

Mohanan Vs. State of Kerala

Mohanan Vs. State of Kerala

SooperKanoon Citation : sooperkanoon.com/1118778

Court : Kerala

Decided On : Jan-08-2014

Judge : Honourable Mr.Justice V.K.Mohanan

Appellant : Mohanan

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE V.K.MOHANAN WEDNESDAY, THE 8TH DAY OF JANUARY 2014 18TH POUSHA, 1935 CRL.A.No. 1796 of 2003 ()
----- (

JUDGMENT

IN SC452000 OF ADDITIONAL DISTRICT COURT, FAST TRACK (ADHOC)-II, TRIVANDRUM DATED 21-10-2003) APPELLANT/ACCUSED NO.3: ----- MOHANAN, S/O. PADMANABHAN, KAILAS MUDUKKU, T.C. 2/167 NEDUMCAUD WARD, MANACAUD VILLAGES, THIRUVANANTHAPURAM. BY ADVS.SRI.V.B.UNNIRAJ SMT.R.S.GEETHA SMT.P.ANITHA RESPONDENT/COMPLAINANT: ----- STATE OF KERALA REPRESENTED BY THE PUBLIC PROSECUTOR HIGH COURT OF KERALA, ERNAKULAM. PUBLIC PROSECUTOR SRI. N. SURESH THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08-01-2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: SCL. V.K.

----- Crl. A. No. 1796 of 2003 ----- Dated this
the 8th day of January, 2014

JUDGMENT

This appeal is directed against the judgment dated 21.10.2003 in S.C. No.45 of 2000 on the file of the Court of the Additional Sessions Judge, Fast Track (Adhoc) No.II, Thiruvananthapuram at the instance of the third accused in the above case, as he is aggrieved by the conviction and sentence imposed on him under Section 55(a) of the Abkari Act as per the above judgment.

2. The prosecution allegation is that the accused 3 numbers, in contravention of the provisions of Abkari Act were found in possession of 23 bottles of Indian Made Foreign Liquor and 40 litres of spirit in a plastic can kept hidden in a drainage canal on the side of the Killippalam - Karamana National Highway in front of the Ex-service men Society Service Station at about 8 p.m. on 26.2.1998. Crl. A. No.1796 of 2003 2 Thus, according to the prosecution, the accused 3 numbers have committed the offence punishable under Section 55(a) of the Abkari Act.

3. On the above allegation, Crime No.59 of 1998 was registered in the Fort Police Station for the above said offence. After completing the investigation, a report was filed and accordingly C.P.No.65 of 1999 was instituted in the Judicial First Class Magistrate Court-II, Thiruvananthapuram. After filing the said charge, A2 in the above case died and therefore the committal court committed the case in respect of accused Nos.1 and 3 to the Sessions Court. But thereafter, the accused No.1 also died. So, only A3 alone was available to face the prosecution. After hearing the prosecution as well as the defence, a formal charge was framed against him for the offence punishable under Section 55 (a) of the Abkari Act and when the said charge read over and explained to the Crl. A. No.1796 of 2003 3 accused, he denied the same and pleaded not guilty. Therefore the prosecution adduced its evidence by examining PWs 1 to 5 and by producing Exts.P1 to P4 documents. MOs 1 to 3 are identified as material objects. No evidence whatsoever adduced from the side of the defence. The trial court finally found that the accused No.3, who faced the prosecution, along with the deceased persons have committed the

offence punishable under Section 55(a) of the Abkari Act and accordingly he is found guilty and convicted thereunder. On such conviction, the appellant/accused is directed to undergo rigorous imprisonment for 3= years and to pay a fine of Rs.1 lakh and in default, he is directed to undergo rigorous imprisonment for a further period of one year. It is the above finding, the order of conviction and sentence that are challenged in this appeal.

4. I have heard Sri.V.B. Unniraj, learned counsel for CrI. A. No.1796 of 2003 4 the appellant and Sri.N. Suresh, learned Public Prosecutor for the State.

