

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CRM-A-657-2020
Reserved on : 10.11.2022
Pronounced on: 09.12.2022**

State of Punjab

... appellant

Versus

Vijay Kumar

... Respondent

**CORAM: HON'BLE MR. JUSTICE G. S. SANDHAWALIA
HON'BLE MS. JUSTICE HARPREET KAUR JEEWAN**

PRESENT: Mr. Abhay Pal Singh Gill, DAG, Punjab.

HARPREET KAUR JEEWAN, J.

1. The present appeal has been filed by the State alongwith an application under Section 378(3) Cr. P.C. for grant of leave to appeal against the judgment of acquittal dated 06.05.2019 recorded by the Judge Special Court, Ludhiana in FIR No. 161 dated 30.10.2012 registered under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, '*the Act*') and under Section 411 of the Indian Penal Code, 1860.

2. The brief facts emerging from record, which are necessary for adjudication of present appeal are that on 30.10.2012 ASI Jaswinder Singh alongwith the police party was present near Canal bridge Gill Road, Ludhiana at check post and was doing the checking. Vijay Kumar-respondent/accused came there on an Aactiva Scooter bearing No. PBIOBH-2971 from the side of village Gill, but on seeing the police party from some distance, he stopped his scooter and tried to turn back. However, ASI Jaswinder Singh (hereinafter referred as 'the IO') asked him to stop and he

was apprehended by the police party. The IO enquired about his name and address on which he disclosed his name as Vijay Kumar son of Rishi Pal. The IO disclosed his identity to the respondent and further told him that he wanted to conduct the search of this scooter as he had suspicion that there is some contraband substance or Narcotic material in the scooter. The respondent was apprised of his legal rights to get the search of the scooter conducted in the presence of Magistrate or Gazetted officer and further told that they can be called at the spot, but the respondent reposed his confidence in IO. Consent of the accused was recorded by way of preparing consent memo and thereafter search of “diggy” of the said scooter was conducted, which led to the recovery of one black colour polythene containing 'Dextropropoxyphene' powder. On weighing it came to be 500gm. and out of which two samples of 200 gm of each were separated. The said samples as well as the bulk weighting 480gm were put in plastic boxes and these were converted into separate parcels and sealed with the seal bearing impression “JS”. Sample seal chits Ex.P1 was also separately prepared and the seal was handed over to HC Gurdev Singh after use. Case property was taken into police possession vide memo Ex.PB; Form no.29 was prepared at the spot and the scooter was also taken into police possession by preparing a separate memo Ex. PC. The scooter was not having any document i.e. Registration Certificate and insurance. Ruqa Ex.PW6/A was sent to the Police Station and on the basis of the same, FIR was registered by ASI Dharminder Singh. Rough site plan Ex.PW7/A was prepared. The respondent/accused was formally arrested and intimation of his arrest was given to his relative. The arrest memo and personal search memo of the respondent was prepared.

On returning to police station, the case property as well as the accused, witnesses and sample seal chits were produced before ASI Dharminder Singh who was officiating SHO. He verified the facts from accused and witnesses and put his seal bearing impression "DS" on the case property and also attested the sample seal slips. The case property was deposited with MHC Gurjit Singh.

On 31.10.2012, the IO took the case property from MHC and produced the same before the Magistrate by moving an application for conducting the proceedings under Section 52-A of *the Act*. The Magistrate passed the order Ex.PW7/C after conducting the inventory proceedings under Section 52-A of the Act taking the photographs and separating of inventory proceedings Ex.P3 to Ex.P5. Thereafter the case property was deposited with the District Nazir except one sample parcel which was sealed with seal bearing impression "JS" and "DS" by the Magistrate. The said sample parcel was deposited with MHC on returning to the police station.

On 30.12.2012, Harbans Singh son of Pritam Singh came present in the police station and produced a copy of application moved before Incharge P.S. Shimlapuri for the theft of the said Aactiva scooter before the IO; he also identified the scooter lying in the Malkhana and the identification memo is Ex.PW4/B was prepared. He produced the Registration Certificate (RC) of the scooter vide memo Ex.PW4/C. The application Ex.PW4/A was taken into police possession vide memo Ex.PW4/E. Thereafter, the offence u/s 379/411 IPC was added and special report to this effect was prepared.

After receiving the report of the chemical examiner, recording the statements of the witnesses and on completion of investigation, challan against the accused was presented before the Trial Court.

3. During the course of trial, prosecution examined 7 witnesses:

PW-6 ASI Dharminder Singh is the Investigating Officer. He has deposed as per the prosecution case and proved all the documents prepared during the investigation of his case.

PW-3 HC Gurdev Singh is the recovery witness. He has also corroborated the version of the Investigating Officer ASI Jaswinder Singh.

