

Appu Vs. State of Kerala

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Court : Kerala

Decided On : Oct-23-2013

Judge : Honourable Mr.Justice V.K.Mohanan

Appellant : Appu

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE V.K.MOHANAN WEDNESDAY, THE 23D DAY OF OCTOBER 2013 1ST KARTHIKA, 1935 CRL.A.No. 1258 of 2005 (F) ----- AGAINST THE

ORDER

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JUDGMENT

IN SC.2037/2004 OF THE ADDL.SESIONS JUDGE, FAST TRACK (ADHOC) No.IV, THIRUVANANTHAPURAM, DATED 21/07/2005 APPELLANTS: ACCUSED : ----- 1.S/O.MADHAVAN, YEARS, APPU, AGED 51 PUTHUVAL PUTHEN VEEDU, TC. 42/726, MUTTATHARA, SREEVARAHAM WARD, THIRUVANANTHAPURAM. 2.S/O.PONNAPPAN, MURUKAN @ KUTTAPPAN, AGED 34 YEARS, PUTHUVAL PUTHEN VEEDU, TC.42/734, SREE VARAHAM WARD, MUTTATHARA, THIRUVANANTHAPURAM. BY ADV. SRI.G.SUDHEER

KARAKONAM RESPONDENT: COMPLAINANT : ----- STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY PUBLIC PROSECUTOR SRI.N.SURESH THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 23/10-2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: V.K.MOHANAN, J.

----- Crl.A.No.1258 of 2005 -----

Dated this the 23rd day of October, 2013

JUDGMENT

On the allegation that on 11/12/1998 at about 6.30 p.m. the accused found conducting sale of Indian Made Foreign Liquor they were arrested and seized 5 litres 625 ml. of foreign liquor, as the accused two in numbers committed the offence punishable under Section 55(a) and 58 of the Abkari Act. The trial court by the impugned judgment dated 21/7/2005 in S.C.No.2037 of 2004 rejected the prosecution case that the accused have committed the offence under Section 55(a) of the Abkari Act, but accepted the prosecution allegation against the accused that they committed the offence under Section 58 of the Abkari Act and accordingly they are sentenced. Challenging the above finding and order of conviction and sentence the accused in the above Sessions Case preferred the present appeal.

2. On the appearance of the accused the court below framed a formal charge against the accused for the offences Crl.A.No.1258 of 2005 :-2-: punishable under Sections 55(a) & 58 of the Kerala Abkari Act and when the said charge read over and explained to them they denied the same and pleaded not guilty. Thereafter the prosecution examined PWs.1 to 6 and produced Exts.P1 to P5 documents and Mos.1 to 8 series as material objects. The trial court finally found that, the prosecution would clearly establish that the accused were found in conscious possession of 5 ltrs. 625 ml. of illicit liquor for sale and hence the prosecution has succeeded in establishing the offence under Section 58 of the Kerala Abkari Act and the possession of illicit liquor is not during the course of the activities like import, export and transport as contemplated under Section 55 of the Kerala Abkari Act and hence found that the prosecution has failed to prove the

ingredients of Section 55(a) of the Abkari Act. Consequently, the learned Judge found that the accused are guilty of the offence under Section 58 of the Abkari Act and not found guilty of the offence under Section 55(a) of the Abkari Act. Accordingly, while convicting the appellants for the offence under Section 58 of the Abkari Act, they are acquitted Crl.A.No.1258 of 2005 :-3-: for the offence under Section 55(a) of the Abkari Act. On such conviction, accused Nos.1 and 2 are sentenced to undergo rigorous imprisonment for three years and to pay a fine of `1,00,000/- each, in default of payment of fine, they are directed to undergo rigorous imprisonment for further period of six months each. Set off is allowed. Challenging the above finding and order of conviction and sentence the accused in the above Sessions Case preferred this appeal.

3. Heard Sri.G.Sudheer Karakonam, the learned counsel for the appellant and Sri.N.Suresh the learned Public Prosecutor for the State.

4. The learned counsel for the appellant submitted that the first appellant is no more. The above submission is recorded. Accordingly, the appeal with respect to the first appellant is abated and the appeal with respect to the 2nd appellant/2nd accused is proceeded.

