Joseph Vs. State of Kerala represented by Public Prosecutor

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Court : Kerala

Decided On : Jan-08-2016

Judge : K. Ramakrishnan

Appeal No. : CRL. A. No. 2129 of 2005

Appellant : Joseph

Respondent : State of Kerala represented by Public Prosecutor

Advocate for Pet/Ap. : Sri. S. Rajeev

Judgement :

1. The accused in S.C.No.146/2005 on the file of the Additional Sessions Court (Adhoc)-I, Kottayam is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Pala Excise Range in Crime No.12/2003 of that excise range under section 55(g) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 5.9.2003, at about 6 p.m, the accused was found to be in possession of 50 litres of wash and 450 ml of arrack in his house with No.XI/58 of Pala Municipality in violation of the provisions of the Abkari Act and thereby he had committed the above said offence.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Pala, where it was taken on file as C.P.No.10/2005. After complying with the formalities, the learned Magistrate committed the case to the

Sessions Court, Kottayam under section 209 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'). After committal, the Sessions Court took cognizance of the case as S.C.No.146/2005 and the same was made over to the Additional Sessions Court (Adhoc)-I, Kottayam for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under section 55(g) of the Abkari Act was framed and the same was read over and explained to him and he pleased not guilty. In order to prove the case of the prosecution, Pws 1 to 6 were examined and Exts.P1 to P11 and Mos1 to 4 were marked on their side. After closure of the prosecution evidence, the accused was questioned under section 313 of the Code and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that no article was seized from his possession. In fact, he was running a finance business and one Kavumpurath Mani, who was a taxi driver, engaged in driving car for excise officials had taken a loan from him and when he did not pay the amount, there was some dispute arose between the accused and the said Mani regarding non payment of the amount borrowed and on account of the enmity, he had instigated the excise officials to fabricate a false case against him. Since evidence in this case did not warrant an acquittal under section 232 of the Code, the accused was called upon to enter on his defence, but no defence evidence was adduced on his side. After considering the evidence on record, the court below found the appellant guilty under section 55(g) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for one year and also to pay a fine of Rs.One lakh, in default to undergo rigorous imprisonment for three months more. Set off was allowed for the period of detention already undergone under section 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant, accused before the court below.

5. Heard Sri. Vinay, learned counsel representing Sri. S. Rajeev,learned counsel for the appellant and Sri. Jibu P.Thomas, learned Public Prosecutor appearing for the respondent State.

6. Counsel for the appellant argued that there is no proper investigation conducted. The specimen impression of the seal used for sealing the article was not sent to court. Forwarding note was marked in this case. Further there was undue delay in conducting the investigation and as such, it cannot be said that the prosecution has proved the case against the accused beyond reasonable doubt. He had relied on the decisions reported in Sivadasan v. State of Kerala (2007 (3) KHC 739), Ramankutty v. Excise Inspector, Chelannur Range (2013 (3) KHC 308), Surendran and Another v. State of Kerala (2013 (3) KHC 780), Majeedkutty v. The Excise Inspector, Kollam Range (2015 (1) KHC 424) and Krishnan H. v. State (2015 (1) KHC 822) in support of his case. He had also argued that the contents of the chemical analysis report was not put to the accused and thereby prejudice has been caused to him. So, according to the learned counsel, the court below was not justified in convicting the accused for the offence alleged and he is entitled to get acquittal.

7. On the other hand, learned Public Prosecutor submitted that the oral evidence and the documentary evidence adduced will go to show that articles were seized from the house where the accused was residing at the relevant time and he is the owner cum occupier of the house. Further there was no delay in producing the article. No questions were put to the witnesses regarding genuineness of the articles produced. In fact, arrest memo, forwarding note etc were produced and non marking of the document alone is not sufficient to acquit the accused. Further, copy of the chemical analysis report was supplied to the accused and as such, failure to put the details of the contents of the report is not fatal and that is not a ground for acquittal.

8. The case of the prosecution as emerged from the prosecution witnesses was as follows:

On 5.9.2003, PW1 was working as the Excise Inspector, Pala excise range. On that day, he along with the excise party was doing patrol duty and when he reached Murikkumpuzha, Ambalakavla, he got information that Parippikunnel Veettil Joseph of Meenachil village was in possession of arrack in his house and immediately he prepared Ext.P3 search memo and sent the same to court and

