State vs Jitendra Paswan on 17 May, 2025

IN THE COURT OF SH. MANUJ KAUSHAL JUDICIAL
MAGISTRATE FIRST CLASS-04/CENTRAL: DELHI

DLCT020153542022

STATE VS. Jitendra Paswan
FIR No. 32/2021
Case No. 8779/2022
P.S. : HNRS
U/s 33 Delhi Excise Act & 147 IR Act

Date of institution of case : 08.06.2022
Date on which case reserved for judgment : 09.04.2025
Date of judgment : 17.05.2025

JUDGMENT :

a) Date of offence : 21.11.2021

b) Offence complained of : U/s 33 Delhi Excise Act & 147 IR Act

c) Name of complainant : HC Sanjay

d) Name of accused, : Jitender Paswan
person her parentage : S/o Rajdev Paswan
local & permanent residence R/o:- Village Patehpur, PS Patepur, District Vaishali Bihar.

e) Plea of accused : Pleaded not guilty

by MANUJ
MANUJ KAUSHAL
KAUSHAL Date: 2025.05.17
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f) Final order : Acquitted

BRIEF FACTS OF CASE:

1. Briefly stated, it is the prosecution's case that on 21.11.2021 at about 02:30 pm at platform no. 2, Okhla Railway Station, Delhi, the accused entered the said platform without any lawful authority and the accused was found in possession of 24 bottles of illicit liquor in violation of Rule 20 of Delhi Excise Rules 2010 and thereby accused committed an offence u/s 33 Delhi Excise Act & 147 Indian Railways Act 1989.

2. On the basis of material filed along with the charge-sheet, charge u/s 33 Delhi Excise Act & 147 IR Act 1989 was framed against accused on 12.07.2023 to which he pleaded not guilty and claimed trial.

3. In order to prove its case, prosecution examined 03 witnesses. Accused has admitted FIR Ex.P3, certificate u/s 65B Indian Evidence Act Ex.P4, GD no. 12A dt. 21.11.2021 Ex.P5, GD no. 19A dt. 21.11.2021 Ex.P6 and chemical examiner report Ex.P7 vide a separate statement under section 294 Cr.P.C dated 04.11.2024.

4. PW1 HC Sanjeet deposed that on 21.11.2021 he alongwith HC Sanjay was on area patrolling duty. He further deposed that at about 2:30 PM, they reached at Okhla Railway Station, platform no. 2 where they saw one person with two bags (pitto bag on his shoulder) and upon seeing them, the said person tried to quickly move away. He further deposed that he alongwith HC Sanjay apprehended the said person whose name was revealed to be FIR no. 32/2021 State Vs. Jitender Paswan Page no. 2 of 12 by MANUJ MANUJ KAUSHAL KAUSHAL Date: 2025.05.17 15:17:01 +0530 Jitender Paswan. He further deposed that upon checking both the bags, illicit liquor of make Russian Night Whishky for sale in Haryana only was recovered. He further deposed that IO kept one bottle each as sample and remaining bottles were kept back in the bag. He further deposed that a pullanda was prepared and same was sealed with the seal of SN. He further deposed that seizure memo was prepared Ex.PW1/A. He further deposed that IO filled a form M-29 Mark PW1/B. He further deposed that IO prepared the tehrir and handed over the same to him for registration of FIR. He further deposed that he went to the PS and got the FIR registered and returned back to the spot and handed over the copy of FIR and original tehrir to ASI Harpal. He further deposed that further investigation was marked to ASI Harpal and HC Sanjay handed over the accused, documents and the sealed case property to ASI Harpal. He further deposed that ASI Harpal recorded the statement of HC Sanjay, prepared the site plan at the instance of HC Sanjay. He further deposed that HC Sanjay left the spot. He further deposed that accused was arrested and personally searched vide memo Ex.PW1/C and Ex.PW1/D. He further deposed that disclosure statement of the accused i.e. Ex.PW1/E was recorded. He further deposed that accused and case property were taken to the PS and case property was deposited in the maalkhana. He correctly identified the accused and case property Ex.P-1(Colly) and Ex.P-2(Colly). He was duly cross examined by Ld. Counsel for accused.

5. PW2 ASI Sanjay deposed on the same lines as deposed by PW1 therefore, his testimony is not being reproduced for the sake of brevity. He further proved tehrir Ex.PW2/A, site plan Ex.PW2/B. He correctly identified the accused and case property Ex.P-1 (Colly) and Ex.P-2 (Colly). He was duly cross examined by Ld. Counsel for accused.

