

Antony 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/1018/2009

Appellant : Antony

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 08.05.2009 IN SC NO.349
OF 2008 OF ADDITIONAL SESSIONS COURT (ADHOC-III),NORTH
PARAVUR APPELLANT: ANTONY KALATHIPARAMBIL HOUSE,
GOTHURUTHUKARA, CHENDAMANGALAM VILLAGE, PARAVUR. BY
ADV SRI.MANSOOR.B.H. RESPONDENT: STATE OF KERALA
INSPECTOR, N.PARAVUR RANGE, REP.BY, 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.1018 of 2009

----- Dated this the 29th day of February, 2024

JUDGMENT

Aggrieved by the judgment dated 08.05.2009, passed by the Additional District and Sessions Court, Adhoc-III, N. Paravur, in Sessions Case No.349/2008, the accused has preferred this appeal. The appellant/accused was convicted under Section 8(2) of the Abkari Act and sentenced to undergo rigorous imprisonment for a period of three years and pay a fine of Rs.1 Lakh.

2. The prosecution case is that on 23.08.2005, at 10.30 p.m. the appellant was found dealing with 30 litres of illicit arrack at Chendamangalam in violation of the provisions of the Abkari Act.

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

Section 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 him for the offence punishable under Section 8(2) of the Abkari Act. The accused pleaded not guilty to the charge, and therefore, he came to be tried by the trial court for the aforesaid offence.

4. The prosecution examined PWs.1 to 6 and proved Exts.P1 to P13 and MO. I series.

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

pleaded innocence. The trial court heard the matter under Section 232 Cr.P.C. and found evidence against the accused, and hence he was called upon to enter on his defence and adduce evidence, if any, he 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. B.H.Mansoor, 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 challenges 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 P5 seizure mahazar does not contain the nature and description of the seal stated to have been affixed on the bottle containing the sample.
- ii) The specimen of the seal was not produced before the court at the time of production of the properties including the sample.
- iii) Various officials who handled the sample during the course of its transit from the Court to the laboratory were not examined by the prosecution to rule out the possibility of the sample being changed or tampered with.

9. The alleged seizure was effected on 23.08.2005. The

detecting officer has prepared seizure mahazar at the scene of occurrence which is marked as Ext.P5. Ext.P5 seizure mahazar does not contain the nature and description of the seal stated to have been used by the detecting officer. 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. There is nothing to show that the specimen of the seal

was forwarded to the laboratory to ensure the genuineness of the sample produced for examination. In Exhibit P11 forwarding note, the space meant for mentioning the specimen of the seal is left blank. The sample remained in the custody of the property clerk. It was delivered in the laboratory on 19.10.2005 by an Excise Guard by name A.B. Sajeev Kumar. The property clerk and the Excise guard were not 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.

11. The crux of the offences under the Abkari Act, by its

very nature, is the seizure of the contraband. The prosecution in a case of this nature can succeed only if it establishes that the very same sample drawn at the place of occurrence was the sample tested in the Chemical Examiner's laboratory.

12. A legal obligation is cast on the prosecution to prove

that it was the contraband substance allegedly seized from the possession of the accused eventually reached the Chemical Examiner's laboratory in a tamper-proof condition. The chain of custody of the contraband commencing from the place of occurrence to the stage when the contraband reaches the laboratory is required to be established by the prosecution.

13. 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].

14. 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.

15. In *Rajamma v. State of Kerala* [2014 (1) KLT 506],

this Court held that if the specimen of the seal affixed on the bottle containing the sample is not produced before the court and forwarded to the Chemical Examiner for verification to ensure that the sample seal so provided is tallying with the seal affixed on the sample, no evidentiary value can be attached to the chemical analysis report.

16. 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.

17. 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]}.

18. In the present case, the prosecution failed to establish

that the contraband seized from the place of occurrence was subjected to analysis in the Chemical Examiner's Laboratory. Therefore, Ext.P10 Certificate of Chemical Analysis has no evidentiary value.

19. 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. He is set at liberty. The Criminal Appeal is allowed as above. Sd/- K. BABU JUDGE saap

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