thereafter he along with Pws 4 and 5, the independent witnesses, went to the house of the accused and at that time, the accused was there in the house. After introducing himself and disclosing the purpose of his visit, he conducted search of the house in the presence of witnesses and the accused and found MO2, a 50 litre jar, on the eastern corner of the kitchen situated on the northern portion of the house. On examination of the contents of the jar, he was satisfied that it was wash, a material used for manufacture of arrack. He convinced the same to the witnesses as well. Thereafter, he had found MO1 bottle of 750 ml capacity, which contained 450 ml arrack and he found MO4, one litre empty plastic bottle as well. Except the accused, none were there in the house. He took 400 ml wash in a one litre bottle as sample and sealed and labelled the same containing the signatures of the accused himself and the witnesses and took 200 ml liquid from MO1 bottle in a 375 bottle and sealed and labelled the same in the same fashion. He destroyed the remaining wash and sealed and labelled Mo2 also in the same fashion and and seized all these articles as per Ext.P1 mahazer in the presence of witnesses. He arrested the accused and prepared arrest memo. He had also prepared Ext.P2 search list. Thereafter he came to the office along with the accused and registered Ext.P4 crime and occurrence report as Crime No.12/2003 under section 55 (g) of the Abkari Act. He produced the accused before court along with the remand report. He produced the articles before court along with the property list. He sent forwarding note with request to send the sample for analysis and the same was sent from court and Ext.P5 report obtained which shows that first sample contained 6.46% by volume of ethyl alcohol and it was having the smell of wash and second bottle contained 37.15% by volume of ethyl alcohol. Investigation in this case was conducted by PW6. He questioned the witnesses and recorded their statements. He went to the place of occurrence and prepared Ext.P11 scene mahazer. As per his request, PW3, the Village Officer prepared Ext.P8 sketch plan of the place of occurrence. As per his request, PW2 issued Ext.P6 property tax extract of the building from where the article was seized and issued Ext.P7 ownership certificate which will go to show that the accused was the owner cum occupier of the house. He completed the investigation and submitted final report before court.

9. Pws 4 is the independent witness to the seizure. He, though admitted his signature in Ext.P1 and also label seen on MO1, denied having seen the arrest or seizure of any liquor from the house of the accused. He had also stated that he knew the accused. According to him, he singed the same from the excise office. PW5 had stated that he knew the accused about 10 to 30 years and he had admitted the signature in Ext.P1 and also label seen on Mos 1, 3 and 4. He had also admitted that he had signed those documents near the house of the accused and the accused was also present at that time. But he did not see seizure of the articles. According to him, he had signed the labels from the excise office and signed Ext.P1 from the road near the house of the accused. He had also stated that one Parameswaran also signed the document. But he did not know whether that document is Ext.P1. So it is clear from the evidence of PW5 that he knew the accused, he signed Ext.P1 and the label seen on Mos1, 3 and 4 from near the house of the accused and at that time accused was also present. So all these things will go to show that they are now trying to help the accused and that was the reason why they are not supporting the case of the prosecution.

10. Then the evidence available to prove the seizure and arrest is that of PW1, the Excise Inspector. He had categorically stated that on that day while he was doing patrol duty along with the excise officials, he got information that accused was in possession of arrack in his house and immediately he sent Ext.P3 search memo to court and thereafter went to the house along with Pws 4 and 5 and at that time the accused alone was there in the house. After appraising him of the purpose of their visit, he conducted the search and found Mo2 cannas having capacity of 50 litres containing wash and MO1 bottle containing 400 ml arrack. He took samples from both the liquids and sealed and labeled them as well as other bottles found there and after destroying wash, he sealed and labelled the cannas as well. He prepared Ext.P2 search list and seized articles as per Ext.P1 mahazer. Thereafter he came to the excise office along with the accused after arresting and preparing arrest memo and registered the case. Though he was cross examined at length, nothing was brought out to discredit his evidence on this aspect.

11. It is settled law that merely because independent witnesses to the seizure did not support the case of the prosecution is not a ground to disbelieve the case of

the prosecution as such. If the court is satisfied with the evidence of the official witnesses, then the court can rely on the same and base conviction on such evidence. The case of the accused was that he was conducting money lending business and one Mani, who was a taxi driver used to ply the cars of excise officials, had borrowed some amount from him. But he did not pay the same. When he asked for the same, there was some dispute arose between them and at the instigation of said Mani, the excise officials have falsely implicated him in a case like this. He had not adduced any evidence to prove this fact. Mere suggestion given regarding false implication alone is not sufficient and it is for the accused to establish the same by cogent evidence which the accused had not established. So, under the circumstances, the court below was perfectly justified in coming to the conclusion that prosecution has proved beyond reasonable doubt that search and seizure are proper and accused was arrested along with liquids said to be wash and arrack.

