

Kundan Vs. State of Rajasthan

Kundan Vs. State of Rajasthan

SooperKanoon Citation : sooperkanoon.com/767266

Court : Rajasthan

Decided On : Dec-03-1985

Reported in : 1986WLN(UC)678

Judge : Jas Raj Chopra, J.

Appeal No. : S.B. Criminal Appeal No. 88 of 1978

Appellant : Kundan

Respondent : State of Rajasthan

Disposition : Appeal allowed

Judgement :

Jas Raj Chopra, J.

1. This is an appeal directed against the judgment of the learned Sessions Judge, Bhilwara, dated 27-1-1978, whereby the learned lower court has convicted and sentenced the accused-appellants as under:

(1) Kundan (1) for offence under Sections 147 and 353, 6 months R.I. each;

(2) for offence under Section 333, IPC, 3 year's R.I. and a fine

of Rs. 200/- and in default of payment of fine to further

undergo .2 month's R.I.;

(2) Dhanna, (1) for offence under Sections 147 and 352, IPC, each of them for 6

Nanda, month's R I. for each offence;

Ram Gopal

Rameshwar, (2) for offence under Section 333/149, IPC, 2 year's R.I. and a

fine of Mishri Rs. 100/- each and in default of payment of

fine to further undergo one month' R.I.2. The facts giving rise to this appeal briefly stated are that on 17th April, 1974 the wine contractor of Shahpura i.e. Shri Lal Chand submitted a report marked Ex. P 2 to the Excise Inspector of Shahpura alleging therein that in village Rajyas certain Bayries, specially Kundan and Nanda were indulging in manufacture and sale of illicit liquor and if a search is made immediately incriminating liquor will be recovered and the accused persons responsible for it can be arrested. It is alleged that Ratan Singh, Excise Inspector immediately prepared a memo Ex. P 13(a) under Section 47 of the Excise Act and proceeded to village Rajyas along with his two guards i.e. Mohan Lal and Dev Bux. Mahaveer s/o Choga, who is the servant of the wine contractor and Tehal Ram who is son of wine contractor Lal Chand accompanied them from Shahpura. They reached village Rajyas by bus on 17-4-1974 at about 4.30 p.m. They went to the house of Kundan and Nanda. Both of them were found present at their own residence. They then entered the Guvadi of the house of Kundan and Nanda and found evidence of the existence of a wine-Bhatti and some empty earthen pots which were alleged to have contained wash, were lying there. When they started enquiring from these two accused-persons about the illicit trade in country made wine it is alleged that Mishri, Rameshwar, Dhanna, Ram Gopal and some other Bavries came armed with lathies on hearing the noise of Kundan and Nanda. When the persons arrived there Kundan and Nanda also joined them and attacked the Excise Party. Looking to their aggressive intent, Excise Inspector Ratan Singh and Mohan Lal guard immediately ran away from the Guvadi and came out in the open. Tehal Ram and Dev Bux tried to escape from the other side but it is alleged

that Nanda and his companions availed Shri Dev Bux and inflicted injuries to him with lathies and an arm of a cot. Kundan was armed with an arm of a cot and he inflicted a blow to Dev Bux which has resulted in a fracture. After that he fell down and later all the accused persons inflicted injuries to him. He became unconscious. After half an hour he regained consciousness and then he went to the hotel of Sohan Maharaj situated on the bus stand. When Ratan Singh and others were informed that Dev Bux has been injured and he has gone to the bus stand they went in search of him. When they were going towards the bus stand all these six accused-appellants came in their way and even then they tried to attack the Excise Officials and their companions. However, one Sobhag Singh Rajpoot of that village interfered and saved the Excise Party from the impending attack. Ratan Singh and his companions then went to the bus stand. They found Dev Bux sitting in the shop of Sohan Maharaj. They found him seriously injured. He was bleeding from the wounds. His clothes were soaked with blood. He was then carried on a bicycle to Kanechan police chowki and from there he was taken to Phulia village. There was no medical aid and, therefore, the injured was shifted to Shahpura, where he was admitted in the hospital and medical examination of his injuries was conducted. PW 5 Dr. C L. Dadich has found five injuries on his person. His injury report has been marked Ex P

