

Thressia vs State of Kerala

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Court : Kerala

Decided On : Feb-29-2024

Judge : Honourable Mr.Justice K. Babu

Appeal No. : CRL.A/1014/2009

Appellant : Thressia

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU THURSDAY,
THE 29TH DAY OF FEBRUARY 2024 / 10TH PHALGUNA, 1945
AGAINST THE ORDER/JUDGMENT DATED 05.05.2009 IN SC NO.29
OF 2006 OF ADDITIONAL DISTRICT COURT (ADHOC), KALPETTA
APPELLANT: THRESSIA W/O.JOSEPH, NADUVATHANIKKAL HOUSE,
PERIKALLOORKADAVU, MULLANKOLLI, WAYANAD DISTRICT. BY
ADV SRI.MATHEW KURIAKOSE RESPONDENT: STATE OF KERALA
(CRIME NO.37/2004 OF SULTHAN BATHERY EXCISE, RANGE), REP.
BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM. BY ADV PUBLIC PROSECUTOR SRI.G. SUDHEER P.P
THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON

29.02.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.BABU, J.

----- CRL.A.No.1014 of 2009
----- Dated this the 29th day of February, 2024

JUDGMENT

Aggrieved by the judgment dated 05.05.2009, passed by the Additional Sessions Court, Adhoc-I, Kalpetta, in Sessions Case No.29/2006, the accused has preferred this appeal. The appellant/accused was convicted under Section 8(2) of the Abkari Act and sentenced to undergo simple imprisonment for a period of six months and pay a fine of Rs.1 Lakh.

2. The prosecution case is that on 20.04.2004, by 5.p.m. the appellant was found in possession of 62 packets of Karnataka made arrack, 100 ml each at Perikkalloor in violation of the provisions of the Abkari Act.

3. After completing the investigation, final report was submitted against the accused for the offences punishable

under Sections 55(a) and 8(2) of the Abkari Act before the jurisdictional magistrate. The case was committed to the Sessions Court, from where it was made over to the trial court. On the appearance of the accused, charge was framed against her for the offence punishable under Section 8(2) of the Abkari Act. The accused pleaded not guilty to the charge, and therefore, she came to be tried by the trial court for the aforesaid offence.

4. The prosecution examined PWs.1 to 5 and proved Exts.P1 to P6 and MOs. I to III.

5. After the closure of prosecution evidence, statement of the accused under Section 313 Cr.P.C. was recorded. She

pleaded innocence. The trial court heard the matter under Section 232 Cr.P.C. and found evidence against the accused, and hence she was called upon to enter on her defence and adduce evidence, if any, she may have in support thereof. After hearing the arguments addressed on both sides, the trial court convicted the appellant/accused for the aforesaid offence.

6. Heard Sri.Mathew Kuriakose, the learned counsel appearing for the appellant/accused and Sri. G.Sudheer, the learned Public Prosecutor appearing for the respondent.

7. The learned counsel for the appellant challenged the

judgment of conviction and sentence on the ground that the

prosecution failed to establish that the contraband seized from the place of occurrence eventually reached the Chemical Examiner's Laboratory.

8. The learned counsel for the appellant relied on the following circumstances to substantiate his contentions:-

i) Exhibit P1 seizure mahazar does not contain the nature and description of the seal stated to have been affixed on the bottle containing the sample. ii) There is no explanation for the custody of the sample from 22.04.2004 to 05.05.2004.

9. The alleged seizure was effected on 20.04.2004. The

detecting officer has prepared seizure mahazar at the scene of occurrence which is marked as Ext.P1. Ext.P1 seizure mahazar does not contain the nature and description of the seal stated to have been affixed on the bottle containing the sample. The detecting officer has also not given evidence as to the specific nature of the seal used by him. No material has been placed before the Court to show that the specimen seal was produced before the Court so as to enable the Court to ascertain the genuineness of the sample produced.

10. In Bhaskaran K. v. State of Kerala and another (2020

KHC 5296), this Court held that the nature of the seal used by the detecting officer shall be mentioned in the seizure mahazar and the specimen of the seal shall be produced in the Court so as to enable the Court to satisfy the genuineness of the sample produced in the Court.

11. The prosecution has not given evidence as to the date

on which the sample was forwarded to the laboratory. Ext.P3 is the Certificate of Chemical Analysis. It shows that the sample was forwarded to the laboratory as per letter dated 22.04.2004 of the Judicial First Class Magistrate Court-II, Sulthan Bathery. The sample was delivered in the laboratory only on 05.05.2004

by an excise guard by name P.Aboobacker. The prosecution has not given any explanation for the custody of the sample from 22.04.2004 to 05.05.2004. The sample remained in the custody of the property clerk. None of these officials, the property clerk and the excise guard who delivered the sample in the laboratory, were examined by the prosecution to rule out the possibility of the sample being changed or tampered with. Non examination of those officials is fatal to the prosecution.

12. In *Sasidharan v. State of Kerala* [2007 (1) KLT 720],

this Court had occasion to elucidate on the legal obligation cast on the prosecution to prove that the sample allegedly seized from the accused eventually reached the hands of the Chemical Examiner in a tamper-proof condition. Relying on *State of Rajasthan v. Daulath Ram* [AIR 1980 SC 1314] in *Sasidharan* (supra) this Court held that where sample changed several hands before reaching the Chemical Examiner, the prosecution had to necessarily examine the various officials who handled the sample to prove that while in their custody the seals on the sample have not been tampered with. In *Sathi v. State of Kerala* [2007 (1) ILR 718 (Ker.)], this Court re-emphasized on

the requirement of strict compliance with the statutory formalities in the matter of sampling/sealing, etc. of the contraband to be sent for Chemical Examination. In *Sathi* (supra), this Court further held that Courts could presume that an official act

was regularly and properly performed only if the said act was shown to have been performed. This Court specified that the presumption under Section 114(e) of the Evidence Act has no application in circumstances where official acts are not shown to be performed properly. The ratio in Sasidharan (supra) and Sathi (supra) has been affirmed by a Division Bench of this Court in Ravi v. State of Kerala [2011 (3) KLT 353].

13. In Vijay Pandey v. State of U.P (AIR 2019 SC 3569)

the Apex Court held that mere production of a laboratory report that the sample tested was the contraband substance cannot be conclusive proof by itself and that the sample seized and that tested have to be co-related.

14. It is settled that the prosecution in a case of this

nature can succeed only if it is proved that the sample which was analysed in the Chemical Examiner's laboratory was the very same sample which was drawn from the contraband substance said to have been seized from the possession of the accused {Vide: State of Rajasthan v. Daulat Ram [AIR 1980 SC 1314], Sasidharan v. State of Kerala [2007 (1) KHC 275]}.

15. In the present case, the prosecution failed to establish that the arrack allegedly seized from the place of occurrence was subjected to analysis in the Chemical Examiner's Laboratory. Therefore, Exhibit P3 Certificate of Chemical Analysis has no evidentiary value.

16. The prosecution failed to establish the link connecting the accused with the contraband seized.

17. The upshot of the above discussion is that the

conviction and sentence entered by the Court below overlooking these vital aspects of the matter cannot, therefore, be sustained. In the result, the appellant/accused is acquitted of the offence alleged. She is set at liberty. The Criminal Appeal is allowed as above. Sd/- K. BABU JUDGE saap