

(2024) 11 SHI CK 0054
In the High Court Of Himachal Pradesh
Case No : Cr.MP(M) No. 1560 Of 2024

State Of Himachal Pradesh

APPELLANT

Vs

Mukhtyar Singh @ Banty

RESPONDENT

Date of Decision : 29-11-2024

Acts Referred:

Code of Criminal Procedure, 1973 — Section 313, 437A
Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 20

Citation : (2024) 11 SHI CK 0054

Hon'ble Judges : Vivek Singh Thakur, J;Rakesh Kainthla, J

Bench : Division Bench

Advocate : Varun Chandel,

Final Decision : Dismissed

Judgement

Rakesh Kainthla, J

1. The State has filed the present application seeking leave to appeal against the judgment dated 30.03.2024 passed by learned Special Judge, Sarkaghat, District Mandi, H.P. (learned Trial Court) vide which the respondent (accused before the learned Trial Court) was acquitted of the commission of an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short NDPS Act).(The parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience).

2. Briefly stated, the facts giving rise to the present application are that police presented a Challan against the accused before the learned Trial Court for the commission of an offence punishable under Section 20 of the NDPS Act. It was asserted that HC Vijay Kumar (PW-12), HC Sarwan Kumar (PW-11), Constable Sanjay Kumar (PW-3) and HHG Pushp Kumar were present near HRTC Petrol Pump, Bus Stand Sarkaghat for patrolling. Entry No. 15 (Ext.P22/PW13) was recorded in the Police Station regarding their departure. The accused climbed the stairs near the petrol pump carrying a green backpack(Ext.MO-02) in his right

hand. He became frightened on seeing the police and went inside a shop. He threw some articles towards the water tank kept inside the shop. He went to another room inside the shop and threw the remaining articles in the drain from the window. Police became suspicious on the conduct of the accused. Vikas Thakur (PW-7) and Kishore Kumar (PW-6) were found outside the shop. They and HC Sarwan Kumar (PW-11) were associated as witnesses. The police apprehended the accused. He revealed his name as Mukhtiyar Singh @ Banty. H.C. Vijay Kumar (PW-4) searched the place behind the water tank and recovered black sticks. These were checked and were found to be Charas. These were weighed on an electronic weighing scale and their weight was found to be 31 grams. The police went towards the drain and found some other black sticks. These were also checked and were found to be cannabis. The said contraband was also weighed and found to be 228 grams. A memo of identification (Ext.P11/PW11) was prepared. The cannabis (Ext. MO-3) was put in a carry bag (Ext.MO-2). The carry bag (Ext.MO-2) was put in a cloth parcel (Ext. MO-1) and the parcel was sealed with three seals of SKTB. A sample seal (Ext. P12/PW11) was taken on a piece of cloth. NCB-I Form (Ext.P19/PW12) was prepared. A seal impression was put on the NCB-I form and the seal was handed over to Vikas Thakur (PW-7) after its use. HC Sarwan Kumar (PW-11) took the photographs (Ext. P13/PW11 to Ext.P15/PW11). The police seized the charas vide memo (Ext.P16/PW11). HC Vijay Kumar (PW-4) wrote the rukka (Ext.P20/PW12) and handed it over to HC Sarwan Kumar (PW-11) with directions to carry it to the Police Station Sarkaghat. HC Sarwan Kumar (PW-11) handed over the rukka to Raj Kumar (PW-13), who recorded the F.I.R. (Ext.P21/PW13). Raj Kumar (PW-13) conducted the further investigation. He visited the spot. HC Vijay Kumar (PW-4) handed over the case property and documents to Raj Kumar (PW-13) vide memo (Ext. P17/PW11). Raj Kumar prepared the spot map (Ext. P23/PW13) and arrested the accused vide memo (Ext. P24/PW13). Raj Kumar (PW-13) recorded the statements of witnesses as per their version. He carried the case property to the police station and handed it over to Satish Kumar (PW-9). Satish Kumar resealed the parcel with four seals impression of seal SK. He obtained the sample seal (Ext. P9/PW9) on a separate piece of cloth and issued a certificate (Ext.P9/PW9). He filled in the relevant columns of the NCB-I form and put the seal impression on the form. He handed over the case property to HASI Vinod Kumar (PW-5), who deposited the case property in Malkhana and made an entry at Sr.830/2018 (Ext.P4/PW5). He handed over the case property to Raj Kumar (PW-13) on 8.10.2018 for certification. Raj Kumar (PW-13) produced the case property before the Court alongwith an application (Ext.P31/PW13) and inventory (Ext.P32/PW13) for its certification. Learned Judicial Magistrate, First Class, Sarkaghat passed an order (Ext.P33/PW-13) and issued the certificate (Ext.P34/PW13). The Court resealed the parcel and obtained the sample seal (Ext.P35/PW13) on a separate piece of cloth. The case property was deposited with HASI Vinod Kumar (PW-5), who deposited it in Malkhana. HASI Vinod Kumar (PW-5) handed over the case property and the documents to Constable Parveen Kumar (PW-1) on 09.10.2018 with the direction to carry them to FSL Junga vide RC No.

