

> "*12.* Before seizure of the contraband from the scooter, personal search of the appellants had been carried out and, admittedly, even at that

3 (2007) 1 SCC 450 : (2007) 1 SCC (Cri) 377

time the provisions of Section 50 of the Act, although required in law, had not been complied with."

21. In the present case, as observed earlier, the vehicle was searched at the first instance and therefore there was no requirement at all to inform the appellants of their right to be searched in the presence of the gazetted officer or Magistrate. Not only this, we have found that by giving option the appellants were apprised of their right and therefore the provision of Section 50 of the Act was fully complied with.

22. Mr P.S. Mishra, while adopting the submission advanced by Mr Rai, has made an additional submission. He contends that appellant Dinesh Kumar cannot be held to be in conscious possession of the charas as he had taken lift in the vehicle and he was not aware of the fact that charas was being transported in the vehicle. In this connection he had referred to the statements of the appellants recorded under Section 313 of the Code of Criminal Procedure. Both of them had specifically pleaded that this appellant had taken lift in the car. According to Mr Mishra if this explanation is accepted, this appellant deserves to be acquitted. We do not find any substance in this submission of Mr Mishra.

23. Statement under Section 313 of the Code of Criminal Procedure is taken into consideration to appreciate the truthfulness or otherwise of the case of the prosecution and it is not an evidence. Statement of an accused under Section 313 of the Code of Criminal Procedure is recorded without administering oath and, therefore, the said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act. The appellants have not chosen to examine any other witness to support this plea and in case none was available they were free to examine themselves in terms of Section 315 of the Code of Criminal Procedure which, inter alia, provides that a person accused of an offence is a competent witness of the defence and may give evidence on oath in disproof of the charges. There is reason not to treat the statement under Section 313 of the Code of Criminal Procedure as evidence as the accused cannot be cross-examined with reference to those statements. However, when an accused appears as a witness in defence to disprove the charge, his version can be tested by his cross-examination. Therefore, in our opinion the plea of the appellant Dinesh Kumar that he had taken lift in the car is not fit to be accepted only on the basis of the statements of the appellants under Section 313 of the Code of Criminal Procedure.

24. Both the appellants have been found travelling in the car from which charas was recovered and, therefore, they were in possession thereof. They were knowing each other. They were not travelling in a public transport vehicle. Distinction has to be made between the accused travelling by public transport vehicle and private vehicle. It needs no emphasis that to bring the offence within the mischief of Section 20 of the Act possession has to be conscious possession. Section 35 of the Act recognises that once possession is established the court can presume that the accused had a culpable mental

state, meaning thereby conscious possession. Further, the person who claims that he was not in conscious possession has to establish it. Presumption of conscious possession is further available under Section 54 of the Act, which provides that the accused may be presumed to have committed the offence unless he accounts for satisfactorily the possession of contraband.

25. The view which we have taken finds support from a judgment of this Court in *Madan Lal* v. *State of H.P.*[4] wherein it has been held as follows: (SCC p. 472, paras 26-27)

> "*26.* 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 the 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.
>
> *27.* In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the appellant-accused that the possession was not conscious in the logical background of Sections 35 and 54 of the Act."

26. Thus we do not find any merit in these appeals and they are dismissed accordingly.

(2010) 9 Supreme Court Cases 93

(BEFORE P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.)

SAQUIB ABDUL HAMEED NACHAN . . Appellant;

Versus

STATE OF MAHARASHTRA . . Respondent.

Criminal Appeals Nos. 419-21 of 2008† with WP (Crl.) No. 128 of 2008 and SLP (Crl.) No. ... of 2010 (D. No. 17899 of 2008), decided on August 11, 2010

A. **Prevention of Terrorism Act, 2002 — S. 32 — Confession/Statement of accused recorded under — Evidentiary value against other co-accused — Admissibility and extent to which can be used — *Navjot Sandhu case*, (2005) 11 SCC 600 clarified that confession/statement made under S. 32 by accused cannot be used as a piece of evidence for any purpose against other co-accused — Such view reiterated — Impugned order of Full Bench of High Court set aside insofar as applicability of confessional statement of accused under S. 32 against other co-accused was concerned — Further directions issued — Constitution of India — Art. 141 (Paras 11, 13, 16 and 17)**

State (NCT of Delhi) v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715, *applied*

4 (2003) 7 SCC 465 : 2003 SCC (Cri) 1664

† From the Judgment and Order dated 5-11-2004 of the High Court of Judicature at Bombay in Crl. WPs Nos. 1650, 1742 and 983 of 2004

(2011) 4 Supreme Court Cases 786

(BEFORE P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.)

STATE OF MADHYA PRADESH .. Appellant;

Versus

RAMESH AND ANOTHER .. Respondents.

Criminal Appeal No. 1289 of 2005†, decided on March 18, 2011

A. **Penal Code, 1860 — Ss. 302 and 120-B — Murder of husband by wife and her paramour — Conviction restored — Cause of death, held, was asphyxia as a result of throttling — R-2 with a false name, filed an FIR that her husband *C* died after falling during a spell of giddiness — Another complaint filed by PW 2 along with PW 1, daughter of deceased and R-2 aged about 8 years, that both respondent-accused had murdered *C* — Trial court came to conclusion that injuries found on person of deceased could not have been received from a fall on the ground — Injuries found on his body were found to be in consonance with deposition of PW 1 — Trial court relying upon PW 1, convicted and sentenced both respondent-accused — High Court allowed appeal of respondent-accused and both of them stood acquitted — High Court found that conspiracy between the said two accused was not possible as R-1 was facing trial for committing rape on R-2 — Rape case remained pending for three years and R-1 got acquitted after death of deceased — In fact, the facts revealed that they were having illicit relationship for a period of more than 3 years, which R-2 failed to specifically deny in her deposition in her defence on entering the witness box under S. 315 CrPC— High Court brushed aside this finding without giving any cogent reason — Held, High Court has completely ignored the most material incriminating circumstances which appeared against respondent-accused — Findings recorded by High Court are contrary to evidence on record — Criminal Trial — Medical Jurisprudence/Evidence — Asphyxia/Throttling/Strangulation/Hanging — Criminal Procedure Code, 1973, S. 315** (Paras 16, 17, 22, 23, 26, 28 and 30 to 34)

B. **Penal Code, 1860 — S. 302 — Murder trial — Child witness — Reliability of testimony of — Competent, unless court considers otherwise — Court may rely upon evidence of child witness, in case her deposition inspires confidence of court and there is no embellishment or improvement — Every witness is competent to depose unless court considers that she is prevented from understanding the question put to her due to tender age, extreme old age, disease whether of body or mind — Only in case there is evidence on record to show that a child has been tutored, can court reject her statement partly or fully — An inference as to whether child has been tutored or not, can be drawn from contents of her deposition — Statement of PW 1 was affirmed by statements of other witnesses, proved circumstances and medical evidence — Her deposition being precise, concise, specific and vivid without any improvement or embroidery, is worth**

† From the Judgment and Order dated 31-3-2004 of the High Court of Madhya Pradesh at Jabalpur, Bench at Gwalior in Crl. A. No. 262 of 1997

acceptance in toto — Conviction based on her testimony, restored — Oaths Act, 1873 — S. 5 — Evidence Act, 1872 — S. 118 — Criminal Trial — Witnesses — Child/Young witness (Paras 7 to 14 and 23)

Rameshwar v. *State of Rajasthan*, AIR 1952 SC 54 : 1952 Cri LJ 547; *Mangoo* v. *State of M.P.*, AIR 1995 SC 959 : 1995 Cri LJ 1461; *Panchhi* v. *State of U.P.*, (1998) 7 SCC 177 : 1998 SCC (Cri) 1561; *Nivrutti Pandurang Kokate* v. *State of Maharashtra*, (2008) 12 SCC 565 : (2009) 1 SCC (Cri) 454; *Ratansinh Dalsukhbhai Nayak* v. *State of Gujarat*, (2004) 1 SCC 64 : 2004 SCC (Cri) 7; *Himmat Sukhadeo Wahurwagh* v. *State of Maharashtra*, (2009) 6 SCC 712 : (2009) 3 SCC (Cri) 1; *State of U.P.* v. *Krishna Master*, (2010) 12 SCC 324 : (2011) 1 SCC (Cri) 381; *Gagan Kanojia* v. *State of Punjab*, (2006) 13 SCC 516 : (2008) 1 SCC (Cri) 109, *relied on*

C. Criminal Procedure Code, 1973 — Ss. 378 and 386 — Appeal against acquittal — Appellate court's power — Appreciation of evidence by appellate court — General principles — Presumption of innocence — Appellate court being the final court of fact is fully competent to reappreciate, reconsider and review the evidence and take its own decision — There is no limitation, restriction or condition on exercise of such power and appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides a further presumption in favour of accused (Para 15)

D. Criminal Trial — Appreciation of Evidence — Contradictions, inconsistencies, exaggerations or embellishments — Minor contradictions — Omissions/Contradictions in present case, held, are of trivial nature and are certainly not of such a magnitude that may materially affect core of prosecution case — Witnesses — Hostile witness — Statement of — Extent of reliability (Paras 19 to 22 and 32)

E. Criminal Procedure Code, 1973 — S. 154 — FIR — Appreciation of — Inference of guilt of accused — R-2 herself had reached police station and lodged complaint under a false name that her husband died because of falling from giddiness — IO as well as trial court disbelieved this version — Held, R-2 would not have moved in the night for 8 km to lodge FIR, that too under a false name, if she was not at fault or having a guilty mind — Criminal Trial — Conduct of accused (Para 26)

F. Evidence Act, 1872 — Ss. 6 and 60 — Res gestae — Hearsay evidence — Exception to the general rule, when hearsay evidence becomes admissible — PW 1 eyewitness immediately after occurrence went to PW 2 and informed him — Thus, statement of PW 2 indicating that PW 1 had come to him and told him that her father was beaten by *R* with the help of her mother, is admissible — Criminal Trial — Confession — Extra-judicial confession/Hearsay (Para 18)

Sukhar v. *State of U.P.*, (1999) 9 SCC 507 : 2000 SCC (Cri) 419, *relied on*

G. Criminal Procedure Code, 1973 — Ss. 313, 315 and 161(2) — Statement of accused — Reliance on — When may accused depose in his defence — Silence of accused — Failure to specifically deny incriminating circumstance after entering witness box under S. 315 — Effect — Reiterated, the law provides against an adverse inference from silence of

accused — However, failure of accused to specifically deny incriminating circumstances after entering witness box under S. 315, relied on against her — Constitution of India — Art. 20(3) — Evidence Act, 1872, S. 114 Ill. (g) and Ss. 106 and 3 (Paras 27 to 31)

Tukaram G. Gaokar v. *R.N. Shukla*, AIR 1968 SC 1050 : 1968 Cri LJ 1234; *Dehal Singh* v. *State of H.P.*, (2010) 9 SCC 85 : (2010) 3 SCC (Cri) 1139, *relied on*

H. **Criminal Trial — Appreciation of evidence — Credibility of witness — Witness in examination-in-chief stating that she did not understand right from wrong, nor what an oath was — Testimony of such witness, held, rightly disregarded by trial court (Para 24)**

Appeal allowed J-D/47706/CR

Advocates who appeared in this case :
Vibha Datta Makhija, Advocate, for the Appellant;
Ms K. Sarada Devi, Advocate, for the Respondents.

Chronological list of cases cited *on page(s)*

1. (2010) 12 SCC 324 : (2011) 1 SCC (Cri) 381, *State of U.P.* v. *Krishna Master* 792*b*
2. (2010) 9 SCC 85 : (2010) 3 SCC (Cri) 1139, *Dehal Singh* v. *State of H.P.* 797*a*
3. (2009) 6 SCC 712 : (2009) 3 SCC (Cri) 1, *Himmat Sukhadeo Wahurwagh* v. *State of Maharashtra* 792*a-b*
4. (2008) 12 SCC 565 : (2009) 1 SCC (Cri) 454, *Nivrutti Pandurang Kokate* v. *State of Maharashtra* 791*c-d*
5. (2006) 13 SCC 516 : (2008) 1 SCC (Cri) 109, *Gagan Kanojia* v. *State of Punjab* 792*e*
6. (2004) 1 SCC 64 : 2004 SCC (Cri) 7, *Ratansinh Dalsukhbhai Nayak* v. *State of Gujarat* 791*f-g*
7. (1999) 9 SCC 507 : 2000 SCC (Cri) 419, *Sukhar* v. *State of U.P.* 794*a-b*
8. (1998) 7 SCC 177 : 1998 SCC (Cri) 1561, *Panchhi* v. *State of U.P.* 791*b*
9. AIR 1995 SC 959 : 1995 Cri LJ 1461, *Mangoo* v. *State of M.P.* 791*a*
10. AIR 1968 SC 1050 : 1968 Cri LJ 1234, *Tukaram G. Gaokar* v. *R.N. Shukla* 797*a*
11. AIR 1952 SC 54 : 1952 Cri LJ 547, *Rameshwar* v. *State of Rajasthan* 790*e-f*

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J.— This appeal has been preferred by the State of Madhya Pradesh against the judgment and order dated 31-3-2004 passed by the High Court of Madhya Pradesh at Jabalpur (Gwalior Bench) in Criminal Appeal No. 262 of 1997, reversing the judgment and order dated 16-8-1996 passed by the Sessions Court, Guna in Sessions Trial No. 155 of 1995, convicting Respondent 1 under Section 302 of the Penal Code, 1860 (hereinafter called as "IPC") and Respondent 2 under Section 302 read with Section 120-B IPC, and sentencing them to life imprisonment.