4. His X-rays film has been marked Ex P 3 and the X-ray reading report has been marked Ex.P

5. It is alleged that on 18-4-1974 Excise Inspector Ratan Singh went and lodged a written report Ex. P 4 at police station, Phulia on the basis of which a report No. 11 was recorded in the Rojnamcha at police station, Phulia at about 2.30 p m. which has been marked Ex.P 12 The police literate constable was not competent to record the FIR and, therefore, he recorded a note on a sheet of paper and later when the head constable arrived at the police station, on the same day he registered a case under Section 353, 332, 324, 326 and 147, IPC. This note is part of Ex.P

12. It is alleged that the Excise Inspector submitted with this report, the injury memo of injured Dev Bux marked Ex P 4, the complaint Ex. P 2 made by Lal

Chand and a copy of the original memo prepared by him under Section 47 of the Excise Act, which has been marked Ex P

13. After the usual investigation, the case of the accused persons was challaned in the court of learned Munsif & Judicial Magistrate. Shahpura (Bhilwara) from where it was committed for trial to the learned Sessions Judge, Bhilwara. The learned Sessions Judge charged the accused Kundan for the offences under Sections 147, 333 and 353, IPC whereas, the remaining accused persons were charged with the offences under Sections 147, 333/149 and 333 IPC. The accused persons did not plead guilty to the charges and claimed trial. Whereupon, the prosecution examined as many as eight witnesses in the case. The statements of the accused persons were recorded under Section

313. They examined DW 1 Mithu and DW 2 Harnath in their defence. After hearing the parties, the learned trial Court decided the case as stated by me above. Aggrieved against this judgment all the six convicted accused persons have preferred this appeal.

3. I heard Shri J.R. Choudhary, learned Amicus Curiae for the accused-appellants and Mr. Basti Chand Bhansali, learned Public Prosecutor for the State. I have also gone through the record of the case.

4. The learned lower Court has held that the Excise Inspector Ratan Singh and the two exercise guards who went to village Phulia were on public duty. They went there to search the house of Kundan and others who were indulging in the manufacture and sale of illicit liquor. The Excise Inspector i.e. Ratan Singh has prepared a memo Ex. P. 13(a) before the search was taken and he has submitted a copy of this memo to the police along with the First Information Report. The delay in lodging the First Information Report was held as properly explained because of the anxiety of the Excise Inspector to provide medical aid to Dev Bux so that his acute agony and suffering may be reduced. It was held that all these accused persons formed an unlawful assembly with the common object to obstruct the search of the house of Nanda and Kundan and in pursuance of that common object Kundan inflicted grievous injuries to Dev Bux and, therefore, it held the accused persons guilty of the aforesaid charges and sentenced them accordingly.

Now, I have to see how far these findings of the learned lower Court can be sustained on the basis of the record.

5. Mr. J.R. Choudhary appearing for the accused appellants has argued that the entire evidence of the prosecution, from the time they left Shahpura for village Rajyas, is highly contradictory. Ex. P. 13(a) is an ex post facto document. The evidence regarding the actual happening of the incident is so doubtful that no conviction can be based on the strength of such an unreliable and mutually contradictory evidence. He did not challenge the conclusion of the learned lower Court that Ratan Singh, Dev Bux and Mohanlal are public servants. He also did not challenge the fact that they went to village Rajyas on duty and tried to search the house of Kundan and Nanda. The main thrust of his argument has been that these persons had no authority to search the house of Kundan and Nanda and so Kundan and his companions had every right to resist the search and to cause them grievous hurts in the exercise of their right of private defence of the property. He further submitted that from the evidence on record, it has not been proved that any body else than Kundan inflicted any injury and thus according to him this evidence has not been properly scrutinized and appreciated by the learned lower Court and it has wrongly recorded the conviction against the accused persons for the offences with which they were charged.

6. The learned Public Prosecutor appearing for the State vehemently submitted that Ratan Singh and the Investigating Officer have categorically proved that Ex. P. 17(a) is a genuine document which was prepared before the search of the house of Kundan and Nanda was actually under taken. As these persons were public servants and they were acting under the colour of official duty, no right of private defence was available to the accused persons and lastly, he submitted that the evidence is worth reliance. It can not be disputed that Dev Bux guard was seriously injured when he was discharging his official duty and, therefore, the conclusion recorded by the learned lower Court is perfectly justified on the basis of the evidence recorded in the case.