218/18 (Ext. P5/PW5). He deposited all the articles at FSL Junga and handed over the receipt to HASI Vinod Kumar (PW-5) on his return. A special report (Ext.P7/PW8) was prepared and handed over to Constable Sanjay Kumar (PW-3) with the direction to carry it to SDPO Sarkagarh. He handed over the Special Report to DySP Chander Paul (PW-8) on 08.10.2018, at about 4:40 p.m. Chander Pal made an endorsement on the Special Report and handed it over to his Reader HC Sandeep (PW-2), who made the entry in the Special Register Ext.PW2/PW2 and retained it on record. The result of the analysis (Ext.P30/PW13) was issued which showed that the exhibit was an extract of cannabis and a sample of charas. The statements of the remaining witnesses were recorded as per their version and after the completion of the investigation, a challan was prepared and presented before the learned Trial Court.

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

4. The prosecution examined thirteen (13) witnesses to prove its case. Constable Parveen Kumar (PW-1) carried the case property to FSL Junga. HC Sandeep (PW-2) was posted as a Reader to SDPO Sarkaghat to whom the special report was handed over. Constable Sanjay Kumar (PW-3) carried the Special Report to SDPO Sarkaghat. HC Vijay Kumar (PW-4) issued the CCTNS certificate. HASI Vinod Kumar (PW-5) was posted as MHC with whom the case property was deposited. Kishore Kumar (PW-6) and Vikas Thakur (PW-7) are the independent witnesses to the recovery but they did not support the prosecution version. Dy.SP Chander Paul (PW-8) was posted as SDPO to whom the Special Report was handed over. Satish Kumar (PW-9) was posted as SHO who resealed the parcel. SI Vinod Kumar (PW-10) conducted the partial investigation. HC Sarwan Kumar (PW-11) is the official witness to recovery. HC Vijay Kumar (PW-12) effected the recovery. ASI Raj Kumar (PW-13) 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 that he was arrested after he was called to the police station. Nothing happened in his presence. He had an inimical relationship with HC Sarwan Kumar (PW-11) who manipulated a false case against him (the accused). No defence was sought to be adduced by the accused.

6. The learned Trial Court held that the independent witnesses did not support the prosecution case, there were major discrepancies in the statement of the official witnesses due to which no reliance could be placed upon them, the prosecution case was not proved against the accused beyond reasonable doubt and acquitted the accused.

7. Being aggrieved from the judgment passed by the learned Trial Court, the State has filed the present application seeking leave to appeal. It has been asserted that the learned Trial Court failed to properly appreciate the material on record. The testimonies of prosecution witnesses were discarded for untenable

reasons. There is no proof of any enmity between the accused and the witnesses. Independent witnesses admitted their signatures on the seizure memo and they could not provide any explanation for them. Their statements could not have been used for discarding the prosecution case. The defence taken by the accused that a false case was made by HC Sarwan Kumar (PW-11) due to enmity was not proved on record. Minor contradictions were blown out of proportion to acquit the accused; therefore, it was prayed that the present application be allowed and leave to appeal be granted to the State.

8. We have heard Mr. Varun Chandel, learned Additional Advocate General for the applicant-State who submitted that the learned Trial Court erred in acquitting the accused. Independent witnesses turned hostile but they admitted their signatures on various documents. They failed to provide any explanation for their signatures, which shows that they were making false statements before the Court and their testimonies could not have been used to discard the prosecution case. The learned Trial Court relied upon minor contradictions to hold that the prosecution case was not proved beyond reasonable doubt. Minor contradictions are bound to come with time and are insufficient to discard the prosecution case. Therefore, he prayed that the present application be allowed and leave to appeal be granted to the applicant/State.

9. We have considered the submissions made at the bar and have gone through the records carefully.

10. The present appeal is 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 an appeal against acquittal cannot be allowed merely on the difference of opinion. 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 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 reappraise or re-visit the evidence on record. However, the power of the High Court to reappraise 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.

