Reserved On: 21.11.2024 vs Rajesh Kumar Alias Raju on 29 November, 2024

Author: Vivek Singh Thakur

Bench: Vivek Singh Thakur

2024:HHC:12713-DB IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA Cr. Appeal No. 4021 of 2013 Reserved on: 21.11.2024 Date of Decision: 29.11.2024 State of Himachal Pradesh ...Appellant.

Versus

Rajesh Kumar alias Raju ...Resp

Coram

Hon'ble Mr Justice Vivek Singh Thakur, Judge. Hon'ble Mr Justice Rakesh Kainthla, Judge.

Whether approved for reporting?1 Yes For the Appellant/State: Mr. Pawan K. Nadda, Additional Advocate General.

For the Respondent : Mr. Ajay Kochhar, Senior Advocate, with Mr. Vivek Sharma, Advocate.

Rakesh Kainthla, Judge The present appeal is directed against the judgment dated 17.01.2013 passed by learned Special Judge, Fast Track Court, Shimla, District Shimla (learned Trial Court) vide which the respondent (accused before learned Trial Court) was acquitted of the commission of an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (in short 'ND&PS Act'). (Parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience). Whether reporters of Local Papers may be allowed to see the judgment? Yes.

2024:HHC:12713-DB

2. Briefly stated, the facts giving rise to the present appeal are that ASI Yoginder Singh (PW8), HC Yashwant Singh, HC Manoj Kumar (PW6), Constable Anil Kumar, Constable Pawan Kumar and Constable Rajiv Kumar (PW7) left Shimla on 16.06.2011 towards Rohru, Jubbal etc for patrolling. They were patrolling on Tiuni, Hatkoti road towards Tiuni on 16.06.2011 at about 4:30 PM at a lonely place when they saw the accused coming towards them. The accused returned after seeing the police party and tried to throw away the bag (Ext.P3). The police apprehended him based on suspicion. The police checked the bag and found black sticks (Ext.P4) inside the bag. ASI Yoginder

Singh (PW8) checked the sticks and found them to be charas. The place was lonely and deserted and no independent witness could be found despite efforts; hence, ASI Yoginder Singh (PW8) associated HC Yashwant Singh and HC Manoj Kumar (PW6) as witnesses. He enquired about the name and address of the accused who revealed his name as Rajesh, resident of Uttrakhand. The police weighed the charas with the help of a weighing scale and found its weight to be 3 kg 250 grams. The charas was put in the bag. The bag was put in a cloth parcel (Ext.P2) and the parcel was sealed with seven impressions of seal 'T'. ASI Yoginder Singh (PW8) searched the accused and found 2024:HHC:12713-DB a purse (Ext.P7) containing currency notes worth 260/- (Ext.P8), passport-size photographs (Ext.P9) and a Nokia mobile (Ext.P6). These were put in another parcel (Ext.P5) and the parcel was sealed with five impressions of seal 'T'. NCB-1 Form (Ext.PW8/A) was filled in triplicate. A seal impression was put on the Form. The sample seal (Ext.PW8/B) was taken on a separate piece of cloth and the seal was handed over to HC Yashwant Singh after the use. The parcel was seized vide memo (Ext. PW6/A). Rukka (Ext.PW8/C) was prepared and handed over to Constable Rajiv Kumar (PW7) along with the case property with the directions to carry it to Police Station Jubbal. ASI Yoginder Singh (PW8) conducted the investigation. He prepared the site plan (Ext.PW8/D) and recorded the statements of witnesses as per their version. He arrested the accused vide memo (Ext.PW8/E). The case property and the rukka were produced before ASI Rikhi Ram (PW5) who was officiating as SHO at Police Station Jubbal. He got the FIR (Ext.PW4/A) registered based on the rukka. He put the parcel containing charas in another parcel and sealed the outer parcel with three seals of seal impression 'R'. He filled the relevant columns of the NCB-1 Form and put the seal impression on the form. He issued a certificate (Ext.PW5/A). He obtained the seal impression (Ext.PW5/B) on a 2024:HHC:12713-DB separate piece of cloth. He handed over the case property, sample seals and other documents to Head Constable Pyare Lal (PW4) who made an entry in the register No. 19 at Sl. No. 265 (Ext.PW4/B) and deposited the case property in Malkhana. He handed over the parcel containing charas to Constable Jagdeep Singh (PW1) on 18.06.2011 along with the documents, and sample seal with a direction to carry them to SFSL, Junga vide R.C. No. 14/11 (Ext.PW4/C). Constable Jagdeep (PW1) deposited all the articles at SFSL, Junga and handed over the receipt to HC Piyare Lal (PW4). A special report (Ext.PW3/A) was prepared on 17.06.2011 which was handed over to LC Babita (PW2) with the direction to carry it to SDPO Rohru. LC Babita (PW2) handed over the special report to Constable Kedar Singh (PW3) Assistant Reader to SDPO, Rohru. He endorsed one copy and handed it over to LC Babita. He produced the second copy before SDPO, Rohru, who made the endorsement on the same. Constable Kedar Singh (PW3) made an entry in the register (Ext.PW3/A) and retained the special report on record. The result of analysis (Ext.PW5/C) was issued in which it was shown that the exhibit was an extract of cannabis and a sample of charas which contained 30.50 per cent w/w resin in it. The statements of the remaining witnesses were recorded as per their version and 2024:HHC:12713-DB after the completion of the investigation the challan was prepared and presented before learned Sessions Judge Shimla, who assigned it to learned Additional Sessions Judge (Fast Track Court), Shimla (learned Trial Court).

