Nct Of Delhi vs Shailendra Kaur on 17 May, 2025

IN THE COURT OF RISHABH KAPOOR, JUDICIAL MAGISTRATE FIRST CLASS -05 SOUTH WEST DISTRICT, DWARKA COURTS: DELHI

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State Vs. : Shailender Kaur

FIR No : 691/2006

U/s : 61/1/14 Punjab Excise Act (as applicable to Delhi)

P.S. : Dabri

JUDGMENT:

1. Criminal Case No. : 428345/2016

2. Date of commission of offence : 09.07.2006

3. Date of institution of the case : 22.06.2007

4. Name of the complainant : State

5. Name and parentage of accused : Shailender Kaur w/o Sh. Harjeet Singh

6. Offense complained or proved : Section 61 Punjab Excise Act (as applicable to Delhi)

7. Plea of the accused : Pleaded not guilty

8. Date on which order was reserved : 17.04.2025

9. Final order : Acquitted

10. Date of final order : 17.05.2025

1. The accused is facing trial for offence u/s 61/1/14 Punjab Excise Act, 1914 (as applicable in NCT of Delhi). The allegations leveled against accused are that on 09.07.2006 at about 4:00 PM at House no. RZ-145 near Nala Par Basti, East Sagarpur Delhi the accused was found in possession of one plastic katta, containing 27 quarter bottles of liquor make "Mastana Masaledar Deshi Sharab for sale

in Haryana only", without any license, permit or authority. The criminal law was set into motion by registration of FIR against the accused and investigation into the case began. After completion of the investigation, the present charge-sheet was filed for conducting trial of the accused for the alleged offences.

2. After taking cognizance of the offences, the copy of charge-sheet was supplied to accused in compliance of section 207 Cr.P.C. The arguments on charges were heard and charge for offence u/s 61 of Punjab Excise Act, 1914 (as applicable in NCT of Delhi) was framed against accused. The accused pleaded not guilty and claimed and trial. Thereafter, prosecution evidence was led.

3. In order to prove allegations against accused, prosecution has examined six prosecution witnesses.

4. The proceedings u/s 294 Cr.P.C. were conducted wherein accused admitted the fact of registration of FIR (Ex. AD-1) and report of Chemical Examiner dated (Ex.AD-2).

5. Ld. APP for the State has argued that prosecution witnesses have supported the prosecution case and their testimony has remained unrebutted. It has been further argued that on the combined reading of the testimony of all the prosecution witnesses, offence u/s 61/1/14 Punjab Excise Act, 1914 (as applicable in NCT of Delhi) has been proved beyond doubt.

6. Per contra, Ld. Counsel for accused has stated that there is no legally sustainable evidence against the accused and that the accused has been falsely implicated by the police officials and the recovery of illicit liquor has been planted upon her. Arguing further, Ld. counsel has inter-alia submitted that no public witnesses were joined by the police officials during investigation and no recovery photographs were also taken on record by the investigating officer. It is further argued that due to the lacunae and incoherency in the story of the prosecution, accused be given the benefit of doubt and is therefore, entitled to be acquitted.

7. Prior to delving into the contentions raised by the prosecution and defence, let us discuss the testimonies of the material prosecution witnesses in brief.

PW-1 Inspector Baney Singh is one of the member of the police patrolling team which allegedly apprehended the accused with the illicit liquor. He deposed that on 09.07.2006 while he along with HC Devender and Ct Sandeep was on patrolling duty , the at about 4:00 PM, when they reached at RZ-145 Nala Par Basti East Sagarpur area, they saw one lady coming from the Delhi Cantt. area after crossing railway lines. On suspicion, she was chased and was apprehended with the plastic bag in her possession. He further deposed that the said bag contained 27 quarter bottles of liquor make "Mastana Masaledar Deshi Sharab" along with envelope which contained tobbacco like items. He also deposed that the plastic bag also contained some contraband charas and the investigation qua the liquor recovered from the accused was initiated by HC Devender and whereas, he initiated investigation with respect to the recovered charas. He deposed that the liquor was seized vide memo Ex. PW 1/A. He correctly identified accused Shailender Kaur as a person from whom the liquor and charas was recovered. He also identified the case property Ex. P1. During his cross examination, he

denied that the case property was planted upon accused.

PW-2 Retired SI Devender Kumar is one of the member of the police patrolling team which allegedly apprehended the accused with the illicit liquor. He also deposed on same lines as that of PW-1 and his entire testimony is not being reproduced to avoid any repetition. Through his testimony, Form M-29 was exhibited as Ex.PW2/1, Tehrir as Ex. PW 2/A, Arrest memo of accused Ex. PW 2/B and personal search memo of accused as Ex. PW2/C. He also correctly identified the accused and case property in the court. During his cross examination, he also denied that the case property was planted upon accused.