FIR no. 32/2021 State Vs. Jitender Paswan Page no. 3 of 12 by MANUJ MANUJ KAUSHAL KAUSHAL Date: 2025.05.17 15:17:08 +0530

6. PW3 ASI Harpal deposed that on 21.11.2021 the investigation in the present matter was marked to him by the SHO. He further deposed that DO handed over original rukka and copy of FIR to him and he alongwith Ct. Sanjeet reached at the spot i.e Okhla Railway station, platform no.2 where they met HC Sanjay who handed over to him the custody of accused and sealed case property alongwith other documents. He further deposed that he prepared the site plan at the instance of HC Sanjay Nagar Ex.PW2/B and recorded the statement of witnesses u/s 161 CrP.C. He further deposed that he interrogated the accused, arrested and personally searched the accused vide memos Ex.PW1/C and Ex.PW1/D, recorded the disclosure statement of accused Ex.PW1/E. He further deposed that thereafter case property was deposited in maalkhana. He further deposed that he sent the sample to the laboratory and received the excise lab result from Vikas Bhawan ITO. He correctly identified the accused and case property Ex.P1(Colly) and Ex.P2 (Colly). He was duly cross examined by Ld. Counsel for accused.

7. Thereafter, prosecution closed its evidence. All incriminating facts were explained to accused u/s 351 BNSS was recorded. After understanding the same, the accused submitted that he was falsely implicated in the present matter. He further stated that he was picked up by the police officials without any reason and his signatures were taken on various blank papers.

8. Accused did not lead any defence evidence. Thereafter, arguments of both the parties were heard. It is argued by counsel for accused that the accused has been falsely implicated in the present matter and he is entitled to be acquitted as no independent witness has been examined by the prosecution. Hence, it is prayed that the prosecution has failed to prove its case beyond FIR no. 32/2021 State Vs. Jitender Paswan Page no. 4 of 12 by MANUJ MANUJ KAUSHAL KAUSHAL Date: 2025.05.17 15:17:14 +0530 reasonable doubt. On the other hand, Sh. Anish, Ld. APP for the State has argued that the testimonies of the all the prosecution witnesses are corroborative of each other and guilt of the accused stands proved beyond reasonable doubt. Hence, it is prayed that the accused be convicted for the offences charged.

9. I have considered the material facts and circumstances of the case. Record has been perused.

10. With respect to the charge under Section 33 of the Delhi Excise Act, the case of the prosecution is that on the fateful day the accused was found in possession of illicit liquor without any permit or licence. In order to bring home the charge against the accused, the prosecution was required to prove beyond reasonable doubt the recovery of illicit liquor from the possession of the accused.

11. Relying upon Section 52 of the Delhi Excise Act, Ld. APP for the state had argued that where the accused is charged of commission of the offence punishable Section 33 of the Delhi Excise Act, a presumption in favour of the prosecution is raised under Section 52 of the Delhi Excise Act to the effect that the accused had committed the said offence and it is for the accused to prove the contrary. The said argument does not find favour with this Court. Section 52 of the Delhi Excise Act reads as under:

> "Presumption as to commission of offence in certain cases. -
>
> (1) In prosecution under section 33, it shall be presumed, until the contrary is proved, that the accused person has committed the offence punishable under that section in respect of any intoxicant, still, utensil, implement or apparatus, for the possession of which he is unable to account satisfactorily.

FIR no. 32/2021 State Vs. Jitender Paswan Page no. 5 of 12 MANUJ MANUJ KAUSHAL KAUSHAL Date: 2025.05.17 15:17:21 +0530 (2) Where any animal, vessel, cart or other vehicle is used in the commission of an offence under this Act, and is liable to confiscation, the owner thereof shall be deemed to be guilty of such offence and such owner shall be liable to be proceeded against and punished accordingly, unless he satisfies the court that he had exercised due care in the prevention of the commission of such an offence".

12. The words "for the possession of which he is unable to account satisfactorily" used in Section 52(1) of the Delhi Excise Act clearly reveal that as a pre-requisite for the presumption under the aforesaid provision being raised against the accused, it is imperative for the prosecution to successfully establish the recovery of the said alleged articles from the possession of the accused. It is only after the prosecution has proved the possession of the alleged articles by the accused, that the accused can be called upon to account for the same. However, for the reasons mentioned hereinafter the prosecution has failed to establish beyond reasonable doubt that the accused was found in possession of the alleged illicit liquor. Accordingly, no presumption as provided for under Section 52 of the Delhi Excise Act can be raised against the accused in the present case.

