IN THE COURT OF METROPOLITAN MAGISTRATE-07, SOUTH-WEST, DWARKA COURTS, NEW DELHI

Presided over by- Ms. Medha Arya, DJS

Cr. Case No.	-:	10502/2020
Unique Case ID No.	-:	DLSW020401912020
FIR No.	-:	622/2020
Police Station	-:	Chhawla
Section(s)	-:	33 Delhi Excise Act, 2009

In the matter of -
STATE

VS.

Pinki
W/o Sh. Pravin,
R/o Village Ahmadpura,
Beedoli, Tonk Newar,
Rajasthan

…. Accused

1.	Name of Complainant	:	Ct. Ashish
2.	Name of Accused	:	Pinki
3.	Offence complained of or proved	:	33 Delhi Excise Act, 2009
4.	Plea of Accused	:	Not guilty
5.	Date of commission of offence	:	25.06.2020
6.	Date of Filing of case	:	24.12.2020
7.	Date of Reserving Order	:	11.10.2023
8.	Date of Pronouncement	:	11.10.2023
9.	Final Order	:	Acquitted

Argued by -: Ld. APP for the State.
Ld. counsel for the accused.

BRIEF STATEMENT OF REASONS FOR THE DECISION

FACTUAL MATRIX –

1. Pithily, it is the case of the prosecution that on 25.06.2020 at about 01.30 p.m., at Goyala Village to Shyam Vihar, Phase-II, Najafgarh, New Delhi, within the jurisdiction of PS Chhawla, accused Pinki W/o Sh. Pravin was found in possession of illicit liquor i.e. 105 nips (180 ml each) of 'ADS Santara Desi Sharab for sale in Haryana only', without any license or permit for the same. As such, it is alleged that she committed an offence punishable under Section 33 of the Delhi Excise Act, 2009 (hereinafter, **"Excise Act"**).

INVESTIGATION AND APPEARANCE OF ACCUSED –

2. After registration of subject FIR, the investigating officer (hereinafter, **"IO"**) undertook investigation and on culmination of the same, charge-sheet against accused was filed. After taking cognizance of the offence, accused was summoned to face trial for the abovesaid offence.

3. On her appearance, a copy of charge-sheet was supplied to her in terms of Section 207 of the Code of Criminal Procedure, 1973 (hereinafter,**"CrPC"**). On finding a *prima facie* case against the accused, charge under Section 33 Excise

Act was framed against her. She pleaded not guilty to the charge, and claimed trial.

PROSECUTION EVIDENCE –

4. The matter was then fixed for recording of PE. In support of its version, prosecution has examined a total of four witnesses-

Witness	**Name**	**Nature of testimony**
PW-1	HC Ashish/ complainant	He supported the case of prosecution. He deposed that on 25.06.2020 he was posted at PS Chhawala. He testified that he apprehended the accused in possession of illicit liquor on that date, upon the tip of secret informer. He further testified that he transmitted information regarding the apprehension of accused with illicit liquor to PS Chhawala. He deposed that thereafter, IO HC Yogender alongwith W/Ct. Poonam reached at the spot, and he handed over the recovered illicit liquor and custody of accused to the IO. He testified that the IO checked the plastic katta and found it to be containing 105 quarter bottles of illicit liquor. He deposed that IO took one quarter bottle as sample, and remaining bottles were kept back in the same plastic katta. He deposed that IO sealed the case property alongwith sample bottle with the seal of 'RK'. In his testimony, he relied upon the documents i.e. his statement Ex. PW1/A, seizure memo of case property alongwith samples Ex. PW1/B. He deposed that IO filled Form M-29 and prepared a tehrir and the same was handed over to him for registration of