12. It is true that arrest memo, property list and forwarding note were not marked in this case. But it is not a case where no such documents were produced in court. But, in fact, they were produced in court but it was omitted to be marked. The arrest memo was produced along with the remand report and arrest intimation was also given and it was also produced along with the remand report. The accused had no case that he was not arrested from his house. He had no case that the was not arrested by the excise officials. Further, the evidence of PW5 will go to show that at the time when he signed Ext.P1 mahazer from the road near the house of the accused, the accused was also present. So that will go to show that arrest was effected by PW1 from the house of the accused along with the contraband articles. So the dictum laid down in the decision reported in Ramankutty's case (cited supra) is not applicable to the facts of this case. Further, in that case, the arrest memo was not produced and marked. There was delay in producing the article as well and there was no satisfactory explanation for the delay as well. So, under the circumstances, this Court has come to the conclusion that the prosecution has not properly proved the case against the accused beyond reasonable doubt and that benefit was given to the accused. But, in this case, arrest memo and arrest intimation were produced along with the remand report on 6.9.2003 itself when the accused was produced before court and there was no delay in producing the

articles seized before court as well.

13. Further, contraband articles seized along with the property list was also produced on 6.9.2003 itself and that was received in court with No.T214/03. Further, it will be seen from Ext.P1 seizure mahazer that the nature of seal used was specifically mentioned as personal seal with letters TOS and it was stated as his personal seal. So the nature of seal used with the letters available in the seal were mentioned in Ext.P1 itself though the specimen impression of the seal was not affixed in the seizure mahazer. The purpose of specimen seal impression provided is to find out the nature of letters seen in the seal so as to identify the same at a later occasion and description of the seal with its letters were described in the seizure mahazer itself which is sufficient for this purpose.

14. Further, forwarding note was also produced in this case which contains the specimen seal impression containing the letters TOS which was mentioned in Ext.P1 seizure mahazer. No questions were put to PW1 regarding this aspect as well. So mere non marking of the documents alone is not sufficient for the purpose of coming to the conclusion that no such documents has been produced in court. Those documents are available in court and Ext.P5 chemical analysis report shows that the seal seen on the bottles were in tact and found tallied with the sample seal provided. This aspect was not challenged in cross examination as well. So the dictum laid down in the decisions reported in Surendran's, Majeedkutty's, Sivadasan's and Krishnan's cases (cited supra) are not applicable to the facts of this case. In all those cases, forwarding note was not seen among the file for verification by the court as well. Further, even if the forwarding note was available, it did not contain the specimen impression of the seal used for sealing the article. In such circumstances, this Court has come to the conclusion that the prosecution has failed to prove beyond reasonable doubt that same articles which were seized had reached the court in a tamper proof condition and chemical analysis report relates to the representative sample said to have been taken from the articles seized from the possession of the accused and that benefit was given to the accused and accused was acquitted in those cases. But that was not the case in this case.

15. The articles were produced before court along with the property list and forwarding note without delay and specimen seal impression was provided in the forwarding note which is available for verification for this Court in the case records. Further, even in Ext.P1 seizure mahazer, the nature of seal used with letters seen in the specimen seal impression was specifically mentioned though the specimen impression was not affixed in the seizure mahazer. The same letters were seen in the specimen seal impression provided in the forwarding note which is seen produced though not marked and available in the court records for verification by the court. So, under the circumstances, the court below was perfectly justified in coming to the conclusion that there was no delay in producing the article and the chemical analysis report relates to the representative sample said to have been taken from the contraband article alleged to have been seized from the house of the accused.

16. The evidence of PW2 coupled with Exts.P6 and P7 will go to show that the accused was the owner and occupier of the house. In Ext.P7 ownership certificate, it was specifically mentioned that as per the property tax extract, the new house No.XI/58 corresponding to old No.XVII/41 belongs to the accused. It will be seen from Ext.P6 property tax extract that old house No.XVII /41 stands in the name of the accused and its old number was shown as XVIII/34. The accused had no case that he was not owner of the house. He had not produced any document to show that any other person was residing in that house along with him as well. Once it is proved that contraband articles were seized from the house belonging to the accused and he was alone found in the house at the time of seizure, then unless the contrary is proved, it can only be presumed that he was in conscious possession of those articles and so the court below was perfectly justified in coming to the conclusion that prosecution has proved the case against the accused beyond reasonable doubt and rightly convicted him for the offence under section 55(g) of the Abkari Act.

