

Kalusingh and anr. Vs. State of M.P.

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SooperKanoon Citation : sooperkanoon.com/500591

Court : Madhya Pradesh

Decided On : Feb-18-2003

Reported in : 2003(89)ECC46; 2003(2)MPHT388; 2003(2)MPLJ355

Judge : S.L. Kochar, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8, 18 and 50

Appeal No. : Criminal Appeal No. 1442/98

Appellant : Kalusingh and anr.

Respondent : State of M.P.

Advocate for Def. : Mayank Upadhyaya, Dy. Govt. Adv.

Advocate for Pet/Ap. : Virendra Sharma, Adv.

Disposition : Appeal dismissed

Judgement :

S.L. Kochar, J.

1. Being dissatisfied with the judgment dated 10-10-98 passed by the Special Judge (Under N.D.P.S. Act), Mandsaur in Special Case No. 8/97, thereby convicting the appellants for the offence under Section 8/18 of the Narcotic Drugs

and Psychotropic Substances Act (hereinafter referred to as the 'Act') and sentencing them each to undergo R.I. for ten years and to pay a fine of Rs. 1,00,000/- each, in default of payment thereof to suffer further R.I. for two years, the appellants have preferred this appeal.

2. The case of the prosecution as put forth by the prosecution before the Trial Court was that on 17-2-1997 at 3.20 AM. The Station House Officer Anil Singh (P. W. 5) received information through Mukhbeer that the accused/appellants were carrying opium for the purposes of sale from Suwasra. A Panchnama (Ex. P-1) was prepared to this effect and sent the same to the S.D.O.P., Sitamau. The S.H.O. then started for the spot alongwith the police party and surrounded the spot. The police party saw the appellants coming towards Ganesh Temple. The police party stopped them and took search of their persons. They found 2.300 kgs opium each in their possession in two white plastic packets. From each of the packets two samples of 30 grams opium was taken. The opium was seized vide Ex. P-2. The appellants were arrested vide arrest-memos (Exs. P-5 and P-6). The SHO registered the FIR (Ex. P-10). The samples of the seized opium were sent for chemical examination to the Forensic Science Laboratory (FSL), Indore. According to the FSL report, the samples were of opium. The FSL report is Ex. P-12. During investigation, spot map was prepared and statements of witnesses were recorded.

After due investigation, charge-sheet was filed against the appellants. The appellants denied the guilty. The defence of accused Kalusingh was that he had sold a bullock to Shambhu Banjara for Rs. 3,000/- which amount was due to him. On this account, there was a dispute between him and Shambhu Banjara. They took the plea of false implication. In their defence, they have examined Amra (D.W. 1) and Gabba (D.W. 2). The learned Trial Court, after hearing both the parties found the appellants guilty of the offence with which they were charged and convicted them accordingly and sentenced as indicated above.

3. I have heard Shri Virendra Sharma, learned Counsel for the appellants and Shri Mayank Upadhyaya, learned Dy. Advocate for the State and perused the entire record.

4. Learned Counsel for the appellants has submitted that following points for assailing the judgment of conviction :--

- (i) There is no compliance of Section 50 of the Act.
- (ii) No separate Panchnama was prepared by the police regarding their own search prior to the search of the appellants.
- (iii) After seizure, where the seized property was kept till filing of the charge-sheet. In this regard, no evidence is led by the prosecution.
- (iv) The sample was not sent to the authorised laboratory for its chemical examination; and
- (v) There was delay in sending the seized article to the Court.

Learned Counsel has also placed reliance on the Standing Order No. 1 of 1989 issued by the Government of India, Ministry of Finance (Department of Revenue) as per provision under Section 52A of the Act.

5. On the other hand, learned Dy. Government Advocate Shri Mayank Upadhyaya appearing for the State supported the judgment of conviction passed by the Trial Court and according to him, there was complete compliance of Section 50 of the Act and the property was also kept intact in the Malkhana for which, sufficient evidence, oral as well as documentary has been adduced by the prosecution. He further submitted that the Standing Order No. 1 of 1989 issued under the provisions of Section 52A of the Act is not applicable, in the present case. Section 52A is meant for disposal of seized Narcotic Drugs and Psychotropic Substances. These provisions as well as the Notification thereunder issued by the Central Government is not laying down any norms as to how the property of crime should be kept. This provision is for the purpose of finally disposing of the property which could not be kept for the long period.

6. Having heard the learned Counsel for the parties and after perusing the entire record, this Court is of the view that there is no force in the submissions of the learned Counsel for the appellants.

7. In the present case, there is clear compliance of Section 50 of the Act. After receiving the information from Mukhbeer, the Station House Officer Anil Singh (P.W. 5) recorded the information vide Ex. P-1 and thereafter, sent the copy of the same to the superior officer through Constable Ganpatsingh (P.W. 4). Thereafter, he asked the appellants whether they wanted to be searched by a Magistrate or authorised Gazetted Officer or willing to give their search to him. Appellant No. 2 Dulesingh in his hand-writing gave his consent on the Panchnama (Ex. P-2) for his search by the Station House Officer Anil Singh (P.W. 5). The appellant No. 1 Kalusingh also gave his consent to this effect, but his consent could not be taken into writing because he was not knowing writing, but was knowing only to put his signatures. This fact is also specifically mentioned at place D to D in Ex. P-2.