3. The learned Trial Court charged the accused with the commission of an offence punishable under Section 20 of the ND&PS Act to which the accused pleaded not guilty and claimed to be tried.

4. The prosecution examined eight witnesses to prove its case. Constable Jagdeep Singh (PW1) carried the case property to SFSL Junga. LC Babita (PW2) carried the special report to Dy.

Superintendent of Police, Rohru. Constable Kedar Singh (PW3) was working as an Assistant Reader to SDPO Rohru. Head Constable Piyare Lal (PW4) was officiating as MHC with whom the case property was deposited. ASI Rikhi Ram (PW5) was officiating as SHO in Police Station, Jubbal who resealed the parcels and signed the FIR. HC Manoj (PW6) and Constable Rajiv Kumar (PW7) are the official witnesses to recovery. ASI Yoginder Singh (PW8) effected the recovery and conducted the initial investigation.

5. The accused in his statement recorded under Section 313 of Cr.P.C. denied the prosecution case in its entirety. He stated 2024:HHC:12713-DB that he was innocent and police planted a false case upon him. He was taken to the Police Station from his house. He did not lead any defence evidence.

6. The learned Trial Court held that the recovery was effected from the Bag and there was no requirement to associate independent witnesses. However, the Court has to see the testimonies of official witnesses with due care and caution. There were many discrepancies in the statements of official witnesses. The incident had taken place near a heavily populated area and no independent witness was associated. This made the prosecution case doubtful. The special report was handed over to Assistant Reader who claimed that he had produced it before SDPO Rohru. However, there is no endorsement regarding this fact in the special report and it was highly doubtful that the report was produced before SDPO. The Investigating Officer had only prepared the NCB-1 Form and the arrest memo. The witnesses were unable to tell who had prepared the other documents. All these circumstances made the prosecution case highly suspect and it was difficult to rely upon the prosecution case. Consequently, the accused was acquitted.

2024:HHC:12713-DB

7. Being aggrieved from the judgment passed by the learned Trial Court, the State has filed the present appeal asserting that the learned Trial Court failed to properly appreciate the material on record in its proper perspective. Learned Trial Court had set unrealistic standards to evaluate the direct and cogent prosecution evidence. The reasoning of the learned Trial Court is unreasonable and unsustainable. The testimonies of official witnesses were discarded without any reason. There was no evidence of any enmity between the police and the accused. Minor discrepancies do not affect the prosecution case and learned Trial Court erred in acquitting the accused based on minor discrepancies. A huge quantity of 3.250 kgs of charas was recovered from the accused. The accused was found at a lonely and deserted place and it was not possible to associate any independent witness. The members of the police team stated that particular documents were scribed by the Investigating Officer and the remaining documents were scribed by one or other member of the team. The failure to mention the name of the scribe of other documents is not fatal. The discrepancies were bound to come with time. Therefore, it was prayed that the present appeal be allowed and the judgment passed by the learned Trial Court be set aside.

2024:HHC:12713-DB

8. The Division Bench of this Court held vide judgment dated 16.07.2013 that the report of the analysis issued by SFSL, Junga was not sufficient to prove that the substance recovered by the police

was charas. Reliance was placed upon the judgment of Sunil Kumar versus State of H.P. Latest HLJ (2010) HP, 207 and other judgments. Hence, the appeal was allowed and the accused was acquitted.

9. Being aggrieved from the judgment passed by this Court, the State filed an appeal before the Hon'ble Supreme Court of India. Hon'ble Supreme Court held that the judgment of Sunil Kumar (supra) was not a good law, in view of the judgment of the Hon'ble Supreme Court in Hira Singh versus Union of India (2020) SCC Online SC 382; hence, the matter was remitted to this Court for a fresh decision.

10. We have head Mr Pawan K. Nadda, learned Additional Advocate General for the appellant-State and Mr Ajay Kochhar, learned Senior Advocate assisted by Mr Vivek Sharma, learned counsel for the respondent/accused.

11. Mr. Pawan K. Nadda, learned Additional Advocate General for the appellant-State submitted that the learned Trial Court erred in rejecting the testimonies of official witnesses. They 2024:HHC:12713-DB had consistently stated about the apprehension of the accused and recovery of 3.250 kgs of charas. The police could not have planted such a huge quantity upon the accused. There was no evidence of any enmity between the accused and the police. It was a case of chance recovery and there was no requirement to associate independent witnesses. Learned Trial Court erred in holding that the police officials were under an obligation to associate independent witnesses from a distance of more than ½ km away; therefore, he prayed that the present appeal be allowed and the judgment passed by learned Trial Court be set aside.

12. Mr. Ajay Kochhar, learned Senior Advocate for the respondent/accused submitted that the contradictions in the testimonies of the police officials are not minor and learned Trial Court had rightly held that these are fatal to the prosecution case. The contradictions highlighted by the learned Trial Court showed that police officials modulated their version to support the prosecution case. It is highly unlikely that the witnesses were not aware of the name of the person who had prepared the various documents except the NCB-1 Form and arrest memo. This shows that the memories of the witnesses were not trustworthy or they were not present on the spot, both of these possibilities are fatal to 2024:HHC:12713-DB the prosecution case. Learned Trial Court had taken a reasonable view while deciding the matter and this Court should not substitute its view merely because an alternative view is possible. Therefore, he prayed that the present appeal be dismissed.

