

Kalua Alias Laxman Vs. the State of Rajasthan

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Court : Rajasthan

Decided On : Jun-22-2001

Reported in : 2002(1)WLN149

Judge : Khem Chand Sharma, J.

Appeal No. : S.B. Criminal Appeal No. 291 of 2000

Appellant : Kalua Alias Laxman

Respondent : The State of Rajasthan

Disposition : Appeal allowed

Judgement :

Khem Chand Sharma, J.

1. This criminal appeal is directed against the judgment and order dated 1.6.2000 passed by the Special Judge, NDPS Act Cases (Sessions Judge, Bharatpur, whereby he has convicted the accused appellant for offence Under Section 8/21 of Narcotic Drugs and Psychotropic Substances Act (hereinafter to be referred as 'the Act') and sentenced him to 10 years rigorous imprisonment with a fine of Rs. 1 lac, in default thereof, to further undergo one year's rigorous imprisonment.

2. Briefly stated that facts of this case are that PW. 8 Rameshwar Prasad received an information on 16.9.1995 at 12.15 P.M. from informer that one person is in

search of selling smack in Chhapar Mohala. Having received the information, he recorded the same in the 'Rojnamcha' and informed the officers superior on telephone and also sent the information in writing. Thereafter, Shri Rameshwar Prasad, SHO Kumher alongwith the witnesses and police party rushed to the disclosed place. The SHO stopped a person and asked him name and address, who disclosed his identity as Kalua S/o Shri Prabhu Dayal Vaishya R/o Januthar, Deeg (Bharatpur). The SHO informed the person about suspicion of his being in possession of smack and therefore, he informed the person of his right to have his search conducted either in presence a Magistrate or a Gazetted Officer vide Ex.P. 13. Thereupon, that person gave his consent in writing on Ex.P. 13 itself for his, search by the SHO himself. On search, the SHO found a small packet (pudiya) in the left pocket of his shirt. On opening the packet, it was found to have contained smack. The accused Kalua was not having any licence. On getting the smack weighed, it was found to be 430 ml. grams vide Ex.P. 5. The SHO prepared the seizure memo Ex.P. 3, arrested the accused vide arrest memo Ex.P. 2.

3. On completion of aforesaid formalities, a case was registered vide FIR No. 315/95 for offence Under Section 8/21 of the Act. During investigation, the police recorded the statements of witnesses Under Section 161 Cr.P.C. and sent the smack to the FSL for its chemical examination. The receipt of FSL is Ex.P. 8. The FSL report Ex.P. 9 shows that the packet marked 'A' gave positive tests for the presence of Diacetylmorphine (heroin). After completion of investigation, the police submitted a charge sheet against the accused in the Court Special Judge, NDPS Act Cases, Bharatpur.

4. The learned trial Court after hearing arguments of Counsel for the parties and on the basis of material on record, framed charge against the accused Under Section 8/21 of the Act. The charge was read over to him to the accused, to which he denied and claimed to be tried.

5. During trial, the prosecution in support of its case examined as many as 9 witnesses and exhibited 18 documents. The accused was examined Under Section 313 Cr.P.C. to enable, him to personally explain the circumstances existing against him. The accused also examined DW. 1 Murari Lal in his defence.

6. The trial judge found the prosecution case established against the appellant and accordingly convicted and sentenced him as aforesaid. Hence, the present appeal.
7. I have heard learned Counsel for the accused appellant and the learned Public Prosecutor and perused the impugned judgment and the record of the case.
8. In assailing the conviction, learned Counsel for the accused appellant has confined his arguments mainly to the extent of non-compliance of the requirement of Section 42 of the NDPS Act. He has vehemently submitted that there was complete non-compliance of the requirements of Sub-section (2) of Section 42 of the Act, inasmuch as the information Ex. P. 11 recorded in 'Rojnamcha' by PW. 8 Rameshwar Prasad was not sent to his immediate official superior. He further submitted that the information sent to the Supdt. of Police vide Ex.P. 18 is not at all a copy of the information Ex.P. 11 received and recorded in the 'Rojnamcha'. Referring to the statement of PW. 8 Rameshwar Prasad', learned Counsel argued that Rameshwar Prasad himself has deposed in his statement that he sent a copy of the information Ex.P. 18 to the Supdt. of Police. According to the learned counsel, neither Ex.P. 18 contains the time to show as when it was transmitted nor the despatch register has been produced. Even the person who handed over copy of information Ex.P. 18 in the office of Supdt. of Police has not been produced in evidence. In these circumstances, the learned Counsel submitted that there was complete non-compliance of the mandatory provisions of Section 42(2) of the Act and, therefore, conviction of the appellant is vitiated for non-compliance of Section 42(2) of the Act and he deserves to be acquitted only on this ground.
9. On the other hand, learned Public Prosecutor has supported the findings arrived at by the learned trial Judge on the point of compliance of Section 42(2) of the Act. She has submitted that it is not at all necessary to establish beyond all reasonable doubt every fact concerning the procedure.
10. To decide the controversy, it would be profitable to have a look at the relevant provisions of the Act. Sub-section (2) of Section 42 of the Act gives mandate to the authorised officer after writing down the information Under Sub-section (1) of Section 42 to forthwith sent a copy thereof to his immediate official superior. To decide the controversy as regards the compliance of Sub-section (2) of Section 42