Factual matrix

2. Respondent 2, Bhaggo Bai filed an FIR dated 31-1-1995 in Police Station Ashok Nagar, mentioning her name as Madhav Bai stating that her husband Chatra died after falling during a spell of giddiness at about 11.00 p.m. In respect of the same incident, another complaint was lodged by

Munna Lal (PW 2) along with Rannu Bai (PW 1), daughter of deceased Chatra and Bhaggo Bai, aged about 8 years stating that both the respondent-accused had murdered Chatra. After holding a preliminary investigation, the investigating officer arrested Respondent 2 Bhaggo Bai and lodged the FIR formally on 4-2-1995.

3. After completing the investigation, a charge-sheet was filed against both the accused for committing the murder of Chatra. A large number of witnesses were examined by the prosecution. Both the respondent-accused examined themselves as defence witnesses along with some other witnesses. After concluding the trial, both the respondent-accused were convicted and sentenced, as mentioned hereinabove, by the Sessions Judge vide judgment and order dated 16-8-1996. Being aggrieved, both the respondent-accused filed Criminal Appeal No. 262 of 1997 which has been allowed by the impugned judgment and order and both of them stood acquitted. Hence, this appeal.

4. Ms Vibha Datta Makhija, learned counsel appearing for the appellant State, has submitted that the judgment and order of the High Court is not sustainable in the eye of the law. The High Court has gravely erred in showing unwarranted sympathy towards the accused and disbelieved the prosecution case brushing aside the statement of Rannu Bai (PW 1), merely being a child witness and pointing out that there was contradiction in the medical and ocular evidence regarding the injuries found on the person of Chatra, the deceased. The High Court further erred in holding that there was enmity between the accused Bhaggo Bai and Ramesh. At the time of death of Chatra, Ramesh, the accused was facing trial for committing rape on Bhaggo Bai; thus, question of conspiracy between the said two accused could not arise; several cases were also pending in different courts between Munna Lal (PW 2) and his wife Kusum Bai on the one hand, and Chatra and Bhaggo Bai on the other hand. Thus, there was a possibility of false implication of Ramesh, the accused. Chatra died because of a fall when he went to urinate, as he was suffering from giddiness all the time because he used to take "dhatura" and had become a lunatic. Chatra used to eat soil, etc. Rannu Bai (PW 1) though a child, was able to understand the questions put to her and her duty to speak the truth. She could not have any enmity with either of the accused. The rape case filed by deceased Chatra and Bhaggo Bai against accused Ramesh remained pending for a long time and Ramesh got acquitted after the death of Chatra, the deceased. The trial court after appreciating the documentary evidence on record came to the conclusion that accused Ramesh committed rape upon Bhaggo Bai during the period between 24-6-1991 to 17-9-1994. In fact, they were having illicit relationship for a period of more than 3 years. The High Court brushed aside the said finding without giving any cogent reason. The allegation that Rannu Bai (PW 1) had been tutored by Munna Lal (PW 2) could not be spelled out from her statement. The neighbours had come at the place of occurrence after being called by Rannu Bai (PW 1) and Munna Lal (PW 2). In spite of the fact that some of them had been declared hostile, part of their evidence could still be relied

upon in support of the prosecution case. Therefore, the impugned judgment and order of the High Court, is liable to be set aside, and the appeal deserves to be allowed.

5. On the contrary, Ms K. Sarada Devi, learned counsel appearing for the respondents, has submitted that the facts and circumstances of the case do not warrant interference by this Court against the judgment and order of acquittal by the High Court. The High Court being the first appellate court and the final court of facts had appreciated the entire evidence on record and came to the conclusion that it was not possible that Bhaggo Bai could have hatched a conspiracy with Ramesh, the accused for committing the murder of her husband Chatra during the pendency of the case filed by her against Ramesh under Section 376 IPC. As Munna Lal (PW 2), his wife and son had also assaulted the deceased Chatra and Bhaggo Bai, the accused and wanted to grab their property and so many civil and criminal cases were pending between them, his evidence cannot be relied upon. As per the medical evidence, it was possible that the injuries suffered by Chatra could have been received by fall caused by giddiness. More so, Chatra had become a lunatic and could not understand right or wrong. The testimony of Rannu Bai (PW 1), has been rightly disbelieved by the High Court as she had been tutored by Munna Lal (PW 2). Admittedly, she had been living with him since the death of her father Chatra. The High Court has rightly believed the defence version and appreciated the depositions of the defence witnesses, including Radha Bai (DW 1), elder daughter of Bhaggo Bai, the accused, in the correct perspective. The appeal lacks merit and is liable to be dismissed.

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

Child witness

7. In *Rameshwar* v. *State of Rajasthan*[1] this Court examined the provisions of Section 5 of the Oaths Act, 1873 and Section 118 of the Evidence Act, 1872 and held that (AIR p. 55, para 7) every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the court considers otherwise. The Court further held as under: (AIR p. 56, para 11)

> "*11.* ... it is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate."

1 AIR 1952 SC 54 : 1952 Cri LJ 547

8. In *Mangoo* v. *State of M.P.*[2] this Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

9. In *Panchhi* v. *State of U.P.*[3] this Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that

> "the evidence of a child witness would always stand irretrievably stigmatised. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring" (SCC p. 181, para 11).

10. In *Nivrutti Pandurang Kokate* v. *State of Maharashtra*[4] this Court dealing with the child witness has observed as under: (SCC pp. 567-68, para 10)

> "*10.* '... *7.* ... The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.'* "

11. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him

2 AIR 1995 SC 959 : 1995 Cri LJ 1461
3 (1998) 7 SCC 177 : 1998 SCC (Cri) 1561 : AIR 1998 SC 2726
4 (2008) 12 SCC 565 : (2009) 1 SCC (Cri) 454 : AIR 2008 SC 1460
* **Ed.**: As observed in *Ratansinh Dalsukhbhai Nayak* v. *State of Gujarat*, (2004) 1 SCC 64 : 2004 SCC (Cri) 7, at SCC pp. 67-68, para 7.

and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him. (Vide *Himmat Sukhadeo Wahurwagh* v. *State of Maharashtra*[5].)

12. In *State of U.P.* v. *Krishna Master*[6] this Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

13. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (Vide *Gagan Kanojia* v. *State of Punjab*[7].)

14. In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.

Appeal against acquittal

15. We are fully alive of the fact that we are dealing with an appeal against acquittal and in the absence of perversity in the said judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. It is settled proposition of law that the appellate court being

5 (2009) 6 SCC 712 : (2009) 3 SCC (Cri) 1 : AIR 2009 SC 2292
6 (2010) 12 SCC 324 : (2011) 1 SCC (Cri) 381 : AIR 2010 SC 3071
7 (2006) 13 SCC 516 : (2008) 1 SCC (Cri) 109

the final court of fact is fully competent to reappreciate, reconsider and review the evidence and take its own decision. Law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court and there can be no quarrel to the said legal proposition that if two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal.

Injuries

16. Dr. D.K. Jain (PW 8) has performed post-mortem of Chatra, the deceased. He found following injuries on his person vide post-mortem report, Ext. P-8:

(*i*) A contusion of size 1 cm × 1 cm on the L of mandible on right side with an abrasion on upper part of contusion 1 cm × 0.3 cm obliquely. Subcutaneous haemorrhage present.

(*ii*) An abrasion of size 0.5 cm × 0.2 cm 1½" below the above contusion over neck. Subcutaneous haemorrhage present.

(*iii*) An abrasion of size 0.5 cm × 0.2 cm, 1.5 cm below and lateral to L of mandible, right on neck.

(*iv*) An abrasion of size 3.5 cm × 0.5 cm over left side of neck posterior laterally on upper part, transversely oblique going upwards. Subcutaneous haemorrhage present.

(*v*) A contusion over lower lip right side near to L of mouth of size 0.5 cm × 0.5 cm, subcutaneous haemorrhage present.

(*vi*) An abrasion over right shoulder posterolaterally of size 4 cm x 1.5 cm post-mortem in nature.

Dr. D.K. Jain (PW 8) opined that Injury (*vi*) was after the death. On internal examination, he found the right pleura adherent to lung parietes. Both the lungs were enlarged. On further dissection, he found a subcutaneous haemorrhage present in suprasternal notch area. Blood-mixed fluid with froth stood discharged through mouth and nose. According to the doctor, cause of death was on account of "asphyxia" as a result of throttling. No piece of cloth or thread was found inside the mouth of the deceased. The deceased had an ailment of the lungs.

17. The trial court after considering the entire evidence on record came to the conclusion that the injuries found on the person of the deceased could not have been received from a fall on the ground. The injuries found on his body are in consonance with the deposition of Rannu Bai (PW 1), who has stated that after hearing the noise, she woke up and saw that accused Ramesh was beating her father with "gumma" (a hard object made of cloth), and her mother had caught hold of the deceased by his legs. The doctor had found that blood had oozed from his mouth and such injury could be possible as per

the case of the prosecution. Undoubtedly, Munna Lal (PW 2) has deposed that Ramesh had caused injuries with the knife. The High Court has given undue weightage to his statement. In fact, as per the prosecution case, Munna Lal (PW 2) was not an eyewitness. He was called by Rannu Bai (PW 1) and reached the place of occurrence along with some other persons.

18. In *Sukhar* v. *State of U.P.*[8] this Court has explained the provisions of Section 6 of the Evidence Act, 1872 observing that it is an exception to the general rule whereunder the hearsay evidence becomes admissible. However, such evidence must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of res gestae, must have been made contemporaneously with the acts or immediately thereafter. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" that it becomes relevant by itself. Applying the ratio of the said judgment to the evidence of Munna Lal (PW 2), we reach the conclusion that his statement indicating that Rannu Bai (PW 1) had come to him and told that her father was beaten by Ramesh with the help of her mother, is admissible under Section 6 of the Evidence Act.

19. Ms K. Sarada Devi, learned counsel appearing for the respondents has drawn our attention to certain minor contradictions in the statement of Rannu Bai (PW 1) and Munna Lal (PW 2). She has placed a very heavy reliance on the statement of Rannu Bai (PW 1) that first she had gone to the house of her grandfather Lala and the trial court committed an error reading it as Munna Lal (PW 2). In view of the fact that Bhaggo Bai, respondent-accused herself stated in her cross-examination while being examined under Section 315 CrPC that she had sent Rannu Bai (PW 1) to call Munna Lal (PW 2), such argument loses significance. Even otherwise, the omissions/contradictions pointed out by Ms K. Sarada Devi are of trivial nature and are certainly not of such a magnitude that may materially affect the core of the prosecution case.

20. The witness examined by the prosecution supported its case to the extent that the door of the room wherein the offence had been committed was bolted from inside. It was only when Ram Bharose, village watchman (PW 5) threatened Bhaggo Bai, the accused, saying that he would call the police, the door was opened and, by that time, accused Ramesh had left the place of occurrence and Chatra had died. Thus, there is no conflict between the medical and ocular evidence. The prosecution case is fully supported by Ram Bharose (PW 5) and partly supported by Hannu (PW 7) and Anand Lal (PW 3). Even the part of the depositions of hostile witnesses, particularly Basori Lal, Sarpanch (PW 4) can be relied upon to the extent that on being called, he reached the place of occurrence and found that the room had been bolted from inside. It is also evident from the evidence on record that Rannu Bai (PW 1) and Munna Lal (PW 2) had called the persons from their houses and

8 (1999) 9 SCC 507 : 2000 SCC (Cri) 419

after their arrival, they found that the room had been bolted from inside. So to that extent, the version of these witnesses including of the hostile witnesses, can be believed and relied upon. The post-mortem report clearly explained that Chatra died of "asphyxia" and this version has been fully supported by Dr. D.K. Jain (PW 8).

21. Bhaggo Bai, respondent-accused has admitted in her statement under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter called as "CrPC") that Rannu Bai (PW 1) was present inside the room/place of occurrence and she further admitted that Rannu Bai (PW 1) had gone to call Munna Lal (PW 2) at the relevant time. Thus, it is evident from the aforesaid admission of the said accused itself that both the persons were present inside the room and are well aware of the incident.

22. Undoubtedly, there had been some minor contradictions in the statements of witnesses in regard to the fact as to who had reached the place of occurrence first. All the witnesses have affirmed in one voice that Munna Lal (PW 2) had entered the room and after coming out, he disclosed that Chatra has died. In fact, this fact had been affirmed by all the witnesses. In view of the contradictions in the statements of witnesses as to whether torch was used to create artificial light in the room or not to find out the scene therein, becomes immaterial. It is evident from the material available on record that it was only a one-room house where the incident took place and no other space was available. Thus, in case the other witnesses had not deposed that Radha Bai (DW 1) was also present in the house along with accused Bhaggo Bai, remains immaterial for the reason that her presence is natural.

23. The trial court after taking note of the rulings of various judgments of this Court as to what are the essential requirements to accept the testimony of a child witness held as under:

> "In the present case, statement of child witness gets affirmed by the circumstances of the incident, facts and from the activities of the other witnesses carried out by them on reaching at the place of occurrence. Thus, on the basis of abovesaid law precedents, statement of witness Rannu Bai not being unreliable in my opinion is absolutely true and correct.... Statement of child witness Rannu Bai gets affirmed by the statements of Munna and witness Hannu and from the medical evidence. Therefore, facts of the abovestated law precedents are not applicable to the present case."