7. I have given my most earnest consideration to the rival submissions made at the bar by both the sides. Initially it was the complaint Ex. P. 2 filed by Lal Chand,

wine contractor which set the excise machinery into motion. PW 4 Tehal Ram, who is son of Lal Chand, has proved that it bears the signatures of his father Lal Chand at place A to B. Lal Chand himself has not been produced. PW 8 Ratan Singh has stated that it was Lal Chand who submitted the report Ex. P. 2. After going through the report, he came to the conclusion that the matter is urgent and, therefore, he prepared a memo under Section 47 of the Excise Act and then he started for Rajyas accompanied not only by Ram Lal and Dev Bux excise guards but also by motbirs Tehal Ram and Mahaveer. Now the correctness of this statement of the testimony of Shri Ratan Singh has been seriously challenged by the learned Counsel for the accused persons. The learned Public Prosecutor has however, vehemently supported it and submitted that it is a very reliable piece of evidence. I have now to decide how far this part of the testimony of PW 8 Ratan Singh can be relied and acted upon.

8. PW 8 Ratan Singh has stated that when he submitted Ex. D. 4 written report at police station Phulia, he submitted with it Ex. P. 2 report of Lal Chand, Ex P. 4 injury report of Dev Bux and a copy of Ex. P. 13(a) which he prepared at Phulia. He does not remember whether he submitted the original report to the police at that time. When this witness was cross-examined by the counsel for the defence, he admitted in his cross-examination that the memo under Section 47 of the Excise Act was prepared by him in the bus when the bus was going from Shahpura to Araniya. The village Araniya is situated at a distance of four miles from Shahpura. Thus he has contradicted himself with his earlier statement made in the examination-in-chief. wherein he has stated that first he prepared the memo and then he started for Rajyas. Now it has to be seen whether this improved version stated by Ratan Singh can also be relied and acted upon. PW 2, Mohanlal guard of the Excise Party has stated that he along with Dev Bux guard travelled with Ratan Singh in the bus from Shahpura to Rajyas. He has admitted in cross-examination that in his presence the Excise Inspector prepared no memo before he took the search. PW 4 Tehal Ram has stated that he was travelling with the Excise Inspector from Shahpura. In his cross-examination he has stated that the Excise Inspector did not prepare any memo between Shahpura to Rajyas till they reached the house of Kundan. These two persons have travelled with Ratan Singh and they have categorically denied that Ratan Singh prepared any memo in the

bus. Ratansingh himself has given a go by to his earlier statement made in examination-in-chief that he prepared the Parcha under Section 47 of the Excise Act before he boarded the bus from Shahpura for Rajyas. The case set up by him in cross-examination is that the Parcha was prepared between Shahpura and Rajyas in the bus, which fact has not been supported either by Dev Bux or by Mohanlal or by Tehalram.

9. He has stated that a copy of this Parcha was submitted at the police station, Phulia along with Ex. D. 4. PW 7 Gopal Singh Head constable, who is the Investigating Officer in this case was re-called and re-examined about Ex. P. 13 and Ex. P. 13(a), after the statement of Ratan Singh was recorded. He has admitted in his cross-examination that in his police diary he has recorded a note that the complainant Ratansingh has submitted along with Ex. D 4, the original report of Lalchand Ex. P. 2 and the injury report of Dev Bux marked Ex. P. 4. He has not mentioned that Ex. P. 13 was submitted with Ex. D. 4 in his police diary. He has further admitted that Ex. P. 13 does not bear his signatures or any note of presentation. He has gone on record to say that usually when any document is produced at the police station, a mention of it is made either in the First Information Report, if it is submitted with the First Information Report or in the police diary but such a mention about Ex. P. 13 does not find place either in the First Information Report or in the police diary. This clearly goes to show that this is an ex post facto document prepared by Ratansingh to cover up the lacuna left by him, otherwise there is no reason why such an important document which formed the very basis of the right to search somebody's house and which affected the liberty of a citizen should have escaped mention by the police officer in his police diary. It is not a case where all other documents were not mentioned but unfortunately, the other two documents which were produced with Ex. D. 4 do find mention in the police diary but this particular document does not. This non-mention abundantly makes it clear that this document was not produced at the time when Ex. D 4 was submitted at police station, Phulia.