PW-3 Retired SI Raj Karan deposed that on 09.07.2006, he along with IO/HC Krishan Kumar went to the spot where HC Devender, SI Baney Singh and Ct. Archana were present along with accused. The accused along with seized case property was handed over by HC Devender to HC Krishan Kumar, who prepared site plan at the instance of HC Devender. He further deposed that HC Krishan Kumar recorded statement of HC Devender and thereafter, arrested the accused. He deposed that the personal search of accused was conducted by Ct. Archana at the spot. During his cross examination, he deposed that the public persons were asked by HC Krishan to join the proceedings but none agreed for the same.

PW-4 Retired SI Krishan Kumar was the IO in the present case and he deposed about the proceedings of the investigation conducted by him. His testimony is similar to that of PW-3 and hence, same is not being reproduced to avoid repetition. During his cross examination, he also deposed that the public persons were asked by HC Krishan to join the proceedings but none agreed for the same.

PW-5 Retired ASI Archana Devi deposed that on 09.07.2006, accused was arrested in her presence and after the arrest of accused, her personal search was conducted by her.

PW-6 HC Harish is the MHC (M) who deposed about deposition of seized liquor along with one sample bottle and Form M-29 by the IO/HC Devender on 09.07.206 vide entry no. 4149 in Register No.19 which is Ex.PW6/A. He further deposed about handing over one sample bottle of case property along with M-29 Form for sending to Excise Lab, ITO vide RC no. 61/21 Ex. PW 6/B. STATEMENT OF ACCUSED U/S 313 Cr.P.C.:

08. Statement of the accused u/s Section 313 Cr.P.C. was recorded separately in which all the incriminating circumstances appearing in evidence were put to her. The accused controverted and denied the allegations levelled against her and stated that she has been falsely implicated in the case. Accused further opted to not lead evidence in her defence, hence, DE was closed.

APPRECIATION OF EVIDENCE AND CONSEQUENT FINDINGS:

09. I have bestowed my thoughtful consideration to the rival submissions made by both the parties. Accused Shailender Kaur has been indicted for the offence u/s 61 of Punjab Excise Act.

10. In order to prove the offence under Section 61 of Punjab Excise Act, the prosecution must establish the fulfilment of all the essential ingredients of the offence. The contents of Section 61 of the Punjab Excise Act are reproduced as follows:

> 61. Penalty for unlawful import, export, transport, manufacture, possession, etc.-
>
> (1) Whoever, in contravention of any section of this Act or of any rule, notification issued or given thereunder or order made, or of any license, permit or pass granted under this Act :-
>
> (a) imports, exports. transports, manufactures, collects, or possesses any l[intoxicant] ; or
>
> (b) constructs or works any distillery or brewery ;or
>
> (c) uses, keeps or has in his possession any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing any l[intoxicant] other than tari ;

shall be punishable for every such offence, with imprisonment for a term which may extend to 3[three years] 4[and with fine which may extend to two thousand rupees, and if found in possession of a working still for the manufacture of any intoxicant shall be punishable with the minimum sentence of six months' imprisonment and fine of two hundred rupees.] 5[. .....-1 (2) Penalty for unlawful import, export, transport, manufacture, possession, sale, etc.-Whoever, in contravention of any section other than sections 29 and 30 of this Act or of any rule, notification issued or given thereunder or order made, or of any license, permit or pass granted under this Act :-

> (a) sells any l[intoxicant] ; or
>
> b) cultivates-the hemp I[* * *]plant ; or
>
> (c) removes any *[intoxicant] from any distillery, brewery or ware- house established or licensed under this Act ; or
>
> (d) bottles any liquor for the purposes of sale ; or
>
> (e) taps or draws tari from any tari-producing tree ;

Shall be punishable with imprisonment for a term which may extend to [two years and with fine which may extend to two thousand rupees] It is also significant to note that Section 76 of Punjab Excise Act lays down a rebuttable presumption which goes as follows:

> 76. Presumption as to commission of offence in certain cases.