13. We have given considerable thought to the submissions made at the bar and have gone through the records carefully.

14. The present appeal has been filed against a judgment of acquittal. It was laid down by the Hon'ble Supreme Court in Mallappa v. State of Karnataka, (2024) 3 SCC 544: 2024 SCC OnLine SC 130 that while deciding an appeal against acquittal, the High Court should see whether the evidence was properly appreciated on record or not; second whether the finding of the Court is illegal or affected by the error of law or fact and thirdly; whether the view taken by the Trial Court was a possible view, which could have been taken based on the material on record. The Court will not lightly interfere with the judgment of acquittal. It was observed:

"25. We may first discuss the position of law regarding the scope of intervention in a criminal appeal. For, that is the foundation of this challenge. It is the cardinal principle of criminal jurisprudence that there is a presumption of innocence in favour of the accused unless proven guilty. The presumption continues at all stages of the trial and finally culminates into a fact when the case ends in acquittal. The presumption of innocence gets concretised when the case ends in acquittal. It is so because once the trial court, on 2024:HHC:12713-DB appreciation of the evidence on record, finds that the accused was not guilty, the presumption gets strengthened and a higher threshold is expected to rebut the same in appeal.

26. No doubt, an order of acquittal is open to appeal and there is no quarrel about that. It is also beyond doubt that in the exercise of appellate powers, there is no inhibition on the High Court to reappreciate or re-visit the evidence on record. However, the power of the High Court to reappreciate the evidence is a qualified power, especially when the order under challenge is of acquittal. The first and foremost question to be asked is whether the trial court thoroughly appreciated the evidence on record and gave due consideration to all material pieces of evidence. The second point for consideration is whether the finding of the trial court is illegal or affected by an error of law or fact. If not, the third consideration is whether the view taken by the trial court is a fairly possible view. A decision of acquittal is not meant to be reversed on a mere difference of opinion. What is required is an illegality or perversity.

27. It may be noted that the possibility of two views in a criminal case is not an extraordinary phenomenon. The "two-views theory" has been judicially recognised by the courts and it comes into play when the appreciation of evidence results in two equally plausible views. However, the controversy is to be resolved in favour of the accused. For, the very existence of an equally plausible view in favour of the innocence of the accused is in itself a reasonable doubt in the case of the prosecution. Moreover, it reinforces the presumption of innocence. Therefore, when two views are possible, following the one in favour of the innocence of the accused is the safest course of action. Furthermore, it is also settled that if the view of the trial court, in a case of acquittal, is a plausible view, it is not open for the High Court to convict the accused by reappreciating the evidence. If such a course is permissible, it would make it practically impossible to settle the rights and liabilities in the eye of the law.

2024:HHC:12713-DB

28. In Selvaraj v. State of Karnataka [Selvaraj v. State of Karnataka, (2015) 10 SCC 230: (2016) 1 SCC (Cri) 19]: (SCC pp. 236-37, para 13) "13. Considering the reasons given by the trial court and on an appraisal of the evidence, in our considered view, the view taken by the trial court was a possible one. Thus, the High Court should not have interfered with the judgment of acquittal. This Court in Jagan M. Seshadri v. State of T.N. [Jagan M. Seshadri v. State of T.N., (2002) 9 SCC 639: 2003 SCC (L&S)

> 1494] has laid down that as the appreciation of evidence made by the trial court while recording the acquittal is a reasonable view, it is not permissible to interfere in appeal. The duty of the High Court while reversing the acquittal has been dealt with by this Court, thus : (SCC p. 643, para 9) '9. ... We are constrained to observe that the High Court was dealing with an appeal against acquittal. It was required to deal with various grounds on which acquittal had been based and to dispel those grounds.

It has not done so. Salutary principles while dealing with appeals against acquittal have been overlooked by the High Court. If the appreciation of evidence by the trial court did not suffer from any flaw, as indeed none has been pointed out in the impugned judgment, the order of acquittal could not have been set aside. The view taken by the learned trial court was a reasonable view and even if by any stretch of imagination, it could be said that another view was possible, that was not a ground sound enough to set aside an order of acquittal.'"

> 29. In Sanjeev v. State of H.P. [Sanjeev v. State of H.P., (2022) 6 SCC 294: (2022) 2 SCC (Cri) 522], the Hon'ble Supreme Court analysed the relevant decisions and summarised the approach of the appellate court while deciding an appeal from the order of acquittal. It observed thus: (SCC p. 297, para 7) "7. It is well settled that:
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> 2024:HHC:12713-DB 7.1. While dealing with an appeal against acquittal, the reasons which had weighed with the trial court in acquitting the accused must be dealt with, in case the appellate court is of the view that the acquittal rendered by the trial court deserves to be upturned (see Vijay Mohan Singh v. State of Karnataka [Vijay Mohan Singh v. State of Karnataka, (2019) 5 SCC 436 :
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> (2019) 2 SCC (Cri) 586] and Anwar Ali v. State of H.P. [Anwar Ali v. State of H.P., (2020) 10 SCC 166 :
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> (2021) 1 SCC (Cri) 395]).

7.2. With an order of acquittal by the trial court, the normal presumption of innocence in a criminal matter gets reinforced (see Atley v. State of U.P. [Atley v. State of U.P., 1955 SCC OnLine SC 51: AIR 1955 SC 807]). 7.3. If two views are possible from the evidence on record, the appellate court must be extremely slow in interfering with the appeal against acquittal (see Sambasivan v. State of Kerala [Sambasivan v. State of Kerala, (1998) 5 SCC 412: 1998 SCC (Cri) 1320])."