In view of the above, it is evident that the statement of Rannu Bai (PW 1) is affirmed by the statements of other witnesses, proved circumstances and medical evidence. Her deposition being precise, concise, specific and vivid without any improvement or embroidery is worth acceptance in toto.

24. A very heavy reliance has been placed by the defence counsel Ms K. Sarada Devi on the statements of defence witnesses, particularly, Radha Bai (DW 1). However, it may be relevant to point out the initial part of her statement made in the examination-in-chief:

"In view of the witness's age before she was sworn she was asked as under:

Q. Are you literate? Have you gone to school for reading?

A. No.

Q. Do you understand right or wrong?

A. I do not understand.

Q. Do you understand saugandh or sau (oath or hundred)?

A. I do not know.

Considering the said answers of the witness it appears that the *witness does not understand right, wrong or oath*, therefore the witness was not sworn." (emphasis added)

In view of the above, we are of the view that it cannot be safe to rely upon her evidence at all.

25. So far as the deposition of Budha (DW 2), father of Bhaggo Bai, the accused, is concerned, he was 80 years of age at the time of examination and not the resident of the same village. He has deposed only on the basis of the information he had received from his daughter Bhaggo Bai, the accused. Thus, he is not of any help to the defence as we see no reason to believe the theory put forward by the defence.

26. A complaint was lodged promptly at 6.00 a.m. on 1-2-1995 in Police Station Ashok Nagar at a distance of 8 km. It may also be relevant to mention herein that the formal FIR was lodged on 4-2-1995 after holding preliminary investigation and arresting Bhaggo Bai, the accused. Bhaggo Bai herself had reached the police station and lodged the complaint that her husband Chatra died because of falling from giddiness when he went to ease himself outside the house. This version has been disbelieved by the IO as well as by the trial court. In our considered opinion, Bhaggo Bai would not have moved in the night for 8 km to lodge the FIR, if she was not at fault or having a guilty mind. Secondly, she lodged the complaint in the name of Madhav Bai and not in her own name Bhaggo Bai.

27. The cumulative effect of reading the provisions of Article 20(3) of the Constitution with Sections 161(2), 313(3) and proviso (*b*) to Section 315 CrPC remains that in India, law provides for the rule against adverse inference from silence of the accused.

28. The statement of the accused made under Section 313 CrPC can be taken into consideration to appreciate the truthfulness or otherwise of the prosecution case. However, as such a statement is not recorded after administration of oath and the accused cannot be cross-examined, his statement so recorded under Section 313 CrPC cannot be treated to be evidence within the meaning of Section 3 of the Evidence Act, 1872. Section 315 CrPC enables an accused to give evidence on his own behalf to disprove the charges made against him. However, for such a course, the accused has to offer in writing to give his evidence in defence. Thus, the accused becomes ready to enter into the witness box, to take oath and to be cross-examined on behalf of the prosecution and/or of the accomplice, if it is so required. (Vide

Tukaram G. Gaokar v. *R.N. Shukla*[9] and *Dehal Singh* v. *State of H.P.*[10]) In such a fact situation, the accused being a competent witness, can depose in his defence and his evidence can be considered and relied upon while deciding the case.

29. Bhaggo Bai, the accused examined herself as a defence witness (DW 3) and entered into the witness box. She has also been cross-examined on behalf of the prosecution as well as on behalf of co-accused Ramesh. Bhaggo Bai, the accused (DW 3) deposed that accused Ramesh had committed rape upon her 6 years ago and in that case, criminal prosecution was launched against him. She has further deposed that after her husband Chatra fell from giddiness, she had brought him inside the room with the help of her elder daughter Radha Bai (DW 1) and put him on the bed. She herself sent her younger daughter Rannu Bai (PW 1) to call Munna. Munna came and saw Chatra.

30. The relevant part of Bhaggo Bai's deposition reads as under:

> "... Then he (Munna) bolted the door from outside. He called the watchman. The watchman and Munna seeing me in the room went to the police station.... It is right that for the last 8-10 years, I, Chatra and Munna had no contact with Ramesh.... I got my name to be written as Bhaggo Bai at the time of report, Ext. D-7. My name is not Madhav Bai. The policemen recorded the report in the name of Madhav Bai. I sent Rannu Bai to call Munna because Munna was my husband's elder brother.
>
> * * *
>
> *Q. 17.* Had you illicit and immoral relations with the accused Ramesh when Chatra was alive?
>
> *A.* What can I say?
>
> * * *
>
> *Q.* We are saying that you had given twisting statement in a rape case on which the accused Ramesh was acquitted?
>
> *A.* I gave statement."

Her aforesaid statement is not worth acceptance for the reason that all the witnesses including those who turned hostile had admitted that the room was bolted from inside and her statement that Munna had bolted the room from outside has not been corroborated by any person. In case she and her husband Chatra were not having any relation with Munna (PW 2) for the last 8-10 years, it would be unnatural that she would send her daughter Rannu Bai (PW 1) to call Munna because he was her husband's elder brother. While lodging report, Ext. D-7 she told her name as Madhav Bai. However, in cross-examination she has stated that policemen recorded her name as Madhav Bai though her name is Bhaggo Bai. More so, she has not specifically denied having illicit relationship with Ramesh, the accused, nor

9 AIR 1968 SC 1050 : 1968 Cri LJ 1234
10 (2010) 9 SCC 85 : (2010) 3 SCC (Cri) 1139

has she denied that she made a twisting statement to help the accused Ramesh to get acquitted in the rape case.

31. The trial court after examining the entire material on record, particularly the documentary evidence came to the conclusion as under:

> "*43.* ... It appears on viewing all the above documents Exts. D-8 to D-42 that all these documents are related to the incident of rape of Bhaggo Bai committed by accused Ramesh for the period 24-6-1991 to 17-9-1994...."

The High Court did not deal with this aspect at all.

32. All the witnesses examined by the prosecution including those who have turned hostile are admittedly the neighbours of Chatra, the deceased and Munna Lal. Thus, they are the most natural witnesses and the trial court has rightly placed reliance on their testimonies.

33. After appreciating the entire evidence on record, we come to the inescapable conclusion that the High Court has completely ignored the most material incriminating circumstances which appeared against the respondent-accused. The findings so recorded by the High Court are contrary to the evidence on record and thus, are held to be perverse.

34. In view of the above, the appeal deserves to be allowed and it is hereby allowed. The judgment and order of the High Court dated 31-3-2004 in Criminal Appeal No. 262 of 1997 is hereby set aside and the judgment and order of the trial court dated 16-8-1996 convicting the respondent-accused under Section 302 IPC in Sessions Trial No. 155 of 1995 is hereby restored. A copy of the judgment be sent to the Chief Judicial Magistrate, Guna, M.P. to take the said respondents into custody and to send them to jail to serve the remaining part of the sentence.

(2011) 4 Supreme Court Cases 798

(BEFORE D.K. JAIN AND H.L. DATTU, JJ.)

RANU HAZARIKA AND OTHERS .. Appellants;

Versus

STATE OF ASSAM AND OTHERS .. Respondents.

Civil Appeals No. 2153 of 2011† with Nos. 2154-67 of 2011‡ and 2168-70 of 2011††, decided on February 28, 2011

A. **Education and Universities — Teachers Training — Minimum qualifications prescribed by NCTE — Primacy of**

B. **Service Law — Recruitment process — Judicial review/Validity — Recruitment process under ultra vires rules, held, is impermissible — Education and Universities — Assam Elementary Education**

† Arising out of SLP (C) No. 17397 of 2009. From the Judgment and Order dated 9-4-2009 of the High Court of Gauhati at Gauhati in WP (C) No. 3254 of 2006

‡ Arising out of SLPs (C) Nos. 19816-29 of 2009

†† Arising out of SLPs (C) Nos. 10052-54 of 2010

objection while amending the Schedule to the Act, we do not find any infirmity in the judgment under appeal.

5. The appeal fails and is, accordingly, dismissed. There shall be no order as to costs.

(2001) 10 Supreme Court Cases 372

(BEFORE K.T. THOMAS AND S.N. VARIAVA, JJ.)

STATE (DELHI ADMINISTRATION) .. Appellant;

Versus

DHARAMPAL .. Respondent.

Criminal Appeals Nos. 1076 of 2001† with Nos. 1077-78 of 2001, decided on October 19, 2001

A. Criminal Procedure Code, 1973 — S. 313 — Failure to draw accused's attention to in'culpatory material to enable him to explain it in examination of accused under S. 313 — Held, by itself does not vitiate the proceedings — Prejudice, if any, caused to the accused must be established by him — It is also open to the appellate court to call upon the counsel for the accused to show the explanation which accused had to offer in respect of the circumstances established against him but not put to him — On facts, held, in a food adulteration case, no prejudice had occasioned to the accused on omission to put to him the contents of the certificate of Director, Central Food Laboratory while recording his statement under S. 313 — Where the prosecution is dependent on any report or certificate it is enough to draw the attention of the accused to it — Not necessary that his attention be specifically drawn to the contents of such report or certificate — Prevention of Food Adulteration Act, 1954, Ss. 13 and 7 & 16 — Drugs and Cosmetics Act, 1940, Ss. 25 and 27 to 30

Held :

Where an omission, to bring the attention of the accused to an in'culpatory material has occurred, that does not ipso facto vitiate the proceedings. The accused must show that failure of justice was occasioned by such omission. Further, in the event of an in'culpatory material not having been put to the accused, the appellate court can always make good that lapse by calling upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against the accused but not put to him. (Para 13)

Shivaji Sahabrao Bobade v. *State of Maharashtra*, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033; *Basavaraj R. Patil* v. *State of Karnataka*, (2000) 8 SCC 740 : 2001 SCC (Cri) 87, *relied on*

In the present case both the Sessions Judge and the High Court were wrong in concluding that the omission to put the contents of the certificate of the Director, Central Food Laboratory, could only result in the accused being acquitted. The accused had to show that some prejudice was caused to him by the report not being put to him. Even otherwise, it was the duty of the Sessions

† From the Judgment and Order dated 28-1-2000 of the Delhi High Court in Crl. A. No. 91 of 1996

Judge and/or the High Court, if they found that some vital circumstance had not been put to the accused, to put those questions to the counsel for the accused and get the answers of the accused. If the accused could not give any plausible or reasonable explanation it would have to be assumed that there was no explanation. Both the Sessions Judge and the High Court have overlooked this position of law and failed to perform their duties and thereby wrongly acquitted the accused. (Para 14)

Further, in all these cases, the copy of the certificate of the Director, Central Food Laboratory had been supplied to the accused. They were thus aware of the contents of the certificate. Under the Prevention of Food Adulteration Act the prosecution is based upon the contents of either the report of the Public Analyst or the certificate of the Director of Central Food Laboratory. During their examination under Section 313 CrPC, questions pertaining to the certificate were put to the accused. The explanation of the accused, in respect of the certificate, had been called for. In such cases it is enough if the attention of the accused is brought to the report or the certificate, as the case may be. It is not necessary that the contents of the report be also put to the accused. The questions put to the accused in these cases clearly indicated that what was being put to the accused were the contents of the certificate. The accused clearly understood that what was being put to them was the contents of the certificate. The accused gave their answers to the contents of the certificate. Clearly no prejudice had been caused to them. Before the Supreme Court also it could not be shown that any prejudice had been caused to them. (Paras 15 and 18)

B. **Criminal Procedure Code, 1973 — S. 378 — Period of limitation for filing appeal against acquittal by State/Central Govt. — Held, is 90 days as provided under Art. 114 of Limitation Act — Limitation Act, 1963, Art. 114**

C. **Criminal Procedure Code, 1973 — S. 378(5) — Period of limitation under — Applies only to application for special leave filed by complainants, who may be a public servant or a private party, but not to appeal by State/Central Govt.**

D. **Criminal Procedure Code, 1973 — S. 378(3) & (4) — For filing appeal against acquittal, while a complainant is required to obtain "special leave" under sub-section (4), State/Central Govt. is only required to obtain "leave" under sub-section (3)**

E. **Criminal Procedure Code, 1973 — S. 378(6) — State Govt. cannot maintain an appeal under S. 378(1) and (2) if special leave to appeal is refused by High Court to a complainant**

F. **Criminal Procedure Code, 1973 — S. 378 — Compared with S. 417 CrPC, 1898 — In S. 378(1) sub-section (6) should be read in place of sub-section (5) — It is an inadvertent mistake — Criminal Procedure Code, 1898, S. 417**

Held:

