

Rajan Vs. State of Kerala

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Court : Kerala

Decided On : Jul-26-2013

Judge : Honourable Mr.Justice S.S.Satheesachandran

Appellant : Rajan

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALAAT ERNAKULAM PRESENT: THE HONOURABLE MR. JUSTICE B.KEMAL PASHA FRIDAY,THE 26TH DAY OF JULY 2013 4TH SRAVANA, 1935 CRL.A.No. 166 of 2004 (B) ----- AGAINST THE JUDGMENT IN SC 381/2001 of ADDL.SESSIONS COURT (ADHOC)-II, THODUPUZHA DATED 01 01-2004 APPELLANT/ACCUSED: ----- RAJAN S/O.PAPPU THOTTATHIKKUDI VEEDU KOZHITHOLU KARA, KARUNAPURAM VILLAGE UDUMBANCHOLA TALUK. BY ADV. SRI.GRASHIOUS KURIAKOSE RESPONDENT/COMPLAINANT: ----- STATEOF KERALA REP.BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA ERNAKULAM. BY PUBLIC PROSECUTOR SRI.SREEJITH V.S. THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26-07-2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: [CR] B.KEMAL PASHA, J.

..... Crl. Appeal No.166 of 2004 E
..... Dated this the 26th day of July,

2013

JUDGMENT

~ ~ ~ ~ ~ Is it not a reality that the accused persons involved in Abkari cases are being dealt with harshly when compared to most of the accused persons involved in offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act'), even when it is permissible to consume liquor containing Ethyl alcohol, whereas, consumption of various contraband under the NDPS Act is totally prohibited? Is it not merely aiming at the collection of revenue rather than aiming at the protection of the health and social security of the citizens? Crl.A.166/2004 :

2. :

2. Accused in S.C.No.381/2001 of the Additional Sessions Court (Adhoc-II), Thodupuzha, who stands convicted under Section 55(a) of the Abkari Act and sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of 1 lakh, in default, to undergo simple imprisonment for two more months, has come up in appeal.

3. The prosecution case is that, on 30.12.1999 at 3.30 p.m., while PW3, Excise Inspector of Udumbanchola, and party were on patrol duty, they could see the appellant coming with a can containing something. He was intercepted and the can was examined. On examination, the can was found containing 2= litres of arrack. A sample was drawn and the appellant was placed under arrest. The contraband was seized through Ext.P1 mahazar. PW3 registered C.R.No.63/99 of Udumbanchola Excise Range through Ext.P6 occurrence report. On the same day, the accused was produced before the learned Magistrate along Crl.A.166/2004 :

3. : with Ext.P1 mahazar, Ext.P4 arrest memo, Ext.P5 arrest notice and Ext.P6 occurrence report. He conducted the investigation and filed the final report on obtaining Ext.P9 certificate of chemical analysis.

4. On the side of the prosecution, PWs 1 to 4 were examined and Exts.P1 to P10 were marked. MO1 was identified. No defence evidence was adduced. The court below found the appellant guilty of the offence punishable under Section 55(a) of the Abkari Act, convicted him thereunder and sentenced him as aforesaid.

5. Heard the learned senior counsel appearing for the appellant and the learned Public Prosecutor. The learned senior counsel for the appellant has mainly argued that the offence under Section 55(a) of the Abkari Act, being a sessions offence, requires stringent proof, that there was inordinate delay in the production of the sample and the contraband before court, that the contraband should have been produced before court with a requisition for drawing Crl.A.166/2004 :

4. : the sample and for forwarding it to the laboratory for chemical analysis and that, there is no independent corroboration of the evidence of PW3 so as to sustain a conviction. In the light of the aforesaid argument, the learned senior counsel for the appellant has guided me through the evidence of PWs 3 and 4.

6. Regarding the first point, it is true that the punishment being a harsher one in an offence like the present one, it requires stringent proof; but through precedents, the stringency has been watered down considerably. Usually, in all the abkari cases, it may not be possible to obtain independent witnesses. If at all some independent witnesses are cited, usually, they used to turn hostile to the prosecution, when the matter comes up for evidence in trial. In the case of the NDPS Act, as rightly pointed out by the learned senior counsel for the appellant, there are stringent provisions for avoiding manipulations at the time of search, seizure, etc. There is added safeguard Crl.A.166/2004 :

5. : of Section 50 in the NDPS Act, unlike in the case of Abkari Act. Apart from that, as rightly pointed out by the learned senior counsel for the appellant, even in a case under the NDPS Act, the offences are graded as one relating to small quantity, one relating to intermediate quantity and the one relating to commercial quantity, based on the quantity of the contraband involved. It has been pointed out that in the case of Ganja, which is cannabis, a quantity above 1Kg. up to 20 Kg. has to be treated as intermediate quantity. In such case, the offence will be punishable with imprisonment for a term which may extend to 10 years and with

fine which may extend to 1 lakh; but in the case of Sections 8(2), 55(a), and 58 of the Abkari Act, the offence will be punishable with imprisonment for a term which may extend to 10 years and with fine which shall not be less than 1 lakh. Further, in the cases under the NDPS Act, if the quantity of Ganja is less than 1 Kg., it comes under the category of small quantity and in such case, it is punishable with imprisonment which Crl.A.166/2004 :

6. : may extend to six months or with fine which may extend to 10,000/- or with both and in such case, the offence is triable by a Judicial Magistrate of First Class.