		FIR. He testified about the preparation of site plan by the IO, Ex. PW1/C. He deposed that the accused was released in terms of Section 41 A Cr.P.C., after conclusion of investigation. He identified the case property Ex. P1, Mark P2 and Ex. P3. He was duly cross examined and discharged.
PW-2	Ct. Jitender/ formal witness	He deposed that he was handed over the sample of case property on 23.07.2020, and he deposited the same in Excise Laboratory on the same day, vide RC no. 117/21/20. He deposed that during the time property was in his possession, no tampering was done with the same. He was cross examined by accused, and discharged.
PW-3	W/Ct Poonam/ Recovery witness.	She supported the case of prosecution. She deposed that she had joined the investigation of the present case alongwith IO HC Yogender, and when she reached the spot of incident with the IO, Ct. Ashish handed over the case property and custody of accused to the IO. She testified that IO checked the plastic katta and found 105 quarter bottles of illicit liquor make Asli Santara Masaledar Desi Sharab for sale in Haryana only, out of which he took one quarter bottle as sample, and kept back remaining quarter bottles in same plastic katta. She testified that IO prepared Form M-29 at the spot. She further testified that the case property and samples were sealed with the seal of 'RK' and after using the same, the seal was handed over to Ct. Ashish. She further deposed on similar lines as PW1 regarding registration of FIR, and other codal formalities discharged by

		the IO. She was duly cross examined and discharged.
PW-4	HC Yogender/ Investigation officer	He supported the case of prosecution. He testified that on 25.06.2020. On that day, he was marked the investigation of the case vide DD No. 55 A, whereafter, he as well as W/Ct. Poonam went to the spot i.e. at Road from Goyala Village to Shyam Vihar, Phase-II, near MBD School, who handed over accused Pinki alongwith case property to him. He deposed that he recorded the statement of Ct. Ashish Ex. PW1/A, and prepared the documents i.e. Form M-29 Ex. PW4/A, seizure memo of case property and samples, Ex. PW1/B, and Tehrir, Ex. PW4/B. He deposed that he prepared the site plan, Ex. PW1/C. He testified that he recorded the disclosure statement of accused Ex. PW4/C and thereafter, accused was released in terms of Section 41 A Cr.P.C. He further testified that thereafter, they returned to PS and case property and samples were deposited in Malkhana PS. He testified that he recorded the statement of witnesses and sent the samples to excise lab for testing and thereafter, got collected the result of the same. He deposed that after concluding the investigation, he filed the challan before the court. He was duly cross examined and discharged.

5. The remaining documents i.e. FIR no. 622/2020 PS Chhawala Ex. A1, Certificate under Section 65-B of Indian Evidence Act Ex. A2, Excise result dated 21.09.2020 Ex. A3, DD entry no. 73A and DD entry no. 0055A Ex. A4 were put to the accused, and were admitted by her under Section 294 CrPC. Accordingly, the remaining witnesses were dropped from the list of prosecution witnesses. PE was closed thereafter.

6. Thereafter, in order to accord an opportunity to the accused to personally explain the incriminating circumstances appearing in evidence against her, the statement of accused was recorded without oath under **Section 313/281 CrPC**. She submitted that she is innocent and has been falsely implicated in the present case. She stated that the recovery was planted on her. To a specific query, she stated that she does not wish to lead defence evidence in the affirmative.

7. The matter was then fixed for final arguments. Final arguments heard. Record perused. Considered.

8. To prove the charge under Section 33 Delhi Excise Act against the accused, prosecution had to prove:-

(i) accused was found in possession of case property.

(ii) The case property is illicit liquor of a description, the possession of which without any permit or license contravened the provision of law.

9. Record reveals that several gaps and loopholes have been pointed out by the accused in the case of prosecution, leading this Court to the conclusion that recovery of case property from the accused was not proved by the prosecution as per law.

10. It is the case of the prosecution that the alleged recovery of the case property was made from the accused from a public area. It is also a matter of record that passersby were crossing the area from where recovery was effected. Despite this, no public witnesses were joined in the prosecution. The witnesses of the prosecution, PW1, PW3 and PW4 deposed on oath that despite availability of independent public witnesses, no such witnesses were joined in the investigation. They deposed that a request was made to public witnesses to join the investigation, but they refused, as a result of which no independent witnesses were joined in the investigation. Admittedly, however, IO did not serve any notice upon these witnesses consequent to this refusal.