Under Section 417 of the Criminal Procedure Code, 1898 no application for special leave to appeal had to be made by the State Government or the Central Government, if they filed an appeal against acquittal. The period of 60 days provided in Section 417(4) did not apply to an appeal by the State Government or the Central Government. The period of limitation for the State Government or the Central Government was only under Article 114(*a*) of the Limitation Act. The right of the State Government to file an appeal under Section 417(1) was subject

to sub-section (5) which provided that if special leave to appeal had been refused to a complainant then the State Government could not maintain an appeal. A comparison of Section 378 with the old Section 417 shows that whilst under the old section no application for leave to appeal had to be made by the State Government or the Central Government, now by virtue of Section 378(3) the State Government or the Central Government have to obtain leave of the High Court before their appeal could be entertained. Sub-section (4) of Section 378 is identical to sub-section (3) of Section 417. Thus a complainant desirous of filing an appeal against acquittal must still obtain special leave. Section 378 makes a distinction between an appeal filed by the State Government or the Central Government, who only need to obtain "leave", and an appeal by a complainant who needs to obtain "special leave". The limitation provided in sub-section (5) is only in respect of applications under sub-section (4) i.e. application for special leave to appeal by a complainant. A complainant may be either a public servant or a private party. If the complainant is a public servant then the period of limitation for an application for special leave is 6 months. If the complainant is a private party then the period of limitation for an application for special leave is 60 days. The periods of 6 months and/or 60 days do not apply to appeals by the State Government [under sub-section (1)] or the Central Government [under sub-section (2)]. Appeals by the State Government or the Central Government continue to be governed by Article 114(*a*) of the Limitation Act. In other words, those appeals must be filed within 90 days from the date of the order appealed from. If there is a delay in filing an appeal by the State Government or Central Government it would be open to them to file an application under Section 5 of the Limitation Act for condonation of such delay. That period can be extended if the court is satisfied that there was sufficient cause for not preferring the appeal within the period of 90 days. (Paras 22, 23 and 25)

However the reference to sub-section (5) in sub-section (1) of Section 378 is clearly an inadvertent mistake. Sub-section (5) applies only to application for special leave by a complainant. It has no application to an appeal by the State Government or to an application for leave under sub-section (3). What the legislature clearly intended was to continue to provide that an appeal by the State Government would not be maintainable if special leave to appeal had been refused to a complainant. Thus sub-section (1) of Section 378 was to be subject to provisions of sub-section (6) and not sub-section (5) as inadvertently provided therein. Inadvertently the figure (5) in Section 417(1) was continued, without noticing that now under Section 378 the relevant provision was sub-section (6). The figure (5) in Section 378(1) is inadvertently retained. Thus in Section 378(1) the figure (6) will have to be read in place of the figure (5). (Para 26)

R-M/ATZ/24664/SR

Advocates who appeared in this case :

B.A. Mohanty, U.R. Lalit, Senior Advocates (Rajeev Sharma, Ms Anita Verma, Ms Mamta Tripathi, Ms Usha Mann, D.S. Mahra, Randhir Singh Jain, D.B. Vohra, S.K. Sabharwal, M. Qamaruddin, Ms M. Qamaruddin and Ambar Qamaruddin, Advocates, with them) for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. (2000) 8 SCC 740 : 2001 SCC (Cri) 87, *Basavaraj R. Patil* v. *State of Karnataka* 376*c*
2. (1973) 2 SCC 793 : 1973 SCC (Cri) 1033, *Shivaji Sahabrao Bobade* v. *State of Maharashtra* 376*c*

The Judgment of the Court was delivered by

S.N. VARIAVA, J.— Leave granted.

2. Heard parties.

3. These appeals are against the judgment of the Delhi High Court dated 20-11-2000. By this judgment a number of appeals, filed by the appellants herein, have been dismissed. All these appeals are against the said common judgment. They are based on almost similar facts and raise common question of law. They are, therefore, being disposed of by this common judgment.

4. It must be mentioned that against the judgment dated 20-11-2000 other SLPs had also been filed before this Court. Those were dismissed leaving the questions of law open.

5. In this judgment the facts in Criminal Appeal No. 1076 of 2001 [arising out of SLP (Crl.) No. 1617 of 2001] are being set out. The facts of the other appeals need not be set out as they are more or less similar.

6. On 29-8-1988 the Food Inspector purchased a sample of lal mirch kutti from M/s Vashno Panjabu Dhaba, H-1, Chander Nagar, Delhi. The respondent was the person who had sold lal mirch to the Food Inspector. The sample purchased was divided into three equal parts and put into bottles which were sealed. One sample was sent to the Public Analyst, who, by his report dated 6-8-1988 found the same to be non-conforming to the prescribed standards. On 4-5-1989 after obtaining sanction from the competent authority, under Section 20 of the Prevention of Food Adulteration Act (hereinafter called "the Act"), a complaint was filed in the Court of learned Metropolitan Magistrate. The respondent exercised his right under Section 13(2) of the Act. Accordingly a sample was sent to the Director, Central Food Laboratory for analysis. A report was given by the Director, Central Food Laboratory. He found the sample to contain moisture as 20.01% and as insoluble in HCl as 1.92% as against the maximum standard of 12% and 1.3% respectively. He also found adulterating material, starches and colouring material in the sample.

7. The respondent was after a trial convicted by the learned Metropolitan Magistrate by his judgment dated 23-2-1991/26-2-1991. He was sentenced to rigorous imprisonment for 1 1/2 years and to pay a fine of Rs 5000 and in default of payment of fine to further undergo simple imprisonment for six months.

8. The respondent filed an appeal before the Sessions Judge, New Delhi. The Sessions Judge by his judgment dated 13-2-1995 acquitted the respondent only on the ground that the trial court, while recording the statement of the accused-respondent under Section 313 of the Criminal Procedure Code, did not read out the contents of the certificate of the Director, Central Food Laboratory to the accused.

9. As against this acquittal the appellants filed an appeal to the High Court of Delhi. As on identical grounds i.e. that the contents of the certificate of the Director, Central Food Laboratory had not been put to the accused

while recording his statement under Section 313 CrPC many other accused had also been acquitted and a number of other appeals had also been filed by the appellants.

10. All those appeals came to be dismissed by the High Court by the impugned order dated 20-11-2000. The High Court dismissed all the appeals on two grounds: (*a*) that non-putting of the contents of the certificate of the Director, Central Food Laboratory, to the accused, whilst recording his statement under Section 313 CrPC, was a vital omission and that the conviction could not therefore be maintained, and (*b*) that all the appeals were barred by limitation as they were not filed within a period of 60 days as provided under sub-section (5) of Section 378 CrPC. Hence these appeals. In these appeals we are only concerned with the abovementioned two questions of law.

11. Dealing with the first question first. This Court has, in the case of *Shivaji Sahabrao Bobade* v. *State of Maharashtra*[1] held as follows: (SCC p. 806, para 16)

> "It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every in'culpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. *However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused.* In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. *It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction.* In such a case, the court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342 CrPC, the omission has not been shown to have caused prejudice to the accused." (emphasis supplied)

12. The same view has been reiterated by this Court in the case of *Basavaraj R. Patil* v. *State of Karnataka*[2].

13. Thus it is to be seen that where an omission, to bring the attention of the accused to an in'culpatory material has occurred, that does not ipso facto vitiate the proceedings. The accused must show that failure of justice was occasioned by such omission. Further, in the event of an inculpatory material

1 (1973) 2 SCC 793 : 1973 SCC (Cri) 1033
2 (2000) 8 SCC 740 : 2001 SCC (Cri) 87

not having been put to the accused, the appellate court can always make good that lapse by calling upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against the accused but not put to him.

14. This being the law, in our view, both the Sessions Judge and the High Court were wrong in concluding that the omission to put the contents of the certificate of the Director, Central Food Laboratory, could only result in the accused being acquitted. The accused had to show that some prejudice was caused to him by the report not being put to him. Even otherwise, it was the duty of the Sessions Judge and/or the High Court, if they found that some vital circumstance had not been put to the accused, to put those questions to the counsel for the accused and get the answers of the accused. If the accused could not give any plausible or reasonable explanation it would have to be assumed that there was no explanation. Both the Sessions Judge and the High Court have overlooked this position of law and failed to perform their duties and thereby wrongly acquitted the accused.

15. We further find that in all these cases, the copy of the certificate of the Director, Central Food Laboratory had been supplied to the accused. They were thus aware of the contents of the certificate. It has to be seen that under the Prevention of Food Adulteration Act the prosecution is based upon the contents of either the report of the Public Analyst or the certificate of the Director of Central Food Laboratory. During their examination, under Section 313 CrPC questions pertaining to the certificate were put to the accused. The explanation of the accused, in respect of the certificate, had been called for. In our view in such cases it is enough if the attention of the accused is brought to the report or the certificate, as the case may be. It is not necessary that the contents of the report be also put to the accused.

16. Let us now see what were the questions put to the accused in these cases. We have been shown the statement of the accused, under Section 313 CrPC in only two of the appeals. However, it is admitted that in other cases also the questions were similar.

17. In Criminal Appeal No. 1076 of 2001 [arising out of SLP (Crl.) No. 1617 of 2001] the question put to the accused and the answer obtained from him are as follows:

> "*Q*: It is further in evidence that on receipt of copy of PA's report and intimation letter, you exercised your right under Section 13(2) and Director, CFL vide his certificate Ext. PX declared the sample to be adulterated. What have you to say?
>
> *Ans*: It is a matter of record."

18. In Criminal Appeal No. 1078 of 2001 [arising out of SLP (Crl.) No. 2437 of 2001] the question put and the answer given are as follows:

> "*Q*: It is further in evidence that intimation letter along with copy of PA's report was served on you IO the court and you exercised your right under Section 12(2) of the PFA Act and certificate of Director is Ext. PX. What have you to say?

Ans. The certificate is erroneous and it is the result of the negligence committed by the FI in the sample proceeding."

Thus it is to be seen that the questions clearly indicated that what was being put to the accused were the contents of the certificate. It is also to be seen that the accused clearly understood that what was being put to them was the contents of the certificate. The accused Ashwani Kumar [in Criminal Appeal No. 1078 of 2001 {arising out of SLP (Crl.) No. 2437 of 2001}] in fact answered that the certificate was erroneous and was a result of negligence committed by the Food Inspector in the sample proceedings. Similarly accused Dharampal [in Criminal Appeal No. 1076 of 2001 {arising out of SLP (Crl.) No. 1617 of 2001}] answered that the report was a matter of record. The accused gave their answers to the contents of the certificate. Clearly no prejudice had been caused to them. Before us also it could not be shown that any prejudice had been caused to them. This aspect of the matter was completely overlooked by both the Sessions Judge and the High Court. In our view, neither the judgment of the Sessions Judge nor the reasoning of the High Court on this point can be sustained.

19. The second question had only been urged before the High Court. The submission made before the High Court was that the appeal had not been filed by a public servant and therefore the limitation for filing such an appeal was 60 days. This submission found favour with the High Court. In all fairness, to counsel appearing for the respondents before us, it must be stated that such a contention was not canvassed before this Court, as it is clearly an untenable contention. Before us it was submitted by Mr Lalit, that the appeals should have been filed within 90 days from the date of the order as provided in Article 114 of the Limitation Act.

20. To understand what the periods of limitation under Section 378 CrPC are one must first look at Section 417 as it stood in the Criminal Procedure Code, 1898. Section 417, as it then stood, reads as follows:

"417. (1) Subject to the provisions of sub-section (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946, the Central Government may also direct the Public Prosecutor to present an appeal to the High Court from the order of acquittal.

(3) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(4) No application under sub-section (3) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from the date of that order of acquittal.

(5) If, in any case, the application under sub-section (3) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1)."

Thus it is to be seen that, under Section 417 of the Criminal Procedure Code, 1898, an appeal against acquittal could be filed by the State Government or by the Central Government. An appeal against acquittal could in cases instituted upon complaint, be filed by the complainant provided the complainant obtained special leave to appeal from the High Court. Under Section 417(4) no application for grant of special leave could be entertained by the High Court after an expiry of 60 days from the order of acquittal. Thus, under Section 417 an application for special leave to appeal had to be made only by the complainant. If the State Government or the Central Government filed an appeal then no application for special leave to appeal had to be made.

21. It is because of this that Article 114(*a*) of the Limitation Act provided that an appeal, by the State Government or the Central Government under sub-section (1) or (2) of Section 417 of the Criminal Procedure Code, 1898, was to be filed within 90 days from the date of the order. Article 114(*b*) provides that an appeal under sub-section (3) of Section 417 of the Criminal Procedure Code, 1898, must be filed within 30 days from the date of grant of special leave.

22. Thus under Section 417 of the Criminal Procedure Code, 1898 no application for special leave to appeal had to be made by the State Government or the Central Government, if they filed an appeal against acquittal. The period of 60 days provided in Section 417(4) did not apply to an appeal by the State Government or the Central Government. The period of limitation for the State Government or the Central Government was only under Article 114(*a*) of the Limitation Act.

23. Also to be noted that the right of the State Government to file an appeal under Section 417(1) was subject to provisions of sub-section (5). Sub-section (5) provided that if special leave to appeal had been refused to a complainant then the State Government could not maintain an appeal.

24. In the Criminal Procedure Code, 1973, Section 417 has been substituted by Section 378, which reads as follows:

"378. *Appeal in case of acquittal.*—(1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court or an order of acquittal passed by the Court of Session in revision.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government

may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub-section (3), to the High Court from the order of acquittal.

(3) No appeal under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant and sixty days in every other case, computed from the date of that order of acquittal.

(6) If, in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2)."