7. It has to be noted that arrack is presently prohibited and the manufacture, sale, possession, transit or transport of arrack will be an offence under Sections 8(1) and (2) or 55(a) of the Abkari Act. Similarly, if any liquor containing Ethyl Alcohol is manufactured, transported, transited or possessed, it will squarely fall within the offence under Section 55(a) of the Abkari Act. In all these cases, there is no classification as to the small quantity, intermediate quantity or commercial quantity. Even a drop of arrack is possessed, it will constitute either an offence under Section 8(1) or 55(a) or 58 of the Abkari Act. The learned senior counsel for the appellant has pointed out that the intoxication by Ganja, which is about 1 Kg., which comes within the purview of small quantity, may be more than the intoxication, which thousands of litres of Alcohol can Crl.A.166/2004 :

7. : produce. Even in that case, unfortunately, there is no classification based on the quantity as far as the contraband coming under the abkari offences are concerned. It has to be noted that the narcotic drugs are prohibited items and that cannot be consumed. At the same time, a person can possess 3 litres of IMFL for his own consumption. It is often being lamented that such disparity is deliberate, solely aiming at the protection and collection of revenue, rather than aiming at the protection of the health and social security of the citizens.

8. When such stringent punishments are there, it is high time for the Legislature to think that there should be proper amendment in the Abkari Act by incorporating necessary classification based on the quantity of the contraband involved; if not, it will be a disparity when comparing it with the contraband involved in the NDPS Act. At the same time, this Court has no power to legislate and, therefore, there is

no power to classify the offence based on Crl.A.166/2004 :

8. : the quantity of the contraband involved in an abkari offence. May be by taking note of that, the Apex Court has, in the question of sentence relating to comparatively small quantity of arrack, in Sasikumar and another v. State of Kerala [2012 KHC 471.(SC)], it was held in paragraph 11 as follows:- "We would like to further observe that from the facts of the case it is evident that the appellants and the other accused in this case are not the real men behind the nefarious trade of illicit intoxicants in the State. From the quantity seized from the possession of the accused and the manner in which it was being carried, it is evident that the three accused were only small time operators in the illicit trade of arrack and though visible, they constitute the weakest link in the chain of illicit trade in arrack. In those circumstances, we think a further reduction of the sentence would be quite in order. We, accordingly, reduce the sentence of imprisonment from 18 months, as awarded by the High Court, to one year and further reduce Crl.A.166/2004 :

9. : the sentence in default of payment of fine from six months to fifteen days". It was held in paragraph 13 as follows:- "Before parting with the record of the case, we would like to point out that S.8(2) of the Abkari Act does not fix any upper limit for the fine but lays down that the fine shall not be less than 1,00,000/-. Since the minimum amount of fine prescribed by the law is kept so high, the courts naturally give the default sentence of imprisonment for a substantially longer period. As noted above, the trial court has given the default sentence of one year which was reduced by the High Court to six months. We may note that in cases where poor people like the appellants who may only be the carrier of the arrack or who may be trying to eke out a living from the illegal trade are caught committing the offence, they are hardly in position to pay the fine of 1,00,000/- and for them the default sentence becomes an additional period of incarceration. In a way, fixing the minimum fine at such a high amount, regardless of the countless possible variables in the commission Crl.A.166/2004 :

10. : of the offence under S.8(1), leads to discrimination in favour of those convicts who have sufficient means to pay the fine and, thus, avoid any default

imprisonment and the small fines for whom the default sentence would invariably mean an additional sentence of imprisonment. To our mind, it is desirable to leave the Court free in exercise of judicial discretion in the matter of imposition of fine." Presently, the Apex Court has given wide discretion to the courts when dealing with abkari offences in such matters, in the question of default sentence.

9. Regarding the next point, it has to be noted that it was PW3, who detected the offence involved in this case. According to him, it was during transit by the appellant, a quantity of 2= litres of arrack was seized. According to PW3, on 30.12.1999 at 3.30 p.m., while he, along with PW4 and other excise men, was on patrol duty, they could see the appellant coming with MO1 can, through the road. The inspection of the can revealed that it contained 2= litres of CrI.A.166/2004 :

11. : arrack. The contraband was seized through Ext.P1 mahazar and a sample of 180 ml. was drawn. On the sample bottle as well as MO1 can, labels containing his signature and the signature of the appellant were affixed. He placed him under arrest through Ext.P4 arrest memo. Ext.P5 is the arrest notice. With the appellant and the material objects, he went to the excise office and registered C.R.No.63/99 through Ext.P6 occurrence report. On the same day, he produced the accused before court. Even though the documents, including the occurrence report, were produced before court along with the accused on the same day, he produced the contraband and the sample before court on 18.01.2000 only. According to PW3, he was keeping it in his safe custody at the office.