-Whenever any person is found in possession of-

a) any still, utensil, implement or apparatus whatsoever or any part or parts thereof, such as are ordinarily used for the manufacture of any intoxicant other than tari ;

(b) any materials which have ,undergone any process towards the manufacture of an l[intoxicant] or from which an l[intoxicant] has been manufactured ; it shall be presumed, until the contrary is proved, that his possession was in contravention of the provisions of this Act

11. It is trite law that the burden always lies upon the prosecution to prove its case beyond reasonable doubt on the basis of acceptable evidence and that the law does not permit the court to punish the accused on the basis of moral conviction or on account of suspicion alone. Also, it is well settled that accused is entitled to the benefit of every reasonable doubt in the prosecution story and such doubt entitles him to acquittal. The words "until contrary is proved" used in Section 76 of Punjab 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, as discussed hereinafter, careful scrutiny of the evidence placed on record brings to light the fact that the case of the prosecution is fraught with multiple inconsistencies, rendering the prosecution version incredible, owing to which, no presumption, as provided for under Section 76 of the Act, can be raised against the accused in the present case.

i). Doubtful Seizure Memo and Form M-29.

12. A careful reading of the testimony of PW-1 and PW-2 reflects that the HC Devender had seized the illicit liquor vide seizure memo Ex. PW1/A and filled in the form M 29 Ex.PW 2/1, both at the spot and thereafter, had prepared the rukka Ex. PW2/A and handed over the same to Ct. Sandeep, for registration of FIR. The narration of such a chronology of events leads to the irresistible conclusion that the seizure memo of the liquor and Form M-29 were prepared at the spot, prior to the rukka being sent to the police station for registration of the FIR and that the FIR was, therefore, admittedly registered after the preparation of these documents. Accordingly, it follows that the number of the FIR would have come to the knowledge of the investigating officer only after a copy of the FIR was brought to the spot by Ct. Sandeep. Thus, ordinarily, the FIR number should not find mention in the seizure memo and Form M-29, both of which documents came into existence before registration of the FIR. However, quite surprisingly, perusal of seizure memo and Form M-29 reflects the mentioning of the full particulars of the FIR thereupon, which fact has remained unexplained on behalf of the prosecution. It is not even the case that the same, on the face of it, appears to have been written in separate ink or at some left over space. Rather, on the seizure memo, it appears to have been recorded in same continuity, handwriting and ink as rest of the contents of these documents. No explanation from the prosecution is forthcoming as to how the FIR number surfaced on a document which was prepared prior to the registration of the FIR. This fact casts a fatal doubt upon the case of prosecution.

13. At this stage, reference may be made to the decision of the Hon'ble High Court of Delhi in Lalit v. The Delhi Administration, 1989 Cri. L.J. 127, wherein it was observed in paragraph 5 as follows:

> "....Learned counsel for the state concedes that immediately after the arrest of the accused, his personal search was effected and the memo Ex.PW11/D was prepared. Thereafter, the sketch plan of the knife was prepared in the presence of the witnesses. After that, the ruqa Ex.PW11/F was sent to the Police Station for the registration of the case on the basis of which the FIR, PW 11/G was recorded. The F.I.R. is numbered as 36, a copy of which was sent to the I.O. after its registration. It comes to that the number of F.I.R. 36 came to the knowledge of the I.O. after a copy of it was delivered to him at the spot by a constable. In the normal circumstances, the F.I.R. No. should not find mention in the recovery memo or the sketch plan which had come into existence before the registration of the case. However, from the perusal of the recovery memo, I find that the FIR is mentioned whereas the sketch plan does not show the number of the FIR. It is not explained as to how and under what circumstances the recovery memo came to bear the F.I.R. No. which had already come into existence before the registration of the case. These are few of the circumstances which create a doubt, in my mind, about the genuineness of the weapon of offence alleged to have been recovered from the accused."

14. Similarly, in paragraph 4 of Mohd. Hashim vs State, 82 (1999) DLT 375, the Hon'ble High Court of Delhi observed:

> "...Surprisingly, the secret information (Ex. P.W. 7/A) received by the Sub- Inspector Narender Kumar Tyagi (P.W. 7), the notice under S. 50 of the Act (Ex. P.W. 5/A) alleged to have been served on the appellant, the seizure memo (Ex. P.W. 1/A) and the report submitted under S. 57 of the Act (Ex. P.W. 7/D) bear the number of the FIR (Ex. P.W. 4/B). The number of the FIR (Ex. P.W. 4/B) given on the top of the aforesaid documents is in the same ink and in the same handwriting, which clearly indicates that these documents were prepared at the same time. The prosecution has not offered any explanation as to under what circumstances number of the FIR (Ex. P.W. 4/B) had appeared on the top of the aforesaid documents, which were allegedly prepared on the spot. This gives rise to two inferences that either the FIR (Ex. P.W. 4/B) was recorded prior to the alleged recovery of the contraband or number of the said FIR was inserted in these documents after its registration. In both the situations, it seriously reflects upon the veracity of the prosecution version and creates a good deal of doubt about recovery of the contraband in the manner alleged by the prosecution."

