

Sajeev Vs. State of Kerala

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Court : Kerala

Decided On : Nov-07-2013

Judge : Honourable Mr.Justice V.K.Mohanan

Appellant : Sajeev

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE V.K.MOHANAN THURSDAY, THE 7TH DAY OF NOVEMBER 2013 16TH KARTHIKA, 1935 CRL.A.No. 1468 of 2005 () ----- SC4401999 of ADDL. DISTRICT COURT (ADHOC), KOLLAM. CP461999 of JUDICIAL FIRST CLASS MAGISTRATE COURT-II, KOLLAM APPELLANT(S)/ACCUSED: ----- 1. SAJEEV, S/O.ASOKAN, VAYALIL PUTHEN VEEDU, AKKONAM CHERI, MAYYANAD VILLAGE.

2. RAJEEVAN, S/O.ASOKHAN, VAYALIL PUTHEN VEEDU, AKKONAM CHERI, MAYYANAD VILLAGE. BY ADV. SRI.C.RAJENDRAN RESPONDENT(S)/COMPLAINANT: ----- STATE OF KERALA REPRESENTED BY THE S.I. OF POLICE, KOTTIYAM POLICE STATION (CRIME NO.160/98) THROUGH PUBLIC PROSECUTOR HIGH COURT OF KERALA, ERNAKULAM. BY PUBLIC PROSECUTOR SRI.N.SURESH THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD

ON0711-2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: tss V.K.MOHANAN, J.

----- Crl.A.No.1468 of 2005 ----- Dated this the 7th day of November, 2013

JUDGMENT

Appellants are accused Nos.1 and 2 in S.C.No.440 of 1999 of the court of Additional District and Sessions Judge (Adhoc)-I, Kollam and their grievance is that by judgment dated 04.08.2005 in the above case they are convicted and sentenced for the offences under Section 55(a) and (i) of the Abkari Act.

2. The prosecution case is that on 27.04.1998 at about 4.50 p.m, the accused 1 and 2 were found in possession of about 6.110 litres of arrack in 47 polythene covers of 1.30 ml each and selling the same from the paddy field near the Kayavil culvert in Akkolil chery of Mayyanad village and thus according to the prosecution, the accused has committed the offences punishable under Sections 55(a) and (i) of the Kerala Abkari Act.

3. On the above allegation, Crime No.160 of 1998 was registered in the Kottiyam police station and on completing the investigation a formal charge was filed in the Judicial First Class Magistrate Court-II, Kollam whereupon C.P.No.46/98 was instituted and subsequently the learned Magistrate by his order Crl.A.No.1468 of 2005 2 dated 31.08.1999 committed the case to the Sessions Court wherein S.C No.440 of 1999 was instituted and eventually the case stood transferred to the present trial court for disposal. Thus when the accused appeared a formal charge for the offences punishable under Sections 55(a) and (i) of the Abkari Act was framed against them and when the said charge read over and explained to the accused they denied the same and pleaded not guilty. As the accused denied the charge trial was proceeded further during which the prosecution adduced its evidence by examining PWs. 1 to 5 and producing Exts.P1 to P4 document. MO1 material object is also identified. Finally, the trial court is found that the prosecution has succeeded in establishing that the seized contraband was arrack and the accused were found in possession of the said arrack for sale, as alleged by the prosecution. Accordingly, the accused not found guilty for the offences under

Sections 55(a) and (i) of the Abkari Act and thus they are convicted thereunder. On such conviction the accused Nos.1 and 2 are sentenced to undergo rigorous imprisonment for a term of 4 years and to pay a fine of Rs.1 lakh each under Section 55(i) of the Abkari Act and in default of payment of fine, each of the accused is Crl.A.No.1468 of 2005 3 directed to undergo simple imprisonment for a period of one year. Set off is allowed under Section 428 of Cr.P.C. and no separate sentence is awarded for the offence under Section 55 (a) of the Abkari Act. Challenging the above finding and aggrieved by the order of conviction and sentence the above two accused preferred this joint appeal.

4. Heard Sri.C.Rajendran, learned counsel appearing for the appellant and Sri.N.Suresh learned public Prosecutor for the state.

