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Court : Kerala

Decided On : Oct-30-2015

Judge : K. Ramakrishnan

Appeal No. : Crl. Appeal Nos. 316 & 359 of 2003

Appellant : Jacob

Respondent : The Excise Inspector, Rep. by the Public Prosecutor, High Court of Kerala

Judgement :

1. 1st accused in SC No.18/2001 on the file of the 3rd Additional Sessions Court (Adhoc-1) Thrissur is the appellant in Crl. Appeal 316/2003, while the 3rd accused in the same case was the appellant in Crl. Appeal 359/2003. The appellants in these cases along with another person were charge sheeted by the Excise Inspector, Thrissur Range in Crime No.9/1998 of that range under Section 55 (a) of the Abkari Act read with Section 34 of the Indian Penal Code.

2. The case of the prosecution in nutshell was that the 3rd accused being the owner of the vehicle KL 5B 1699, 1st accused being the driver of the vehicle and 2nd accused who travelled in the vehicle with a connivance and active participation have transported 1750 litres spirit in a secret chamber of the cabin of

that lorry in violation of the provisions of the Abkari Act and thereby all of them have committed offence punishable under Sections 55(a) of the Abkari Act and Section 34 of the Indian Penal Code.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Thrissur, where it was taken on file as CP 11/2000. After complying with the formalities, the learned Magistrate committed the case to Sessions Court, Thrissur, where it was taken on file as SC 18/2001 and originally the case was made over to 1st Additional Assistant Sessions Court, Thrissur for disposal. Thereafter the case was withdrawn by the Sessions Court and made over to 3rd Additional Sessions Court (Adhoc-1) Thrissur for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55 (a) of the Abkari Act was framed and the same was read over and explained to them and they pleaded not guilty. In order to prove the case of the prosecution, PWs 1 to 8 were examined and Exts.P1 to P19 and MO1 series and MO2 series were marked on the side of the prosecution. After closure of the prosecution evidence, the accused were questioned under Section 313 of the Code of Criminal Procedure and they denied all the incriminating circumstances brought against them in the prosecution evidence. Accused Nos. 1 and 2 have stated that they were only travelling in the vehicle as passengers and when the Excise party stopped the vehicle, the driver and cleaner of the vehicle ran away from the vehicle and they have been falsely implicated in the case. 3rd accused has stated that he was not the owner of the vehicle at the relevant time. He had transferred the vehicle to one Appachan on 17.3.1998 and he had no connection with the vehicle and the article seized. Since the evidence in this case did not warrant an acquittal under Section 232 of the Code of Criminal Procedure, the accused were called upon to enter on their defence. 3rd accused was examined as DW1 and Ext.D1 was marked on his side. After considering the evidence on record, the court below found the 2nd accused not guilty of the offence alleged and he was acquitted of the charges levelled against him under section 235(1) of the code of Criminal Procedure giving him the benefit of doubt. But court below found the accused Nos. 1 and 3 guilty of the offence under Section 55(a) of the Abkari Act and convicted them thereunder and sentenced

them to undergo rigorous imprisonment for three years each and also to pay a fine of Rs.1,00,000/- each, and in default to undergo rigorous imprisonment for six months each. Set off was allowed for the period of detention already undergone by them under Section 428 of the Code of Criminal Procedure. Aggrieved by the same, the above appeals have been filed by the appellants, the respective accused in the court below.

5. Since both these appeals arose out of the same judgment, this court is disposing the appeals by a common judgment.

6. Heard the counsel for the appellant, Shri. Nitish Mathew in both cases and Shri.Jibu P. Thomas, learned Public Prosecutor appearing for the State.

7. The counsel for the appellant submitted that the evidence of PW6 will go to show that there were other persons in the vehicle other than accused Nos.1 and 2, who was an independent witnesses to the seizure. Though he had not fully supported the case of the prosecution, his evidence to that effect in favour of the accused can be relied on by the court to prove that other than the 1st and 2nd accused, there were other persons and they were the real culprits in the case. Further the evidence of PW1 will go to show that apart from the driver, there were other persons in the vehicle. If really 2nd accused alone was there, he would not have stated so. Further the court below had acquitted the 2nd accused on the ground that he was only a passenger of the vehicle and if that be the case, the same benefit ought to have been given to the 1st accused also in the circumstance of the case. He had further argued that though the seizure was effected on 9.4.1998, the case was registered only on the next day and the articles were produced before the court only on 11.5.1998, more than one month after the seizure. There is no explanation forthcoming for the delay in producing the article. Further though it is seen from the Mahazar that three samples were taken but only two samples were produced before the court and there is no explanation forthcoming as to why the third sample was not produced and that creates doubt regarding the genuineness of the sample produced before the court and it cannot be said that the prosecution has proved the link between the accused and the contraband articles seized and the chemical analysis report relates to the