of the Act, I have gone through the evidence on record. The material and important witness in this regard is the SHO Rameshwar Prasad (PW. 8). This witness has stated in his examination in chief that he had recorded the information in Rojnamcha, the entry of which is at Serial No. 647 dated 16.9.1995 and a certificate copy of which is Ex.P. 11. He has further deposed that he had immediately sent the information to the Supdt.' of Police which is Ex.P. 18 and is a carbon copy bearing his signatures from A to B. On seeing the record, I find that Ex.P. 18, is not at all a carbon copy of the information recorded by the SHO in the Rojnamcha (Ex. P. 11). From a perusal of record, it is not clear as to how and through whom the SHO sent the information to the Supdt, of Police, nor there is any receipt to show that the information has been received in the office of Supdt. of Police. That apart, the prosecution has not only failed to produce the despatch register, but has not produced any evidence to show that a copy of the information received and recorded by him was at all sent to the Supdt. of Police. These discrepancies in the prosecution case are sufficient to infer that there was failure on the part of the prosecution to comply with the requirements of Sub-section (2) of Section 42 of the Act. Thus, it is difficult to sustain the conviction and sentence of the appellant. I find support from the following observations of their lordships of the Supreme Court in State of Punjab v. Balbir Singh : 1994 CriLJ3702 ;

Under Section 42(2) such empowered officer who taken down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory.

11. There is yet another serious infirmity in the prosecution case as to the quantity of contraband item, which creates doubt on the genesis of the prosecution case. A statutory duty is cast upon the prosecution to establish beyond doubt that the sample or the recovered contraband item remained intact and the seals put at the time of seizure were not disturbed throughout from the stage of recovery to the stage of chemical examination.

12. In the case in hand, according to the prosecution, the smack weighing 430 mgs. in a small packet (Pudiya) was recovered from the pocket of shirt of the accused. PW. 8 Rameshwar Prasad got the recovered contraband weighed from one Omprakash PW. 3 Ex.P. 5 is the receipt of weight, which shows that Omprakash weighed the packet (Pudiya) which was weighing 430 mgs. PW. 3 Omprakash in his examination in chief has deposed that Prabhu Dayal got grey coloured powder weighed, which was 450 mgs. PW. 4 Bhagwat Dayal at one place states that smack was weighed alongwith Pudiya and thereafter, only smack was weighed PW. 8 Rameshwar Prasad has stated that he directed Bhagwat Dayal, HC to get the smack weighed, thereupon, he called Omprakash, goldsmith who weighed the Pudiya containing smack, the net weight of which came to 430 mgs. He further states that the net weight of the smack was 430 mgs.

13. Thus, from the discussion of the evidence as aforesaid, it cannot be concluded as to what was the exact weight. I felt that the quantity of the recovered smack was too meagre that it was not at all possible to have it weighed without packet.

14. Now it has to be found out whether the smack recovered remained intact right from the time of its recovery till it reached the FSL for chemical examination and that there was no tampering with the seal and sample. The recovery of smack was made on 16.9.1995 and according to the prosecution the quantity was 430 mgs. PW. 5 Paras Ram, Constable of Police Station, Kumher has stated that on 25.9.1995 at 7.30 PM he left with a sealed packet, a letter of the Supdt. of Police and 4-5 other papers for Jaipur for the purposes of getting the same deposited in the Office of Director, Forensic Science Laboratory, Jaipur, He deposited the same and got receipt Ex.P. 8, which he handed over to the Incharge of Malkhana, Police Station, Kumher. In cross-examination he stated that he does not remember that the letter of Supdt. of Police received by him on 25.9.1995 was written on which date. He did not gave any receipt as against the packet and the letter. He further states that it is wrong to say that he received the letter and the packet on 16.9.1995. He stated that he stayed at Jaipur from 26.9.1995 to 29.9.1995 for government work. PW. 6 Mohan Lal has stated that the SHO, Kumher had sent the goods relating to case No. 315/1995 for offence Under Section 8/21 of the Act to him on 21.9.1995 for chemical examination in the Office of Director, Forensic

Science Laboratory, Jaipur. He then stated that on the basis of the report of SHO he had sent the goods in a sealed packet alongwith the Constable on that very day i.e. 21.9.1995, Ex.P. 18 is the letter dated 21.3.1995 of the Supdt, of Police, a perusal of which shows that it contains the signature of PW. 6 Mohan Lal, Reader. PW-8 Rameshwar Prasad has identified the signature of PW-6 Mohan Lal on the letter Ex.P. 18. However, witness Mohan Lal has denied his signature on the letter Ex.P. 18.

15. From the above discussion, it appears to me that Shri Bhagwat Dayal, Head Constable, Incharge, of Malkhana handed over the sealed packet of smack marked 'A' to Paras Ram Constable, P.W. 5. It also appears that PW-8 Rameshwar Prasad had sent the goods on 21.9.1995 for getting the same deposited in the FSL and the same was sent to the FSL alongwith PW-5 Paras Ram, Constable on that very day. The prosecution has not been able to explain as to where the sealed packet of smack marked 'A' remained for five days till the same was delivered in the office of Director, Forensic Science Laboratory, Jaipur on 26.9.1995.

16. Even if it is believed to be true, for the sake of argument, that the packet 'A' remained intact and in the same condition in which it was handed over by the Incharge of Malkhana on 21.9.1995, still it can safely be inferred that the possibility of tampering with the seal and sample cannot be ruled out for simple reason that the quantity of smack contained in a sealed packet marked 'A' does not tally with the quantity when it was weighted at the FSL. As per the prosecution case the quantity of recovered smack was 430 mgs., whereas, according to the FSL report the packed 'A' delivered for chemical examination contained 0.704 gms. along with the piece of paper. These circumstances are sufficient to create serious doubt on the truthfulness of the prosecution story, entitling the accused appellant to get benefit of doubt.

17. Resultantly, the appeal stands allowed. The judgment dated 1.6.2000 is set aside and the accused appellant is acquitted from the charge Under Section 8/21 of the NDPS Act, 1985. The accused appellant is in custody, he shall be released forthwith, if not required in any other case. The record of the case be sent

forthwith.

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