25. A comparison of Section 378 with the old Section 417 shows that whilst under the old section no application for leave to appeal had to be made by the State Government or the Central Government, now by virtue of Section 378(3) the State Government or the Central Government have to obtain leave of the High Court before their appeal could be entertained. Sub-section (4) of Section 378 is identical to sub-section (3) of Section 417. Thus a complainant desirous of filing an appeal against acquittal must still obtain special leave. Thus, Section 378 makes a distinction between an appeal filed by the State Government or the Central Government, who only need to obtain "leave", and an appeal by a complainant who needs to obtain "special leave". The limitation provided in sub-section (5) is only in respect of applications under sub-section (4) i.e. application for special leave to appeal by a complainant. A complainant may be either a public servant or a private party. If the complainant is a public servant then the period of limitation for an application for special leave is 6 months. If the complainant is a private party then the period of limitation for an application for special leave is 60 days. The periods of 6 months and/or 60 days do not apply to appeals by the State Government [under sub-section (1)] or the Central Government [under sub-section (2)]. Appeals by the State Government or the Central Government continue to be governed by Article 114(*a*) of the Limitation Act. In other words, those appeals must be filed within 90 days from the date of the order appealed from. Needless to state, if there is a delay in filing an appeal by the State Government or Central Government it would be open to them to file an application under Section 5 of the Limitation Act for condonation of such delay. That period can be extended if the court is satisfied that there was sufficient cause for not preferring the appeal within the period of 90 days. The High Court was thus wrong in concluding that the appeals had to be filed within 60 days as provided in Section 378(5).

26. It must also be noted that sub-section (6) of Section 378 is identical to sub-section (5) of Section 417. Thus under Section 378 also the State Government cannot maintain an appeal if special leave to appeal is refused to

the complainant. In this behalf there is no change. Section 417(1) specifically provided that it was "subject to the provisions of sub-section (5)". Section 378(1) similarly provides that it is "subject to sub-sections (3) and (5)". Sub-section (3) is the newly added provision which now provides that an appeal by the State or Central Government cannot be entertained without leave of the High Court. However the reference to sub-section (5) in sub-section (1) is clearly an inadvertent mistake. As pointed out above sub-section (5) of Section 378 applies only to application for special leave by a complainant. Sub-section (5) of Section 378 has no application to an appeal by the State Government or to an application for leave under sub-section (3). What the legislature clearly intended was to continue to provide that an appeal by the State Government would not be maintainable if special leave to appeal had been refused to a complainant. Thus sub-section (1) of Section 378 was to be subject to provisions of sub-section (6) and not sub-section (5) as inadvertently provided therein. Inadvertently the figure (5) in Section 417(1) was continued, without noticing that now under Section 378 the relevant provision was sub-section (6). In our view it is clear that the figure (5) in Section 378(1) is inadvertently retained. Thus in Section 378(1) the figure (6) will have to be read in place of the figure (5).

27. There is one last fact which must be mentioned. We find that the main argument on the question of limitation was made before the High Court on behalf of respondent Dharampal [i.e. the respondent in Criminal Appeal No. 1076 of 2001 {arising out of SLP (Crl.) No. 1617 of 2001}]. It had been argued on his behalf that the appeal against his acquittal was barred by limitation as there was a delay of 95 days. The High Court accepted this contention. We however find from a copy of an order produced before us that in his appeal, before the High Court, the delay had already been condoned. The order, which is available in this SLP paper-book, reads as follows:

"ORDER

21-5-1996 *Present*: Mr B.T. Singh for the petitioner

Crl. M. No. 2245 of 1996

Leave granted.

This application is disposed of.

Crl. M. No. 2246 of 1996

Delay in refiling the appeal is condoned.

This application is disposed of.

Crl. A. No. 92 of 1996

Let the appeal be registered. Appeal is admitted.

sd/-
Arun Kumar, J.

sd/-
21-5-1996 Mohd. Shamim, J."

The delay already having been condoned there was no question of the High Court subsequently entertaining and upholding an argument on delay. This does not seem to have been brought to the notice of the High Court.

28. In any view of the matter, the impugned order cannot be sustained. The orders of the Sessions Judge dismissing the appeals also cannot be sustained. Therefore, the impugned judgment dated 20-11-2000 as well as the orders of the Sessions Judge in the abovementioned three cases are set aside. The appeals which had been filed by the respondents in the Court of Additional District and Sessions Judge are hereby restored to the file of the Additional District and Sessions Judge, New Delhi. They shall now be disposed of on merits, in accordance with law.

29. These appeals stand disposed of accordingly. There will be no order as to costs.

(2001) 10 Supreme Court Cases 382

(BEFORE S.P. BHARUCHA, N. SANTOSH HEGDE AND Y.K. SABHARWAL, JJ.)

COMMISSIONER OF INCOME TAX .. Appellant;

Versus

SARITA AGGARWAL (SMT) AND ANOTHER .. Respondents.

Civil Appeals Nos. 6208-09 of 1995 with Nos. 6210-12 of 1995 and SLPs (C) Nos. 10336 of 1990 and 22685-87 of 1995, decided on December 5, 2000

Constitution of India — Art. 136 — Interference in tax matters — Income tax reference — ITAT following, on the question involved, its earlier decisions which were against the Revenue and against which it had rejected reference applications of Revenue — Such decisions of ITAT remaining unchallenged — In such circumstances, Revenue's SLP against High Court's decision to call for a reference of the question dismissed — Income Tax Act, 1961, S. 256(1) & (2) **(Para 2)**

Appeals and SLPs dismissed H-M/C/24153/S

ORDER

1. The High Court rejected the application of the Revenue to call for a reference of two questions on the ground that no question of law arose. The Tribunal, in the Revenue's application under Section 256(1) of the Income Tax Act, had noted that the questions were covered against the Revenue by its earlier decisions, particulars whereof it gave. It also stated that reference applications against those decisions had been moved and had been rejected by the Tribunal. It would appear from a statement made by learned counsel for the Revenue before the Tribunal that in respect of these questions an application under Section 256(2) had been moved but counsel for the Revenue cannot tell us what happened thereafter. And the assessee has filed an affidavit to state that it has no information in this behalf.

2. Having regard to the fact that, under these circumstances, the earlier decisions of the Tribunal on the same question remain unchallenged, these appeals and the special leave petitions are dismissed with costs.

(2013) 14 Supreme Court Cases 420

(BEFORE DR B.S. CHAUHAN AND S.A. BOBDE, JJ.)

GIAN CHAND AND OTHERS .. Appellants;

Versus

STATE OF HARYANA .. Respondent.

Criminal Appeal No. 2302 of 2010†, decided on July 23, 2013

A. **Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 15, 35, 50 and 54 — Recovery of 410 kg poppy husk from jeep — Conviction of occupants of jeep confirmed — Conscious possession established — Police party, at about 2.15 a.m., saw a jeep coming at high speed — They asked said jeep to stop — However, instead of stopping, driver accelerated speed of jeep — On suspicion police chased the jeep — Occupants of jeep took a U-turn and in that process jeep struck the wall of a house in the village — Three occupants of jeep tried to run away but they were caught by police — In compliance with S. 50 NDPS Act, Dy. SP was called and a search was conducted in his presence — Vehicle had 10 bags, each containing 41 kg poppy husk — Trial court convicted appellants — High Court affirmed conviction — Appellants submitted that no independent witness was examined by prosecution, prosecution failed to prove that they were in conscious possession of contraband material, and this incriminating circumstance had not even been put to appellants under S. 313 CrPC — Held, no dispute has been raised regarding recovery of poppy husk from damaged jeep — Police witnesses were found to be reliable — Appellants in their statement under S. 313 CrPC took plea of false implication only and they miserably failed to rebut statutory presumption under Ss. 35 and 54, and no prejudice was shown to have been caused appellants due to any defect in questioning under S. 313 CrPC — Criminal Procedure Code, 1973 — S. 313 — Criminal Trial — Witnesses — Police officials/personnel/IO as witnesses (Paras 9, 10, 12, 20, 21, 30, 35 and 36)**

Gian Chand v. *State of Haryana*, Criminal Appeal No. 392-SB of 2001, decided on 4-11-2008 (P&H), *affirmed*

B. **Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 35 and 54 — Presumption of culpable mental state — When arises — Once possession of contraband articles is established, burden shifts on accused to establish that he had no knowledge of same — It is impossible for prosecution to prove certain facts particularly within special knowledge of accused, thus the case falls within the provisions of S. 106 of Evidence Act, 1872 — Accused has to establish how he came to be in possession of same — Conscious possession — Inference of — Appellants were found travelling in a jeep at odd hours at night (at about 2.00 a.m.) and contraband material was found in the jeep — Upon police trying to stop jeep, accused had tried to speed away — There were only three occupants in jeep at relevant time**

† From the Judgment and Order dated 4-11-2008 of the High Court of Punjab and Haryana at Chandigarh in Crl. A. No. 392-SB of 2001

— As many as 10 bags, each containing 41 kg poppy husk were found lying in jeep — It was not a small quantity of poppy husk, and could not escape notice of accused sitting in jeep — Accused were having special means of knowledge with regard to bags lying in jeep — Culpable mental state is also revealed by the fact that in case there was no contraband in jeep, and accused were not in the knowledge of the same then what was the necessity of speeding away jeep — Under these circumstances, it could be said that they were in possession of and in control over the poppy husk bags lying in jeep — Conviction confirmed — Evidence Act, 1872 — S. 106 — Burden of proving fact especially within knowledge (Paras 11 and 16 to 22)

Madan Lal v. *State of H.P.*, (2003) 7 SCC 465 : 2003 SCC (Cri) 1664; *State of W.B.* v. *Mir Mohammad Omar*, (2000) 8 SCC 382 : 2000 SCC (Cri) 1516; *Shambhu Nath Mehra* v. *State of Ajmer*, AIR 1956 SC 404 : 1956 Cri LJ 794; *Gunwantlal* v. *State of M.P.*, (1972) 2 SCC 194 : 1972 SCC (Cri) 678; *Sucha Singh* v. *State of Punjab*, (2001) 4 SCC 375 : 2001 SCC (Cri) 717; *Sahadevan* v. *State*, (2003) 1 SCC 534 : 2003 SCC (Cri) 382; *Durga Prasad Gupta* v. *State of Rajasthan*, (2003) 12 SCC 257 : 2004 SCC (Cri) Supp 385; *Santosh Kumar Singh* v. *State*, (2010) 9 SCC 747 : (2010) 3 SCC (Cri) 1469; *Manu Sao* v. *State of Bihar*, (2010) 12 SCC 310 : (2011) 1 SCC (Cri) 370; *Neel Kumar* v. *State of Haryana*, (2012) 5 SCC 766 : (2012) 3 SCC (Cri) 271, *followed*

C. Criminal Trial — Search and seizure — Independent witness — Police witness — Whether prosecution case to be doubted only on ground that all witnesses are from police — Mere non-joining of independent witness where evidence of prosecution witnesses may be found to be cogent, convincing, creditworthy and reliable, cannot cast doubt on prosecution version if there seems to be no reason on record to falsely implicate the accused — Huge quantity of poppy husk recovered from appellant in a jeep — At the time of incident some villagers had gathered there — IO made it clear that in spite of his best persuasion, none of them were willing to become a witness — Occupants/Appellants abandoned the vehicle just after it dashed against wall and made a desperate attempt to escape but were apprehended by police — No discrepancies were found in statements of officials witnesses — Their statements inspired tremendous confidence and there was no reason for court to discard the testimony of official witnesses — When a police officer gives evidence in court that a certain article was recovered by him on the strength of statement made by accused it is open to court to believe that version to be correct if it is not otherwise shown to be unreliable — Burden is on accused, through cross-examination of witnesses or through other materials, to show that evidence of police officer is unreliable — It is not permissible to presume that police action is unreliable to start with — Criminal Trial — Witnesses — Police officials/personnel/IO as witnesses — Evidence Act, 1872 — S. 114 Ill. (e) — Presumption regarding judicial and official acts (Paras 10 and 31 to 37)

Rohtash Kumar v. *State of Haryana*, (2013) 14 SCC 434; *Paras Ram* v. *State of Haryana*, (1992) 4 SCC 662 : 1993 SCC (Cri) 13; *Balbir Singh* v. *State*, (1996) 11 SCC 139 : 1997 SCC (Cri) 134; *Akmal Ahmad* v. *State of Delhi*, (1999) 3 SCC 337 : 1999 SCC (Cri) 425; *M. Prabhulal* v. *Directorate of Revenue Intelligence*, (2003) 8 SCC 449 : 2003 SCC (Cri) 2024; *Ravindran* v. *Supt. of Customs*, (2007) 6 SCC 410 : (2007) 3 SCC (Cri) 189; *State*

(Govt. of NCT of Delhi) v. *Sunil*, (2001) 1 SCC 652 : 2001 SCC (Cri) 248; *Appabhai* v. *State of Gujarat*, 1988 Supp SCC 241 : 1988 SCC (Cri) 559, *relied on*

D. Criminal Procedure Code, 1973 — S. 313 — Statement of accused — Non-compliance with S. 313 CrPC — When vitiates trial — Held, only when accused can establish that prejudice has been caused or was likely to have been caused — Attention of accused must specifically be brought to incriminating pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so — Every error or omission regarding S. 313 CrPC does not however necessarily vitiate trial — Accused must show that some prejudice has been caused or was likely to have been caused to him — Issue relating to non-compliance with provisions of S. 313 CrPC raised for first time before Supreme Court — Appellant-accused could not point out what prejudice was caused to them if fact of "conscious possession" was not put to them in a case under NDPS Act, when all relevant circumstances were put to them — Even otherwise such an issue cannot be raised in existing facts and circumstances of case wherein burden was on accused to show how 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 — Narcotics and Intoxicants — Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 35 and 54 — Criminal Trial — Fair and Speedy trial — Procedural errors in trial — Trial when vitiated — Prejudice to accused — Need to establish (Paras 23 to 30)