PW1 HC Pardeep Singh and **PW-2 MHC Gurjit Singh** have been examined to prove the link evidence. They tendered their affidavits.

PW-4 Harbans Singh has been examined to prove that his Activa Scooter was stolen. He testified that he lodged a complaint regarding loss of his scooter to the police.

PW-5 Om Parkash junior assistant DTO office has been examined to prove the RC of the said scooter.

After hearing the public prosecutor, learned defence counsel and after examining the record, the trial Court held that the prosecution has not successfully proved the case against the respondent beyond shadow of doubt.

4. Vide judgment dated 06.05.2019, the trial Court acquitted the respondent by giving him benefit of doubt and the appellants had filed the present appeal seeking setting aside the aforesaid order passed by the trial Court.

5. The trial Court acquitted the respondent on the following grounds:-

- i. There are material contradictions in the statement of the material witnesses. It was observed that the recovery witness PW-3 HC Gurdev Singh had stated that the entire writing work was done at the spot by standing under the light of the shop situated nearby whereas PW-7 ASI Jaswinder Singh IO had stated that some writing work was done by putting papers on the bonnet of the car. Secondly, PW-3 HC Gurdev Singh has stated that the IO obtained the signatures of the accused on the recovery memo but the recovery memo Ex. PP is not having the signatures of the respondent. Thirdly, as per the statement of the Investigating Officer as well as the recovery witness, Form No. 29 was filled at the spot whereas PW-6 SHO ASI Dharminder Singh has testified that he was not present at the spot at the time of alleged recovery. The prosecution has failed to explain as to how the signatures of SHO ASI Dharminder Singh were obtained on Form No. 29.
- ii. There is contradiction with regard to the original RC of the Activa scooter being taken into possession on 30.12.2012. As per the statement of PW-4 Harbans Singh, original RC was brought into the Court during the trial on the date when his statement was taken in the Court, whereas as per the statement of PW-7 ASI Jaswinder Singh (IO) on 30.12.2012, Harbans Singh (PW-4) had produced the RC of the said vehicle and it was taken into possession vide memo Ex. PW-4/C and even the said memo reflects that the RC of the scooter was taken into possession by the police.
- iii. The prosecution has failed to prove that any DDR or FIR was lodged regarding theft of the scooter by PW-4 Harbans Singh.

iv. The prosecution has failed to prove that the samples were kept intact.

It was observed that the seal of one of the samples was found to be broken. The prosecution has failed to prove link evidence as affidavit of the formal witness PW1 HC Pardeep Singh and PW-2 MHC Gurjit Singh does not bear any attestation stamp which were required to be attested by the Magistrate.

6. The learned counsel for the State contended that the trial Court has failed to appreciate the prosecution evidence. The minor discrepancies and contradiction in the statement of the prosecution witnesses are bound to occur with the passage of time. It was further submitted that as per the report of the Chemical Examiner, the seals on the samples were intact when these were received in the office of the Chemical Examiner. So, if the seal over the representative sample, which was produced during the testimony of Investigating Officer was broken that does not make any difference and it does not amount to any illegality. It is further submitted that the prosecution has fully proved that PW-4 Harbans Singh is the registered owner of the vehicle. If in his cross-examination some new facts have arisen, no adverse inference can be drawn on the basis of the said fact. The vehicle was recovered from the possession of the respondent. It was also submitted that the trial Court has given over emphasis to the link evidence which was not required as the witnesses have appeared in the witness box and deposed on oath. In such circumstances, any discrepancy regarding attestation of the affidavits is immaterial.

7. We have considered the submissions and perused the record.

8. It is the case of the prosecution that the recovery of the contraband was effected from the scooter which was a stolen property and was being

driven by the respondent at the time of recovery. It is further the prosecution case that the said scooter was owned by PW-4 Harbans Singh but it was stolen. The prosecution has failed to lead a cogent evidence to prove that the said scooter was stolen. The evidence of the prosecution on this point is found doubtful. PW-4 Harbans Singh has deposed that he has lodged a complaint Ex. PW4/A to the police regarding the loss of his scooter but the trial Court has rightly observed that no FIR or DDR is proved on record lodged by the said witness regarding the theft of his scooter. A perusal of the copy of the complaint Ex. PW-4/A indicates that it is only the photocopy of a handwritten application addressed to the Incharge, Police Post Shimlapuri, Ludhiana. Neither any receipt of the said application is there on it nor it has been proved that it was actually moved to the police station. Apart from this fact, the said application does not bear any date. As per the version of PW-4, his scooter was stolen on 26.08.2012 whereas the alleged recovery was made on 30.10.2012 i.e. after a period of 2 months. It is highly improbable that a person would not record DDR or FIR if his vehicle is lost.