5. To prove the seizure, the detection of the crime and seizure of the contraband article the prosecution examined PWs.1 & 2 and 4 & 5 out of which PWs.1 and 4 are independent witnesses who turned hostile to the prosecution and hence the prosecution very much stress upon the evidence of PWs.2 and 5 to substantiate its case. Thus when PW2 and PW5 were examined they have deposed before the court fully in terms of the prosecution allegation. According to PWs.2 and 5, while they were conducting law and order patrol duty and when reached near Kayavil culvert in Mayyanad, PW5 got a secret information about the sale of arrack in polythene covers by accused Nos.1 and 2 from the eastern side of that culvert. Crl.A.No.1468 of 2005 4 According to them, in pursuance to the above information, the police party lead by PW5 reached on the eastern side of the above mentioned culvert at about 4.40 pm and seen the accused two in numbers standing there with two plastic covers and when they approached them both of them tried to escape, but the first accused was intercepted, whereas the 2nd accused ran away after abandoning the plastic cover which was held by him. Thus according to PWs.2 and 5, on interception of the first accused, the plastic cover held by him inspected and detected 27 polythene covers and one cover was opened and by smelling and tasting the content of the same distinguished as illicit arrack. Similarly, according to PWs. 2 and 5, the same modus operandi with respect to the plastic cover abandoned by the 2nd accused who ran away from the spot and in that cover there were 20 polythene covers. It is also the case of PW2

and 5 that on the search of the body of the first accused, currency notes worth Rs.430/- was also recovered and the first accused was arrested then and there and though the 2nd accused ran away from the spot, he was also arrested on the same date at about 8.30 pm. According to PW2 and 5, the contraband article were seized and prepared a mahazar and also drawn Crl.A.No.1468 of 2005 5 sample from the polythene covers containing illicit arrack. It is the further case of PWs. 2 and 5, the entire proceedings were recorded in the mahazar and on completing the proceedings towards the seizure and arrest of first accused, they returned to the police station wherein FIR was registered and the properties were produced before the court on the basis of a property list and the samples were sent for chemical analysis and thus obtained chemical analysis report. Thus when Pws.1 was examined Ext.P1 mahazar is marked through him. PW1 has also identified MO1 material object consist of 47 polythene covers. Similarly, when PW5 was examined Ext.P2 FIR, Ext.P3 property list and Ext.P4 chemical analysis report were marked through him. PW3 is the then Sub Inspector of police attached to the kottiyam police station who undertook the investigation and on completing the same he laid the charge before the court. These are the evidence on materials referred to by the learned Judge in support of his finding and for convicting the accused.

6. The learned counsel for the appellant vehemently submitted that though the alleged incident was on 27.04.98 and though claimed that the contraband article were seized Crl.A.No.1468 of 2005 6 from the accused, the same produced before the court only on 26.08.98 and there is delay nearly 4 months for which there is no explanation. According to the counsel, no explanation is offered proper custody of the material objects as well as the sample allegedly drawn. It is also pointed out that the empty packets were not produced and also not produced the currency notes allegedly seized from the physical possession of the first accused. It is contented that in the mahazar, there is no description of the impression of the seal said to have affixed by PW5 while he seized the contraband article and drawn the sample. It is the further submission of the counsel that the material objects were produced before the court after filing the final report and in the absence of any forwarding note or requisition for sending sample, according to the learned counsel, the Chemical Analysis Report produced in this case cannot be accepted

and no evidential value can be attached. According to the counsel, to prove the arrest of the accused no arrest memos were produced and there is glaring contradiction in the evidence of Pws. 2 and 5 about the manner in which the sample drawn and thus according to the learned counsel, the trial court has committed wrong in convicting the appellants Crl.A.No.1468 of 2005 7 especially in the light of the decision of this Court reported in Lakshmy v. State of Kerala (2012 (4) KLT SN93(C.No.82) and Gopalan v. State of Kerala (2012 KHC812).