10. Even the prosecution evidence as to how many persons started from Shahpura for village Rajyas is also contradictory. PW 8 stated that he was accompanied by Mohan Lal and Dev Bux guards and Tehal Ram and Mahaveer

motbirs. This fact is admitted even by Tehal Ram however, PW 2 Mohan Lal and PW 3 Dev Bux have categorically stated that Mahaveer and Tehal Ram did not accompany them from Shahpura till they reached Rajyas. Mahaveer has stated that he did not accompany the Excise Inspector from Shahpura but he was present at Rajyas it self. Thus the testimony of the prosecution as to who accompanied Ratan Singh from Shahpura is also mutually contradictory.

11. The learned Counsel for the accused persons further argued that Tehal Ram and Mahaveer cannot be taken as motbirs. They are actual complainants. Tehal Ram is son of the complainant Lal Chand and Mahaveer is his servant. If the Excise Inspector and his party wanted to avail of the services of the motbirs then he should have arranged for local motbirs from village Rajyas but this probably did not suit them and, therefore, they only took these two interested persons with them just to implicate the accused persons. Be that as it may, Mahaveer has turned hostile. Tehal Ram, of course, has tried to help the prosecution case in his own way but this much is clear that they cannot be called local motbirs as such.

12. Now, I propose to scrutinize the evidence so far as it relates to the actual incident. It has been admitted by all the five alleged eye-witnesses of the occurrence i.e. PW 2 Mohan Lal, PW 3 Dev Bux, PW 4 Tehal Ram, PW 6 Mahaveer and PW 8 Ratan Singh that from the bus stand of village Rajyas they went to the house of Nanda and Kundan It has been stated by Ratan Singh and Dev Bux that they entered into the Guvadi of Kundan whereas, Tehal Ram has stated that they did not enter the Guvadi but they were standing in the village chowk situated outside the house of Kundan. Ratan Singh and Dev Bux have stated that Mohan Lal accompanied them in side the Guvadi of Kundan where as PW 2 Mohan Lal has stated that he did not stay there rather he was deputed to call Mitthu and so he went to the field of Mitthu and by the time he returned, occurrence has already taken place. According to him no beating took place in his presence. PW 8 Ratan Singh has also stated that when the accused persons took the aggressive posture he came out of the Guvadi along with Mohan Lal and so he too has not seen the occurrence. As against this PW 3 Dev Bux has stated that when beating started, these two persons i.e. Ratan Singh and Mohan Lal were present in the Guvadi of Kundan and after the first blow was dealt to him he fell

unconscious and after that these persons ran away from the place of occurrence. Tehal Ram has a different story to tell. He has stated that they were standing in the village chowk situated outside the house of Kundan and there the Excise Inspector was enquiring from Kundan about manufacture of illicit liquor. At that time, Kundan, who was armed with an arm of a cot, struck a blow on the hand of Dev Bux. Seeing this he immediately ran away from there. Later the Inspector took out rifle controlled the mob by using it. After the mob was controlled he came back and found that Dev Bux was lying there and his left hand was injured. They then lifted Dev Bux from there and took him to Kanechan and then to Phulia. According to him the entire incident took place out side the Guvadi of Kundan in the public lane They also did not go to the Hotel of Sohan Maharaj. As against this Ratan Singh and Mohan Lal have stated that when they came to know about the injuries inflicted to Dev Bux, they tried to search him and when they proceeded towards the bus stand, they found Dev Bux sitting in the shop of Sohan Maharaj and from there they took him to Kanechan and then to Phulia. They do not support Tehal Ram's testimony that the mob was controlled by Ratan Singh and that too by use of his rifle. Thus the entire prosecution evidence as to where the occurrence took place and who actually participated in it and who has witnessed it, is shrouded with great mystery. Two of the eye witnesses i.e. Ratan Singh and Mohan Lal have categorically stated that no beating took place in their presence. Dev Bux has, however, stated that he was beaten in side the Guvadi of Kundan, whereas the other eye-witness Tehal Ram has stated that he was beaten in the public chowk. According to him they did not enter the Guvadi of Kundan at all.

