

Kailash Vs. State of Rajasthan

Kailash Vs. State of Rajasthan

SooperKanoon Citation : sooperkanoon.com/769954

Court : Rajasthan

Decided On : Dec-05-2005

Reported in : 2006CriLJ1728; RLW2006(2)Raj1259

Judge : H.R. Panwar, J.

Acts : Narcotics Drugs and Psychotropic Substances Act, 1985 - Sections 8, 20, 50, 52, 55, 57, 60 and 63; ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 313 and 374(2)

Appeal No. : S.B. Criminal Appeal No. 1205 of 2003

Appellant : Kailash

Respondent : State of Rajasthan

Advocate for Def. : J.P.S. Choudhary, Public Prosecutor

Advocate for Pet/Ap. : Sandeep Mehta and; Dharmendra Surana, Advs. for; Suresh

Disposition : Appeal allowed

Judgement :

H.R. Panwar, J.

1. These two criminal appeals under Section 374 of the Code of Criminal Procedure, 1973 (for short 'the Code' hereinafter) and Criminal Revision No. 1151/2003 are directed against the judgment and order dated 23.9.2003 passed by Special Judge, N.D.P.S. Cases, Churu (for short 'the Trial Court' hereinafter) in Special Sessions Case No. 01/2003 whereby the Trial Court convicted both the appellants Kailash and Suresh Kumar for the offence under Section 8/20 of the Narcotics Drugs & Psychotropic Substances Act, 1985 (for short 'the N.D.P.S. Act' hereinafter) and sentenced each of them to undergo 10 years rigorous imprisonment with a fine of Rs. 1,00,000/- each, a default of payment of fine to further undergo two years rigorous imprisonment. The Trial Court further directed confiscation of the Maruti Car No. R.J. 18-C-4828 which was registered in the name of revisionist Suresh Kumar. Aggrieved by the judgment and order impugned as also confiscation of the aforesaid Maruti Car, both the appellants have filed the instant two separate criminal appeals and petitioner Suresh Kumar has filed the instant revision petition.

2. Briefly stated the facts of the case are that on 5.2.2003, PW-6 Ranveer Singh, Station House Officer, Ratan Nagar received a secret information telephonically at 6.00 PM that a white coloured Maruti Car bearing No. R.J. 18-C-4828 loaded with Ganja is coming from Fatehpur to Churu side. The said information was reduced to writing vide Ex.P-13. The secret information Ex.P-13 was sent to the Supdt. of Police and Circle Officer, Churu. PW-6 Ranveer Singh SHO Ratan Nagar along with police personnel namely PW-4 Dharmpal Singh H.C., constables PW-7 Virendra Singh, PW-8 Ram-narayan, PW-2 Ranveer Singh and PW-10 Shivbhagvan driver of the Jeep started from the police station and reached Ratan Nagar town, where from, he took two Motbirs PW-1 Kisan Kumar and PW-3 Dilip Singh. The Motbirs were served with notice Ex.P-1 and Ex.P. 7 respectively for obtaining their consent and they consented to be the Motbirs in writing on the aforesaid notices. Thereafter, PW-6 Ranveer Singh along with police party and Motbirs reached Onkar Ashram near Churu-Ramgarh Road, Ratan Nagar and started arranging Nakabandi. At about 7.15 A.M., while Nakabandi, a white coloured Maruti Car bearing No. R.J.18-C-4828 came from Ramgarh side. The Car was got stopped. On being asked, the driver of the said Car disclosed his name as Suresh Kumar S/o Nandlal R/o Surajgarh, the present appellant and

other person who was found sitting by the side of accused appellant Suresh Kumar disclosed his name as Kailash S/o Hariprasad R/o Fatehpur, district Sikar appellant in Cr. Appeal No. 1205/2003. The appellants were given notice purporting to be under Section 50 of the N.D.P.S. Act vide Ex.P-3 and Ex.P-4. They were given option whether they be searched in presence of nearest Magistrate or Gazetted Officer or by concerned S.H.O. They expressed their option and agreed for the search of their own and the Car by the S.H.O. concerned i.e., PW-6 Both the appellants gave consent in writing to be searched by S.H.O. On the Car being checked, it was found carrying 12 bundles of Ganga, each bundles weighing 16 kg. totaling to 194 Kg. and 850 Gram. From each of the bundles, 250 grams of contraband Ganja was taken as sample in plastic bags and the plastic bags of samples were sealed on the spot. The remaining contraband Ganja was also sealed on the spot. Both the appellants were found carrying contraband Ganja without licence or permit. After usual investigation, police filed challan against the appellants for the offence punishable under Section 8/20 of the N.D.P.S. Act.