representative sample said to have been taken from the articles alleged to have been seized from the possession of the accused. Further the 3rd accused was not in the vehicle and originally one C.J. Jose was shown as accused and only later the present 3rd accused was implicated as accused. There is no proper investigation conducted as to whether he was the real owner at the relevant time and the court below was not justified in rejecting the evidence of DW1 and Ext.D1 on this aspect. Further in the forwarding note, the specimen seal impression of the seal used for sealing the sample was not produced and in the forwarding note, the place was kept blank as well. So under the circumstances, it cannot be said that articles reached court in the same condition in which it was seized in a tamper free condition and that benefit must be given to the accused. He had relied on the decisions reported in Soni C Mathew v State of Kerala [2007 (3) KLJ 629], Sooraj v Excise Inspector [2002 (1) KLJ 739], Narayana Velichappada v Sub Inspector of Police and Another [2007 (4) KHC 748], Krishnan v State [2015 (1) KLD 421] and Ravi v State of Kerala and Another [2011 (3) KHC 121] in support of his case.

8. On the other hand, the learned Public Prosecutor submitted that the accused persons were red handedly caught with the contraband articles while they were travelling in the vehicle and the vehicle documents were seized from the possession of the 1st accused. That shows that he was driving the vehicle at the relevant time, though he was not having driving licence. Further there is nothing to disbelieve the evidence of prosecution witnesses to prove the seizure and production of the vehicle documents seized from the possession of first accused. So according to the learned Public Prosecutor, the court below was perfectly justified in convicting the first accused for the offence alleged. The counsel also submitted that the 3rd accused being registered owner of the vehicle and in the absence of any evidence to show that he was not the owner of the vehicle, it cannot be said that secret chamber was created in the vehicle without his connivance. So under the circumstances, court below was perfectly justified in convicting the third accused also for the offence alleged.

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

On 9.4.1998, PW1 the Excise Inspector attached to Thrissur Excise Enforcement and Anti Narcotic Special Squad along with PW2 another Excise official and Excise party were doing vehicle check-up duty in Peechy village along the National Highway near Vazhakkumpara Milk Cooperative Society in Thrissur-Palakkad Road and at that time, the lorry with No.KL 5B 1699 came with high speed and it was stopped by PW1 and he asked the driver and another person sitting in the vehicle to get down and both of them got down from the vehicle and on examination of the vehicle, he found a secret chamber by the side of the cabin and on examination of the cabin, he found that it contained about 1750 litres of spirit. He had found Ext.P7 attested copy of the permit, Ext.P8 attested copy of the R.C. Book and Ext.P6 tax receipt relating to the vehicle in the shirt pocket of the 1st accused. Thereafter he had taken three samples of 375 ml. each, from the spirit seen in the vehicle and sealed and labelled the same and thereafter seized the vehicle and the sample bottle as per Ext.P1 mahazar in the presence of PWs 5 and 6. Thereafter, he arrested the accused Nos.1 and 2 and prepared, Exts.P2 and P3 arrest memos and conducted body search of the accused Nos. 1 and 2 and found Rs.5710 from the pocket of 2nd accused Rs.453 from the pocket of 1st accused which is noted in Exts.P4 and P5 body search lists. Thereafter he produced the accused and the documents prepared before his superior officer, who in turn produced them before PW3 who registered Ext.P10 crime and occurrence report as Crime No.9/1998 against the present accused persons under Section 55(a) of the Abkari Act. He produced the accused Nos. 1 and 2 before the court along with remand report. He produced the articles before the court along with Ext.P11 property list. He prepared Ext.P14 scene mahazar and Ext.P15 sketch plan of the place of occurrence. He gave Ext.P12 forwarding note with a request to send the sample for analysis and samples were sent from the court and Ext.P13 chemical analysis report obtained. The further investigation in this case was conducted by PW4. He questioned the witnesses and recorded their statements. He collected Ext.P16 registration particulars of the vehicle from the RTO's office. Further investigation was conducted by PW4 and he completed investigation and submitted final report. The earlier part of the investigation was conducted by PW7 who questioned the witnesses and recorded their statements. PW8 was examined to prove that while they decided to dispose of the spirit, he

had taken spirit in two 5 litre cannases as per Ext.P17 mahazar and the lorry was auctioned and at that time Ext.P18 mahazar was prepared and he had produced MO2 series those two cannases before court along with Ext.p19 property list.

