

Prasannakumar Vs. State of Kerala

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Court : Kerala

Decided On : Nov-04-2013

Judge : Honourable Mr.Justice V.K.Mohanan

Appellant : Prasannakumar

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE V.K.MOHANAN MONDAY, THE 4TH DAY OF NOVEMBER 2013 13TH KARTHIKA, 1935 CRL.A.No. 666 of 2005 (F) ----- 3 AGAINST SESSIONS JUDGE, KOLLAM DATED 05-02-2005 THE

ORDER

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JUDGMENT

IN SC.1150/2002 of rd ADDL. APPELLANT: 1st ACCUSED : ----- PRASANNAKUMAR, S/O.PADMANABHAN, THOPIIL VEEDU, NEAR KARUVELITHODE, ERAVIPURAM, KOLLAM. BY ADV. SRI.C.R.SIVAKUMAR RESPONDENT: COMPLAINANT : ----- THE STATE OF KERALA REPRESENTED BY THE SUB INSPECTOR OF POLICE, KOLLAM EAST POLICE STATION, THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF

KERALA, ERNAKULAM. BY PUBLIC PROSECUTOR SRI.N.SURESH THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON0411-2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: V.K.MOHANAN, J.

----- Crl.A.No.666 of 2005 -----
Dated this the 04th day of November, 2013

JUDGMENT

Challenging the conviction and sentence for the offence under Section 8(1) & (2) of the Abkari Act imposed by the trial court as per the judgment dated 05/02/2005 of the court of the 3rd Additional Sessions Judge, Kollam in S.C.No.1150 of 2002, the first accused therein preferred this appeal.

2. The prosecution case is that, the accused two in numbers found in possession of 158 plastic packets, each having capacity of 100 ml., arrack at about 5.40 p.m. on 28/6/1999 which was kept for sale at the coconut garden of one Jose which situates at Valathungal cherri in Eravipuram Village and thus according to the prosecution the accused two in numbers have committed the offence punishable under Section 8(1) & (2) of the Abkari Act.

3. On the basis of the above allegation, Crime No.587 of 1999 was registered in the Kollam East Police Station and on completing the investigation in the above crime a report Crl.A.No.666 of 2005 :-2-: was filed and on the basis of which eventually S.C.No.1150 of 2002 was instituted in the Sessions Court, Kollam. Thereafter the case was made over to the present trial court for disposal. Thus, when the accused appeared after hearing the prosecution as well as the defence a formal charge was framed against them for the offence punishable under Section 8(1) & (2) of the Kerala Abkari Act which when read over and explained to the accused, they denied the charge and pleaded not guilty. Thereafter the prosecution adduced its evidence by examining PWs.1 to 5 and producing Exts.P1 to 5 documents. Mos.1 to 6 were also identified as material objects. Finally the learned Judge of the trial court has found that the prosecution has successfully shown that A1-the present appellant, had held arrack in violation of Section 8(1) of the Abkari Act. But the charge against A2 is not proved. Accordingly, A1 is found guilty for the offence under Section 8(1) of the Abkari Act for possessing arrack.

Accordingly he is convicted thereunder. Whereas according to the learned Sessions Judge the case against A2 is not proved by the prosecution and therefore he is CrI.A.No.666 of 2005 :-3-: acquitted under Section 235(1) of Cr.P.C. The first accused is also acquitted for the offence of the alleged sale of arrack. On conviction of A1 for the offence of possession of arrack under Section 8(1) of the Abkari Act he is sentenced to undergo rigorous imprisonment for three years and to pay a fine of `1,00,000/- and in default he is directed to undergo rigorous imprisonment for another ten months. Set off is allowed. Hence, the first accused in the above Sessions Case, preferred this appeal challenging the above findings of the court below and the order of conviction and sentence.

4. Heard Sri.C.R.Sivakumar, the learned counsel for the appellant and Sri.N.Suresh, the learned Public Prosecutor for the State.

5. Among the five witnesses examined PWs.1 and 2 are independent witnesses, who are attestors to Ext.P1 seizure mahazar but they turned hostile towards the prosecution. Out of the three remaining official witnesses PW.5 is the police officer, who laid the charge on completing the investigation. To prove the detection and the alleged seizure of the CrI.A.No.666 of 2005 :-4-: contraband article from the accused the prosecution mainly relied upon the evidence of PWs.3 and 4, who involved in the detection of the crime.