15. This position was reiterated in Ramesh v. State of Karnataka, (2024) 9 SCC 169: 2024 SCC OnLine SC 2581 wherein it was observed at page 175:

> "20. At this stage, it would be relevant to refer to the general principles culled out by this Court in Chandrappa v. State of Karnataka [Chandrappa v. State of Karnataka, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325], regarding the power of the appellate court while dealing with an appeal against a judgment of acquittal. The principles read thus: (SCC p. 432, para 42) "42. ... (1) An appellate court has full power to

review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on the exercise of 2024:HHC:12713-DB such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion. (4) An appellate court, however, must bear in mind that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

21. In Rajendra Prasad v. State of Bihar [Rajendra Prasad v. State of Bihar, (1977) 2 SCC 205: 1977 SCC (Cri) 308], a three- judge Bench of this Court pointed out that it would be essential for the High Court, in an appeal against acquittal, to clearly indicate firm and weighty grounds from the record for discarding the reasons of the trial court in order to be able to reach a contrary conclusion of guilt of the accused. It was further observed that, in an appeal against acquittal, it would not be legally sufficient for the High Court to take a contrary view about the credibility of witnesses and it is absolutely imperative that the High Court convincingly finds it well-nigh impossible for the trial court to reject their 2024:HHC:12713-DB testimony. This was identified as the quintessence of the jurisprudential aspect of criminal justice."

16. The present appeal has to be decided as per the parameters laid down by the Hon'ble Supreme Court.

17. In the present case the police had not associated any independent witness as it was a case of chance recovery. Learned Trial Court held that the police were under an obligation to associate independent witnesses from lower Kuddu village. This finding cannot be sustained. It was laid down by the Hon'ble Supreme Court in Kashmira Singh Versus State of Punjab 1999 (1) SCC 130 that the police party is under no obligation to join independent witnesses while going on patrolling duty and the association of any person after effecting the recovery would be meaningless. It was observed:

> "3. Learned counsel for the appellant has taken us through the evidence recorded by the prosecution as also the judgment under appeal. Except for the comment that the prosecution is supported by two police officials and not by any independent witness, no other comment against the prosecution is otherwise offered. This comment is not of any value since the police party was on patrolling duty and they were not required to take along independent witnesses to support recovery if and when made. It has come in the evidence of ASI Jangir Singh that after the recovery had been effected, some people had passed by. Even so, obtaining their counter-signatures on the documents already prepared 2024:HHC:12713-DB would not have lent any further credence to the prosecution version."

18. In similar circumstances, it was laid down by this Court in Chet Ram Vs State Criminal Appeal no. 151/2006 decided on 25.7.2018 that when the accused was apprehended after he tried to flee on seeing the police, there was no necessity to associate any person from the nearby village. It was observed:-

> "(A)appellant was intercepted and search of his bag was conducted on suspicion, when he turned back and tried to flee, on seeing the police. Police officials did not have any prior information nor did they have any reason to believe that he was carrying any contraband. They overpowered him when he tried to run away and suspected that he might be carrying some contraband in his bag. Therefore, the bag was searched and charas was recovered. After the recovery of Charas, there was hardly any need to associate any person from the nearby village, because there remained nothing to be witnessed.

It is by now well settled that non-association of independent witnesses or non-supporting of the prosecution version, by independent witnesses where they are associated, by itself is not a ground to acquit an accused. It is also well-settled that the testimony of official witnesses, including police officials, carries the same evidentiary value as the testimony of any other person. The only difference is that Courts have to be more circumspect while appreciating the evidence of official witnesses to rule out the possibility of false implication of the accused, especially when such a plea is specifically raised by the defence. Therefore, while scrutinizing the evidence of official witnesses, in a case where independent witnesses are not associated, contradictions and inconsistencies in the testimony of such witnesses are required to be taken into account and given due weightage, unless satisfactorily explained. Of course, it 2024:HHC:12713-DB is only the material contradictions and not the trivial ones, which assume significance." (Emphasis supplied)

19. It was laid down by the Hon'ble Supreme Court of India in Raveen Kumar v. State of H.P., (2021) 12 SCC 557 : (2023) 2 SCC (Cri) 230: 2020 SCC OnLine SC 869 that non-association of the independent witnesses will not be fatal to the prosecution case. However, the Court will have to scrutinize the statements of prosecution witnesses carefully. It was observed a page 566:

> "(C) Need for independent witnesses

> 19. It would be gainsaid that the lack of independent witnesses is not fatal to the prosecution case. [Kalpnath Rai v. State, (1997) 8 SCC 732: 1998 SCC (Cri) 134: AIR 1998 SC 201, para 9] However, such omissions cast an added duty on courts to adopt a greater degree of care while scrutinising the testimonies of the police officers, which if found reliable can form the basis of a successful conviction."

20. This position was reiterated in Rizwan Khan v. State of Chhattisgarh, (2020) 9 SCC 627: 2020 SCC OnLine SC 730, wherein, it was observed at page 633:

> "12. It is settled law that the testimony of the official witnesses cannot be rejected on the ground of non- corroboration by independent witness. As observed and held by this Court in catena of decisions, examination of independent witnesses is not an indispensable requirement and such non-examination is not necessarily fatal to the prosecution case [see Pardeep Kumar [State of H.P. v. Pardeep Kumar, (2018) 13 SCC 808 : (2019) 1 SCC (Cri) 420]].
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> 13. In the recent decision in Surinder Kumar v. State of Punjab [Surinder Kumar v. State of Punjab, (2020) 2 SCC 563 :
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> (2020) 1 SCC (Cri) 767], while considering somewhat similar 2024:HHC:12713-DB submission of non-examination of independent witnesses, while dealing with the offence under the NDPS Act, in paras 15 and 16, this Court observed and held as under : (SCC p.
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> 568) "15. The judgment in Jarnail Singh v. State of Punjab [Jarnail Singh v. State of Punjab, (2011) 3 SCC 521 :
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> (2011) 1 SCC (Cri) 1191], relied on by the counsel for the respondent State also supports the case of the prosecution. In the aforesaid judgment, this Court has held that merely because the prosecution did not examine any independent witness, would not necessarily lead to a conclusion that the accused was falsely implicated. The evidence of official witnesses cannot be distrusted and disbelieved, merely on account of their official status.
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> 16. In State (NCT of Delhi) v. Sunil [State (NCT of Delhi) v. Sunil, (2001) 1 SCC 652: 2001 SCC (Cri) 248], it was held as under : (SCC p. 655) 'It is an archaic notion that actions of the police officer should be approached with initial distrust. It is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law, the presumption should be the other way around.