5. The specific case of the prosecution is that, the police patrol party headed by PW.6, while conducting patrolling and when they reached at a place namely Thirunelli, Crl.A.No.1258 of 2005 :-4-: PW.6 got information that the accused are conducting sale of foreign liquor at the house of the first accused and accordingly they rushed to the house and arrested the accused and seized the material objects. To prove the factum of seizure of the contraband article as well as other material objects and arrest of the accused the prosecution mainly depends upon the evidence of PWs.1, 2, 4 and 6. PWs.1 and 2 are the Head Constables attached to the Fort Police Station, Thiruvananthapuram, who accompanied PW.6 the detecting Officer, who is the then S.I. of Police attached to Fort Police Station. When PWs.1 and 2 were examined they gave evidence strictly in accordance with the prosecution allegation. Both of them deposed that when the patrolling party reached at Thirunelli during the course of patrolling duty the detecting officer got information about the sale of foreign liquor being conducted at the house of the

first accused and accordingly they proceeded to the place of occurrence and they saw two persons, when they reached at the place of occurrence, who tried to escape from the place, but they were CrI.A.No.1258 of 2005 :-5-: detained by PW.6 and seven bottles of 750 ml. each and one bottle of 375 ml. of foreign liquor for sale and an amount of `6,085/- were found as sale proceed. Thus, according to PWs.1 and 2, the Sub Inspector of Police-PW.6 arrested the accused and the material objects were seized by preparing seizure mahazar in the presence of the independent witness. According to PWs.1 and 2, Ext.P1 was the seizure mahazar and PW.2 says that he put his signature in Ext.P1 seizure mahazar. PWs.1 and 2 were identified MO.1 glasses, MO.2, MOs.3 & 4 series, MO.8 series of currency notes as seized from the place of occurrence. They have also identified accused Nos.1 and 2.

6. PW.3 is an independent witness cited and examined by the prosecution to prove the seizure and arrest of the accused, but he turned hostile. PW.4 is also a police constable attached to the Fort Police Station, Thiruvananthapuram, who was one among the patrolling parties and when he examined he had also deposed fully in support of the prosecution case. PW.5 is the then Circle Inspector of Police, who completed the investigation and laid charge. CrI.A.No.1258 of 2005 :-6-:

7. PW.6 is the then S.I. of Police attached to the Fort Police Station, Thiruvananthapuram who led the patrolling party. When PW.6 was examined he had deposed about the facts which led to the seizure of the contraband article and the arrest of the accused and evidence of PW.6 shows that during the patrolling duty while they were reached the place, namely, Thirunelly he got information about the sale of liquor being conducted in the house of accused No.1 and accordingly they proceeded to the scene of occurrence and they found the accused and accordingly seized the contraband article and arrested the accused. When PW.6 was examined Ext.P1 scene mahazar, Ext.P3 F.I.R., Ext.P4 property list and Ext.P5 chemical analysis report were marked. It is on the basis of the above evidence and materials the trial court found that the accused are guilty and convicted them for the offence under Section 58 of the Kerala Abkari Act.

8. The learned counsel for the appellant submitted that the bottles allegedly seized are not sealed and there is 12 days delay in producing the properties before the court below and CrI.A.No.1258 of 2005 :-7-: therefore there is every chance for tampering the material objects and hence the trial court is not correct in convicting the appellant. It is also the submission of the learned counsel for the appellant that Section 58 of the Abkari Act is not attracted in the present case since the prosecution has no case that the IMFL seized from the possession of the accused are illicit liquor. Thus, according to the learned counsel, the findings of the court below and the conviction recorded by it against the appellant under Section 58 of the Abkari Act is legally and factually unsustainable. Per contra the learned Public Prosecutor for the State vehemently submitted that the prosecution case is well established through the evidence of PWs.1, 2, 4 and 6, who involved in the detection of the crime and seizure of contraband article from the possession of the accused and their evidence are supported by the contemporaneous documentary evidence like Ext.P1 scene mahazar, Ext.P4 property list and Ext.P5 chemical analysis report. Thus, according to the learned Public Prosecutor, no interference is warranted. CrI.A.No.1258 of 2005 :-8-:

9. I have carefully considered the arguments advanced by the learned counsel for the appellant as well as the learned Public Prosecutor. I have perused the evidence and materials on record.

10. In the light of the contentions advanced on behalf of the appellant and prosecution, the question to be considered is whether the trial court is justified in its finding and convicting the appellant for the offence under Section 58 of the Abkari Act. The prosecution case, as I indicated earlier, is to the effect when PW.6 and party on patrol duty and while they reached at Thirunelli according to them PW.6 has got information about the illicit sale of Indian Made Foreign Liquor in the house of A1 and according to the prosecution on getting such information they proceeded to the scene of occurrence. According to me, to prove the above fact absolutely there is no evidence. As per the version of the prosecution the seizure was not effected on their detection of the crime in sudden, but according to the prosecution witness they proceeded to the scene of occurrence on getting the information. If that be so, CrI.A.No.1258 of 2005 :-9-: PW.6 is expected to prepare

search memorandum and sent to the court informing the court the step being taken by him towards the search of the house since the information is to the effect that the sale is going on in the house of accused No.1. So, the initiation of the prosecution case itself rendered as doubtful. Without a proper search memorandum, the search and seizure, itself render as inadmissible.