13. As regards identification of the accused persons, Nanda has been identified by all. Kundan has been identified by Ratan Singh and Dev Bux. The other accused persons have not been identified by any body Ratansingh has stated that he was informed about their names by Sobhag Singh but PW 7 Sobhag Singh has not supported the prosecution case at all. No identification of all these accused persons except Nanda, was got conducted by the Investigating Agency out of any of these witnesses. When they did not know these accused persons from before the incident it was necessary on the prosecution to have arranged for a test identification parade so that it could have lended support to their testimony before the court that these were the very persons who were involved in the incident. Dev

Bux became unconscious as soon as he received the first blow. Tehal Ram ran away from the spot as soon as first blow was dealt on the person of Dev Bux and so who inflicted all the other injuries on the person of Dev Bux is not clear from the evidence of the prosecution witnesses because Ratan Singh and Mohan Lal here categorically stated that no beating took place in their presence. In this view of the matter I am at a loss to understand how the learned lower court held that these accused persons other than Kundan or Nanda were involved in this incident. I am, therefore, of the view that the evidence regarding actual incident itself is contradictory and it cannot be relied so far as it relates to the participation of accused Dhanna, Ram Gopal, Rameshwar and Mishri in the incident is concerned.

14. The learned Counsel for the accused appellants next argued that it has been admitted by all the witnesses of the prosecution that initially they went to the police chowki Kanechan and then they went to police station Phulia and from there they went to Shahpura. All the witnesses except Ratan Singh have categorically admitted that on that very evening a report was lodged at police station, Phulia. PW 2 Mohan Lal has stated that when they reached police station, Phulia a report was lodged there at 6.00 p.m. Shri Ratan Singh Excise Inspector himself got the report recorded at the police station at that very time in the Rojnamcha and it was signed by him and Shri Ratan Singh. PW 3 Dev Bux has admitted that they did go to the police station on that very day at about 6 or 7 p.m, but he was unconscious when they reached the police station, and, therefore, he is unable to say on that evening. It is strange that even if he was unconscious he could know that they have gone to the police station. This clearly shows that he was conscious. PW 4 Tehal Ram has admitted in his cross-examination that at about 6 p.m. the Excise Inspector along with Mahaveer reached police station, Phulia. There he lodged a written report before the police and that report was got signed by Mahaveer also. He does not remember whether any accused was named in the report or not but a report was definitely lodged on that very evening of 17-4-74 and this report was made to Gopal Singh Head Constable and after that they proceeded to Shahpura. According to this witness the Excise Inspector remained at Shahpura on the next day also i.e. 18-4-74. He along with the Inspector did not go to Phulia on 18-4-74 but actually they went to Phulia on 19-4-1974. Thus according to him there was no occasion for Ratan Singh to have lodged a report in the police station, Phulia on

18-4-1974. Mahaveer is silent about his accompanying Ratan Singh to Phulia. He is also silent about the fact whether a report was lodged at Police Station, Phulia on that day or on the next day. He does not admit that he signed any report at Police Station, Phulia on 17-4-1974 at 6.00 p.m. as stated by PW 4 Tehal Ram. PW 8 has also admitted that they went first to Kanechan police chowki and then to Puhlia Police Station. This statement is contained in his examination-in-chief. However, when he was cross-examined, he has stated that although he went to Phulia on 17-4-1974 but he did not go to the police station. A question naturally crops up as to why he did not make a report of this incident at police station on 17-4-1974 when he has actually gone to the Police Station as per his own admission made in his examination-in-chief. The learned Counsel for the appellants has vehemently argued that when Ratan Singh went to the Police Station, Phulia on 17-4-1974 in the evening, which he actually did, he should have lodged a report of this incident at the police station. If the injured could be taken on a bicycle to Kanechan and Phulia it clearly establishes the fact that his condition was serious no danger could have occasioned to the life of the injured in absence of immediate medical aid. Two of the prosecution witnesses, i.e., Mohan Lal and Tehal Ram have categorically stated that such a report was lodged which clearly means that the First Information Report actually lodged on 17-4-1974 and which contained the earliest version of the prosecution case seems to have been suppressed. At one stage in the cross-examination even PW 8 Ratan Singh himself has admitted that he lodged a report at Police Station, Phulia on 17-4-1974 at 5 p.m. and he also copied Ex. D. 3 at Phulia on 17-4-1974 at 5 p.m. but in the very next breath he has stated that the report was not lodged on that day but it was lodged on the next day. This retracted admission of PW 8 Ratan Singh also goes to show that some report was actually lodged at police station, Phulia on 17-4-1974, but probably either it did not contain the names of the accused persons or its contents were such that they were going against the case of the prosecution now set up at the trial and, therefore, it was purposely suppressed a report suited the case of the prosecution was got prepared and was purported to have been submitted at the police station, Phulia on 18-4-1974 at 2.30 p.m. It may be mentioned here at the cost of repetition that PW 4 Tehal Ram has categorically stated that PW 8 Ratan Singh did not go to Phulia on 18-4-1974 but he remained at Shahpura for the