20. The aforesaid rulings of the Hon'ble High Court of Delhi squarely apply to the facts in the present case as well, which leads to only one of the either inference, that is, either the FIR was registered prior to the alleged recovery of the illicit liquor, or that the said documents were prepared later in point of time. In either of the scenarios, a dent is created in the version of the prosecution, the benefit of which must accrue to the accused.

ii). The non-joining of any independent / public witness.

15. It is evident from the record that no public witnesses to the recovery of the liquor have been either cited in the list of prosecution witnesses or have been examined by the prosecution. Apparently, IO had even asked a few public persons to join the investigation, however, all of them refused to join the investigation. Admittedly, no notice was served to such public persons upon their refusal to join investigation in the case. Thus, it is not the case of prosecution that public witnesses were not available at the spot. However, from a perusal of the record, no serious effort for joining public witnesses appears to have been made by the investigating officer. These facts are squarely covered by the ruling of the Hon'ble High Court of Delhi in the case titled as, Anoop Joshi Vs. State" 1992 (2) C.C. Cases 314 (HC), wherein it was observed as under:

> ".....18. It is repeatedly laid down by this Court in such cases it should be shown by the police that sincere efforts have been made to join independent witnesses. In the present case, it is evidence that no such sincere efforts have been made, particularly when we find that shops were open and one or two shopkeepers could have been persuaded to join the raiding party to witness the recovery being made from the appellant. In case any of the shopkeepers had declined to join the raiding party, the police could have later on taken legal action against such shopkeepers because they could not have escaped the rigours of law while declining to perform their legal duty to assist the police in investigation as a citizen, which is an offence under the IPC."

22. Further, in a case law reported as Roop Chand v. The State of Haryana, 1999 (1) C.L.R. 69, Hon'ble Punjab & Haryana High Court held as under:

> ".....The recovery of illicit liquor was effected from the possession of the petitioner during noon time and it is in the evidence of the prosecution witnesses that some witnesses from the public were available and they were asked to join the investigation. The explanation furnished by the prosecution is that the independent witnesses were asked to join the investigation but they refused to do so on the ground that their joining will result into enmity between them and the petitioner.
>
> 16. It is well settled principle of the law that the Investigating agency should join independent witnesses at the time of recovery of contraband articles, if they are available and their failure to do so in such a situation casts a shadow of doubt on the prosecution case. In the present case also admittedly the independent witnesses were available at the time of recovery but they refused to associate themselves in the investigation. This explanation does not inspire confidence because the police officials who are the only witnesses examined in the case have not given the names and addresses of the persons contacted to join it is a very common excuse that the witnesses from the public refused to join the investigation. A police officer conducting investigation of a crime is entitled to ask anybody to join the investigation and on refusal by a person from the public the Investigating Officer can take action against such a person under the law. Had it been a fact that the witnesses from the

> public had refused to join the investigation, the IO must have proceeded against them under the relevant provision of law. The failure to do so by the police officer is suggestive of the fact that the explanation for non- joining the witnesses from the public is an after-thought and is not worthy of credence. All these facts taken together make the prosecution case highly doubtful."

17. In fact, in this regard, Section 100 of the Cr.P.C also accords assistance to the aforesaid finding, by providing that whenever any search is made, two or more independent and respectable inhabitants of the locality are required to be made witnesses to such search, and the search is to be made in their presence. Under Section 100(8) Cr.P.C, refusal to be a witness can render such non willing public witness liable for criminal prosecution. Despite the availability of such a provision, no sincere attempts were made by the police to join witnesses in the present case. Therefore, non-compliance of the mandatory provisions of law, even though public witnesses were easily available in the vicinity, makes the prosecution version highly doubtful.

18. This Court is conscious of the legal position that non-joining of independent witnesses cannot be the sole ground to discard or doubt the prosecution case, as has been held in Appabhai and another v. State of Gujarat, AIR 1988 SC 696. However, evidence in every case is to be sifted through in light of the varied facts and circumstances of each individual case. As observed above, the testimony of the police witnesses in the present case is not worthy of credit. In such a situation, evidence of an independent witness would have rendered the much needed corroborative value, to the otherwise uncompelling case of the prosecution, as discussed above, and hereinafter.

iii). Possibility of misuse of seal of the investigating officer.