Wasim Khan v. *State of U.P.*, AIR 1956 SC 400 : 1956 Cri LJ 790; *Bhoor Singh* v. *State of Punjab*, (1974) 4 SCC 754 : 1974 SCC (Cri) 664; *Asraf Ali* v. *State of Assam*, (2008) 16 SCC 328 : (2010) 4 SCC (Cri) 278; *Shivaji Sahabrao Bobade* v. *State of Maharashtra*, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033; *Paramjeet Singh* v. *State of Uttarakhand*, (2010) 10 SCC 439 : (2011) 1 SCC (Cri) 98, *relied on*

State of Punjab v. *Hari Singh*, (2009) 4 SCC 200 : (2009) 2 SCC (Cri) 243; *Avtar Singh* v. *State of Punjab*, (2002) 7 SCC 419 : 2002 SCC (Cri) 1769, *distinguished on facts*

E. Narcotics and Intoxicants — Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 43, 49, 35, 52 and 54 — Condition of case property — Chit carrying contents of case property was not available on seized poppy bags — This, held, did not give any benefit to accused as there was overwhelming evidence to prove that seizure of ten bags had actually been made from accused — Further, contents of samples sent for chemical analysis gave positive results on analysis — Witnesses have been examined after four years from date of recovery — Case property remained lying in malkhana — On account of shortage of space in malkhana, case properties could not be stacked properly and bags, containing poppy husk, underwent the process of decay, however, this did not mean that case property produced in court did not relate to instant case — There was nothing on record to show that said case property had been tampered with — Defence did not put any question to IO in his cross-examination in respect of missing chits from bags containing case property/contraband articles — Thus, no grievance could be raised by appellants in this regard — Conviction

confirmed — Evidence Act, 1872 — S. 146 — Failure to cross-examine witness — Effect (Paras 10 and 13 to 15)

Laxmibai v. *Bhagwantbuva*, (2013) 4 SCC 97 : (2013) 2 SCC (Civ) 480; *Ravinder Kumar Sharma* v. *State of Assam*, (1999) 7 SCC 435; *Ghasita Sahu* v. *State of M.P.*, (2008) 3 SCC 52 : (2008) 1 SCC (Cri) 605; *Rohtash Kumar* v. *State of Haryana*, (2013) 14 SCC 434, *relied on*

F. Precedents — Ratio decidendi — If binding — Matching of material facts — Circumstantial flexibility — One additional or different fact may make a world of difference between conclusions in two cases or between two accused in 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 entire aspect — Constitution of India, Art. 141 (Para 24)

Megh Singh v. *State of Punjab*, (2003) 8 SCC 666 : 2004 SCC (Cri) 58, *relied on*

J-D/52046/SR

Advocates who appeared in this case :
J.P. Dhanda and N.A. Usmani, Advocates, for the Appellants;
Brijender Chahar, Senior Advocate (R.K. Shokeen and Kamal Mohan Gupta, Advocates) for the Respondent.

Chronological list of cases cited ***on page(s)***

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9. (2008) 3 SCC 52 : (2008) 1 SCC (Cri) 605, *Ghasita Sahu* v. *State of M.P.* 428*c*
10. Criminal Appeal No. 392-SB of 2001, decided on 4-11-2008 (P&H), *Gian Chand* v. *State of Haryana* 424*c-d*, 425*b*
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13. (2003) 8 SCC 666 : 2004 SCC (Cri) 58, *Megh Singh* v. *State of Punjab* 430*b-c*
14. (2003) 8 SCC 449 : 2003 SCC (Cri) 2024, *M. Prabhulal* v. *Directorate of Revenue Intelligence* 432*d*
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16. (2003) 1 SCC 534 : 2003 SCC (Cri) 382, *Sahadevan* v. *State* 430*a*
17. (2002) 7 SCC 419 : 2002 SCC (Cri) 1769, *Avtar Singh* v. *State of Punjab* 430*b*, 430*b-c*, 430*d*, 430*e-f*
18. (2001) 4 SCC 375 : 2001 SCC (Cri) 717, *Sucha Singh* v. *State of Punjab* 430*a*
19. (2001) 1 SCC 652 : 2001 SCC (Cri) 248, *State (Govt. of NCT of Delhi)* v. *Sunil* 432*d-e*

20. (2000) 8 SCC 382 : 2000 SCC (Cri) 1516, *State of W.B.* v. *Mir Mohammad Omar* 429*e-f*
21. (1999) 7 SCC 435, *Ravinder Kumar Sharma* v. *State of Assam* 428*c*
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24. (1992) 4 SCC 662 : 1993 SCC (Cri) 13, *Paras Ram* v. *State of Haryana* 432*d*
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27. (1973) 2 SCC 793 : 1973 SCC (Cri) 1033, *Shivaji Sahabrao Bobade* v. *State of Maharashtra* 431*b-c*
28. (1972) 2 SCC 194 : 1972 SCC (Cri) 678, *Gunwantlal* v. *State of M.P.* 430*a*
29. AIR 1956 SC 404 : 1956 Cri LJ 794, *Shambhu Nath Mehra* v. *State of Ajmer* 430*a*
30. AIR 1956 SC 400 : 1956 Cri LJ 790, *Wasim Khan* v. *State of U.P.* 430*f-g*

The Judgment of the Court was delivered by

DR B.S. CHAUHAN, J.— 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 *Gian Chand* v. *State of Haryana*[1], by which it has affirmed the judgment and order dated 2-2-2001 passed by the trial court at Sirsa by which the appellants were convicted under the provisions of Section 15 of the 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. The facts and circumstances giving rise to this appeal are that: on 5-9-1996, at about 2.15 a.m., Bhan Singh, ASI of Police Station Rania along with other police officials was present in 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.

3. The police party took samples of 200 gm of poppy husk from each bag and the same was sealed by the Dy. S.P. On the basis of same, an FIR was lodged on 5-9-1996 itself at 3.15 a.m. at Rania Police Station against the appellant-accused. After investigation, a charge-sheet was filed against them and the appellants claimed trial. Hence, the trial commenced.

[1] Criminal Appeal No. 392-SB of 2001, decided on 4-11-2008 (P&H)

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

5. After conclusion of the trial, the appellants were convicted and sentenced as referred to hereinbefore vide the 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[1]. Hence, this appeal.

6. 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 appellant-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 appellant-accused were in conscious possession of the contraband material. This incriminating circumstance had not even been put to the appellant-accused while recording their statements under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC"). The appellants have already served about 8 years of sentence. Thus, the appeal deserves to be allowed.

7. 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 is there any requirement in law that in every case an independent witness should be examined. Further, all incriminating material was put to the appellant-accused while recording their statements under Section 313 CrPC. 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 CrPC 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.

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

9. 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

1 *Gian Chand* v. *State of Haryana*, Criminal Appeal No. 392-SB of 2001, decided on 4-11-2008 (P&H)

meconic acid, morphine, codeine, thebaine, papaverine and narcotine had all been shown as positive.

10. 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. A 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.

11. 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 kg 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 police 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.
>
> *Once the possession of the accused and their control over the contraband was proved, then statutory presumption under Sections 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 supplied)

12. Further, in their statements under Section 313 CrPC, 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 CrPC 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."

13. 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 malkhana, the case properties could not 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.

14. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in *Laxmibai* v. *Bhagwantbuva*[2] observing as under: (SCC p. 114, para 40)

> *"40. 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*

[2] (2013) 4 SCC 97 : (2013) 2 SCC (Civ) 480 : AIR 2013 SC 1204

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*[3], *Ghasita Sahu* v. *State of M.P.*[4] and *Rohtash Kumar* v. *State of Haryana*[5].)

15. 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.

16. 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.

17. This Court dealt with this issue in *Madan Lal* v. *State of H.P.*[6] observing that: (SCC p. 472, para 20)

"*20.* 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.

"*23.* The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

24. ... possession in a given case need not be [actual] physical possession but can 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." (SCC p. 472, paras 23-24)

[3] (1999) 7 SCC 435 : AIR 1999 SC 3571
[4] (2008) 3 SCC 52 : (2008) 1 SCC (Cri) 605 : AIR 2008 SC 1425
[5] (2013) 14 SCC 434 : JT (2013) 8 SC 181
[6] (2003) 7 SCC 465 : 2003 SCC (Cri) 1664 : AIR 2003 SC 3642

18. The Court further held as under: (*Madan Lal case*[6], SCC p. 472, paras 26-27)

a "*26. 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 the 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.

b *27.* ... 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 supplied)

19. From the conjoint reading of the provisions of Sections 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 c 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.

20. 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 d accused to establish that he had no knowledge of the same.

21. 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 e as "the 1872 Act").

22. In *State of W.B.* v. *Mir Mohammad Omar*[7] 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 the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the f 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.

g "*38. ... 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.*" (SCC p. 393, para 38) (emphasis supplied)

h

6 *Madan Lal* v. *State of H.P.*, (2003) 7 SCC 465 : 2003 SCC (Cri) 1664
7 (2000) 8 SCC 382 : 2000 SCC (Cri) 1516 : AIR 2000 SC 2988

(See also *Shambhu Nath Mehra* v. *State of Ajmer*[8], *Gunwantlal* v. *State of M.P.*[9], *Sucha Singh* v. *State of Punjab*[10], *Sahadevan* v. *State*[11], *Durga Prasad Gupta* v. *State of Rajasthan*[12], *Santosh Kumar Singh* v. *State*[13], *Manu Sao* v. *State of Bihar*[14] and *Neel Kumar* v. *State of Haryana*[15].)

23. The learned counsel for the appellants has placed much reliance upon the judgment of this Court in *State of Punjab* v. *Hari Singh*[16], wherein placing reliance upon the earlier judgment in *Avtar Singh* v. *State of Punjab*[17], 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 CrPC the principles of natural justice stand violated and the judgment stands vitiated.

24. So far as the judgment in *Avtar Singh*[17] is concerned, it has been considered by this Court in *Megh Singh* v. *State of Punjab*[18]. 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.

25. In *Avtar Singh*[17], 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 CrPC 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. Therefore, it is evident that *Avtar Singh*[17] does not lay down the law of universal application as it had been decided on its own facts.

26. So far as Section 313 CrPC is concerned, undoubtedly, the attention of the accused must specifically be brought to inculpatory 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. *State of U.P.*[19] and

[8] AIR 1956 SC 404 : 1956 Cri LJ 794
[9] (1972) 2 SCC 194 : 1972 SCC (Cri) 678 : AIR 1972 SC 1756
[10] (2001) 4 SCC 375 : 2001 SCC (Cri) 717
[11] (2003) 1 SCC 534 : 2003 SCC (Cri) 382
[12] (2003) 12 SCC 257 : 2004 SCC (Cri) Supp 385
[13] (2010) 9 SCC 747 : (2010) 3 SCC (Cri) 1469
[14] (2010) 12 SCC 310 : (2011) 1 SCC (Cri) 370
[15] (2012) 5 SCC 766 : (2012) 3 SCC (Cri) 271
[16] (2009) 4 SCC 200 : (2009) 2 SCC (Cri) 243 : AIR 2009 SC 1966
[17] (2002) 7 SCC 419 : 2002 SCC (Cri) 1769
[18] (2003) 8 SCC 666 : 2004 SCC (Cri) 58
[19] AIR 1956 SC 400 : 1956 Cri LJ 790

Bhoor Singh v. *State of Punjab*[20] held that every error or omission in compliance with the provisions of Section 342 of the old CrPC does not necessarily vitiate trial. The accused must show that some prejudice has been caused or was likely to have been caused to him.

27. In *Asraf Ali* v. *State of Assam*[21] a similar view has been reiterated by this Court observing that: (SCC p. 334, para 21)

> "*21.* ... [all] material circumstance appearing in the evidence against the accused is required to be put to him specifically ... and failure to do so amounts to a serious irregularity vitiating trial, *if it is shown that the accused was prejudiced.*" (emphasis supplied)

28. In *Shivaji Sahabrao Bobade* v. *State of Maharashtra*[22] a three-Judge Bench of this Court held that: (SCC p. 806, para 16)

> "*16.* ... 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.*" (emphasis supplied)

29. In *Paramjeet Singh* v. *State of Uttarakhand*[23], after considering a large number of cases on the issue, this Court held as under: (SCC p. 451, para 30)

> "*30.* Thus, it is evident from the above that the provisions of Section 313 CrPC 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 supplied)

30. In the instant case the issue relating to non-compliance with the provisions of Section 313 CrPC has not been raised before the High Court, and it is raised for the first time before this Court. The 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.

[20] (1974) 4 SCC 754 : 1974 SCC (Cri) 664 : AIR 1974 SC 1256
[21] (2008) 16 SCC 328 : (2010) 4 SCC (Cri) 278
[22] (1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : AIR 1973 SC 2622
[23] (2010) 10 SCC 439 : (2011) 1 SCC (Cri) 98 : AIR 2011 SC 200

31. 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.

32. In *Rohtash Kumar* v. *State of Haryana*[5] 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*[24], *Balbir Singh* v. *State*[25], *Akmal Ahmad* v. *State of Delhi*[26], *M. Prabhulal* v. *Directorate of Revenue Intelligence*[27] and *Ravindran* v. *Supt. of Customs*[28].)