6. When PWs.3 and 4 examined they have deposed supporting the prosecution case. According to these witnesses when they were on patrol duty and when they reached Eravipuram Junction, PW.4 got information to the effect that two persons are selling arrack in the property of one Joseph near Karuvelithodu. According to them, on receiving such information, they proceeded to the place of occurrence and when they reached, they saw two persons holding something in their hands, and on seeing them, abandoning the things which were held by them ran away and after stopping the jeep they also chased them and the first accused was intercepted by PW.5, but the other accused escaped from the scene of occurrence. Thus on questioning the first accused he conveyed his name as 'Prasannan' and in the bag which was possessed by him contained 86 packets of arrack and the person who ran away from the spot was one Asokan-the second

Crl.A.No.666 of 2005 :-5-: accused and the plastic covers held by him were opened and found the content as arrack by smelling and tasting. In the bag abandoned by A2, there were altogether 86 packets and the bag possessed by the first accused containing 72 packets. Both the witnesses have stated about the procedure adopted in seizing the entire contraband article and the arrest of the first accused and according to them on completing such proceedings, they returned to the Police Station and registered F.I.R. and on the next day, the first accused was produced and the contraband article and the samples were also produced before the court. Thus, when PW.3 was examined, he had identified Mos.1 to 4. When PW.4 was examined, he had also identified Ext.P1 seizure mahazar, Mos.2 and 4 bags, Ext.P3 F.I.R. and Ext.P4 property list. As I indicated earlier, it was PW.5 who laid the charge and during his examination Ext.P5 chemical analysis report was also identified and marked through him. It is on the basis of the above evidence and materials which are referred in the impugned judgment the trial court entered into the above finding and convicted the Crl.A.No.666 of 2005 :-6-: appellant and acquitted the 2nd accused.

7. The learned counsel appearing for the appellant vehemently submitted that, there are several contradictions and inconsistencies in the evidence of PWs.3 and 4 and therefore their evidences cannot be believed. It is also the submission that PW.4 has no authority to register the crime and he registered crime as part of his training. It is also contented that there is delay in producing properties before the court below and the same is not properly explained. Thus, according to the learned counsel, the prosecution has not succeeded in proving its case, but the trial court went wrong in holding otherwise and convicting the appellant. Therefore, the impugned judgment is liable to be dismissed.

8. Per contra the learned Public Prosecutor submitted that, the contradictions and infirmities that occurred in PWs.3 and 4 are not so serious to disbelieve the case of the prosecution especially when the same are very minor and quite natural. According to the learned Public Prosecutor, PW.4 while appointed as the Station House Officer of Eravipuram Crl.A.No.666 of 2005 :-7-: Police Station he was working as Assistant Superintendent of Police, who will come above the rank of the Station House Officer and there is no illegality in the seizure effected by PW.4.

According to the learned Public Prosecutor, though the court below returned the material objects, the samples were retained in the court which sent for chemical analysis and finally obtained Ext.P5 report and therefore the role of the present accused/appellant in the commission of the above offence is proved and thus the case of the prosecution was duly accepted by the court below and therefore no interference is warranted.

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

10. In the light of the divergent contentions advanced and particularly in view of the evidence and materials on record, the question to be considered is, whether the trial court is justified in its finding and convicting the appellant for CrI.A.No.666 of 2005 :-8-: the offence punishable under Section 8(1) & (2) of the Kerala Abkari Act. Though the contention is advanced about the competency of PW.4 to detect the crime and seize the contraband article and for registering F.I.R. such a contention is not supported by material and according to me, in the light of the submission made by the learned Public Prosecutor, the contention advanced against the competency of PW.4 is untenable. In the present case, though PWs.1 and 2 were examined as independent witnesses to prove the seizure and arrest of the first accused, they turned hostile towards the prosecution and therefore the task of the Court is to find out whether the evidence of PWs.3 and 4 are sufficient to substantiate the allegation raised by the prosecution. It is true when PWs.3 and 4 were examined they have categorically stated about the facts which led to the seizure of certain materials from the possession of the accused. According to PWs.3 and 4 the contraband article involved in the present case is illicit arrack which were possessed by A1 and A2 among which A1 alone was arrested from the spot and A2 ran CrI.A.No.666 of 2005 :-9-: away from the scene of occurrence. PWs.3 and 4 further stated about the steps taken towards the seizure of above mentioned contraband article. No doubt, the seizure was effected by PW.5 and to prove the seizure the prosecution has produced Ext.P1 seizure mahazar, which was prepared at the detection of PW.4. Though I have repeatedly gone through the deposition of PW.4, he has not stated the preventive measures taken to keep

the samples in tact and for preventing the same from tampering. What PW.4 has stated is that he had drawn samples and sealed it. He has no case that he affixed any seal on the samples and other materials allegedly seized by PW.4. In Ext.P1 seizure mahazar also what recorded is about the sealing of samples and other material objects seized at the spot. Nothing mentioned in Ext.P1 mahazar that any particular seal is affixed on the samples and the other material. According to me, the absence about the affixing seal on the samples or on the material objects very relevant in the present case particularly when the properties were produced belatedly before the court. Though Ext.P4 property list is dated CrI.A.No.666 of 2005 :-10-:

