REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 2187-88 of 2011

Raveen Kumar ..... Appellant(s)

VERSUS

State of Himachal Pradesh .....Respondent(s)

JUDGMENT

Surya Kant, J:

These Criminal Appeals have been heard over video-conferencing.

2. The appellant, Raveen Kumar, challenges the judgment dated 23.04.2010 and the order dated 18.05.2010 passed by a Division Bench of the High Court of Himachal Pradesh, whereby his acquittal under Section 20 of the Narcotics, Drugs and Psychotropic Substances Act, 1985 ("NDPS Act") was reversed and a sentence of two-years rigorous imprisonment with a fine of Rs.50,000 was instead imposed.

FACTS

3. Briefly put, the prosecution case is that on 01.11.1994 at around 3:30 P.M., a police party while conducting traffic checks for

suspected ammunition near the HP-J&K border at Surangani, stopped a Maruti van which was being driven by the appellant. The police in the course of rummaging found that the van was loaded with tins of ghee, a bag of maize, 20 bottles of honey, *rajmah*, *angithi,* thermos, stepney and some other miscellaneous articles. A polythene bag underneath the driver's seat was also discovered. Suspecting it to contain narcotics, the police summoned two local shopkeepers (including Nam Singh, PW1) as independent witnesses. The appellant was informed of his statutory right to be searched in the presence of a magistrate or gazetted officer but he consented to being searched by the police party itself. The contents of the bag were then examined and *charas,* in the form of *dhoopbati* and balls was found. It was weighed using scales obtained from a nearby shop and was found to be 1 kg and 230 gms. After a 10 gm sample of the contraband was extracted, the *charas* was sealed and seized, and other procedural formalities were completed. The appellant was arrested and statement of one of the two independent witnesses – Nam Singh (PW1) was recorded. The sample was sent for chemical analysis where it was confirmed to be *charas* with a resin content of 34.5%. The prosecution, accordingly, charged the appellant for offence under Section 20 of the NDPS Act.

4. Over the course of trial, five witnesses were examined by the

prosecution and various documents including PW1's statement, appellant's written consent for search, recovery memo, arrest memo, seals and site plan were adduced in evidence. PW1 was declared hostile by the prosecution as he denied having personally witnessed seizure of the *charas*, but nevertheless he broadly supported the prosecution case as regards procedural compliances, sealing of the recovered narcotics and presence of the appellant. PW2 to PW5, being police witnesses, corroborated the prosecution version regarding search, seizure, and other statutory compliances under the NDPS Act. The appellant, in his defence, denied possession of any prohibited substance and claimed that the charges were fabricated by the police given his earlier refusal to contribute money towards a sports meet organised by the jurisdictional police. No defence evidence, however, was led and the appellant instead focused on highlighting contradictions between statements of the police witnesses.

5. The learned Special Judge vide his judgment dated 10.07.1995, acquitted the appellant observing that possession of a prohibited substance had not been proved beyond reasonable doubt. In reaching such conclusion, the Court placed heavy reliance on an earlier reply dated 09.11.1994 - given by the prosecution to oppose appellant's prayer for bail, wherein the police claimed that the appellant "*roams in the area in the vehicle in the guise of a contractor and usually deals in*

Contraband articles. Earlier also on 27.10.94, reliable secret information was received that he was carrying charas 7 kgs in the same vehicle. He was chased … but he could not be nabbed … He has been under observation for a long time." In the opinion of the trial Court, this unambiguously negated PW2 and PW5's depositions that they did not know or previously engage with the appellant. It also became the sole factor to conclude that the police, in fact, had previous information of the alleged smuggling and the chance recovery was nothing but a deliberately crafted narrative to circumvent the legal safeguards under the NDPS Act, which consequently weakened the very foundations of the case. The Special Judge also noted that there was a contradiction in the statements of PW2 and PW5, and that the only independent witness had not supported the prosecution version.