5. Out of 5 witnesses examined, except PW1, all others are official witnesses including PW3 who was given up. To prove the detection of the crime and the seizure of the contraband article and arrest of the accused, the prosecution examined PW1, PW2 and PW4 and the prosecution is constrained to depend upon the evidence of PWs 2 and 4 to prove its case, since PW1 turned hostile. PWs 2 and 4 when examined, they have deposed fully in terms of the prosecution allegation. According to PWs 2 and 4, on 26.2.1998, when PW4 received an information that accused Nos. 1, and 2 others have kept spirit and foreign liquor in the drainage canal in front of the Popular Automobile at Killippalam, the police party consisting of themselves proceeded to that place and they found accused Nos 1 to 3 at that spot and on questioning the accused, CrI. A. No.1796 of 2003 5 according to PWs 2 and 4, the accused took out MOs 1 to 3 which were kept hidden in a drainage canal. According to PWs 2 and 4, one bottle each from the two cartons were opened by PW4 and by smelling and tasting the contents therein, was identified as Indian Made Foreign Liquor. Similarly, the content of MO1 plastic can was also identified as spirit. According to these witnesses, the properties and the contraband articles were taken into custody by describing the same in a mahazer. Accused Nos.1 to 3 were arrested then and there. According to these witnesses, the entire proceedings, including the seizure of the contraband article and material objects and arrest of the accused etc are elaborately recorded in the Mahazer prepared at the spot. PW4 deposed that on completing the above proceedings, the accused as well as the material objects were taken to the police station and thereafter, a crime was registered and the samples drawn from the CrI. A. No.1796 of 2003 6 contraband article sent for chemical analysis. When PW2

was examined, he had identified the material objects MOs 1 to 3. During the examination of PW4, the then Sub Inspector of Police of Fort Police Station, who detected the crime, he had identified Ext.P2 Mahazer, Ext.P3 FIR and Ext.P4 Chemical Analysis Report. On completing the investigation, the charge was laid by PW5, the then Circle Inspector of Police, Fort Police Station. As I indicated earlier as PW1 turned hostile, he was cross-examined by the prosecution and thus Ext.P1, which is the portion of his 161 statement, is marked. These are the evidence and materials referred to by the learned Judge in his impugned judgment.

6. The learned counsel for the appellant vehemently submitted that considering the discrepancies and contradictions in the evidence of PWs 2 and 4, particularly when no independent evidence is available to corroborate CrI. A. No.1796 of 2003 7 the evidence of those witnesses, the trial court is not in its finding. It is also the contention of the learned counsel that the contraband articles were produced before the court only after 27 days from the date of its alleged seizure and no explanation is offered by the prosecution for such delay and thus the seizure is rendered as doubtful. It is also the contention of the learned counsel that to prove that what seized from the possession of the accused are contraband article, there is no legal evidence, particularly when Ext.P4 is not supported by any link of evidence.

7. Per contra, the learned Public Prosecutor submitted that the trial court has found that the seizure of the contraband article from the possession of the accused has been proved, particularly in the light of the evidence of PWs 2 and 4 and thereafter the samples taken from the contraband article, had sent for chemical analysis report and obtained Ext.P4 report and thus it is proved that what CrI. A. No.1796 of 2003 8 seized from the possession of the accused are contraband article. So, according to the learned Public Prosecutor, even though the independent witness turned hostile, the minor discrepancies or contradictions in the evidence of PWs 2 and 4 are not sufficient to disbelieve the entire prosecution case and therefore the findings of the trial court is correct in convicting the appellant and as such no interference is warranted.