11. Now, it is true that non-joining of independent witnesses cannot be a sole ground to discard the entire prosecution story, in view of the law laid down by the Hon'ble Supreme Court of India in ***Appabhai versus State of Gujarat AIR 1988 SC 696*****,** and evidence in each case has to be weighed in light of the peculiar factual matrix of the same. Non-joining of public witnesses, despite their easy availability, reflects lack of genuine efforts on the part of the prosecution, denting its case. The IO could have easily served notice in writing to the witnesses, to make them join the investigation. But not to be. Where the IO has failed to make genuine efforts to join public witnesses, veracity of the case of prosecution becomes doubtful. At this juncture, this court seeks guidance from the law laid down by the Hon'ble High Court of Delhi in ***Anoop Joshi Vs. State" 1992 (2) C.C. Cases 314 (HC)*****:-**

"18.It is repeatedly laid down by this Court in such cases it should be shown by the police that sincere efforts have been made to join independent witnesses. In the present case, it is evident that no such sincere efforts have been made, particularly when we find that shops were open and one or two shop-keepers could have been persuaded to join the raiding party to witness the recovery being made from the appellant. In case any of the shopkeepers had declined to join the raiding party, the police could have later on taken legal action against such shopkeepers because they could not have escaped the rigours of law while declining to perform their legal duty to assist the police in investigation as a citizen, which is an offence under the IPC".

12. Further, the present case rests entirely on the alleged recovery of case property, i.e. illicit liquor, from the possession of the accused at the relevant time by a police official HC Ashish, who was on patrolling duty at the relevant time and place, as per the prosecution story and was tipped of the presence of accused by a secret informer. He is stated to be a chance witnesses at the spot, but his presence thereat could not be proved by prosecution beyond reasonable doubt. The DD entry vide which he had gone for the patrolling duty was neither specified, nor proved. Police officials are under a statutory duty to mark their departure and arrival in the register kept in the police station for the purpose as per the Punjab Police Rules. Chapter 22 Rule 49 of Punjab Police Rules, 1934, provides that the hour of arrival and departure on duty at or from a police station of all enrolled police officers of whatever rank, whether posted at the police station or elsewhere, with a statement of the nature of their duty shall be entered vide a separate entry and this entry shall be made immediately on arrival or prior to the departure of the officer concerned and shall be attested by the latter personally by signature or seal. In absence of the departure and arrival entry of the police officials in the aforesaid manner, their presence at the spot cannot be believed. Reference can be placed upon ***Rattan Lal Vs. State 1987 (2) Crimes 29 Delhi High Court*** wherein it has been observed:

"if the investigating agency deliberately ignores to comply with the provisions of the Act, the courts will have to approach their action with reservations. The matter has to be viewed with suspicion if the provisions of law are not strictly complied with and the least that can be said is that it is so done with an oblique motive. This failure to bring on record, the DD entries creates a reasonable doubt in the prosecution version and attributes oblique motive on the part of the prosecution."

13. It is also evident from the record that prosecution has made no efforts whatsoever to dig out the source from which the illicit liquor was procured by the accused. Lack of any efforts on part of the police to interrogate the accused on these lines is also reflective of a shoddy investigation, benefit of which, must accrue to the accused.

14. As per case of prosecution, the sample of case property was sealed with the seal of "RK". However, property brought to court was unsealed and did not bear any distinctive identification mark. As such, it could not be established by prosecution that any liquor was seized from accused, and the samples brought to court were samples of said case property. This circumstance further perforate the case of prosecution, indicating that no recovery was effected from the accused.

15. Even if the fact that sample brought before the Court was unsealed is ignored, it is seen that out of the liquor seized allegedly, the excise report shows that the samples were received for testing on 23.07.2020, despite the fact that the alleged recovery was made on 25.06.2020. The fact that the prosecution has failed to explain where the property was present during the intervening period of around one month also casts a shadow of doubt on the case of the prosecution. None of the witnesses examined by the prosecution have stated that the samples of illicit liquor taken for examination from the time they were taken and till the time the said samples were handed over to the Public Analyst, were not tampered with. As per testimony of PW-1 and PW-4, the seal with which the case property was sealed remained in possession of the IO, posted in the same PS. The possibility that the samples were tampered with cannot be ruled out. In this regard, Hon'ble Delhi High Court has held in ***Datu Ram v. State (Delhi) :1996(1) Crimes 604 : 1996(36) DRJ 527 : 1997(1) CCR 18***as follows :

*"**In the State of Rajasthan v. Daulat Ram, 1980, C.C. Cases 83 (S.C)**, the Supreme Court observed that the prosecution has to prove all the links starting from the seizure of the samples till the same reached the hands of the Public Analyst so that the court could conclude that the seals remained intact throughout. Unfortunately, thiswarning seems to have fallen on deaf ears at least as far as this case is concerned.*

3.Does the evidence as noticed above satisfy the requirement highlighted by the Supreme Court in Daulat Ram's case? The answer, to my mind, has necessarily to be in the negative.

