
(2012) 06 SHI CK 0001

In the High Court Of Himachal Pradesh

Case No : Criminal Revision No. 70 of 2006

Manoj Kumar and Poobhakaran Pillai

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 01-06-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 397, 401, 482
Punjab Excise Act, 1914 — Section 61(1)(a)

Citation : (2012) 3 ShimLC 1201

Hon'ble Judges : V.K. Sharma, J

Bench : Single Bench

Advocate : R.L. Sood, with Ms. Akshi Chauhan, for the Appellant; Ramesh Thakur, Asstt. Advocate General, for the Respondent

Final Decision : Allowed

Judgement

V.K. Sharma, Judge

1. The challenge herein in this criminal revision petition u/s 397 read with Sections 401 and 482 of the Code of Criminal Procedure, 1973 (in short "Cr.P.C."), is against the judgment dated 22.05.2006, passed by the learned Sessions Judge, Shimla, in Criminal Appeal No. 61-S/10 of 2004, whereby the appeal filed by the petitioners, who shall hereinafter be referred to as convicts No. 1 and 2, respectively, has been dismissed and the conviction and consequent sentence of six months rigorous imprisonment and fine of Rs. 2000/- (Rs. Two Thousand) and in default further simple imprisonment for one month imposed upon each of them by the learned Chief Judicial Magistrate, Shimla, H.P., vide judgment/order dated 07.12.2004, for the offence u/s 61(1)(a) of the Punjab Excise Act, 1914 (in short "the Act"), as applicable to the State of Himachal Pradesh, has been maintained. Briefly stated the case of the prosecution was that on 13.01.2002, at about 12.05 PM, a police party headed by ASI Rajinder Singh (PW-2) was on duty at Shogi barrier. In the meantime, vehicle Mahindra Bolero bearing registration No. HP-06-2557 being driven by convict No. 1 Manoj

Kumar was found coming from Solan side towards Shimla. It was stopped by the police for routine checking. Convict No. 2 Jagan Nath was also sitting in the vehicle. On checking the vehicle two cases containing 24 bottles of liquor Grover Viniyards Gaberent; one case of Riviera Red Wine, 12 bottles of 750 ml. each; two bottles of Seagrams 100 Pipers Delux Scotch Whiskey, 750 ml. each; one bottle of Teachers 50 Rare Vintage Malt Scotch Whisky 750 ml; two bottles Famous Grouse Finest Scotch Whisky 750 ml each; half bottle of ISLE of Jura Single Malt Scotch Whisky, two cases containing Legend Leger beer, 47 cans, 500 ml. each; one case of Hack Back strong beer 12 bottles, 650 ml each; one case of Strohs beer, containing 12 bottles, 650 ml each; one polythene packet containing Hack Back super Brew strong beer, 7 cans of 500 ml each; one polythene packet containing Hack Back German quality leger beer, 7 cans of 500 ml. each, were found therein without any permit. The convicts failed to account for the recovered contraband, which was taken into possession by the police vide memo Ex.PW-1/A. A rukka was sent to the police station, on the basis of which FIR Ex.PW-8/C was registered. Out of the recovered contraband 27 samples were drawn. The samples and the bulk were separately sealed with seal bearing impression "A" and the samples were sent for chemical analysis to CTL Kandaghat and reports Ex. PA to Ex. PF were obtained, according to which the samples were of beer, Indian made foreign liquor (IMFL) and wine and were containing different percentages of proof alcohol strength.

2. On completion of investigation the convicts were sent up to face trial. On being charged, they pleaded not guilty and claimed trial. The prosecution evidence followed, which examined eight witnesses in all. The convicts were examined u/s 313 Cr.P.C., wherein while admitting their presence in the vehicle and that the same was stopped and checked by the police, they set up defence of total denial, innocence and false implication. In answer to question No. 5 of the respective statements, they have submitted the following identical explanation:-

It is incorrect. As a matter of fact in the vehicle one foreigner Bobart Mukirain was also sitting and the vehicle also belongs to M/S Boning Himachal Pradesh Ltd. Nathpa Jhakri and I happens to be employee of the said company and I came to drop said Rabort Makrain at Shimla.