10. PWs5 and 6 are the independent witnesses to the seizure. Though they have admitted that they have signed Ext.P1 mahazar and found the accused Nos. 1 and 2 in the jeep, but denied that they have seen the seizure or arrest of the accused persons. PW6 had even gone to the extent of stating that there were two more persons in the vehicle who when stopped the vehicle had run away from the vehicle. So it is clear from the evidence that they are now trying to help the accused persons and that was the reason why they were not supporting the case of the prosecution. The fact that lorry was seized and accused Nos. 1 and 2 were arrested from there is not in dispute as well.

11. Then the evidence is that of PWs 1 and 2, the detecting officer and other officer who accompanied him at that time to prove the seizure and arrest. PW1 had deposed that on 9.4.1998, at about 4.00 pm, they were doing vehicle inspection duty along the Palakkad Thrissur Road in front of Vazhakkumpara APCOS Co-operative Milk Society. At that time, they saw the lorry in question came at high speed and they stopped the vehicle and asked the driver and other person sitting in the vehicle to get down and on conducting the examination of the vehicle, he found a secret chamber and when he opened the same, he found about 1750 litres of spirit in it. Thereafter he conducted body search of the accused Nos.1 and 2 and found Exts.P6 to P8 documents relating to the vehicle from the first accused and also found MO1 series currency notes from the possession of both accused which were seized as per Exts.P4 and P5 body search lists. He arrested them as per Exts.P2 and P3 arrest memos. He sent arrest intimation to the relatives evidenced by Ext.P9 series telegraph receipts. According to him, taking three sample in three 375 ml bottles, sealed and labelled the same, he had seized the lorry and sample bottles as per Ext.P1 mahazar. He produced the same along with the accused before his superior officer who in turn produced the accused along with the documents prepared before PW3 who had registered the case. PW2 had corroborated the evidence of PW1 on this aspect. There is some discrepancy in the evidence of PWs1 and 2, according to the

counsel for the appellants, as to the number of persons travelled in the vehicle. But a reading of the evidence of PWs1 and 2 coupled with description mentioned in Ext.P1 mahazar, it will be seen that there were only two persons in the vehicle at the time when it was stopped and both PWs 1 and 2 have stated that 1st accused was driving the vehicle at the relevant time and 2nd accused was sitting in the vehicle. The fact that the accused Nos. 1 and 2 were found at that place, at that time was proved by the evidence of PWs.5 and 6 the independent witnesses as well, though they did not fully support the seizure as such. So under the circumstances and also from the evidence available on record, it can be safely concluded that prosecution has proved the arrest of accused Nos. 1 and 2 along with the lorry which had said to have contained 1750 litres of spirit concealed in a secret chamber of the lorry.

12. Mere seizure of the article alone is not sufficient to convict the accused persons for offence alleged. It must be further proved by the prosecution that the articles seized had reached the court in the same condition in which it was seized and the chemical analysis report relates to the representative sample said to have been taken from the large quantity of contraband article said to have been seized from the possession of the accused. In this case, the original property list was not marked and it has not been seen received along with the records and in Ext.P11, there was no endorsement regarding the verification of the articles produced by the court as well. That only shows the list of articles seized and nothing more. So the entire records were called from the court below and it is seen that there was a property list produced which contained the description of the articles produced which shows that two sample bottles of 375 ml and MO1 series cash alone were produced. It was mentioned in the property list that the vehicle was produced before the authorised officer and it is seen from the property list that thondi articles were produced before the court only on 11.5.1998 i.e. more than one month of the alleged seizure. Further there is no explanation forthcoming for the delay in producing the article. None of the witnesses examined have explained the delay for producing the article as well. Further it is seen from the evidence of PWs.1 and 2 and Ext.P1 mahazar that 3 samples were taken from the spot which contained the seal and label but what was produced before the court is only two sample bottles as per the property list which were sent for examination and Ext.P13 report

obtained. There is no explanation forthcoming as to what happened to the 3rd sample as well. So under the circumstances, in the absence of producing the vehicle along with the huge quantity of spirit before the court, unless the three samples said to have been taken were produced before court, it cannot be said that the articles produced before the court represents the representative sample said to have been taken from the alleged contraband articles, so as to connect the accused with the contraband articles and also the chemical analysis report with sample said to have been taken from the contraband articles said to have been seized from the possession of the accused.