7. Per contra the learned Public Prosecutor submitted that though the independent witnesses turned hostile they have admitted their signature in Ext.P1 mahazar and their evidence also corroborate the case of the prosecution case about the seizure effected on the alleged date from the alleged place. According to the Public Prosecutor, as there is no serious contradiction in the evidence of PWs.2 and 5, their evidence can be acted upon for which corroboration from independent source not necessary. According to the learned Public Prosecutor, under the above circumstances, there is no scope for any interference with the findings of the court below and, therefore, the appeal deserve to be dismissed.

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

9. In view of the rival contentions and having regard to the facts and circumstances involved in the case and in the Crl.A.No.1468 of 2005 8 light of the evidence and materials on record, the question that arose for consideration is whether the finding and the conviction recorded by the trial court are sustainable. According to me, in the light of the available evidence on record, I find no reason to disbelieve the evidence of Pws. 2 and 5 about the seizure of the alleged contraband article. However, it can be seen that, there is serious contradiction in the evidence of Pws. 2 and 5 particularly with respect to the approach made by PW5 in drawing the sample. According to me, in this case the offence alleged are under the provisions of Abkari Act. Mere seizure of certain materials from the possession of the accused itself are not sufficient to warrant a conviction. On the other hand, the prosecution has to establish about the seizure of the contraband

article beyond reasonable doubt and further prove and establish that what seized from the possession of the accused are illicit liquor or implements for illicit distillation of liquor etc. In that context, according to me, the evidence of PWs.2 and 5, especially when PWs.1 and 4 turned hostile, are very material and the same should be free of any doubt, infirmities or contradiction. According to me, having regard to the particular facts and circumstances CrI.A.No.1468 of 2005 9 involved in the case, even if the seizure of some liquor or material from the possession of the accused, proved the prosecution has got a further duty to prove that, if the seizure is with respect to illicit liquor or arrack, they have to substantiate the said fact with cogent and satisfactory evidence, for which proper sampling is an essential requirement. It is in this context, the contradiction occurred in the evidence of PWs.2 and 5, about the sampling, became more relevant. As rightly pointed out by the learned counsel for the appellant when PW2 deposed that for the purpose of sample one polythene packet is taken from the cover said to have possessed by A1 and A2, but deposition of PW5 is to the effect that he had taken two packets, after mixing the polythene covers seized from the polythene covers possessed by A1 and A2. So according to me, the above difference of opinion or conflict in the deposition, occurred in the evidence of the official witnesses of the prosecution, mandate the court to have a thorough scrutiny of the entire prosecution evidence. According to me, the defects pointed out by the learned counsel for the appellant in the proceedings adopted by PW5 towards the seizure and sampling and also the defect in the CrI.A.No.1468 of 2005 10 investigation are very serious in nature. In this juncture, it is relevant to note that in Ext.P3 property list dated 26.08.1998, the 5th item therein mentioned as (375 ml f5^UaK5M_O_W XaN^V200ml :^x^O" H_y:nm X`W f:Oq_x_AaKa.). It is relevant to note that Ext.P3 is a carbon copy and that too as per the endorsement contained therein, thus said property list as well as the properties were received in the court only on 26.08.1998. Neither in Ext.P1 mahazar nor in the deposition of PW5, there is any mention about the capacity of the bottle in which the sample drawn. So I failed to understand under what circumstances in Ext.P3 property list the capacity of the sample bottle mentioned as 375 ml, that too in a belated document. In the deposition of PW5 or in Ext.P1 seizure mahazar though, he claimed that seal was affixed on the sample bottle, there is no evidence about the sample seal so

affixed. Suffice to say on Ext.P1 mahazar seal impression not affixed and sample seal also not provided. It is under the above back drops of the prosecution case the delay occurred in producing the properties and property list has to be appreciated.