3. Before the Trial Court the prosecution produced as many as 10 witnesses and tendered in evidence documents Ex.P-1 to Ex.P- 43. Accused appellants made statement under Section 313 of the Code and denied allegation and produced as many as six witnesses in defence as also tendered in evidence documents Ex.D-1 to Ex.D- 6.

4. The Trial Court after hearing the learned Counsel for the parties and on appreciation of the evidence on record, by the judgment and order impugned convicted and sentenced the appellants as notice above. The Trial Court has also ordered confiscation of the aforesaid Maruti Car and for auction the same after expiry of the period of limitation of appeal. Hence, these two appeals and the revision.

5. I have heard learned Counsel for the appellants and public prosecutor for the State. I have carefully gone through the judgment and order impugned as also the record of the Trial Court. I have also scrutinized, scanned and evaluated the evidence on record.

6. It is contended by the learned Counsel for the appellants that the prosecution has failed to establish that the Seizure Officer prepared the seal at the time of seizing the contraband at the place of occurrence as also failed to send the specimen seal to the Forensic Science Laboratory. Learned Counsel contended that not only the specimen seal was not sent to Forensic Science Laboratory but also it was not deposited in the Malkhana. Learned Counsel further contended that the prosecution witnesses themselves specifically admitted in their evidence that at the time of sending the samples of the seized contraband Ganja to the Forensic Science Laboratory for Chemical analysis, no specimen seal was sent along with the samples. Learned Counsel have relied on decisions of Hon'ble Supreme Court in Gurbax Singh v. State of Haryana 2001 Cr.L.R. SC 166 : RLW 2001(1) SC 152 and State of Rajasthan v. Gurmail Singh : 2005 CriLJ1746 and a decision of this Court in Raja @ Gurcharan and Anr. v. State of Rajasthan 2005 (2) Cr.L.R. (Raj.) 1222.

7. Learned Counsel for revisionist Suresh Kumar also contended that the Trial Court confiscated the aforesaid Maruti Car without affording an opportunity of hearing to the owner and therefore, the order of confiscation of the Car is bad in law.

8. Learned Public Prosecutor appearing for the State supported the judgment and order impugned of the Trial Court.

9. I have given my thoughtful consideration to the rival submissions made by the counsel for the parties.

10. PW-1 Kisan Kumar and PW-3 Dilip Kumar Motbirs to recoveries have not supported the prosecution case and turned hostile. PW-2 Ranveer Singh, constable is a witness to the recoveries. PW-4 Dharampal, Head Constable and Incharge Malkhana as well as the witness to the seizure, admitted that along with the article contraband Ganja seized, no seal was deposited by the seizure officer in the Malkhana. He also stated that no specimen seal was prepared and deposited in the Malkhana. The samples were sent to the Forensic Science Laboratory through PW-5 Sultan Singh, however, he stated that along with the samples, no specimen seal was sent to the Forensic Science Laboratory.