13. In the decision reported in Ravi v State of Kerala and Another [2011 (3) KHC 121] the Division Bench of this court has held that mere delay in producing the article is not sufficient to disbelieve the case of the prosecution. If the delay is explained to the satisfaction of the court, court can ignore the delay. But if the delay is not explained and no report has been filed showing the reason for delay in producing the articles, then that benefit must be given to the accused. In the absence of any explanation, it cannot be said that the articles alleged to have been seized from the possession of the accused have reached the court in a tamper free condition and chemical analysis report represents the representative sample said to have been taken from the possession of the accused. In this case also there was a delay of more than one month in producing the article which has not been explained.

14. Further the nature of seal used was not mentioned in Ext.P1 mahazar. The specimen seal impression of the seal was not produced before the court or it was provided along with the property list as well. Further in Ext.P12 forwarding note in the space provided for specimen seal impression, such a specimen impression of the seal was not seen provided as well. There is no explanation forthcoming on the side of the prosecution for this is lacuna as well. In the decision reported in Krishnan H. v State [2015 (1) KLD 421], this court has held that non production of the specimen impression of the seal used for sealing the article along with property list and not making that available in the forwarding note will create doubt regarding the genuineness of the sample produced and that benefit must be given to the accused.

15. These aspects were not properly considered by the court below before coming to the conclusion that the prosecution has proved the case against the accused beyond reasonable doubt and the chemical analysis reports relates to the representative sample said to have been taken from the possession of the accused. So the finding of the court below that prosecution has proved the case against accused Nos. 1 and 3 who are the appellants herein beyond reasonable doubt and the consequential conviction entered under Section 55(a) and of the Abkari Act for the reasons stated above are unsustainable in law and they are entitled to get acquittal of the charge levelled against him giving him the benefit of doubt.

16. Though the counsel for the appellant submitted that 3rd accused was not the owner of the vehicle as he had gone to the witness box and produced Ext.D1 to prove that he has sold the vehicle to one Appachan before the seizure of the vehicle, a perusal of the Ext.D1 will go to show that it is not sufficient to prove the transfer. Further normally the original agreement will be with the transferee and not with the transferor. Non examination of the transferee to prove that he obtained the vehicle as per Ext.D1 is also fatal to the case of the defence.

17. In the decision reported in Soni C Mathew v State of Kerala [2007 (3) KLJ 629] and Sooraj v Excise Inspector [2002 (1) KLJ 739], this court had held that if there is no allegation made against the owner of the vehicle that he had involved directly or indirectly in transporting the liquor, he cannot be charged with offence under Section 55(a) of the Abkari Act, merely because the spirit was transported in the vehicle of which he was the registered owner. But in this case it will be seen from the evidence that there was a secret chamber created in the vehicle for the purpose of transportation and Section 34 of the Indian Penal Code was also added for the purpose of proving the fact that it was done with the connivance of the owner of the vehicle. So the dictum laid down in the above decisions is not applicable to the facts of the case.

18. However, since this court has found on other reasons that the prosecution has failed to prove the case against the accused and they are entitled to get acquittal of the charge levelled against them giving them the benefit of doubt, the order of

conviction passed by the court below against the appellants under Section 55(a) of the Abkari Act is liable to be set aside and the appellants are acquittal of the charge levelled against them giving them the benefit of doubt. In view of my finding that the appellants are entitled to get acquittal, the sentence imposed is also not proper and the same is also set aside. In the result both the appellants succeed and the appeals are allowed. The order of conviction and sentence passed by the court below against the appellants under Section 55(a) of the Abkari Act are hereby set aside and they are acquitted of the charge leveled against them giving them the benefit of doubt. They are set at liberty and the bail bond executed by them will stand cancelled. The appellants if remitted any amount towards the fine, then lower court is directed to refund the same to them on making necessary application for that purpose.

Office is directed to communicate this judgment to the concerned court immediately.