8. I have carefully considered the arguments of the learned counsel for the appellant and the learned Public Prosecutor and I have perused the evidence and the materials on record. In the light of the rival contentions and in view of the evidence available on record, the question to be considered is whether the conviction recorded by the trial court against the appellant is sustainable. At the outset, it is to be noted that though the prosecution allegation is against 3 persons, accused Nos.1 Crl. A. No.1796 of 2003 9 and 2 are no more, and only A3, the present appellant alone faced the prosecution. Having regard to the facts and circumstances involved in the case and in view of the available evidence, according to the two points raised by the learned counsel for the appellant are very relevant. A Division Bench of this Court in the decision in Ravi Vs. State of Kerala reported in 2011(3) KLT353 it has held that there should be explanation for the delay when there is delayed production of the property. It is admitted that no property list seen marked in this case. The only documents filed by the prosecution are Ext.P2 mahazer, P3 FIR and Ext.P4 chemical analysis report. As per the prosecution allegation, the occurrence was on 26.2.1998 and the seizure was affected on that day itself. On perusal of the case bundle, it appears that the prosecution has prepared and filed their property list on 26.2.1998, though not marked the same. However, no such list is filed in time Crl. A. No.1796 of 2003 10 and as per the endorsement of the committal magistrate upon such property list, it appears that the properties were produced only on 23.3.1998. It is also relevant to note that on the reverse side of the above mentioned property list, the learned magistrate has ordered on 23.3.1998 to be kept the MOs in Fort Police Station until further orders. From the above endorsement of the learned magistrate upon the above property list, it can be seen that there was inordinate delay in producing the contraband article. None of the official witnesses made any deposition explaining the delay occurred in producing the contraband article. PW4 during his cross examination deposed that he entrusted the material object with the Station Writer for producing before the court. The above said Station Writer is not examined and no explanation is sought for and no reasons available in the deposition of PW4, as to what happened after entrusting the material object with the Station Writer. Thus Crl. A. No.1796 of 2003 11 in fact, there is no evidence as to who was the custodian of the contraband article after the seizure and thereafter

till the same produced before the court as per the order of the learned magistrate on 23.3.1998. This Court in Narayani Vs. Excise Inspector reported in 2002(3) KLT725 has found that no evidence therein as to who was in possession of contraband article till it was produced in the court and further found that the testimony of PW4, it was clear that he was not in custody of the contraband article. In view of the facts and circumstances mentioned above, according to him the above decision is squarely applicable in the present case. So it cannot be ruled out that the contraband articles were tampered. In the absence of any explanation for the delayed production of the material objects and when there is no evidence as to who was the custodian of the contraband article for the period mentioned above, according to me, the prosecution cannot withstand the test CrI. A. No.1796 of 2003 12 laid down in the aforesaid decision of the Division Bench of this Court.

9. Another important aspect is that in the present case, no evidence is available as to the taking of the sample and its following steps. Neither PW2 nor PW4 has claimed that they have drawn sample from the contraband article allegedly seized from the possession of the accused. It is crystal clear from the evidence of PW4 that sample was taken from the court. But absolutely no evidence as to who was the person authorised and taken the sample and what was the precautionary measures taken by such a person to keep the samples in tact and to get a correct result of the sample so drawn on chemical analysis. A learned judge of this court in the decision in Nalinakshan Vs. State of Kerala reported in 2012(4) KLT575 has held in the absence of evidence as to the taking of sample and its following steps, the conviction is bad. According to me, the CrI. A. No.1796 of 2003 13 above decision is attracted in the present case, since in this case also as I indicated earlier, absolutely there no evidence with regard to the sampling.

10. In the light of the above discussion and in view of the evidence and materials referred above, I am unable to sustain the finding and the conviction recorded by the learned judge of the trial court. According to me, the available evidence are totally insufficient to substantiate the prosecution allegation against the appellant and therefore it is unsafe to convict the appellant simply on the basis of the evidence of PWs 2 and 4. Therefore, 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 21.10.2003 in S.C.No.45 of 2000 of the Court of the Additional Sessions Court, Fast Track (Adhoc) No.II, Thiruvananthapuram and the appellant/accused is acquitted of all the charges levelled against him and the bail CrI. A. No.1796 of 2003 14 bond, if any, executed by him stands cancelled and he is set at liberty. Sd/- V.K. MOHANAN, JUDGE Scl. True Copy PA to Judge

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com