6. The respondent-State appealed before the High Court, which through judgment dated 23.04.2010 held that the reasoning of the trial Court was totally fallacious. The High Court upon re-appreciating the entire evidence on record, observed that *first*, the trial Court had wrongly discarded the statement of PW1, for he had corroborated major parts of the prosecution version and had merely pleaded ignorance to recovery of the polythene bag. *Second*, the conviction was possible even in the absence of any independent witness. *Third*, it was

shown how the version of PW2 and PW5 could be reconciled and any possible contradiction would be remote and immaterial. *Fourth* and most crucially, PW5 (Investigating Officer) had not been confronted with the prosecution's earlier reply to the bail application and thus the same could not be relied upon to doubt the prosecution version. The High Court further opined that the alternate theory propounded by the defence was selectively not suggested to PW5. Given these two facts, there was nothing to infer that there was any prior information and the case was clearly one of chance recovery, thus ameliorating the requirements to comply with Section 42 of the NDPS Act.

7. The High Court thereafter heard the appellant on the quantum of sentence and passed a separate order of sentencing dated 18.05.2010, observing that although the quantity of the seized *charas* was 1 kg 230 gms but the pure resin content was only 424 gms, which was not a 'commercial quantity'. Further, giving due weight to the appellant's dependants and the over 15 years delay in trial, the High Court awarded a lenient sentence of two years rigorous imprisonment and a fine of Rs 50,000 (or further one-year imprisonment in lieu thereof).

CONTENTIONS OF PARTIES

8. The aggrieved appellant has challenged the reversal of his acquittal, asserting that the High Court exceeded its jurisdiction in

setting-aside the trial Court's reasoned order. It was vehemently contended by his learned counsel that once the sole independent witness had disowned the prosecution case, it would be unjustified to convict the appellant by trusting the police version. The contents of the reply dated 09.11.1994 were re-agitated with a view to prove that the case was not of chance recovery and in case of two possible views on the same set of evidence, the one favouring acquittal ought to be taken. It was contended that the reply, being a court record, was not required to be proved like a statement recorded under Section 161 of the Code of Criminal Procedure, 1973 ("CrPC"). Additionally, leniency was sought sighting the now-advanced age of the appellant and the low quantity of the narcotics recovered.

9. These pleas for acquittal and leniency have been ably controverted by learned State counsel who supports the judgment and order of the High Court. He urged that the conviction can be well sustained in such like cases solely on the strength of testimonies of official witnesses and despite non-corroboration by an independent witness. He further demonstrated how the trial Court had impermissibly relied upon the reply document when the same had not been brought forth at the stage of PW5's cross-examination. It was also submitted that more than adequate leniency has already been shown at the sentencing stage as the High Court had imposed

punishment for only the pure resin content, whereas the entire weight of the mixture, including its neutral substance, ought to have been considered.

ANALYSIS

10. Having heard learned counsel for the parties and on perusal of the record, we find that these appeals raise the following three questions of law: (A) What is the scope and essence of the High Court's appellate jurisdiction against a judgment of acquittal?; (B) What is the extent of reliance upon a document with which the other side was not confronted with during cross-examination?; and (C) Whether non-examination of independent witnesses vitiates the prosecution case? Additionally, considering that the question of sentencing arose for the first time before the High Court, the possibility of taking a lenient view in the present circumstances also requires consideration.

A) Scope of appeal in cases of acquittal

11. The appellant's contention that the High Court could not have set aside a finding of acquittal, is legally unfounded. It has been settled through a catena of decisions that there is no difference of power, scope, jurisdiction or limitation under the CrPC between appeals against judgments of conviction or of acquittal. An appellate Court is free to re-consider questions of both law and fact, and re-

appreciate the entirety of evidence on record. There is, nonetheless, a self-restraint on the exercise of such power, considering the interests of justice and the fundamental principle of presumption of innocence. Thus, in practice, appellate Courts are reluctant to interfere with orders of acquittal, especially when two reasonable conclusions are possible on the same material.[1]

12. This Court has very illustratively, in ***State of UP v. Banne***[2]**,** listed circumstances were interference of an appellate Court against acquittal would be justified. These would include patent errors of law, grave miscarriage of justice, or perverse findings of fact. In turn, ***Babu v. State of Kerala***[3]**,** clarified that "*findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material*" or if they are '*against the weight of evidence*' or if they suffer from the '*vice of irrationality*'.