8. Learned Counsel has strenuously argued that prior to taking the search of the appellants, the police officials have not given their personal search, which is mandatory and to this effect they have not prepared the separate Panchnama. He placed reliance on a judgment of this Court reported in Gurucharan Singh v. State of M.P. [1992 (I) MPWN 53]. According to this judgment, the officer making search should give his own search before taking search of the accused. In this case, the raiding party did not give their search before taking search of Dhaha of the accused and the accused was not made known of his right to be searched before Magistrate or any authorised Gazetted Officer. Therefore, on these two counts, this Court has allowed the appeal of the appellant. But this is not the factual situation available in the present case. A bare perusal of Ex. P-2 as well as the statements of Anil Singh (P.W. 5) and Raisingh (P.W. 6) are clearly indicating that the appellants were duly made known of their right to be searched by the Magistrate or authorised Gazetted Officer and from appellant No. 2 Dulesingh, in his own hand-writing his consent was taken/The appellant No. 1 Kalusingh could not write. Therefore, this fact is mentioned in the Panchnama and as he was only able to put his signatures, his signature was also obtained. The Panchnama (Ex. P-2) and the statements of both these witnesses are also revealing the fact that after appraising them of their right as per provision under Section 50 of the Act, the police party and the Station House Officer Anil Singh (P.W. 5) had given their search to the appellants and nothing incriminating was found in their possession. There is no provision of preparing the separate Panchnama of giving search by

the Police Officer to the accused prior to their search.

9. After the search of the appellants, the contraband articles were seized and detailed Panchnama was prepared. On this Panchnama (Ex. P-2) specimen of seal was also affixed. This Panchnama is bearing the signatures of the appellants at two places. Each of them was also supplied a copy of this Panchnama.

10. Learned Counsel has placed reliance on the Standing Order No. 1 of 1989 (supra). This order is issued under Section 52A of the Act. That is meant for disposal of property. Therefore, the same has no relevance in the facts and circumstances of the present case.

11. The seizure was effected on 17-2-1997. The same day, seized contraband articles (packets of opium) were deposited with the Malkhana in-charge of the Police Station Head Constable Nandkishore (P.W. 8). He made an entry in the Malkhana Register, photo-copy of the same is Ex: P/13-C. This document is also supporting the statement of Station House Officer Anil Singh (P.W. 5) and Head Constable Nandkishore (P.W. 8). In column Nos. 4 and 5 offence and details of property deposited are mentioned. In this document it is also mentioned that the property of the crime was sent through Constable Babulal along with the charge-sheet before the Sessions Judge, Mandsaur. The charge-sheet was filed on 28-3-1997 and in the column of the property description, the fact of depositing two packets each containing 4.40 grams of opium vide Articles A and B and two packets each containing 30 grams opium (Articles A-2 and B-2) were deposited in the Court along with the charge-sheet and two samples each containing 30 grams opium marked as A-1 and B-1 were sent to the F.S.L., Indore.

12. The sample was sent to the Forensic Science Laboratory, Indore which has been established under the State Forensic Science Laboratory, Sagar by order dated 4th December, 1992. This is an authorised Laboratory and the report given by it is fully covered under Section 293(1)/Section 4(1) of the Code of Criminal Procedure. The sample was sent through Memo Ex. P-5 by Sub Inspector Pawan Singhal (P.W. 7). The sample was taken to the Laboratory on 19-2-97 by Head Constable Hccralal (P.W. 9). After depositing the sample in the Laboratory, he submitted the receipt (Ex. P-14) on 20-2-1997. This is evident from the statement

of Hecralal (P.W. 9). Head Constable Nandkishore (P.W. 8) has also stated that on 19-2-1997, he handed over two samples (A-1 and B-1) to Constable Hecralal (P.W. 9) for taking the same to the F.S.L., Indore. After depositing the sample, Heeralal (P.W. 9) submitted its receipt (Ex. P-14) to Head Constable Nandkishore (P.W. 8).

13. Hccralal (P.W. 9) in his statement Para 4 has specifically stated that though the fact of sending of samples to the F.S.L. on 19-2-97 is not mentioned in the Malkhana Register, but the same is written in the Daily Rojnamcha Sanha of the Police Station. Copy of such Sanha is available on record, but unfortunately the same has not been got proved. This Court does not find anything to disbelieve the statement of this witness about handing over of the samples to Head Constable Hccralal on 19-2-1997, for taking it to F.S.L., Indore. His version is fortified by the statement of Hecralal (P.W. 9) as well as the F.S.L. Report (Ex. P-12) and Receipt (Ex. P-14) issued by the in-charge of the Regional Legal Forensic Science Laboratory, Indore. This has been proved by Head Constable Nandkishore (P.W. 8) and Head Constable Hecralal (P.W. 9).