19. As per the version of the prosecution witnesses, after sealing the case property and the samples of illicit liquor with seal of 'DK'. The testimony of all the prosecution witnesses is silent qua handing over the seal to any of the independent public persons or even to the other members of the police team which allegedly apprehended the accused. It is apparent from record that the seal was not handed over to any independent witness. There is nothing on record to suggest that IO had made efforts to handover the seal to any independent witness. Further, no handing over memo is on record to show the genuineness of fact of actual handing over of seal by IO to any of the public witnesses or the members of the police patrolling team. Assumingly, the seal after its use was handed over by the IO either to some public person or to some member of the police patrolling team but still also, there is no taking over memo on record to show as to when the seal was taken back by the IO or if it remained with him forever. In such a factual backdrop, the chain of custody of sample seal seems to have been breached and the possibility of tampering with the case property cannot be ruled out. Moreover, it is not even the case of the prosecution that the seal was not within the reach of the IO and thus, there was no scope of tampering of case property.

20. In this regard, judgment in case titled as Ramji Singh Vs. State of Haryana 2007 (3) RCR (CRIMINAL) 452, may be adverted to, wherein it was observed in paragraph 7 that:

> "....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."

21. 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..."....

22. It is nowhere the case of the prosecution that the seal after use was handed over to the independent witness rather it has come to fore that seal was returned by Ct. Rajeev to the IO/HC Rajpal after 7-15 days of the incident. Therefore, the conclusion which can be arrived at is that the seal remained with the Investigating Officer or with the other member of the raiding party therefore the possibility of interference or tempering of the seal and the contents of the parcel cannot be ruled out...."

23. Thus, in light of the aforesaid discussion, the possibility of misuse of seal and tampering of case property cannot be ruled out.

iv). Failure to prove the possession of alcohol by accused beyond permissible limits.

24. The perusal of record shows that the Excise Result dated 24.08.2006 (Ex.AD-2) was obtained qua one quarter bottle of liquor (bottle containing 180 ml of liquor) only, whereby the presence of alcohol in the said sample was confirmed. The presence of alcohol in the remaining allegedly recovered liquor bottles has not been thus, proved by the prosecution. Now, since the State has only found one bottle (total 180 ML of liquid), allegedly recovered from the accused, containing alcohol, an offence under section 61 of the Punjab Excise Act, 1914 cannot be said to have been made out as the same falls within the maximum permissible limit specified under Rule 22B of the Punjab Liquor Permit and Pass Rules, 1932. At this juncture, the ruling of the Hon'ble High Court of Karnataka, in its judgment titled as Nagesh S/O Ningaiah vs The State Of Karnataka, Criminal Revision Petition No.772 /2009, decided on 31 January, 2014, may be adverted to, wherein, while acquitting the accused of a similar offence, following observations were made:

> "It is seen from the mahazar that out of 49,440 Whisky bottles, 15 Whisky bottles of 180 ml. each were sent for Chemical Analysis, and it is opined that there was presence of Ethyl Alcohol in all the bottles that were sent for Chemical Examination, fit for consumption. Thus, the total quantity sent for Chemical Analysis is less than permitted quantity under law. We do not know the contents of the other bottles seized under a Panchanama. There is no evidence to show that all other bottles also contained alcohol. When the quantity found in the bottle sent for Chemical Examination is less than permitted limit and when there is no evidence regarding the contents of all other bottles seized under Panchanama, it cannot be said that the accused was in possession of the illicit liquor without pass or permit more than permitted quantity so as to constitute an offence. The unreported decision of this Court in W.P.No.17991/2011 (Excise), dated 28.02.2012, relied upon by the learned counsel for the petitioner is rightly applicable to the facts of this case.....In this case also the prosecution has failed to establish that the accused was in possession of liquor more than permitted quantity."

25. There is no gainsaying that if two reasonably probable and evenly balanced views of the evidence are possible, one must necessarily concede to the existence of a reasonable doubt. The aforementioned lacunae in the story of the prosecution render the version of the prosecution doubtful, leading to the irresistible conclusion that the burden of proving the guilt of the accused beyond reasonable doubt has not been discharged by the prosecution. Thus, this Court is of the opinion that the prosecution has failed to bring on record any cogent evidence in order to prove the commission of and guilt of the accused for offence u/s 61 of Punjab Excise Act beyond reasonable doubt, thus, entitling the accused person to benefit of doubt and acquittal.

26. Accordingly, this Court hereby accords the benefit of doubt to the accused for the offence u/s 61 of Punjab Excise Act and holds the accused Joginder Singh not guilty of commission of the said offence. Accused Shailender Kaur is thus, acquitted of the offence u/s 61 of Punjab Excise Act.

Announced in the open court 17.05.2025.

(Rishabh Kapoor) Judicial Magistrate First Class-05 (South-West)/Dwarka 17.05.2025