13. Further, this Court in exercise of its powers under Article 136, would ordinarily only examine whether the High Court has failed to correctly apply these principles governing appeals against acquittal. It would be aptly beneficial to quote what this Court has observed in ***Ram Jag v. State of UP***[4]*:*

[1] Ramabhupala Reddy v. State of Andhra Pradesh, (1970) 3 SCC 474.

[2] (2009) 4 SCC 271, ¶ 28.

[3] (2010) 9 SCC 189, ¶ 20.

[4] (1974) 4 SCC 201.

> *"14. If after applying these principles, not by their mechanical recitation in the judgment, the High Court has reached the conclusion that the order of acquittal ought to be reversed, this Court will not reappraise evidence in appeals brought before it under Article 136 of the Constitution. In such appeals, only such examination of the evidence would ordinarily be necessary as is required to see whether the High Court has applied the principles correctly. The High Court is the final Court of facts and the reserve jurisdiction of this Court under Article 136, though couched in wide terms, is by long practice exercised in exceptional cases where the High Court has disregarded the guidelines set by this Court for deciding appeals against acquittal or "by disregard to the forms of legal process or some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done" or where the finding is such that it shocks the conscience of the Court. ... A finding reached by the application of correct principles cannot shock judicial conscience and this Court does not permit its conscience to be projected save where known and recognised tests of testimonial assessment are totally disregarded; otherwise, conscience can become an unruly customer."*

14. There is, therefore, no legal necessity for us to re-appreciate the entire evidence merely on the premise that the High Court has convicted the appellant for the first time in exercise of its appellate jurisdiction. Instead, the scope of the present appeals ought to be restricted to test whether the trial Court's order was indeed perverse and whether the High Court's re-appreciation of evidence and consequent conviction was founded on cogent evidence.

B) Reliance on prosecution's reply to bail application

15. It is apparent that the appellant's acquittal was primarily based upon the finding that the case was not one of 'chance recovery'. The trial Court reached such finding solely on the basis of certain averments made in a written reply submitted on 09.11.1994 by the prosecution in opposition to the appellant's bail application.

16. Learned counsel for the appellant could not fairly dispute the distinction between 'replies' submitted to the Court in some pending proceedings, as compared to the statements recorded by the police under Section 161 of CrPC. Nevertheless, a Court should be over-cautious to place reliance on a piece of evidence with which the concerned witness has not been confronted despite an opportunity to do so. Although there is no need to separately prove the court records emanating during trial but no legal presumption can be extended to the veracity of the contents of such documents. The reply filed in court proceedings, at best, can be treated as an admission; which as held by this Court in ***Sita Ram Bhau Patil v. Ramchandra Nago Patil***[5]**,** must not only be proved, but also the opposite party must be confronted with it at the stage of cross examination. It would be apposite to extract the cited judgment to the following effect:

> "17. If admission is proved and if it is thereafter to be used against the party who has made it the question comes within the provisions of Section 145 of the Evidence Act. The provisions in the

[5] (1977) 2 SCC 49.

> Indian Evidence Act that "**admission is not conclusive proof**" are to be considered in regard to two features of evidence. First, what weight is to be attached to an admission? In order to attach weight it has to be found out whether the admission is clear, unambiguous and is a relevant piece of evidence. Second, **even if the admission is proved in accordance with the provisions of the Evidence Act and if it is to be used against the party who has made it, "it is sound that if a witness is under cross-examination on oath, he should be given an opportunity, if the documents are to be used against him, to tender his explanation and to clear up the point of ambiguity or dispute.** This is a general salutary and intelligible rule" ... **Therefore, a mere proof of admission, after the person whose admission it is alleged to be has concluded his evidence, will be of no avail and cannot be utilised against him**."
>
> *[emphasis supplied]*

17. The High Court has correctly noted in the present case that no opportunity to controvert this reply document was given to the prosecution, nor was PW5 confronted with it. Moreover, no weight can be accorded to such reply when the trial Court itself, while rejecting bail on 17.11.1994, had interpreted the same to conclude that the police "*was not having a prior information that the petitioner was carrying Charas in his Maruti Van, though, it appears, that there was a general information against the petitioner indulging in such activities.*"

18. Since irrelevant material was impermissibly relied upon by the trial Court to arrive at an acquittal, the High Court was adequately

justified to interfere with and reverse the findings.