10. As pointed out by the learned counsel for the CrI.A.No.1468 of 2005 11 appellants, though the alleged seizure was on 27.04.1998 the properties including the sample were produced before the court only on 26.08.1998 as per Ext.P3 that too after filing the report on completing the investigation. It is manifest from the above record, particularly in view of the endorsement made by the committal Magistrate, that there is 4 months delay. No explanation is forthcoming from PW5 or any other prosecution witnesses for such a huge delay. PW5 during cross examination has deposed "g5^?D_O_W Y^x^A^H^O_ ^X fD^I_ NaD_fHOa" X^L_{_fHOa" %KaDfK writer_fH /WM_:n_xaKa. Forwarding note - DOn^y^A_f5^?aJ_xaKa. Ext.P3 5^VLY g5^M_O^Cm .Ka lyOaKDa Vx_O^Cm.e'Da g5^?D_O_W .J_OD^O_ 5^CaKDa 26_08_98_H^Cm .Ka lyOaKDa Vx_O^O_x_Aa"". So, if the evidence of PW5 is taken as such, the material objects and samples were entrusted with the Writer of the Kottiyam police station. The said Writer is not examined in the present case. So absolutely there is no evidence, after the entrustment of the sample with the Writer, till the same produced before the court, as to who was the actual custodian of the same. There is no evidence as to what are the safety measures adopted to keep the sample intact and to prevent any tampering of the same. CrI.A.No.1468 of 2005 12 11. A learned Judge of this Court in the decision reported in Lakshmy v. State of Kerala (2012 (4) KLT SN93(C.No.82), following the Division Bench decision of this Court reported in Ravi v. State of Kerala (2011 (3) KLT353, held that insofar as the prosecution was not able to satisfy this Court that the contraband and the samples were kept in proper custody till the date of production before the court, prompting this Court to infer all chances of tampering with the samples taken and the residue seized. In the above referred Division Bench decision, this Court has held production of the property before the Court without unreasonable delay is also a necessary requirement of law and there should be the explanation for the delay when there is delayed production of the property. In the present case the delay is inordinate for which there is absolutely no explanation and the tampering of the

sample cannot be ruled out. In view of the fact as per Ext. P4 chemical analysis report the quantity of sample was 300 ml, even though the claim of PW5 is that two plastic cover, each having capacity of 130 ml, were opened and poured into the sample bottle and normal quantity expected is 260 ml. It is also relevant to note that item No.5 in Ext.P3 property list, the Crl.A.No.1468 of 2005 13 measurement of the sample bottle is shown as 375 ml which does not find a place either in Ext.P1 mahazar or in the deposition of PW5. So the evidence of the prosecution are not so cogent and satisfactory.

12. It is pertinent to note that in the present case, the prosecution has not produced any forwarding note or written requisition for sending the sample for chemical analysis. If such a document is produced, it is expected to contain the specimen impression of the seal affixed on the sample bottle, on the basis of which the chemical examiner can verify whether the sample seal affixed on the sample bottle is same as that of provided. In the present case, I have already indicated that either in the evidence of PW5 or in Ext.P1 mahazar there is no description as to the seal affixed on the sample. So absolutely there is no link evidence to prove that the sample, which claimed to have drawn by PW5 from the liquid seized from the possession of the accused, safely reached at the hands of the chemical examiner. In the very same Division Bench decision cited Supra this Court has held that the prosecution has the duty to prove that it was the sample taken from the contraband liquor seized from the Crl.A.No.1468 of 2005 14 accused which had reached the hands of chemical examiner in a fool proof condition. In the above given facts and circumstances of the case, and in view of the suspicious nature of the evidence and the defects thereon and the inordinate and unexplained delay of four months, it cannot be said that the sample which subjected to chemical analysis is the sample which allegedly drawn by PW5 from the contraband article said to have seized from the possession of the accused.

13. In the light of the above facts and circumstances and the evidence and materials on record and in view of the defect in the investigation and due to paucity of proper and clinching evidence, it cannot be said that the prosecution has succeeded in proving its case against the appellant beyond reasonable doubt. Suffice to say the learned Judge of the trial court failed to consider the above

aspect and erroneously found in favour of the prosecution. Hence I am unable to approve the above finding and the order of conviction. Accordingly, the conviction recorded by the trial court against the appellant is set aside. In the result, this appeal is allowed setting aside the judgment dated 24.08.2005 in S.C.No. 440 of 1999 of the court of Additional District and Sessions Judge (Adhoc) -I, Crl.A.No.1468 of 2005 15 Kollam and the appellants are acquitted of all the charges levelled against them and the bail bond if any executed by them are stand cancelled and they are set at liberty. V.K.MOHANAN JUDGE mns

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