10. PW3 filed Ext.P8 forwarding note and Ext.P7 property list. Sample impressions were affixed in the forwarding note as well as the property list. Ext.P9 is the certificate of chemical analysis, which shows that the CrI.A.166/2004 :

12. : sample contained 31.98% by volume of Ethyl Alcohol.

11. The learned senior counsel for the appellant has pointed out that there was no proper explanation from the part of PW3 as to why the sample and the contraband were being detained by him till 18.01.2000. At the same time, it has to be noted that the occurrence report, Ext.P1 mahazar, the arrest memo and the arrest notice, which contained all the details regarding the seizure, were produced on the

very same day itself before the learned Magistrate. That is evident from the initials of the learned Magistrate in those documents. The explanation offered by PW3 is that, as it was Christmas season, due to the pressure of work during those days, he could not produce the sample and the contraband on the same day. When the occurrence report along with the seizure mahazar and other documents were produced on the very same day along with the accused, there is nothing to suspect that the contraband and the sample were detained by PW3 unnecessarily with a view to CrI.A.166/2004 :

13. : manipulating, or tampering with it.

12. The learned Public Prosecutor has invited my attention to the decision in Ravi Vs. State of Kerala [2011 (3) KLT 353] rendered by a Division Bench of this Court, wherein it was held that it is not necessary that the article seized under Section 34 of the Abkari Act should be produced before the Magistrate's court "forthwith", whereas, it would be sufficient if the records relating to the seizure were produced "forthwith" before the learned Magistrate. It was also held that wherever it is practicable, the contraband should also be produced along with the records itself and in case of delay in the production of the contraband, there should be explanation for the delay. Even though any details have not been furnished, PW3 has explained that it was due to pressure of work being the Christmas season that there occurred the said delay in the production of the contraband and the sample. The said explanation seems to CrI.A.166/2004 :

14. : be acceptable.

13. Regarding the corroboration of the evidence of PW3, it has to be noted that, as usual in an abkari case, the two independent occurrence witnesses cited by the prosecution as PWs 1 and 2 turned hostile to the prosecution, even though they have admitted their signatures in Ext.P1 seizure mahazar. PW4, who is the Excise Guard, who had accompanied PW3 during the seizure, has corroborated the evidence of PW3 in detail, in all material particulars. When the accused, the documents relating to the seizure and the occurrence report were produced before the learned Magistrate on the same day itself, there is absolutely nothing to suspect the veracity of the evidence of PW3, which stands fully corroborated by

the evidence of PW4 in all material particulars.

14. The next point argued by the learned senior counsel for the appellant is that, the contraband as such should have been produced before the court from where the Crl.A.166/2004 :

15. : samples could be drawn by the court and could have been sent for chemical analysis. It seems that there is no provision as such enabling the court to draw samples in a case like this. It will not be a healthy practice to leave it to the ministerial staff of the court to draw samples from such contraband and forward it for chemical analysis. In such case also, it is easy to allege manipulations on their part. It should be feasible always to draw the sample in the presence of the accused as was done in the present case. In the present case, a sample was drawn in the presence of the appellant and the sample was produced before court along with the property list and the forwarding note. Ext.P9 certificate of chemical analysis rules out any manipulations or tampering with, of the sample. It has been clearly stated therein that the seal on the packet was in tact and found tallying with the sample seal provided. Matters being so, any manipulation or tampering with the sample can clearly be ruled out. From the discussions made above, it can be Crl.A.166/2004 :

16. : concluded that there is absolutely nothing to interfere with the conviction passed by the court below.

15. At the same time, as pointed out by the learned senior counsel for the appellant, the quantity involved, the circumstances in which the appellant is placed, etc. are matters to be considered while imposing sentence. When considering the quantity and the facts and circumstances of this case, I am satisfied that the sentence imposed by the court below is excessive. I am of the view that a sentence of simple imprisonment for three months and to pay fine of 1 lakh, in default, to undergo simple imprisonment for one more month will meet the ends of justice in this case. In the result, this Criminal Appeal is allowed in part by maintaining the conviction and modifying the sentence as follows:- The appellant shall undergo simple imprisonment for three months and to pay fine of 1 lakh, in default, to undergo simple imprisonment for one more month. Of Crl.A.166/2004 :

17. : course, the appellant is entitled to set off, of the period, if any, undergone by him in custody in connection with the investigation, inquiry and trial of this case, under section 428 Cr.P.C. Sd/- (B.KEMAL PASHA, JUDGE) aks/26/07 // True Copy // PA to Judge

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