4.The parcels were allegedly sealed at the spot by the Investigating Officer and if the Moharer Malkhana is to be believed the same were deposited with him by the said officer. However, the Investigating Officer no where says so. In any case, even if it be taken that the parcels were actually deposited by him, was it not for him to assure the Court that so long as they had remained in his possession they had not been tampered with? This, however, is not the end of the matter. The Investigating Officer nowhere says that he had filled the C.F.S.L. form nor is there anything, either in his statement or in the statement of the Moharer Malkhana or even in the entry made in the Register, that any such form was ever deposited. The Constable who took the sample parcel also no where speaks of his having deposited any such form with the C.F.S.L. There are judgments of this court in which it has been held that absence of such evidence would be fatal to the prosecution. Reference, in *this connection may be made to* ***Chameli Devi v. State, 1993 JCC 293, Mool Chand v. State, 1993 (2) Delhi Lawyer 14, Anoop Joshi v. State, 1992 (2) CC Cases 314, Jagdish Prasad v. State, 55(1994) DLT 315 and Munni Lal v. The State, 1994 IV AD (Delhi) 1099****.*

5.Last, but not the least, the report of the C.F.S.L. itself, the relevant portion of which has already been reproduced above, cannot be considered to be such as to inspire the confidence of the Court with regard to the seals on the sample parcel. As would be apparent though it does show that the parcel received was having " the seal impression as per specimen enclosed intact" we are not told as to what was the "specimen enclosed". This further takes away the sting from the prosecution version.

16. Similarly, in **Chandra Wati v. State (Delhi) : 1991(44) DLT 31 : 1991 JCC 508** it was also held by Hon'ble Delhi High Court that the prosecution has to bring on record the link evidence to show that the sample of the recovery alleged to have been made by the police witness from the accused was analysed in the CFSL without it being tampered with by any one, failure of which is a ground in favour of the accused.

17. Mark P2 is the order of the Assistant Commissioner (Excise), whereby the case property of the present case has been ordered to be destructed. In ***Manjit Singh vs. State (2014) 214 DLT 646,*** the Hon'ble High Court of Delhi had observed that detailed panchnama containing the inventory should be prepared and photographs of the entire lot should be taken. It was further observed in Para No. 75 that the sample alongwith photographs and panchnama would be sufficient evidence during trial. In the present case, no panchnama was produced. Photographs of the entire lot of the case property were not produced, however, as is revealed by perusal of the document Ex P3. Even with respect to the photograph, it is admitted that the contents of the katta are not visible in the photograph. The same only shows a katta, with no seal visible. In this regard, even though Section 60 of the Excise Act provides that non production of case property does not affect the conviction, however, at the same time, the provision also lays down that samples and photographs of the confiscated property are to be preserved to meet evidentiary requirements. Without any proper photographs, the standard cannot be said to be met beyond reasonable doubt.

18. The fact that seizure memo of the case property Ex. PW1/B mentions the FIR number, even though the seizure was made prior in time as per the case of prosecution, further dents the case of prosecution fortifying the doubt that it was prepared after registration of FIR, and with a view to falsely implicate the accused. No cogent explanation was given by the IO/PW4 to explain this discrepancy.

19. Apprehension of accused was made at the tip of a secret informer, but the said secret informer was never examined by prosecution, for best reasons known it.

20. When considered cumulatively, these factors show that a lot of gaps and crevices exist in prosecution version, and the benefit of this accrues to the accused **Pinki W/o Sh. Pravin**, who thus stands **acquitted** of the offence punishable under section 33 Delhi Excise Act, 2009.

21. File be consigned to Record Room after due compliance with Section 437A Cr.P.C.

Pronounced in open court on 11.10.2023 in presence of accused person.
This judgment contains 14 pages and each page has been signed by the undersigned.

Medha Arya

Digitally signed by Medha Arya
Date: 2023.10.11 16:36:04 +0530

(MEDHA ARYA)
Metropolitan Magistrate – 07
South-West District, Dwarka Courts,
New Delhi, 11.10.2023