However, they did not lead any evidence in defence. On conclusion of the trial the convicts were convicted and sentenced by the learned trial court, which findings were upheld by the learned first appellate court, as already noticed. Being aggrieved, they are in revision before this court.

3. I have heard the learned counsel for the petitioners (convicts) and the learned Assistant Advocate General for the respondent-State and gone through the records.

4. The impugned judgments have been challenged on behalf of the convicts mainly on two fold grounds. Firstly that independent witnesses were not joined

by the police during the proceedings to lend credence to its case and secondly it is not proved beyond reasonable doubt that the convicts were in exclusive possession of the recovered contraband. Conversely, the findings returned by the learned courts below have been supported by the respondent-State.

5. As far as the first contention regarding non-joining of independent witnesses during the proceedings is concerned, it would be seen that admittedly Shogi bazaar is at a short distance of about 500 meters from the spot. The occurrence had taken place during the day at 12.05 PM on the busy highway, when admittedly many vehicles were passing through the road. PW-1 HC Rajinder Singh has stated during cross examination that efforts to associate independent witnesses were made, but no such witnesses were available on the spot. However, to the contrary PW-2 ASI Rajinder Singh, who was heading the police party at the time of search and seizure has stated that no efforts were made to join independent witnesses as no such witnesses were present on the spot. He has admitted that he had not sent anyone to call independent witnesses from Shogi bazaar. Thus, both these witnesses have contradicted each other regarding efforts, if any, made to join independent witnesses to the proceedings.

6. PW-1 HC Rajinder Singh, PW-2 ASI Rajinder Kumar, PW-3 constable Rajinder Kumar, PW-4 constable Partap Chand and PW-5 constable Bhagwan Datt have been examined on behalf of the prosecution as eye witnesses to the occurrence. All of them except PW-3 constable Rajinder Kumar have denied that apart from the convicts foreigner(s) was also traveling in the vehicle and the recovered contraband belonged to him. However, PW-3 constable Rajinder Kumar has admitted during cross examination in quite categorical terms that some "Angrez" (Whites) were also traveling along with the convicts in the aforesaid vehicle and the recovered contraband was being transported by them from Delhi to Jhakri. However, even despite that the witness has not been re-examined by the prosecution on this material aspect of the case and the convicts can rely on the admission made by PW-3 constable Rajinder Kumar, as has been held by the Hon'ble Supreme Court in Mukhtiar Ahmed Ansari Vs. State (N.C.T. of Delhi), , wherein, it has been held as under vide paras 29 to 31 of the report:-

29. The learned counsel for the appellant also urged that it was the case of the prosecution that the police had requisitioned a Maruti car from Ved Prakash Goel. Ved Prakash Goel had been examined as a prosecution witness in this case as PW-1. He, however, did not support the prosecution. The prosecution never declared PW-1 "hostile". His evidence did not support the prosecution. Instead, it supported the defence. The accused hence can rely on that evidence.

30. A similar question came up for consideration before this Court in Raja Ram v. State of Rajasthan. In that case, the evidence of the Doctor who was examined as a prosecution witness showed that the deceased was being told by one K that she should implicate the accused or else she might have to face prosecution. The Doctor was not declared "hostile". The High Court, however, convicted the accused. This Court held that it was open to the defence to rely on the evidence

of the Doctor and it was binding on the prosecution.

31. In the present case, evidence of PW-1 Ved Prakash Goel destroyed the genesis of the prosecution that he had given his Maruti car to police in which police had gone to Bahai Temple and apprehended the accused. When Goel did not support the case, accused can rely on that evidence.

7. For the foregoing reasons, even if in the facts and circumstances of the case, no fault is found with the prosecution case for non-joining of independent witnesses, it cannot be concluded beyond reasonable doubt that the convicts were in exclusive possession of the recovered contraband being transported without permit. Resultantly, the petition is allowed and consequently impugned judgment/order of conviction/sentence dated 7.12.2004, passed by the learned trial Magistrate, as affirmed by the learned Sessions Judge vide the impugned judgment dated 22.05.2006, are set aside and the convicts are acquitted of the charge. The amounts of fine if already deposited by them shall be liable to be refunded to them after the time for filing appeal against this judgment is over, in which event the orders of the Hon"ble appellate court shall prevail.