9. It is also observed that as per the version of the prosecution, the RC of the scooter was handed over by PW-4 to the police and it was taken into possession by preparing a separate memo Ex. PW-4/C. But in the cross examination, the witness had stated that he was called to the police station but no paper work was done by the police regarding his scooter. There is another material contradiction in the statement of the said witness and the documents on record. As per the said memo Ex. PW4/C the original RC was presented by the said witness and it was taken into possession by the IO but in his examination-in-chief, the witness had stated that he brought the original RC in the Court on the day when his statement was recorded in the Court. In

view of the above discussion, it is concluded that the very basis of prosecution case that the scooter from which contraband was recovered has not been proved with cogent evidence. This fact is a material fact, however the evidence of the prosecution on this material fact is doubtful and shaky. In this regard, the trial Court has rightly appreciated the said discrepancy.

10. There is another material fact which requires consideration. As per the IO, the contraband was produced before the Judicial Magistrate for conducting the proceedings under Section 52-A of the Act. The order passed by the Magistrate Ex. PW7/C indicates that a representative sample was drawn on 31.10.2013 by the Magistrate and she had sealed the said sample with the seal bearing impression "HG" (Himanshi Gilotra). At the time of alleged recovery, the Investigating Officer has sealed the sample with the seal bearing impression "JS" as testified by PW-7 ASI Jaswinder Singh (IO). The sample was further sealed PW-6 ASI Dharminder Singh has testified that after verification of the facts, he has put his seal bearing impression "DS" which means that the sample separated by the Investigating Officer were bearing 2 seals i.e. "JS" and "DS" whereas the representative sample drawn by the Judicial Magistrate were bearing the seal impression "HG". A perusal of the report of the Chemical Examiner Ex. PX indicate that the samples which were sent for examination were only bearing the seal impressions "JS+DS". This indicates that the representative sample drawn by the Judicial Magistrate was not sent for chemical examination. There is no explanation given by the IO as to why the representative sample was not sent for chemical examination.

11. It is further seen that Form No. 29 which is stated to be prepared at the spot by ASI Jaswinder Singh bears the signatures of the officiating SHO,

when he (ASI Dharminder Singh-PW6) has not stated that he was present at the spot. He has categorically stated that on the same day, he was present at the police station and the case property as well as the accused were produced before him in the police station.

12. It is the cardinal principal of criminal jurisprudence that the prosecution has to prove its case beyond shadow of doubts. In the present case, the basis of the prosecution case that recovery of the contraband was effected from a scooter which was stolen property stands falsified. It is highly improbable that a person would remain silent for about 2 months without reporting to the police regarding the theft of his vehicle. No intimation to the police has been proved on record to show that scooter was stolen at any point of time. Even the representative sample drawn by the Magistrate was not sent for chemical examination.

13. The Hon'ble Supreme Court has repeatedly held that benefit of doubt ensues to accused. If two views are possible, the benefit of doubt must be granted to accused. It has been further held that if two views are possible, the order of acquittal should not be set aside by High Court because there is double presumption of innocence. The Hon'ble Supreme Court in **para 39 in Dhanapal v. State By Public Prosecutor, Madras, (2009) 10 SCC 401** while dealing with scope of interference at appellate stage has held:

“39.The following principles emerge from the cases above:

- 1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court acquittal bolsters the presumption that he is innocent.*
- 2. The power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts*

and law, but the appellate court must give due weight and consideration to the decision of the trial court.

3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

4. The appellate court may only overrule or otherwise disturb the trial court acquittal if it has “very substantial and compelling reasons” for doing so.

5. If two reasonable or possible views can be reached— one that leads to acquittal, the other to conviction—the High Courts/appellate courts must rule in favour of the accused.”

14. In the case in hand, the opinion expressed by the trial court is not only a possible view, but also it is fair and reasonable and cannot be termed as perverse in any manner, thus, it does not warrant interference.

15. As noted above, there is always presumption of innocence and in case of acquittal, there is double presumption. The burden lies upon prosecution to prove the guilt beyond reasonable doubt. The learned trial Court has passed a detailed, reasoned and speaking judgment and we find no infirmity in the said judgment. There is no manifest error, illegality, perversity or non-application of mind or non-appreciation of evidence which could compel us to form an opinion different from the one formed by the learned Trial Court.

16. Accordingly, finding no merit in the present appeal, we are of the considered opinion that leave to appeal deserves to be declined and accordingly application seeking leave to appeal as well as appeal is dismissed.

(G. S. SANDHAWALIA)
JUDGE

(HARPREET KAUR JEEWAN)
JUDGE

09.12.2022

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