Malkhana register Ex.P-9 also does not show that along with the seized contraband and the samples any specimen seal was deposited in the Malkhana. There is no such mention in the Malkhana register that seizure officer along with the contraband seized and samples taken there from, deposited any specimen seal in the Malkhana. In Ex.P-2 recovery memo, it has been mentioned that specimen seal has been affixed on the margin of the Furd itself. Ex.P-29 is said to be the specimen seal. On perusal of the Ex.P-29 it appears that it does not bear the signature of Motbirs PW-1 and PW-3 or the accused appellants. So much so, the police officials who were said to be the witness to the seizure have also not signed on the document Ex.P-29 alleged to be the specimen seal. Learned Counsel for the appellants submit that neither the document Ex.P-29 bears the date when the specimen seal was prepared for any time and therefore, in order to fill up the lacuna in the prosecution case, the specimen seal was prepared subsequent to the sending of the samples to the Forensic Science Laboratory. Even from the statement of prosecution witness it is clear that till the samples were sent to the Forensic Science Laboratory for being chemical analysis, there was no specimen seal, however, the document Ex.P-29 appears to have been subsequently prepared by the seizure officer and therefore, it is not free from shadow of doubt. Ex.P-30 is the letter issued from the office of Supdt. of Police, Churu by which the samples were forwarded to the Forensic Science Laboratory, Jaipur dated 6.2.2003. In the said letter also there is no mention that the samples were sent along with the specimen seal. This shows that till 06th February 2003 the specimen seal did not come in existence and therefore, in view of the missing of link evidence, the entire prosecution case becomes doubtful.

11. The report of Forensic Science Laboratory though placed on record, but has neither been tendered in evidence nor exhibited. However, the learned Trial Court relied on the report of Forensic Science Laboratory and it was also put to the accused appellants in the statements under Section 313 of the Code. In the report of Forensic Science Laboratory, it has been printed that enclosed within separate cloth cover which was properly sealed bearing impressions which tallied with the specimen seal impression forwarded. The seals were intact. This shows that admittedly when it is the case of the prosecution that the prosecution never forwarded the specimen seal and if the specimen seal has never been forwarded

to the Forensic Science Laboratory, then how the Assistant Director (Chem.), State Forensic Science Laboratory, Rajas-than, Jaipur compared the seal appearing on the samples, this also creates serious doubt in the prosecution case and also shows that the report of Forensic Science Laboratory is contrary to the prosecution case.

12. Apart from witness PW-4 Dharampal, the witness PW-5 Sultan Singh who alleged to have carried the samples to the Forensic Science Laboratory has categorically stated that on 7.2.2003 at about 5 A.M. PW-4 Dharampal Incharge Malkhana handed over 12 packets to him in sealed condition for depositing in Forensic Science Laboratory. He categorically stated that he was given only the packets and along with the packets nothing more was given to him. This also clearly shows that along with the 12 packets, no specimen seal was handed over to PW-5 Sultan Singh.

13. PW-6 Ranveer Singh also admitted that in Malkhana Register Ex.P-19 (sic Ex.P-9) there is no entry regarding deposit of specimen seal. He further admitted that there is no such entry that along with the samples sent to Forensic Science Laboratory, any specimen seal was also sent. He is the person who got the forwarding letter Ex.P-30 prepared for taking the samples to the Forensic Science Laboratory. He categorically admitted that at the time of getting the forwarding letter prepared from the office of Supdt. of Police, no specimen seal was sent even to the office of Supdt. of Police. On perusal of the record it appears that there is no forwarding letter from the S.H.O. P.S. Ratan Nagar addressed to Supdt. of Police, Churu, by which the samples were sent to the office of Supdt. of Police, Churu for onwards transmission to Forensic Science Laboratory by a forwarding letter. PW-6 Ranveer Singh categorically admitted that in Ex.P-30 forwarding letter to Forensic Science Laboratory, there is no mention of specimen seal though there are as many as six columns, but so far as the column regarding specimen seal is concerned, it has not been tick-marked and only Panchnama column No. 4 has been ticked, that shows that till the samples were taken to Forensic Science Laboratory, there was no specimen seal in existence.