33. In *State (Govt. of NCT of Delhi)* v. *Sunil*[29] 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: (SCC p. 662, para 21)

> "*21.* ... it is an archaic notion that actions of the police officer should be approached with initial distrust. ... At any rate, the court cannot [begin] with the presumption that the 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

5 (2013) 14 SCC 434
24 (1992) 4 SCC 662 : 1993 SCC (Cri) 13 : AIR 1993 SC 1212
25 (1996) 11 SCC 139 : 1997 SCC (Cri) 134
26 (1999) 3 SCC 337 : 1999 SCC (Cri) 425 : AIR 1999 SC 1315
27 (2003) 8 SCC 449 : 2003 SCC (Cri) 2024
28 (2007) 6 SCC 410 : (2007) 3 SCC (Cri) 189 : AIR 2007 SC 2040
29 (2001) 1 SCC 652 : 2001 SCC (Cri) 248

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.

34. In *Appabhai* v. *State of Gujarat*[30] this Court dealt with the issue of non-examining the independent witnesses and held as under: (SCC pp. 245-46, para 11)

> "*11.* ... the prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilised 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."

35. 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.

36. 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.

37. Section 114 of the 1872 Act 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 solemniter 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.

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

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

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[30] 1988 Supp SCC 241 : 1988 SCC (Cri) 559 : AIR 1988 SC 696

3-Judge Bench
2020
Sep. 28

(2020) 10 Supreme Court Cases 108

(BEFORE ROHINTON FALI NARIMAN, NAVIN SINHA AND INDIRA BANERJEE, JJ.)

MAHESHWAR TIGGA .. Appellant; a

Versus

STATE OF JHARKHAND .. Respondent.

Criminal Appeal No. 635 of 2020†, decided on September 28, 2020

A. Penal Code, 1860 — Ss. 90, 375, 376, 323 and 341 — Consent of prosecutrix to physical relationship — When is no consent in the eye of the law — Consent whether given under misconception of fact — Consent whether given under false and fraudulent promise of marriage — Determination of b

— Case of rape, voluntarily causing hurt and wrongful restraint alleged — Held, consent given under misconception of fact is no consent in eyes of law — But, misconception of fact, has to be in proximity of time to occurrence, c and cannot be spread over period of 4 yrs, as in present case — Furthermore, appellant did not make any false promise or intentional misrepresentation of marriage, which led to establishment of physical relationship between parties — Prosecutrix was herself aware of obstacles in their relationship because of different religious beliefs — In instant case, consent to physical relationship by prosecutrix was conscious, and informed choice was made by her, after due d deliberation, it being spread over long period of time, coupled with conscious positive action not to protest — Conviction of accused under Ss. 376, 323 and 341, reversed

— Held, under S. 90, consent given under fear of injury or misconception of fact, is no consent in the eye of the law

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— Prosecutrix, PW 9, lodged FIR, alleging, that 4 yrs ago, appellant-accused had outraged her modesty at point of a knife — He had since been promising to marry her and on that pretext continued to establish physical relations with her as husband and wife — She had also stayed at his house for 15 days, during which also, he established physical relations with her — That 5 days prior to lodging of FIR, appellant had established physical relations with f her — That appellant had cheated her, as presently, he was going to solemnise his marriage with another girl, and all efforts at compromise had failed — High Court upheld conviction of appellant under Ss. 376, 323 and 341

— Held, it is not possible to hold in nature of evidence on record, that appellant obtained consent of prosecutrix at the inception, by putting her under any fear — In facts of present case, solitary statement of prosecutrix, that at g the time of first alleged offence, her consent was obtained under fear of injury, is not sustainable — Under S. 90, consent given under misconception of fact is no consent in the eye of the law — But, misconception of fact, has to be in proximity of time to occurrence, and cannot be spread over period of 4 yrs

† Arising out of SLP (Crl.) No. 393 of 2020. Arising from the Judgment and Order in *Maheshwar Tigga* v. *State of Jharkhand*, 2018 SCC OnLine Jhar 1731 (Jharkhand High Court, Criminal Appeal No. 300 of 2004, dt. 7-12-2018) h

— Herein, consent by prosecutrix was conscious and informed choice made by her after due deliberation, it being spread over long period of time, coupled with conscious positive action not to protest — Prosecutrix in her letters to appellant, also mentioned, that there would often be quarrels at her home with her family members with regard to their relationship, and beatings given to her

— Considering facts and circumstances of present case, held, appellant did not make any false promise or intentional misrepresentation of marriage, leading to establishment of physical relationship between parties — Prosecutrix was herself aware of obstacles in their relationship because of different religious beliefs — Engagement ceremony was also held in solemn belief, that societal obstacles would be overcome, but unfortunately, differences also arose, whether marriage was to solemnised in church or in temple, and ultimately failed — It is not possible to hold on evidence available, that appellant, right from inception, did not intend to marry prosecutrix ever, and had fraudulently misrepresented, only in order to establish physical relation with her — Prosecutrix in her letters acknowledged, that appellant's family was always very nice to her

— Again, there is no medical evidence on record, to sustain conviction of appellant under S. 323 — Also, no offence is made out against appellant under S. 341, considering statement of prosecutrix, that she had gone to live with appellant for 15 days, of her own volition

— In aforesaid facts and circumstances, conviction of appellant under Ss. 376, 323 and 341, stands reversed (Paras 11 to 21)

Uday v. *State of Karnataka*, (2003) 4 SCC 46 : 2003 SCC (Cri) 775; *Kaini Rajan* v. *State of Kerala*, (2013) 9 SCC 113 : (2013) 3 SCC (Cri) 858; *K.P. Thimmappa Gowda* v. *State of Karnataka*, (2011) 14 SCC 475 : (2013) 3 SCC (Cri) 464; *Dhruvaram Murlidhar Sonar* v. *State of Maharashtra*, (2019) 18 SCC 191 : (2020) 3 SCC (Cri) 672; *Pramod Suryabhan Pawar* v. *State of Maharashtra*, (2019) 9 SCC 608 : (2019) 3 SCC (Cri) 903, *affirmed*

Maheshwar Tigga v. *State of Jharkhand*, 2018 SCC OnLine Jhar 1731, *reversed*

Parkash Chand v. *State of H.P.*, (2019) 5 SCC 628 : (2019) 2 SCC (Cri) 665; *Vijayan* v. *State of Kerala*, (2008) 14 SCC 763 : (2009) 3 SCC (Cri) 585; *Deepak Gulati* v. *State of Haryana*, (2013) 7 SCC 675 : (2013) 3 SCC (Cri) 660, *referred to*

B. **Penal Code, 1860 — Ss. 376, 323 and 341 — Rape, voluntarily causing hurt and wrongful restraint — Prosecutrix alleging, that 4 yrs ago, when she was 14 yrs of age, accused had first committed rape upon her at point of a knife — Absence of positive evidence regarding age of prosecutrix on date of occurrence — Benefit of doubt — Entitlement to, of accused — (Re substantive allegations of rape not having been established *see* Shortnote *A*)**

— FIR by prosecutrix, PW 9, alleging that 4 yrs ago, when she was 14 yrs of age, appellant-accused had first committed rape upon her at point of a knife — He had since been promising to marry her, and on that pretext, continued to establish physical relations with her as husband and wife — He did not abide by his promise to marry her — High Court upheld appellant's conviction under Ss. 376, 323 and 341 — Sustainability of

— Held, there is wide variation in evidence regarding age of prosecutrix — In absence of positive evidence being led by prosecution with regard to her age on date of occurrence, possibility of her being above age of 18 yrs on the date, cannot be ruled out — Benefit of doubt, therefore, has to be given to appellant — Conviction of appellant, reversed

Held :

The prosecutrix in her deposition dithered with regard to her age, by first stating she was sixteen years on the date of occurrence and then corrected herself to state she was thirteen. Though she alleged, that the appellant-accused outraged her modesty at the point of a knife, while she was on way to school, no name of the school has been disclosed either by the prosecutrix or her parents PWs 5 and 6. If the prosecutrix was studying in a school, there is no explanation, why proof of age was not furnished on basis of documentary evidence, such as school register, etc. PW 10 (the doctor who medically examined her), in cross-examination, assessed the age of the prosecutrix to be approximately 25 years. PW 2, the cousin (brother) of the prosecutrix, aged about 30 years, deposed, that she was six years younger to him. There is, thus, wide variation in the evidence with regard to the age of the prosecutrix. The Additional Judicial Commissioner held the prosecutrix to be 14 years of age, applying the rule of the thumb on basis of the age disclosed by her in deposition on 18-8-2001 as 20 years. In absence of positive evidence being led by the prosecution with regard to the age of the prosecutrix on the date of occurrence, the possibility of her being above the age of 18 years on the date cannot be ruled out. The benefit of doubt, therefore, has to be given to the appellant. (Para 6)

C. Criminal Procedure Code, 1973 — S. 313 — Statement of accused under — Evidentiary value and Importance of, in criminal trial — Defences raised by accused in his S. 313 statement — Standard of proof on which to be examined — Principles summarised

— Held, it stands well settled, that circumstances not put to accused under S. 313, cannot be used against him, and must be excluded from consideration — In criminal trial, importance of questions put to accused, are basic to principles of natural justice, as it provides him opportunity not only to furnish his defence, but also to explain incriminating circumstances against him — A probable defence raised by accused is sufficient to rebut accusation without requirement of proof beyond reasonable doubt — Supreme Court, time and again, has emphasised, importance of putting all relevant questions to accused under S. 313 CrPC

— Instant case of rape, voluntarily causing hurt and wrongful restraint — Herein, bare perusal of examination of appellant-accused under S. 313 CrPC, reveals it to be extremely casual and perfunctory in nature — Appellant's conviction reversed on consideration of entire prosecution case, which could not establish guilt of appellant (*see* Shortnotes *A* and *B*) — Constitution of India — Arts. 20(3) and 21 — Evidence Act, 1872 — S. 132 — Penal Code, 1860, Ss. 376, 323 and 341 (Paras 7 to 9)

Naval Kishore Singh v. *State of Bihar*, (2004) 7 SCC 502 : 2004 SCC (Cri) 1967, *affirmed*

D. Criminal Procedure Code, 1973 — S. 154 — Delay in lodging/filing FIR — Doubts about truth and veracity of allegations — Held, stand established and cast doubt on prosecution case in the facts of circumstances of the present case — Conviction reversed

— Instant case of rape, voluntarily causing hurt and wrongful restraint — Delay of 4 yrs in lodgement of FIR, at opportune time of 7 days prior to appellant-accused solemnising his marriage with another girl, on pretext of promise to marry prosecutrix — Such delay raises serious doubts about truth and veracity of allegations levelled by prosecutrix — Also, regarding allegation of prosecutrix, that 5 days prior to lodging of FIR, appellant had established physical relations with her, entire genesis of case is again in serious doubt, in view of admission of prosecutrix in cross-examination, that no such incident had occurred 5 days prior to lodging of FIR — Appellant's conviction, reversed — Penal Code, 1860, Ss. 376, 323 and 341 (Para 10)

Appeal allowed Y-D/65899/CR

Advocates who appeared in this case :
Ms V. Mohana, Senior Advocate, for the Appellant;
Ms Pragya Baghel, Advocate, for the Respondent.

Chronological list of cases cited *on page(s)*

1. (2019) 18 SCC 191 : (2020) 3 SCC (Cri) 672, *Dhruvaram Murlidhar Sonar* v. *State of Maharashtra* 116*e*
2. (2019) 9 SCC 608 : (2019) 3 SCC (Cri) 903, *Pramod Suryabhan Pawar* v. *State of Maharashtra* 116*e*
3. (2019) 5 SCC 628 : (2019) 2 SCC (Cri) 665, *Parkash Chand* v. *State of H.P.* 112*d-e*
4. 2018 SCC OnLine Jhar 1731, *Maheshwar Tigga* v. *State of Jharkhand* **(reversed)** 116*b-c*
5. (2013) 9 SCC 113 : (2013) 3 SCC (Cri) 858, *Kaini Rajan* v. *State of Kerala* 112*d-e*, 116*b-c*
6. (2013) 7 SCC 675 : (2013) 3 SCC (Cri) 660, *Deepak Gulati* v. *State of Haryana* 112*d-e*
7. (2011) 14 SCC 475 : (2013) 3 SCC (Cri) 464, *K.P. Thimmappa Gowda* v. *State of Karnataka* 116*c*
8. (2008) 14 SCC 763 : (2009) 3 SCC (Cri) 585, *Vijayan* v. *State of Kerala* 112*d-e*
9. (2004) 7 SCC 502 : 2004 SCC (Cri) 1967, *Naval Kishore Singh* v. *State of Bihar* 113*g-h*
10. (2003) 4 SCC 46 : 2003 SCC (Cri) 775, *Uday* v. *State of Karnataka* 112*d-e*, 115*f-g*, 117*c-d*

The Judgment of the Court was delivered by

NAVIN SINHA, J.— Leave granted. The appellant assails his conviction under Sections 376, 323 and 341 of the Penal Code, 1860 (in short "IPC") sentencing him to seven years, one year and one month, respectively with fine and a default stipulation.

2. The prosecutrix, PW 9 lodged FIR No. 25 of 1999 on 13-4-1999 alleging that four years ago the appellant had outraged her modesty at the point of a knife. He had since been promising to marry her and on that pretext continued to establish physical relations with her as husband and wife. She had also stayed at his house for fifteen days during which also he established physical relations with her. Five days prior to the lodging of the FIR, the appellant had established physical relations with her on 9-4-1999. The appellant had cheated her as now he was going to solemnise his marriage with another girl on 20-4-1999. All efforts at a compromise had failed.