28. 6/1999, the same produced only on 5/7/1999 as per the endorsement thereon made by the learned Magistrate of the committal court. Though PW.4 during his examination claimed that he produced the property on the next date, there is no documentary evidence justifying such a claim. The delay occurred in producing the samples and other material objects before the court is not explained by any of the prosecution witnesses. There is no explanation or evidence offered by any of the prosecution witnesses as to what are the steps taken by them in keeping the sample and other materials in safe custody and the measures adopted to prevent tampering the samples. In the absence of any seal affixed on the samples as well as other material objects anybody can tamper it and therefore it was incumbent, particularly upon PW.4, to depose before the court about where the samples were kept till the same produced before the court and the measures adopted by him to keep the samples in tact and to prevent the tampering of the same. So the delay in producing the material objects and the samples before the court which delay is not properly CrI.A.No.666 of 2005 :-11-: explained, goes against the prosecution in view of the Division Bench decision of this Court in Ravi Vs. State of Kerala [2011(3)KLT353, wherein the Division Bench has held that production of property before the court should also taken place without unnecessary delay and there should be explanation for the delay when there is delayed production of the property.

11. In the very same decision the Division Bench has also held that the 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 chemical examiner in a fool proof condition. In the present case as I indicated earlier no seal is affixed on the samples. The samples are produced before the court belatedly. Still then none of the prosecution witnesses has got any case that they have made any request before the court to send the samples for chemical analysis. Ext.P5 chemical analysis report shows that the samples were forwarded by the committal Magistrate as per his letter dated 12/7/1999. It is further seen that in Ext.P5 there is an endorsement to the effect that "the seals on the CrI.A.No.666 of 2005 :-12-: bottles were in tact and found tallied with the sample seal provided" as incorporated by the chemical examiner. But it is very strange to note that no such sample seal is provided to the chemical examiner. As I indicated earlier PWs.4 or 5 has not stated that they have requested the court to send the sample for chemical examination. If there is any such request naturally they are bound to make such request in writing. But in the present case no such requisition or any forwarding note filed and produced by the prosecution. Normally when a requisition made or a forwarding note filed before the court, ample spaces would have been provided for affixing the sample seal and when the sample seals have provided to the chemical examiner with the forwarding note, which containing specimen impression of the sample seal, the chemical examiner would be get an opportunity to verify whether the seal affixed on the sample tally with the seal provided. But in the present case no such document is produced and no evidence is forthcoming from PWs.3, 4 and 5 that they have provided sample seal, etc. It is pertinent to note that, when PW.4 was examined he never CrI.A.No.666 of 2005 :-13-: claimed that he had affixed any seal on the samples. Ext.P1 seizure mahazar also disclosed about affixture of any seal on the samples. So there is no guarantee the samples which subjected for chemical analysis, is the sample allegedly drawn from the contraband article seized from the possession of the accused. So the available evidence and materials on record are not sufficient to show that the prosecution has discharged their duties in terms of the dictum laid down by this Court in the aforesaid Division Bench decision.

12. Another learned Judge of this Court has also considered similar situation in a decision reported in Gopalan Vs. State of Kerala [2012 KHC812. In the said case also forwarding note was not produced and there is no specific impression on the

seal on the seizure mahazar and also on the samples and thus extending the benefit of doubt mainly for the above reason, this Court acquitted the accused. According to me, in the present case also following the above decision, the benefit of doubt has to be extended in favour of the appellant. CrI.A.No.666 of 2005 :-14-:

13. In the light of the above discussion and the evidence and materials referred to above, I am of the view that, the trial court is not correct in its finding and the court below ought to have extended the benefit of doubt in favour of the appellant herein as the prosecution miserably failed to prove its case against the appellant/accused beyond reasonable doubt. Therefore, extending the benefit of doubt, the conviction recorded by the trial court against the appellant stands set aside. In the result, this appeal is allowed setting aside the judgment dated 05/02/2005 in S.C.No.1150 of 2002 on the file of the court of the 3rd Additional Sessions Judge, Kollam and the bail bond, if any, executed by the appellant stands cancelled and he is set at liberty. V.K.MOHANAN, JUDGE skj True copy P.A. to Judge

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