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:

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 overturned (see *Vijay Mohan Singh v. State of Karnataka* [*Vijay Mohan Singh v. State of Karnataka*, (2019) 5 SCC 436 : (2019) 2 SCC (Cri) 586] and *Anwar Ali v. State of*

H.P. [*Anwar Ali v. State of H.P.*, (2020) 10 SCC 166 : (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])."

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

12. Independent witnesses did not support the prosecution case. They were permitted to be cross-examined. They denied that they were associated by the police and a search of the shop was conducted during which black sticks were found behind the water tank. They denied that sticks were checked and found to be cannabis. They denied that some cannabis sticks were found in the drain. They denied that their total weight was found to be 31+228 =259 grams. They denied that these were seized by the police in their presence after putting them in the carry bag and thereafter in a cloth parcel. They denied the previous statements recorded by the police. Statements of these witnesses show that they have not supported the prosecution case and no advantage can be derived by the prosecution from their testimonies.

13. It was the specific case of the prosecution as unfolded in the rukka (Ex.P20/PW12) that the accused ran inside the shop and threw some substance behind the water tank kept inside the shop. He also threw some substance into the drain from a room inside the shop.

14. ASI Raj Kumar (PW-13) prepared the site plan Ext.P23/PW13). It shows point 'H' as the place located on the ground floor where the accused ran after seeing the police. Point 'I' was the room where Mukhtyar Singh (accused) reached. Point 'X' was a place where 31 grams of cannabis was thrown behind the water tank and thereafter the remaining cannabis was thrown from the window of the inner room. The shop was shown as at point 'F'. The building is shown to have three storeys and the shop is on the first floor. The water tank

and the room from where the cannabis was thrown are shown on the ground floor. The site plan falsifies the prosecution's version that the shop and water tank were located on the same floor.

15. HC Sarwan Kumar (PW-11) stated that the shop has three storeys. There is a basement and a shop is upon the basement. One stair leads to the basement having two rooms. The accused was seen climbing the stairs from the basement. There is a shop over the basement and another storey above the shop. They were on the second or third step of the stairs when they saw the accused throwing the cannabis behind the tank. The accused entered the room from the door. The cannabis was thrown from the shop in the presence of the witnesses but it was thrown outside the room in his presence. Sanjay Kumar (PW-3) and Pushp Raj. There was a big hole in the wire mesh but he had not taken any photographs of the wire mesh.

16. HC Vijay Kumar (PW-12) stated in his cross-examination that cannabis was recovered from the shop/ground floor. The building has three storeys. It has a balcony and two rooms on the ground floor. There is a shop on the ground floor. There is one room in the basement. The second room is adjoining to the first room. There is an entry to the second room from the first room. There is a shop above the alleged place of recovery. Both the rooms were connected and there was no separate entry to each of the rooms.

17. ASI Raj Kumar (PW-13) stated that cannabis was recovered from the backside of the water tank on the first floor. The entrance to the second room is from outside. The shop is also on the first floor. The witnesses were sitting in the shop.

18. Thus, as per the Investigating Officer ASI Raj Kumar (PW-13), the recovery was effected from the first floor and not the basement. HC Sarwan Kumar (PW-11) stated that the shop is on the first floor, whereas, HC Vijay Kumar (PW-4) stated that the shop is on the ground floor. ASI Raj Kumar stated that the water tank is on the first floor. This shows that the prosecution witnesses have given different versions regarding the place from where the recovery was effected. As per HC Sarwan Kumar (PW-11) and HC Vijay Kumar (PW-4), the recovery was effected from behind the water tank on the ground floor but according to ASI Raj Kumar (PW-13), the recovery was effected from behind the water tank on the first floor. The place of recovery is intricately connected to the recovery itself and when the witnesses are not sure about the place of recovery, it is difficult to rely upon their testimonies regarding the recovery as well, especially when independent witnesses failed to establish the prosecution case.

19. 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 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."

20. 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 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 Lloyd's 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 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:

- (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 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 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 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."

21. In the present case, the testimonies of the witnesses are not consistent. If the witnesses are not sure about the place of recovery, their testimonies regarding the recovery also become doubtful and the learned Trial Court was justified in discarding the prosecution case based upon this major discrepancy.

22. Thus, the learned Trial Court had taken a reasonable view based on the evidence led before it and no interference is required with it while deciding the application against acquittal against the accused.

23. In view of the above reasons, no reasons are made out for granting the leave to appeal in the present case. Hence, the present application fails and the same is dismissed.

24. A copy of this order along with the record of the learned Trial Court be sent back forthwith. Pending applications, if any, also stand disposed of.