17. It is true that in the decision reported in Surendran's case (cited supra), it has been observed that as per Section 50 of the Abkari Act, investigation will have to be completed and final report will have to be filed immediately. But, in this case, it is seen from the records that chemical analysis report was dated 24.11.2004 and it

reached the court only 23.3.2005 and the final report was filed in the year 2005. So it cannot be said that there was undue delay in filing the final report in this case. In the decisions cited supra, though the chemical analysis report was dated 3.12.1998, final report was filed only on 5.10.2010 with a delay of more than one year and nine months which has not been explained. So the dictum laid down in the above decisions is also not applicable to the facts of this case. Further, it is settled law that mere delay in completing the investigation alone is not sufficient to acquit the accused unless prejudice has been caused to the accused on account of the delay. In this case, there was no case for the accused that any prejudice has been caused on account of the delay in submitting the final report as well. Further, search and seizure was proved and the witnesses have no case that they have not signed the document, but only their case was that they singed the documents from the excise office at the request of the excise officials which this Court has already found to be unbelievable.

18. The other contention raised is that the contents of the chemical analysis report was not put him when questioned under section 313 of the Code and as such he is entitled to get acquittal. The copy of the chemical analysis report was furnished to the accused and he had no case that he had not received the same. Not putting the contents of analysis report was considered by this Court in the decision reported in Raveendran v. Food Inspector (2009 (3) KLT) 728) relying on the decision of this Court in State of Kerala v.Venga Gopalan (1994 (2) KLJ 507) and held that if the copy of the analysis report was furnished to the accused, then not putting the contents of the same to him under section 313(b) of the Code is not fatal and that cannot be a ground for acquittal. So the contention that he is entitled to acquittal on that ground is not sustainable in law and the same is rejected. So under the circumstances, the court below was perfectly justified in coming to the conclusion that the prosecution has proved the case of the accused beyond reasonable doubt and rightly convicted him for the offence under section 55(g) of the Abkari Act and the findings did not call for any interference.

19. As regards the sentence is concerned, court below had sentenced him to undergo rigorous imprisonment for one year and also to pay a fine of Rs. One lakh, in default to undergo rigorous imprisonment for three months more. Set off

was allowed for the period of detention already undergone. It is seen from the judgment of the court below that at the time when the accused was arrested, he was aged 67 years and at the time when he was convicted, he was aged 70 years and he has got three daughters. But it may be mentioned here that persons who are committing the offence under the Abkari Act are doing the same knowing that it is an offence and ignoring the consequences of their act on innocent persons, who are consuming the articles manufactured by them illegally only for the purpose of their personal gain. Showing undue leniency in such cases may give a wrong signal to the society and this may cause loss of confidence in the public in the criminal delivery system as well. But, at the same time, court can take into consideration family background, age and possibility of reformation etc while imposing sentence. In this case, the accused was aged 70 years at the time when the court below convicted him and he will be much more older now. The prosecutor had no case that he had involved in other crime of similar nature earlier or has got any criminal background earlier. Possibility of reformation in such persons cannot be ruled out as well. This Court feels that this can be taken as a mitigating circumstance to show leniency in imposing sentence. So considering the circumstances, sentencing the accused to undergo simple imprisonment for six months and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for three months will be sufficient and that will meet the ends of justice. So the sentence imposed by the court below is set aside and the same is modified as follows:

The appellant is sentenced to undergo simple imprisonment for six months and also to pay a fine of Rs.One lakh, in default to undergo simple imprisonment for three months more. Set off was allowed for the period of detention already undergone under section 428 of the Code.

In the result, the appeal is allowed in part. The order of conviction passed by the court below against the appellant under section 55(g) of the Abkari Act and sentence of fine of Rs.One lakh are hereby confirmed. But the substantive sentence and nature of substantive sentence and the nature of default sentence are hereby set aside and the same is modified as follows:

The appellant is sentenced to undergo simple imprisonment for six months and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for three months more. Set off is allowed for the period of detention already undergone under section 428 of the Code.

Before parting, this Court wants to make some observations regarding the manner in which trial of abkari cases being conducted in the trial court. Though arrest memo, property list, forwarding note etc were produced by the investigating agency, neither the Prosecutor who is conducting the case in the lower court nor the witnesses who were examined in the court are taking initiative in marking those documents at the time of trail. It is the duty of the Prosecutor to mark all the documents produced before court through the witnesses and prove the same through those witnesses who have prepared the same in accordance with law. Showing such laches in conduct of the case, some times result in unmerited acquittal as well. So the persons who are charge of conducting the case in lower court are alerted to take necessary interest in conducting the case and marking of the documents that were produced by the investigating officer which are relevant for the purpose of disposal of the case non marking of which are likely to be agitated by the accused in the appellate court as a ground of acquittal. If those documents were not produced, but available in the case diary, then the Prosecutor has got a duty to see that those documents are produced during the course of trial invoking section 311 of the Code as well so that court will get an opportunity to verify all the relevant materials to arrive at a just conclusion regarding proper adjudication of the case in accordance with law.

Office is directed to communicate a copy of this judgment to the concerned court at the earliest.