whole day. In this view of the matter this document Ex. D 4 itself becomes a suspicious document on which the very case of the prosecution is based. The learned Public Prosecutor has not been able to explain why that particular document which was prepared on 17-4-1974 at 5 or 6 p.m. has been suppressed. This one fact alone is sufficient to make the entire case of the prosecution doubtful.

15. I have already held that Ex. P 13(a) is an ex-post facto document which was prepared after wards to fill up the lacuna. The grounds which prevailed with me to arrive at this conclusion have already been mentioned by me above in the earlier part of this judgment. When the search was made without complying with the provisions of Section 47 of the Excise Act, the search itself was illegal and the inmates or owners of the house, i.e., Nanda and Kundan and their companions had every right to resist that search and to cause grievous injuries to the persons who were playing with their liberty. A search against the provisions of Section 47 is definitely illegal. In this respect reference may be made to K.L. Sughayya v. State of Karnataka : 1979 CriLJ651 . This case related to an illegal search made against the provisions of Section 54 of Mysore Excise Act which are almost similar to the provisions of Section 47 of the Rajasthan Excise Act. In this authority their Lordships of the Supreme Court have been pleased to lay down as under:

Both Sections 53 and 54 contain valuable safeguards for the liberty of the citizen in order to protect them from mis-founded or frivolous prosecution or harassment. In the instant case, the Inspector who had searched the car of the accused had not made any record of any ground on the basis of which he had a reasonable belief that an offence under the Act was being committed before proceeding to search the car.

Their Lordships have further observed as under:

that the provisions of Section 54 of were not at all complied with. Thus, therefore, rendered the entire search without jurisdiction and as a logical corollary, vitiated the conviction under Section 54.

16. In a decision of our own High Court in Birdha v. State it has been held that a forest guard cannot be said to be acting in discharge of his duties when he was trying to seize the cattle belonging to the accused when it has really reached the field belonging to the accused. Such a seizure of the cattle by the accused has been held to be without lawful authority and so the persons had a right of private defence of their property to protect it from seizure and in exercise of that right they were within their limits if they even caused grievous hurt to the forest guard.

17. In the present case search was illegal because no memo under Section 47 of the Excise Act was prepared and, therefore, Kundan and Nanda and their companions had a right of private defence available to them to protect their properties and to resist this illegal search.

18. It has also been held in Babu Singh v. State of Rajasthan 1978 Raj. Cr. Cases 267 that delay in lodging the First Information Report is fatal to the prosecution. Here, it is not only a case of delay in lodging the First Information Report but it appears to be a case of substitution of the First Information Report and suppression of the actual earlier First Information Report.

19. Taking into consideration of all these facts and circumstances of the case I am of the opinion that the learned lower court was not justified in recording conviction against the accused persons in this case. The search itself was not justified as it was illegal in absence of the compliance of Section 47 of the Excise Act and hence it cannot be held that the Excise Inspector was acting in bona fide discharge of his duty. Even the evidence regarding the occurrence is totally contradictory. On the strength of such an ocular evidence it is not possible to fasten the guilt on the accused persons.

20. I, therefore, accept this appeal, set aside the convictions and sentences of the accused appellants Kundan, Dhanna, Nanda, Ram Gopal, Rameshwar and Mishri and acquit them of the offences of which they have been convicted and sentenced by the learned lower court vide its judgment dated 27-1-1978.

21. The accused persons are on bail so they need not surrender to their bail bonds. Their bail bonds are cancelled.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com