C) Need for independent witnesses

19. It would be gainsaid that lack of independent witnesses are not fatal to the prosecution case.[6] 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. The trial Court held that no independent witness supported the prosecution case and that the testimonies of the star police-witnesses, namely, PW2 and PW5, were contradictory. Both these observations are unreasoned and unsubstantiated by the evidence on record. The High Court, on the contrary, has given cogent and lucid reasons as to how the testimony of PW1 (alleged hostile independent witness) also substantially supports the prosecution case.

21. Although declared hostile by the prosecution, Nam Singh (PW1), admits to being literate and having signed his statement on the spot. During cross-examination he admits to having duly perused the contents of these documents before having signed them, and of not being under any form of police pressure, thus, seriously undermining any oral statement to the contrary. His deposition independently establishes that the Maruti van of the appellant had indeed been stopped, the appellant's consent was taken, a search had been

[6] Kalpnath Rai v. State, (1998) AIR SC 201, ¶ 9.

conducted, certain items were seized and some substance had been weighed and sealed. Although PW1 claimed not to have specifically witnessed seizure of the *charas,* but he has not denied so either. He submits that he had gone back to his shop to attend to some customers at that stage of the search. However, he admits to having been shown the extracted sample of *charas,* which he identified before the trial Court. Thus, far from undermining the prosecution version, PW1's statement broadly corroborates and strengthens the seizure of contraband substance from the possession of the appellant.

22. As regards the question of contradiction between PW2 and PW5's statements, we find that the High Court's observations are unimpeachable. It would indeed be patently wrong to suggest that PW5 deposed that the independent witnesses were called after the suspected contraband had already been recovered from underneath the driver's seat. In fact, both PW2 and PW5 unequivocally state that the polythene bag was inspected only after the independent witnesses had arrived. There might be some confusion over the timing of removal of the other substances, being the tins of ghee, honey, maize etc., but such trivialities are not material.

D) Leniency in sentencing

23. After having given a very generous consideration to the appellant's age and circumstances, as well as the delay in trial and

appeal, we feel that it would serve the interests of justice to simply not disturb the sentence of two years' rigorous imprisonment and a fine of Rs.50,000 which has been awarded by the High Court.

24. We say so for the reason that the law on minimum mandatory sentence, both at the time of commission of the offence and at the stage of appeal, prohibits any imprisonment lower than a term of ten years. Section 20(ii) of the NDPS Act, as it stood before the amendment of 2001[7], specified that where contravention relates to cannabis in a form other than *ganja,* then the same shall be punishable with "*rigorous imprisonment which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees*".

25. Similarly, Section 20(ii)(C) of the NDPS Act, as it stands post the amendment of 2001, specifies the same minimum mandatory punishment of ten years for possession of 'commercial quantity' of cannabis. The High Court, as the law was being misconstrued at that time, relied upon the quantity of pure resin content of 424 gms. Instead, as now stands clarified by a co-ordinate Bench of this Court in ***Hira Singh v. Union of India***[8] the total quantity of the mixture, which includes the neutral substance, ought to be relevant for

[7] Section 7, Act 9 of 2001.

[8] 2020 SCC OnLine SC 382, ¶ 10(II).

purposes of sentencing. This total quantity in the instant case is 1 kg 230 gms, which exceeds the definition of 'commercial quantity' as specified at Sl. No. 23 in Notification S.O. 1055 (E), dated 19.10.2001. Thus, the sentence accorded by the High Court is clearly already far too charitable.

CONCLUSION

26. For the afore-stated reasons, the appeals are dismissed. The appellant's bail bonds are cancelled and the respondent-State is directed to take the appellant into custody to serve the remainder of his two years' sentence.

..... J.
(N.V. RAMANA)

..... J.
(SURYA KANT)

.....J.
(HRISHIKESH ROY)

NEW DELHI
DATED : 26.10.2020