11. A Division Bench of this Court in the decision reported in Ravi Vs. State of Kerala [2011(3)KLT353, has held prosecution has a duty to prove that it was the sample taken from the contraband liquor seized from the accused which had reached the hands of the chemical examiner in a fool proof condition. In the present case to prove the seizure as well as drawing of sample, absolutely no document is produced. What produced by the prosecution is Ext.P1 which is a scene mahazar. Though it is a scene mahazar the same could have been admitted for the purpose to find out whether there was proper seizure and drawing of sample, if the content of the same shows the procedure adopted by PW.6 towards the Crl.A.No.1258 of 2005 :-10-: seizure of the contraband article and the drawing of sample. In Ext.P1, except the bare statement about the seizure of the material objects nothing mentioned in detail about the method adopted by him towards the proper seizure of the contraband article as well as the safety measures adopted for drawing proper sample and the preventive measures to prevent tampering of the sample. So, the basic document of the prosecution to prove the seizure is vitiated rather the same is absent. Besides the above, though Ext.P5 chemical analysis report is available on record there is no corresponding evidence as to who draw the sample and how the sample was drawn, what are the methods adopted to keep the samples in tact and the preventive measures taken to rule out tampering of the sample, etc. No forwarding note is produced and marked and this Court is unable to understand on what basis the court below had sent the sample for chemical analysis report. The position is now cleared by a decision reported by this Court in Nalinakshan Vs. State of Kerala [2012(4)KLT575. As I indicated earlier no forwarding note is produced Crl.A.No.1258 of 2005 :-11-: and therefore this Court is not able to understand on what basis the learned Magistrate forwarded the sample to the chemical examiner. In the absence of the forwarding note or in the absence of any other similar material no evidentiary value can be given to the endorsement contained in

Ext.P5. Another learned Judge of this Court in the decision reported in Gopalan Vs. State of Kerala [2012 KHC812, has held that, as the prosecution failed to produce the document to show what was the seal used by the preventive officer to seal the sample and MO - Prosecution should not rest content without producing relevant documents and not following procedure correctly and the accused entitled to benefit of doubt. In the present case also, according to me, the prosecution has miserably failed to produce any cogent evidence regarding the drawing of the sample and the seal affixed there and also failed to produce the forwarding note which contained the sample seal so as to enable the chemical examiner to compare the seal affixed on the sample bottle, if any, sent to them. So, on that aspect also the prosecution case fails. Crl.A.No.1258 of 2005 :-12-:

12. It is also pertinent to note that, though the samples were not drawn from the place of occurrence, even the properties said to have been seized, were produced belatedly and as per the endorsement contained on Ext.P4 property list, it is seen produced before the court only on 23/12/1998 and there is nothing discernible to hold that the same were produced on 11/12/1998 as claimed by PW.6 the detecting officer. No explanation is forthcoming for such a huge delay. There is no rule prescribing the time for the production of the material objects. The prosecution agency is duty bound to produce the same forthwith or without delay. Even if there is delay it is up to the prosecution to explain the same to the satisfaction of the court. But in the present case the huge delay of 12 days in producing the material has not been explained which is also a factor goes against the prosecution.

13. Going by the evidence of PWs.1 and 2 it can be seen that the exact place of the arrest of the accused and the place at which they were found etc., their evidences are contradicting each other and there is no consistency in their Crl.A.No.1258 of 2005 :-13-: evidence regarding the facts led to the arrest of the accused. In the light of the above facts and circumstances and the evidence and materials referred to above, I am of the view that the prosecution has miserably failed to prove its case beyond reasonable doubt against the accused and the available materials are not sufficient to withstand the test laid down by the Division Bench of this Court in the decision cited supra. So, extending the benefit of doubt the appellants/accused are entitled to get an acquittal and accordingly the

conviction recorded against the appellant by the trial court is set aside. In the result, this appeal, as far as the first accused/appellant is concerned is abated, whereas with respect to the second appellant/accused is allowed setting aside the judgment dated 21/7/2005 and acquitting the second appellant/accused of all the charges levelled against him and the bail bond, if any, executed by him stand cancelled and he is set at liberty. V.K.MOHANAN, JUDGE skj

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