That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature.'"

21. Similar is the judgment of this Court in Balwinder Singh & Anr. Vs State of H.P., 2020 Criminal L.J. 1684, wherein it was held:-

> "3. (iii) Learned defence counsel, contended that in the instant case, no independent witness was associated by the Investigating Officer, therefore, the prosecution case cannot be said to have been proved by it in accordance with provisions of the Act. Learned defence counsel, in support of his contention, relied upon titled Krishan Chand versus State of H.P.,2017 4 CriCC 531 3(iii)(d). It is by now well settled that prosecution case 2024:HHC:12713-DB cannot be disbelieved only because the independent witnesses were not associated."

22. This position was reiterated in Kallu Khan v. State of Rajasthan, (2021) 19 SCC 197: 2021 SCC OnLine SC 1223, wherein it was held at page 204: -

> "17. The issue raised regarding conviction solely relying upon the testimony of police witnesses, without procuring any independent witness, recorded by the two courts, has also been dealt with by this Court in Surinder Kumar [Surinder Kumar v. State of Punjab, (2020) 2 SCC 563 : (2020) 1 SCC (Cri) 767] holding that merely because independent wit- nesses were not examined, the conclusion could not be drawn that the accused was falsely implicated. Therefore, the said issue is also well settled and in particular, looking at the facts of the present case, when the conduct of the ac- cused was found suspicious and a chance recovery from the vehicle used by him is made from a public place and proved beyond a reasonable doubt, the appellant cannot avail any benefit on this issue. In our view, the concurrent findings of the courts do not call for interference.."

23. A similar view was taken in Kehar Singh v. State of H.P., 2024 SCC OnLine HP 2825 wherein it was observed:

> 16. As regards non-association of the independent witnesses, it is now well settled that non-association of the independent witnesses or non-supporting of the prosecution version by independent witnesses itself is not a ground for acquittal of Appellants/accused. It is also well settled that the testimonies of the official witnesses, including police officials carry the same evidentiary value as the testimony of any other person. The only difference is that the Court has to be most circumspect while appreciating the evidence of the official witnesses to rule out the possibility of false implication of the accused, especially when such a plea is specifically raised by the defence.

2024:HHC:12713-DB Therefore, while scrutinising the evidence of the official witnesses, in cases where independent witnesses are not associated, contradictions and inconsistencies in the testimonies of such witnesses are required to be taken into account and given due weightage, unless satisfactorily explained. However, the contradiction must be material and not trivial one, that alone would assume significance.

17. Evidently, this is a case of chance recovery, therefore, the police party was under no obligation to join independent witnesses while going on patrolling duty and the association of any person after effecting the recovery would be meaningless.

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19. A similar reiteration of law can be found in the judgment rendered by the learned Single Judge of this Court in Avtar @ Tarri v. State of H.P., (2022) Supreme HP 345, wherein it was observed as under: --

> "24. As regards the second leg of the argument raised by learned counsel for the appellant, it cannot be said to be of much relevance in the given facts of the case. The fact situation was that the police party had laid the 'nakka' and immediately thereafter had spotted the appellant at some distance, who got perplexed and started walking back. The conduct of the appellant was sufficient to raise suspicion in the minds of police officials. At that stage, had the appellant not been apprehended immediately, police could have lost the opportunity to recover the contraband. Looking from another angle, the relevance of independent witnesses could be there, when such witnesses were immediately available or had already been associated at the place of 'nakka'. These, however, are not mandatory conditions and will always depend on the fact situation of each and every case. The reason is that once the person is apprehended and is with police, a subsequent association of independent witnesses, may not be of much help. In such events, the manipulation, if any, cannot be ruled out."

Xxxx 2024:HHC:12713-DB

22. A similar reiteration of law can be found in a very recent judgment of the Coordinate Bench of this Court in Cr. A. No. 202 of 2020, titled Dillo Begum v. State of H.P., decided on 27.03.2024."

24. Thus, in view of the binding precedents of this Court and Hon'ble Supreme Court, the non-association of independent witnesses is not fatal and the prosecution case cannot be discarded due to the non-association of independent witnesses. However, the Court will have to carefully scrutinize the testimonies of the police officials.