13. The prosecution has failed to join any independent witness in the present matter. The effect of non-joining of independent witnesses can very well be analyzed in light of the provisions of Section 165 Cr.P.C r/w Sec. 100 of Cr.P.C. Sub-Sec. 4 to Section 100 of Cr.P.C. mandates that while conducting search under chapter VII, two or more independent and respectable inhabitants of the locality (in which the place to be search is situated or of any other locality, if no such inhabitants of the said locality is available or is willing to be a witness to the search), shall be called upon to attend and witnesses the search. Furthermore, the officers conducting search may issue an order in FIR no. 32/2021 State Vs. Jitender Paswan Page no. 6 of 12 by MANUJ MANUJ KAUSHAL KAUSHAL Date: 2025.05.17 15:17:26 +0530 writing in this regard.

14. It is a settled proposition of law that Sub-section 4 to Sec. 100 of Cr.P.C. is a directory provision however, the explanation of non-joining of independent witness should also be plausible. In nearly each and every case, a general explanation is given that no public witness volunteered to join the search/investigation and it appears that even the "directory" provision has been made nugatory. Such a vital provision cannot be made a dead letter in the statute book as it is intended to curb any false recovery.

15. No cogent explanation has been put forth by the prosecution for non-joining of independent witness. This court cannot lose sight of the fact that the recovery was affected from a railway station which is a public place. In such a situation, it was incumbent on part of recovery witnesses and IO to

make efforts to join any independent witness. At-least one of the residents of the locality or passerby could have been joined in the investigation to witness the alleged recovery which is alleged to have been made from a public place during morning. There is nothing on record to reflect that any sincere attempt was made by recovery witnesses and IO to join any of them in the investigation. The reluctance of public persons to join an independent witness is rather strange. As per the testimony of the prosecution witnesses a raiding party was prepared at the information of the secret informer however, the IO has failed to join any independent person in the said raiding party. There was sufficient time with the IO to at-least note down the names of the persons who had refused to join the investigation. No notice whatsoever, was given to the public persons at the spot either to join the investigation. This creates a doubt on the very recovery of illicit liquor from the accused. In my considered opinion, it would be highly unsafe to record the finding of guilt against the FIR no. 32/2021 State Vs. Jitender Paswan Page no. 7 of 12 by MANUJ MANUJ KAUSHAL KAUSHAL Date: 2025.05.17 15:17:32 +0530 accused on the basis of testimony of police witnesses.

16. It is correct that corroboration from a public witness is not essential but if a case is entirely based on the statements of the police officials, despite availability of public witnesses, the Court is put to a caution. In case titled as Roop Chand Vs. State of Haryana reported as CC Cases 3 (HC) , it was held as that where the police has failed to join independent witnesses in the investigation despite their availability and further failed to take action against those who refused to take part in investigation nor their names were noted down by the police, the explanation of the police for not joining independent witnesses is an after thought and liable to be rejected.

17. Further, in the case of Hem Raj Vs. State of Haryana AIR 2005 SC 2110, it has been observed that:-

> "The fact that no independent witness though available, was examined and not even an explanation was sought to be given for not examining such witness is a serious infirmity in the prosecution case. Amongst the independent witnesses one who was very much in the know of things form the beginning was not examined by the prosecution. None examination of independent witness by itself may not give rise to adverse inference against the prosecution. However, when the evidence of the alleged eye witness raise serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the independent witness would assume significance."

18. In the case of Massa Singh Vs. State of Punjab 2000(2)C.C. Cases HC 11, conviction was set aside on the ground that it was obligatory on the part of investigating officer to take assistance of independent witnesses to lend authenticity to the investigation conducted by him. It was observed as under:-

> FIR no. 32/2021 State Vs. Jitender Paswan Page no. 8 of 12 MANUJ KAUSHAL KAUSHAL Date:

> 2025.05.17 15:17:38 +0530 "The recovery has been effected from a public place. The investigating officer could have taken the trouble to associate an independent witness to get the attestation of such independent witness regarding the authenticity of the investigating conducted by him. This aspect of the case has not been properly appreciated by the court below".

19. In the cases of Gurbel Singh Vs. State of Punjab 1991 Crl. Rev.No.504(P&H) and Dhanpat Vs. State of Punjab 2000(1) CC Cases HC 52 it has been held that non joining of independent witnesses is fatal to the prosecution case & accused is entitled to benefit of doubt.

20. In such cases, the Court must see that testimonies of all police witnesses are credible, in sync with each other and the circumstantial facts. However, in the present matter all the prosecution witnesses have admitted that no notice was served to any of the public witnesses to join investigation. Further all the witnesses have failed to state the name of any such public person who was asked by them to join investigation.