14. Learned Counsel for the appellant has heavily placed reliance on a judgment rendered by the Punjab and Haryana High Court in Paramjit Singh and Anr. v. State of Punjab, reported in [1997 (1) Crimes 247]. According to this judgment, the offer of search to be given individually to the accused persons. There is no dispute in this proposition. But, in the present case, having regard to the facts and circumstances of this case, this judgment is not helpful to the appellant because, both the appellants were given offer separately and the appellant No. 2 Dulcsingh had given his consent in his own hand-writing whereas the appellant No. 1 Kalusingh could not give his consent in writing because he was not knowing to write, but at the same time, as he was knowing to put his signature, he did so on the Panchnama and all these facts are duly recorded in the Panchnama.

15. Learned Counsel has cited several judgments regarding non-compliance of Section 50 of the Act, but this Court does not feel it necessary to refer and discuss each and every judgment because it would make the judgment unnecessary and bulky. The evidence discussed in this case is clearly establishing the compliance

of Section 50 of the Act. The judgments cited by the learned Counsel for the appellants are-

State of Punjab v. Balhirsingh (AIR 1994 SC 1872)

State of Punjab v. Jasbirsingh and Ors., [1996 (1) EFR 224J

Saiyad Mohd. and Ors. v. State of Gujarat, [1995 (2) Crimes 132]

R.P. Eazak alias Nagappan Razak v. State of Kerala, [1996 (2) EFR 80]

K. Mohanan v. State of Kerala [2000 SCC (Cr.) 1228].

16. The Supreme Court, in its judgment rendered in the case of Joseph Femandes v. State of Goa [2000 SCC (Cr.) 300], has held that if there is substantial compliance of Section 50 of the Act, then the benefit will not be given to the accused and Section 50 should not be construed hyper technically. Hypertechnical view should not be taken.

17. The judgment relied on by the learned Counsel in the case of K. Mohanan (supra) has been passed by two Judges Bench of the Supreme Court whereas the judgment passed in Joseph Fernandez's case (supra) has been passed by three Judges Bench. Therefore, applying the principle of application of precedent, former judgment passed by Larger Bench prevails over the latter. This Court may usefully refer to the judgment passed by the Supreme Court in the case of Mitthulal v. Radhe Lal (AIR 1974 SC 1596). It is pertinent to note here that in both these judgments (K. Mohanan's case and Joseph Fernandez's case) the Supreme Court has considered the judgment rendered by the Constitutional Bench.

18. This Court has gone through the judgment of Constitutional Bench in State of Punjab v. Baldev Singh [(1990) 4 SCC 892]. In this judgment, the Supreme Court has not expressed any opinion, whether the provisions of Section 50 are mandatory or directory, in the judgment Para 43, the Supreme Court has held that:--

'The judgment in Pooran Mal case has to be considered in the context in which it was rendered. It is well settled proposition of law that a decision is an authority for

what it decides and not that everything said therein constitutes a precedent. The Courts are obliged to apply an intelligent technique in use of precedents bearing in mind that a decision of the Court takes its colour from the questions involved in the case in which it was rendered.'

19. In the light of the judgment passed in Joseph Fernandez's case (supra) this Court is of the firm view that substantial compliance of Section 50 of the Act, has been done in the present case. On the basis of the statements of Station House Officer Anil Singh (P.W. 5) and other witnesses as also the document (Ex. P-2), no prejudice has been caused to the appellants. Therefore, they are not entitled to get any benefit in that behalf.

20. Learned Counsel has also relied on the judgment of the Supreme Court passed in *Visala v. State of Kerala* (1994 Cr.LJ 1). In this case, there was a delay in sending the seized article in the Court for three months and there was no evidence led by the prosecution to show that article was sealed and kept in proper custody at the police station, and that very article was sent for Chemical Examination. This is not the factual situation in the present case. In the present case, property was seized on 17-2-1997 and on the same day it was deposited in the Malkhana. Thereafter, on 19-2-1997, the sample was sent to the F.S.L. and the Laboratory in-charge found the seal upon the sample tallying with the sample of seal available separately. The receipt was also duly deposited on 20-7-97 with the in-charge of Malkhana and the F.S.L. Report was received on 28-2-97. Thereafter, charge-sheet was filed on 28-3-1997. Along with the charge-sheet, complete seized contraband article was also deposited in the Court, which is clear from the column of the property of description. In this regard, it is pertinent to mention here that no question were put in cross-examination by the defence to this effect that the property was not deposited alongwith the charge-sheet. But, the entries in the charge-sheet and the copy of the order-sheet is reflecting this fact.

21. In the light of the aforesaid factual and legal analysis, this Court finds no substance in this appeal. Consequently it is hereby dismissed.