25. It was a specific case of the prosecution as mentioned in the rukka (Ext.PW8/C), FIR (Ext.PW4/A) and the special report (Ext.PW3/A) that the police party started from Shimla on 16.06.2011. However, the police officials changed this version in the Court. HC Manoj Kumar (PW6) and Constable Rajiv Kumar (PW7) stated in their cross-examination that they went by Bus to Rohru from Shimla on 15.06.2011. Constable Rajiv Kumar (PW7) stated in his cross-examination that they went by bus from Shimla to Rohru on 15.06.2011. ASI Yoginder Singh (PW8) stated in his examination-in-chief that the police party started from Shimla on a bus and stayed at Rohru on 15.06.2011. It is apparent from the statements of the police officials that they have changed their initial version as recorded in the rukka and the FIR that they had 2024:HHC:12713-DB started from

Shimla on 16.06.2011 and had apprehended the accused on the date of their departure from Shimla. This assumes significance in view of the statement of ASI Yoginder Singh (PW8) in the cross-examination that they started from Jubbal at 9 AM and reached Shimla at 10 PM which shows that it took more than 12 hours to cover the distance between Jubbal and Shimla; thus, they could not have travelled from Shimla on 16.06.2011 and apprehended the accused at 4:30 PM on the same day. Hence, they changed the date of their departure to suit the prosecution case. It was laid down by the Hon'ble Supreme Court in Badri v. State of Rajasthan, (1976) 1 SCC 442: 1976 SCC (Cri) 60 that where a witness can modulate his version to suit the prosecution case, his testimony is suspect. It was observed at page 448:

> "19.... The trial court has noted that Patram was "compelled to change his version a little" because of the doctor's opinion after the post-mortem examination was held on the spot the following morning. If a witness, who is the only witness against the accused to prove a serious charge of murder, can modulate his evidence to suit a particular prosecution theory for the deliberate purpose of securing a conviction, such a witness cannot be considered a reliable person and no conviction can be based on his sole testimony."

26. Therefore, the testimonies of the official witnesses were highly suspect and the learned Trial Court had rightly observed that it was essential to produce the entry in the daily 2024:HHC:12713-DB diary to explain the change in the date in the statements of the official witnesses.

27. Constable Rajiv Kumar (PW7) stated in his examination-in-chief that they started from Police Station, Rohru on 16.06.2011 at 11:00 AM and went towards Sawara Kainchi road. They went towards the Kuddu barrier and reached at the spot at about 4 PM. He explained in his cross-examination that they stayed at Hatkoti for more than two hours and Sawara Kainchi for half an hour. HC Manoj Kumar (PW6) has not mentioned the time of departure or the place of stay at Rohru. He simply stated that they started from Rohru on a bus, stayed at Hatkoti for one hour and thereafter went to Kuddu. ASI Yoginder Singh (PW8) stated that they conducted patrolling at Rohru Bazar. They went to Hatkoti and remained at Hatkoti for about one hour and thereafter went towards Kuddu. They went towards Tiuni on foot.

28. These statements show that the prosecution witnesses have tried to explain the time spent by them before reaching the spot in different manners. These witnesses consistently stated about their halt at Hatkoti but they gave different times of their stay at Hatkoti. They have also given a different version regarding what transpired before they went towards Hatkoti. ASI Yoginder 2024:HHC:12713-DB Singh (PW8) stated that they patrolled Rohru Bazaar whereas Constable Rajiv Kumar (PW7) stated that they went from Police Station Rohru at 11 AM. He tried to cover the distance by expanding the time spent at Hatkoti and also created a halt at Sawra Kainchi. The statements of the prosecution witnesses show that they gave different versions regarding the time spent before the incident.

29. HC Manoj (PW6) stated in his cross-examination that the parcel was prepared on the spot. He admitted that the parcel (Ext.P2) was stitched by a machine from two sides. He further stated that he could not name the words and the details on the parcel or who had put the FIR number on the parcel. The police party was not carrying any sewing machines. Constable Rajiv Kumar (PW7) also stated in his cross-examination that the police party did not carry any sewing machine. He did not know who had mentioned the words and details on the parcel or the FIR number on the parcel.

30. Thus, it is admitted that the police party was not carrying any sewing machine with them. The police officials also admitted that the parcel was machine stitched from two sides. No explanation was given by the police official as to how the parcel could have been machine stitched on the spot without any sewing 2024:HHC:12713-DB machine. This shows that either the parcel was already lying with the police official or the proceedings were not conducted on the spot and the testimonies of the police officials regarding the fact that the proceedings were conducted on the spot is highly suspect. It was laid down by this Court in State of H.P. vs Nand Lal Latest HLJ 2018(1) (HP) 388: 2018 (1) Him L.R. 506 that when a parcel was stated to be prepared on the spot but it was machine stitched, it made the prosecution case doubtful. The Court speaking through one of us (Vivek Singh Thakur J) observed:

> "36. There is another flaw in prosecution evidence as when the parcel was shown to PW-8 in the Court, he admitted that the same was found to be stitched on two sides with a sewing machine and with a hand only on one side, indicating that the said parcel was prepared with the help of sewing machine, which could be possible only in the shop of a tailor but not on the spot as there was no tailor available on the spot. It also falsified the story of prosecution regarding preparation of cloth parcel and seizure of contraband on the spot."

31. It was specifically mentioned in the rukka that the charas was weighed with the help of the weighing scale with a weight of 500-50 grams. A simple calculation shows that 3.250 kgs of charas can be weighted in 11 lots (500x6 + 5x50). HC Manoj Kumar (PW6) stated in his cross-examination that charas was weighed with the help of a traditional scale in six lots. Constable Rajiv Kumar (PW7) stated that charas was weighed in 3-4 lots. The 2024:HHC:12713-DB statements of these witnesses do not show how it was possible to weigh 3.250 kgs of charas in 3 to 4 lots or 6 lots with weights of 500 and 50 grams. This also shows that the testimonies of the police officials regarding the proceedings having been conducted on the spot are highly suspect or the memories of the police officials are not trustworthy.

32. ASI Yoginder Singh (PW8) stated in his cross- examination that except for the NCB-1 Form and arrest memo, all other documents including the sample seal, and writing on the parcel are not in his hand. He did not remember who had written those documents. He had not filled the FIR number in any of the documents or the statements. Constable Rajiv Kumar (PW7) stated in his cross-examination that he was not aware of who had put the FIR number on the parcel or other documents. He did not remember whether the Investigating Officer had completed the formalities on the spot or whether the seizure memo was prepared in his presence or not. HC Manoj Kumar (PW6) stated in his cross- examination that the statements of Yashwant and Rajiv Kumar are not in

the handwriting of the ASI. He denied that all the documents were prepared at the Police Station. He did not know who put the FIR number on the various documents.