14. In *Gurbax Singh v. State of Haryana* (supra), Hon'ble Supreme Court observed as under:--

It is true that provisions of Sections 52 & 57 are directory. Violation of these provisions would not ipso facto violate the trial or conviction. However, I.O. cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. In the present case, I.O. has admitted that the seal which was affixed on the muddamal article was handed over to the witness PW-1 and was kept with him for 10 days. He has also admitted that the muddamal parcels were not sealed by the officer in charge of the police station as required Under Section 55 of the NDPS Act. The prosecution has not led any evidence whether the Chemical Analyser received the sample with proper intact seals. It creates a doubt whether the same sample was sent to the Chemical Analyser. Further, it is apparent that the I.O. has not followed the procedure prescribed Under Section 57 of the NDPS Act of making full report of all particulars of arrest and seizure to his immediate superior officer. The conduct of panch witness is unusual as he offered himself to be a witness for search and seizure despite being not asked by the I.O., particularly when he did not know that the substance was poppy husk, but came to know about it only after being informed by the police. Further, it is the say of the Panch witness that Muddamal seal used by the PSI as a wooden seal. As against this, it is the say of PW-2 SI/IO that it was a brass seal. On the basis of the aforesaid evidence and faulty investigation by the prosecution, in our view, it would not be safe to convict the appellant for a serious offence of possessing poppy-husk.

15. In *State of Rajasthan v. Gurmail Singh* (supra), Hon'ble Supreme Court held that the link evidence adduced by the prosecution was not at all satisfactory. In the first instance, though the seized articles are said to have been kept in the malkhana on 20th May, 1995, the malkhana register was not produced to prove that it was so kept in the malkhana till it was taken over by PW-6 on June 5, 1995. It was further noticed that no sample of the seal was sent along with the sample to Excise Laboratory, Jodhpur for the purpose of comparing with the seal appearing on the sample bottles. Therefore, there is no evidence to prove satisfactorily that the seals found were in fact the same seals as were put on the sample bottles

immediately after seizure of the contraband. On these loopholes in the prosecution case, the case resulted in acquittal.

16. In *Raja @ Gurcharan and Anr. v. State* (supra), this Court held that there was no evidence of preparing specimen seal and sending to FSL. There was also no evidence that the seized material were kept intact and accused therein was acquitted on the ground of missing link evidence. While considering the case of owner of the vehicle alleged to have been found transporting contraband poppy-husk for confiscation of the vehicle, this Court held that since the owner of the vehicle was not heard before passing order of confiscation, therefore, the order is bad in law and while setting aside the order confiscating the vehicle, the matter was remanded back to the Trial Court with a direction to dispose it of after providing opportunity of hearing to the parties.

17. From the perusal of the record, it appears that no controlled samples were taken and the samples which were sent to the Forensic Science Laboratory had never been produced in the Court. There is no evidence that any controlled samples were taken and the samples which were sent to the Forensic Science Laboratory though returned by the Forensic Science Laboratory but have been produced in the Court and therefore, the prosecution has failed to establish that the samples taken are of the same articles which were seized by the seizure officer.

18. From the discussion made herein above, in my view, the prosecution has failed to prove the case against both the appellants beyond reasonable doubt and therefore, the appellants are entitled for the benefit of doubt. In the circumstances therefore, the judgment and order impugned convicting and sentencing the appellants cannot be sustained and are liable to be set aside.

19. So far as the order of confiscation of the Maruti Car in question is concerned, there is no evidence that before ordering confiscation, the owner of the Car was ever served with notice or was afforded any opportunity of hearing. It also appears that the procedure provided under Section 60 and 63 of the N.D.P.S, Act have not been followed by the Trial Court before ordering confiscation of the Maruti Car in question and therefore, the order confiscating the Car also deserves to be set

aside.

20. Consequently, the Appeals No. 1205/03 and 1163/03 filed by appellants Kailash and Suresh Kumar are allowed. The judgment and order impugned dated 23.9.2003 passed by Special Judge, NDPS Cases, Churu in Special Sessions Case No. 01/2003 convicting and sentencing accused-appellants Kailash S/o Hariprasad and Suresh Kumar S/o Nandlal under Section 8/20 of the Narcotics Drugs & Psychotropic Substances Act, 1985 is set aside and they are acquitted of the charge. The appellants are in jail. They be set at liberty forthwith, if not required in any other case. The revision petition filed by petitioner Suresh Kumar is allowed. The order impugned confiscating the Maruti Car is hereby set aside and the matter is remanded to the Trial Court to decide the matter afresh after affording an opportunity of hearing to the petitioner and after following the due procedure of law as envisaged under Sections 60 and 63 of the NDPS Act. Stay application in revision stands disposed of.

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