21. No efforts whatsoever have been made by the IO to search the clue about the source from where illicit liquor was arranged by the accused persons. At-least, some efforts must have been made by the police to interrogate the accused and conduct the requisite investigation to know as to from where the accused arranged such huge quantity of illicit liquor. It could be a result of either a hasty investigation or a shoddy investigation but in either case, the benefit should go to the accused.

22. Moreover, no seal handing over memo was prepared by the IO. Further, there is are material contradictions in the testimony of the witnesses FIR no. 32/2021 State Vs. Jitender Paswan Page no. 9 of 12 MANUJ by MANUJ KAUSHAL KAUSHAL Date: 2025.05.17 15:17:44 +0530 regarding the handing over of the seal. PW-1 has stated that seal was handed over to him, PW-2 has stated that the seal after use was handed over to him. Therefore, there is a material contradiction regarding the person to whom the seal was handed over. Be that as it may be, from the above observations it is clear that the seal was not handed over to the an independent witness. In the given factual matrix, since the seal remained with the police officials of the same police station where the case property was taken therefore, the possibility of the tampering with the case property cannot be ruled out. In view of the foregoing discussion, the prosecution has failed to prove that the case property was in safe custody throughout and has not been tempered with. This further creates an adverse inference against the case of the prosecution. Reliance in this regard is placed on Ramji Singh v. State of Haryana, 2007 SCC OnLine P&H 213 wherein it was observed as under:

> "the very purpose of giving seal to an independent person is to avoid tampering of the case property. It is well settled that till the case property is not dispatched to the forensic science laboratory, the seal should not be available to the prosecuting agency and in the absence of such a safeguard the possibility of seal, contraband and the samples being tampered with cannot be ruled out. In the present case, the seal of Investigating Officer-Hoshiar Singh bearing impression 'HS' was available with Maha Singh, a junior police official and that of Deputy Superintendent of Police remained with Deputy Superintendent of Police himself. Therefore, the possibility of tampering

with seals as well as seized contraband and samples cannot be ruled out."

FIR no. 32/2021 State Vs. Jitender Paswan Page no. 10 of 12 by MANUJ MANUJ KAUSHAL KAUSHAL Date: 2025.05.17 15:17:49 +0530

23. Similarly, Hon'ble High Court of Delhi in Safiullah v. State, (1993) 49 DLT 193, had observed:

> "9. ... The seal after use were kept by the police officials themselves therefore the possibility of tempering with the contents of the sealed parcel cannot be ruled out. It was very essential for the prosecution to have established from stage to stage the fact that the sample was not tempered with. The prosecution could have proved from the CFSL form itself and from the road certificate as to what articles were taken from the Malkahana. Once a doubt is created in the preservation of the sample the benefit of the same should go to the accused..."....

24. Moreover, PW-1 and PW-2 in their testimony have admitted that they did not have the FIR number at the time of preparation of the seizure memo. However, a perusal of the seizure memo shows that the particulars of the present FIR have been mentioned on the said seizure memo Ex.PW1/A. This casts a doubt on the sequence of events in which the investigation has been conducted. At this stage, it is pertinent to mention that none of the prosecution witnesses have deposed anything regarding the fact that the accused could not produce the lawful ticket for his presence on the platform.

25. It is trite in criminal jurisprudence that the prosecution is under an obligation to prove its case against the accused beyond reasonable doubt. The standard of proof to be adopted in criminal cases is not merely of preponderance of probabilities but proof beyond reasonable doubt on the basis of cogent, convincing and reliable evidence. It is also well settled that in case FIR no. 32/2021 State Vs. Jitender Paswan Page no. 11 of 12 MANUJ MANUJ KAUSHAL KAUSHAL Date: 2025.05.17 15:17:56 +0530 of doubt, the benefit must necessarily be allowed to the accused.

26. Thus, in view of the foregoing analysis, this Court is of the considered opinion that the benefit of doubt ought to be granted to the accused, who is entitled to be exonerated of the charges against him in the present case. Accused Jitender Paswan is are hereby acquitted of the offence punishable under Section 33 of the Delhi Excise Act and Section 147 of Indian Railways Act.

File be consigned to record room.

Digitally signed by MANUJ KAUSHAL Date: 2025.05.17 15:18:03 +0530

PRONOUNCED IN THE OPEN COURT

MANUJ KAUSHAL

TODAY ON 17th May 2025

(MANUJ KAUSHAL)

JUDICIAL MAGISTRATE FIRST CLASS-04
CENTRAL DISTRICT: TIS HAZARI COURTS
DELHI

FIR no. 32/2021 State Vs. Jitender Paswan Page