2024:HHC:12713-DB

33. The ignorance of the witnesses regarding all of the documents except the NCB-1 Form and the arrest memo fortifies the conclusion that the memories of the police officials cannot be trusted or the investigation was not conducted in their presence. The fact that Constable Rajiv Kumar (PW7) stated that the seizure memo was not prepared in his presence shows that he cannot be called to be a witness to the seizure memo.

34. ASI Rikhi Ram (PW7) stated in his examination-in- chief that the accused was apprehended at an isolated place, hence no independent witness was available. He stated in his cross- examination that he did not send any police official to nearby village or locality to arrange for independent witnesses. Constable Rajiv Kumar (PW7) and HC Manoj (PW6) also stated in their cross-examination that no efforts were made to join any independent witness. This is contrary to the prosecution case as unfolded in rukka (Ext.PW8/C) where it was mentioned that no independent witness could be found despite efforts ( ). This shows that a wrong statement was made in the rukka that efforts were made to join independent witnesses whereas no such efforts were made.

2024:HHC:12713-DB

35. ASI Yoginder Singh (PW8) stated in his cross- examination that they reached Police Station Jubbal at 11:15 PM and stayed in the private houses known to the police official. They started from Jubbal at 9 AM and reached Shimla at 10 PM. Constable Rajiv Kumar (PW7) stated in his cross-examination that they returned from Shimla to Jubbal on 17.06.2011. Even though the report was entered regarding their departure on 16.06.2011. They could not return on 16.06.2011 because there was no bus service during the night time. They stayed at different places and boarded a bus on 17.06.2011. They returned to Shimla after conducting patrolling at different places. He did not remember the time of their arrival at Shimla. HC Manoj (PW6) stated that they returned from Jubbal to Shimla on 17.06.2011 in the morning.

36. Thus, it is apparent that the prosecution witnesses have given different versions regarding the circumstances surrounding the recovery. It was laid down by the Hon'ble Supreme Court in Krishnan v. State, (2003) 7 SCC 56: 2003 SCC (Cri) 1577: 2003 SCC OnLine SC 756 that the evidence of the prosecution must be tested for its inherent consistency: consistency with the account of other witnesses and consistency with undisputed facts. It was observed:

> "21. .... Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of 2024:HHC:12713-DB the trial process. Eyewitnesses' accounts would require a careful independent assessment and evaluation for its credibility which should not be adversely prejudged making any other evidence, including the medical evidence, as the sole touchstone for the test of

such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the "credit" of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

37. It was held in David Piper vs. Mark Hales 2013 EWHC B1 (QB) that the Court has to see whether the statement of the witness is consistent or not. It was observed: -

34. The guidance about how courts approach this is given in the extra-judicial writing of the late Lord Bingham of Cornhill approved by the courts is apposite. In "The Judge as Juror: The Judicial Determination of Factual Issues" published in "The Business of Judging", Oxford 2000, reprinted from Current Legal Problems, vol 38, 1985 p 1-27, he wrote:

". . . Faced with a conflict of evidence on an issue substantially affecting the outcome of an action, often knowing that a decision this way or that will have momentous consequences on the parties' lives or fortunes, how can and should the judge set about his task of resolving it? How is he to resolve which witness is honest and which dishonest, which reliable and which unreliable?

The normal first step in resolving issues of primary fact is, I feel sure, to add to what is common ground between the parties (which the pleadings in the action should have identified, but often do not) such facts as are shown to be incontrovertible. In many cases, letters or minutes written well before there was any 2024:HHC:12713-DB breath of dispute between the parties may throw a very clear light on their knowledge and intentions at a particular time. In other cases, evidence of tyre marks, debris or where vehicles ended up may be crucial. To attach importance to matters such as these, which are independent of human recollection, is so obvious and standard a practice, and in some cases so inevitable, that no prolonged discussion is called for. It is nonetheless worth bearing in mind, when vexatious conflicts of oral testimony arise, that these fall to be judged against the background not only of what the parties agree to have happened but also of what plainly did happen, even though the parties do not agree.

The most compendious statement known to me of the judicial process involved in assessing the credibility of an oral witness is to be found in the dissenting speech of Lord Pearce in the House of Lords in Onassis v Vergottis [1968] 2 Lloyds Rep 403 at p 431. In this, he touches on so many of the matters which I wish to mention that I may perhaps be forgiven for citing the relevant passage in full:

''Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes

> it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who 2024:HHC:12713-DB are emotional, and who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point, it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process, contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part."

Every judge is familiar with cases in which the conflict between the accounts of different witnesses is so gross as to be inexplicable save on the basis that one or some of the witnesses are deliberately giving evidence which they know to be untrue . . .. more often dishonest evidence is likely to be prompted by the hope of gain, the desire to avert blame or criticism, or misplaced loyalty to one or other of the parties. The main tests needed to determine whether a witness is lying or not are, I think, the following, although their relative importance will vary widely from case to case:

> 2024:HHC:12713-DB (1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;
>
> (2) the internal consistency of the witness's evidence;
>
> (3) consistency with what the witness has said or deposed on other occasions;
>
> (4) the credit of the witness in relation to matters not germane to the litigation;
>
> (5) the demeanour of the witness.