3. The Additional Judicial Commissioner, Ranchi on consideration of the evidence convicted the appellant holding that the prosecutrix was 14 years of age when the appellant had first committed rape upon her at the point of a knife. He did not abide by his promise to marry her. The High Court dismissing the appeal opined that the letters written by the appellant to the prosecutrix, their photographs together, and the statement of the appellant recorded under Section 313 CrPC were sufficient to sustain the conviction.

4. The learned Senior Counsel, Mrs V. Mohana on behalf of the appellant, submits that the FIR lodged belatedly after four years was clearly an afterthought. The entire genesis of the allegations is highly doubtful and suspect as the prosecutrix in her cross-examination admitted that the appellant had not committed rape with her on 9-4-1999. The letters written by the appellant to the prosecutrix as also those written by her to the appellant marked as exhibits during trial, more than sufficiently established a deep love affair between them over a period of time. The prosecutrix was aged approximately 25 years as opined by PW 10, the doctor who medically examined her on 14-4-1999. The physical relations between the appellant and the prosecutrix were consensual in nature occasioned by their love affair. No offence under Section 375 IPC is therefore, made out. The questions put to the appellant under Section 313 CrPC were very casual and perfunctory, leading to denial of proper opportunity of defence causing serious prejudice to him by denial of the right to a fair trial. The marriage between them could not materialise due to societal reasons as the appellant belonged to the Scheduled Tribe, while the prosecutrix was a Christian. Reliance was placed on *Parkash Chand* v. *State of H.P.*[1], *Vijayan* v. *State of Kerala*[2], *Kaini Rajan* v. *State of Kerala*[3], *Deepak Gulati* v. *State of Haryana*[4] and *Uday* v. *State of Karnataka*[5].

5. Ms Pragya Baghel, learned counsel for the State, submitted that the prosecutrix stood by the allegations during trial. The delay in lodging the FIR has been sufficiently explained by reason of the compromise efforts which failed to materialise. PW 7, the sister of the prosecutrix had also confirmed that the latter was sexually assaulted by the appellant at the point of a knife and had come home crying. The appellant had told the prosecutrix to keep quiet in his absence, revealing that his intentions were not bona fide. The defence of a consensual relationship is irrelevant considering that the prosecutrix was fourteen years of age. The appellant had held out a false promise of marriage only to establish physical relations with the prosecutrix. He never had any such intentions from the very inception, and he obtained the consent of the appellant by a false misrepresentation, which is no consent in the eyes of the law. The evidence of the prosecutrix is reliable.

6. We have considered the submissions on behalf of the parties. The prosecutrix in her deposition dithered with regard to her age by first stating she was sixteen years on the date of occurrence and then corrected herself to state

1 (2019) 5 SCC 628 : (2019) 2 SCC (Cri) 665
2 (2008) 14 SCC 763 : (2009) 3 SCC (Cri) 585
3 (2013) 9 SCC 113 : (2013) 3 SCC (Cri) 858
4 (2013) 7 SCC 675 : (2013) 3 SCC (Cri) 660
5 (2003) 4 SCC 46 : 2003 SCC (Cri) 775

she was thirteen. Though she alleged that the appellant outraged her modesty at the point of a knife while she was on way to school, no name of the school has been disclosed either by the prosecutrix or her parents PWs 5 and 6. If the prosecutrix was studying in a school there is no explanation why proof of age was not furnished on basis of documentary evidence such as school register, etc. PW 10, in cross-examination assessed the age of the prosecutrix to be approximately twenty-five years. PW 2, the cousin (brother) of the prosecutrix aged about 30 years deposed that she was six years younger to him. There is thus wide variation in the evidence with regard to the age of the prosecutrix. The Additional Judicial Commissioner held the prosecutrix to be fourteen years of age applying the rule of the thumb on basis of the age disclosed by her in deposition on 18-8-2001 as 20 years. In absence of positive evidence being led by the prosecution with regard to the age of the prosecutrix on the date of occurrence, the possibility of her being above the age of eighteen years on the date cannot be ruled out. The benefit of doubt, therefore, has to be given to the appellant.

7. A bare perusal of the examination of the accused under Section 313 CrPC reveals it to be extremely casual and perfunctory in nature. Three capsuled questions only were asked to the appellant as follows which he denied:

> "*Question 1*. There is a witness against you that when the informant V. Anshumala Tigga was going to school you were hiding near Tomra canal and after finding the informant in isolation you forced her to strip naked on knifepoint and raped her.
>
> *Question 2*. After the rape when the informant ran to her home crying to inform her parents about the incident and when the parents of the informant came to you to inquire about the incident, you told them that "if I have committed rape then I will keep her as my wife".
>
> *Question 3*. On your instruction, the informant's parents performed the "Lota Paani" ceremony of the informant, in which the informant as well as your parents were present, also in the said ceremony your parents had gifted the informant a saree and a blouse and the informant's parents had also gifted you some clothes."

8. It stands well settled that circumstances not put to an accused under Section 313 CrPC cannot be used against him, and must be excluded from consideration. In a criminal trial, the importance of the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity not only to furnish his defence, but also to explain the incriminating circumstances against him. A probable defence raised by an accused is sufficient to rebut the accusation without the requirement of proof beyond reasonable doubt.

9. This Court, time and again, has emphasised the importance of putting all relevant questions to an accused under Section 313 CrPC. In *Naval Kishore Singh* v. *State of Bihar*[6], it was held to be an essential part of a fair trial observing as follows: (SCC p. 504, para 5)

6 (2004) 7 SCC 502 : 2004 SCC (Cri) 1967

"5. The questioning of the accused under Section 313 CrPC was done in the most unsatisfactory manner. Under Section 313 CrPC the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been produced by the prosecution, should have been put to the accused in the form of questions and he should have been given opportunity to give his explanation. No such opportunity was given to the accused in the instant case. We deprecate the practice of putting the entire evidence against the accused put together in a single question and giving an opportunity to explain the same, as the accused may not be in a position to give a rational and intelligent explanation. The trial Judge should have kept in mind the importance of giving an opportunity to the accused to explain the adverse circumstances in the evidence and the Section 313 examination shall not be carried out as an empty formality. It is only after the entire evidence is unfurled the accused would be in a position to articulate his defence and to give explanation to the circumstances appearing in evidence against him. Such an opportunity being given to the accused is part of a fair trial and if it is done in a slipshod manner, it may result in imperfect appreciation of evidence."

10. The appellant belonged to the Scheduled Tribe while the prosecutrix belonged to the Christian community. They professed different religious beliefs in a traditional society. They both resided in the same Village Basjadi and were known to each other. The nature and manner of allegations, coupled with the letters exchanged between them, marked as exhibits during the trial, make it apparent that their love for each other grew and matured over a sufficient period of time. They were both smitten by each other and passions of youth ruled over their minds and emotions. The physical relations that followed was not isolated or sporadic in nature, but regular over the years. The prosecutrix had even gone and resided in the house of the appellant. In our opinion, the delay of four years in lodgement of the FIR, at an opportune time of seven days prior to the appellant solemnising his marriage with another girl, on the pretext of a promise to the prosecutrix raises serious doubts about the truth and veracity of the allegations levelled by the prosecutrix. The entire genesis of the case is in serious doubt in view of the admission of the prosecutrix in cross-examination that no incident had occurred on 9-4-1999.

11. The parents of the prosecutrix, PWs 5 and 6 both acknowledged awareness of the relationship between appellant and the prosecutrix and that they were informed after the first occurrence itself but offer no explanation why they did not report the matter to the police immediately. On the contrary, PW 5 acknowledges that the appellant insisted on marrying in the Temple to which they were not agreeable and wanted the marriage to be solemnised in the Church. They further acknowledged that the appellant and the prosecutrix were in love with each other. Contrary to the claim of the prosecutrix, PW 6 stated that the prosecutrix was sexually assaulted in her own house.

12. The prosecutrix acknowledged that an engagement ceremony had also been performed. She further deposed that the marriage between them could not be solemnised because they belonged to different religions. She was therefore conscious of this obstacle all along, even while she continued to establish physical relations with the appellant. If the appellant had married her, she would not have lodged the case. She denied having written any letters to the appellant, contrary to the evidence placed on record by the defence. The amorous language used by both in the letters exchanged reflect that the appellant was serious about the relationship desiring to culminate the same into marriage. But unfortunately for societal reasons, the marriage could not materialise as they belonged to different communities.

13. The question for our consideration is whether the prosecutrix consented to the physical relationship under any misconception of fact with regard to the promise of marriage by the appellant or was her consent based on a fraudulent misrepresentation of marriage which the appellant never intended to keep since the very inception of the relationship. If we reach the conclusion that he intentionally made a fraudulent misrepresentation from the very inception and the prosecutrix gave her consent on a misconception of fact, the offence of rape under Section 375 IPC is clearly made out. It is not possible to hold in the nature of evidence on record that the appellant obtained her consent at the inception by putting her under any fear. Under Section 90 IPC a consent given under fear of injury is not a consent in the eye of the law. In the facts of the present case, we are not persuaded to accept the solitary statement of the prosecutrix that at the time of the first alleged offence her consent was obtained under fear of injury.

14. Under Section 90 IPC, a consent given under a misconception of fact is no consent in the eye of the law. But the misconception of fact has to be in proximity of time to the occurrence and cannot be spread over a period of four years. It hardly needs any elaboration that the consent by the appellant was a conscious and informed choice made by her after due deliberation, it being spread over a long period of time coupled with a conscious positive action not to protest. The prosecutrix in her letters to the appellant also mentions that there would often be quarrels at her home with her family members with regard to the relationship, and beatings given to her.

15. In *Uday*[5], the appellant and the prosecutrix resided in the same neighbourhood. As they belonged to different castes, a matrimonial relationship could not fructify even while physical relations continued between them on the understanding and assurance of marriage. This Court observed as follows: (SCC pp. 56-57, para 21)

> "*21.* It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there

5 *Uday* v. *State of Karnataka*, (2003) 4 SCC 46 : 2003 SCC (Cri) 775

is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them."

16. The appellant, before the High Court[7], relied upon *Kaini Rajan*[3] in his defence. The facts were akin to the present case. The physical relationship between the parties was established on the foundation of a promise to marry. This Court set aside the conviction under Section 376 IPC also noticing *K.P. Thimmappa Gowda* v. *State of Karnataka*[8]. Unfortunately, the High Court did not even consider it necessary to deal with the same much less distinguish it, if it was possible. It is indeed unfortunate that despite a judicial precedent of a superior court having been cited, the High Court after mere recitation of the facts and the respective arguments, cryptically in one paragraph opined that in the nature of the evidence, the letters, the photograph of the appellant with the prosecutrix and the statement of the appellant under Section 313 CrPC, his conviction and sentence required no interference.

17. This Court recently in *Dhruvaram Murlidhar Sonar* v. *State of Maharashtra*[9] and in *Pramod Suryabhan Pawar* v. *State of Maharashtra*[10] arising out of an application under Section 482 CrPC in similar circumstances where the relationship originated in a love affair, developed over a period of time accompanied by physical relations, consensual in nature, but the marriage could not fructify because the parties belonged to different castes and communities, quashed the proceedings.

18. We have given our thoughtful consideration to the facts and circumstances of the present case and are of the considered opinion that the appellant did not make any false promise or intentional misrepresentation of marriage leading to establishment of physical relationship between the parties. The prosecutrix was herself aware of the obstacles in their relationship because of different religious beliefs. An engagement ceremony was also held in the solemn belief that the societal obstacles would be overcome, but unfortunately differences also arose whether the marriage was to solemnised in the church or in a temple and ultimately failed. It is not possible to hold on the evidence

7 *Maheshwar Tigga* v. *State of Jharkhand*, 2018 SCC OnLine Jhar 1731
3 *Kaini Rajan* v. *State of Kerala*, (2013) 9 SCC 113 : (2013) 3 SCC (Cri) 858
8 (2011) 14 SCC 475 : (2013) 3 SCC (Cri) 464
9 (2019) 18 SCC 191 : (2020) 3 SCC (Cri) 672 : AIR 2019 SC 327
10 (2019) 9 SCC 608 : (2019) 3 SCC (Cri) 903

available that the appellant right from the inception did not intend to marry the prosecutrix ever and had fraudulently misrepresented only in order to establish physical relation with her. The prosecutrix in her letters acknowledged that the appellant's family was always very nice to her.

19. The appellant has been acquitted of the charge under Sections 420 and 504 IPC. No appeal has been preferred against the acquittal. There is no medical evidence on record to sustain the conviction under Section 323 IPC. No offence is made out against the appellant under Section 341 IPC considering the statement of prosecutrix that she had gone to live with the appellant for 15 days of her own volition.

20. We have no hesitation in concluding that the consent of the prosecutrix was but a conscious and deliberated choice, as distinct from an involuntary action or denial and which opportunity was available to her, because of her deep-seated love for the appellant leading her to willingly permit him liberties with her body, which according to normal human behaviour are permitted only to a person with whom one is deeply in love. The observations in this regard in *Uday*[5] are considered relevant: (SCC p. 58, para 25)

> "*25.* ... It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent."

21. In conclusion, we find the conviction of the appellant to be unsustainable and set aside the same. The appellant is acquitted. He is directed to be set at liberty forthwith unless wanted in any other case. The appeal is allowed.

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5 *Uday* v. *State of Karnataka*, (2003) 4 SCC 46 : 2003 SCC (Cri) 775