The first three of these tests may in general be regarded as giving a useful pointer to where the truth lies. If a witness's evidence conflicts with what is clearly shown to have occurred or is internally self-contradictory, or conflicts with what the witness has previously said, it may usually be regarded as

suspect. It may only be unreliable, and not dishonest, but the nature of the case may effectively rule out that possibility.

The fourth test is perhaps more arguable. . . ."

35. The following guidance of Lord Goff in Grace Shipping v. Sharp & Co [1987] 1 Lloyd's Law Rep. 207 at 215-6 is also helpful.

> "And it is not to be forgotten that, in the present case, the Judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the Judge to have regard to the contemporary documents and the overall probabilities. In this connection, their Lordships wish to endorse a passage from a judgment of one of their number in Armagas Ltd v. Mundogas S.A. (The Ocean Frost), [1985] 1 Lloyd's Rep. 1, when he said at p. 57: -
>
> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by 2024:HHC:12713-DB reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth." [emphases added]. That observation is, in their Lordships' opinion, equally apposite in a case where the evidence of the witnesses is likely to be unreliable; and it is to be remembered that in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence."

In that context, he was impressed by a witness described in the following terms.

> "Although like the other main witnesses, his evidence was a mixture of reconstruction and original recollection, he took considerable trouble to distinguish precisely between the two, to an extent which I found convincing and reliable."

That is so important, and so infrequently done."

36. This approach to fact-finding was amplified recently by Lady Justice Arden in the Court of Appeal in Wetton (as Liquidator of Mumtaz Properties) v. Ahmed and others [2011] EWCA Civ 610, in paragraphs 11, 12 & 14:

> 11. By the end of the judgment, it is clear that what impressed the judge most in his task of fact-finding was the absence, rather than the presence, of contemporary documentation or other independent oral evidence to confirm the oral evidence of the respondents to the proceedings.
>
> 12. There are many situations in which the court is asked to assess the credibility of witnesses from their oral evidence, that is to say, to weigh up their evidence to see whether it is reliable. Witness choice is an 2024:HHC:12713-DB essential part of the function of a trial judge and he or she has to decide whose evidence, and how much evidence, to accept. This task is not to be carried out merely by reference to the impression that a witness made by giving evidence in the witness box. It is not solely a matter of body language or the tone of voice or other factors that might generally be called the 'demeanour' of a witness. The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence, for example, if the issue was whether a defendant was an employee, the judge would naturally consider whether there were any PAYE records or evidence, such as evidence in texts or e-mails, in which the defendant seeks or is given instructions as to how he should carry out work. This may be particularly important in cases where the witness is from a culture or way of life with which the judge may not be familiar. These situations can present particular dangers and difficulties to a judge.
>
> 14. In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.

37. Contemporaneity, consistency, probability and motive are key criteria and more important than demeanour which can be distorted through the prism of prejudice: how witnesses present themselves in a cramped witness box surrounded for the first time with multiple files can be 2024:HHC:12713-DB distorted, particularly elderly ones being asked to remember minute details of what happened and what was said, and unrecorded, nearly 4 years later as here. Lengthy witness statements prepared by the parties' lawyers long after the events also distort the accurate picture even though they are meant to assist the court."

38. In the present case the statements of the prosecution witnesses are not consistent. Learned Trial Court had rightly held that these inconsistencies would assume significance in the absence of independent witnesses.

39. LC Babita (PW2) stated that she handed over the special report to Assistant Reader Kedar Singh who returned one copy to her and submitted another copy to Dy. Superintendent of Police. Constable Kedar Singh (PW3) stated that he endorsed one of the copies as a receipt and handed it over to LC Babita (PW2). He placed another copy before SDPO. The copy of the special report (Ext.PW3/A) placed on the record shows that it only bears the endorsement of the Assistant Reader regarding its receipt on 17.06.2011 at 12:25 PM through LC Babita (PW2). It does not contain any endorsement of the SDPO/Dy.SP. Therefore, the learned Trial Court had rightly held that there was insufficient compliance with Section 57 of the ND&PS Act.

40. Thus, the learned Trial Court had rightly held that the prosecution case was suspect due to the discrepancies in the 2024:HHC:12713-DB statements of official witnesses and the absence of the independent witnesses would assume significance in the present case. This was a reasonable view that could have been taken on the material placed before the learned Trial Court and this Court will not interfere with the same even if another view is possible or this Court would have taken a different view had the matter been tried before this Court.

41. It was submitted that a huge quantity of charas was recovered from the accused and the prosecution case should not have been rejected in the absence of the proof of any enmity. This submission is only stated to be rejected. The prosecution is required to prove its case beyond reasonable doubt by providing satisfactory evidence and it cannot insist upon the conviction of a person merely because the quantity of contraband stated to have been recovered from the possession of the accused is huge.

42. No other point was urged.

43. In view of the above, the present appeal fails and the same is dismissed.

44. In view of the provisions of Section 437-A of the Code of Criminal Procedure [Section 481 of Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)], the respondent/accused is directed to 2024:HHC:12713-DB furnish his personal bond in the sum of 25,000/- with one surety in the like amount to the satisfaction of the learned Registrar (Judicial) of this Court/learned Trial Court, within four weeks, which shall be effective for six months with stipulation that in the event of Special Leave Petition being filed against this judgment, or on grant of the leave, the respondent/accused, on receipt of notice(s) thereof, shall appear before the Hon'ble Supreme Court.

45. A copy of this judgment along with the records of the learned Trial Court be sent back forthwith. Pending miscellaneous application(s), if any, also stand(s) disposed of.

(Vivek Singh Thakur) Judge (Rakesh Kainthla) Judge 29th November, 2024 (Nikita)