

Surendran vs Excise Inspector, Kalpetta Range and Ano

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Court : Kerala

Decided On : Jan-19-2023

Judge : Honourable Mr.Justice K. Babu

Appeal No. : CRL.A/820/2009

Appellant : Surendran

Respondent : Excise Inspector, Kalpetta Range and Ano

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU THURSDAY,
THE 19TH DAY OF JANUARY 2023 / 29TH POUSHA, CRL.A NO. 820
OF 2009 AGAINST THE JUDGMENT SC 494/2006 OF ADDITIONAL
SESSIONS COURT (ADHOC)-II, KALPETTA

APPELLANT/ACCUSED: SURENDRAN, S/O NARAYANAN CHETTY,
AGED 30 YEARS,PARAKKAL VEEDU, PARAKKAL KUZHIMUKKU
BHAGAM, NATHAMKUNI,WAYANAD DISTRICT BY ADV
SRI.N.J.ANTONY RESPONDENTS/STATE: 1 EXCISE INSPECTOR,
KALPETTA RANGE, WAYANAD DISTRICT 2 STATE OF KERALA,
REP.BY PUBLIC PROSECUTOR, HIGH COURT OF

KERALA, ERNAKULAM BY ADV. SMT. REKHA, GP SRI. RAJESH A, SPL
GP THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON
19.01.2023, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

K.BABU, J.

----- Crl.A No.820 of 2009
----- Dated this the 19th day of January,
2023

JUDGMENT

Aggrieved by the judgment dated 13.05.2009, passed by the Additional Sessions Court (Adhoc)-II, Kalpetta in Sessions Case No. 494/2006, the accused has preferred this appeal. The appellant was convicted under Section 8(2) of the Abkari Act and sentenced to undergo rigorous imprisonment for a term of two years and pay a fine of Rs.1 Lakh.

2. The prosecution case is that on 25.03.2006 at 2.45 p.m., the accused was found in possession of 20 litres of arrack at Thrikkaipetta, 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 5 and proved Exts.P1 to P7, MOs 1 and 2.

5. After the closure of the evidence on behalf of the

prosecution, 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. On the side of defence, DWs 1 and 2 were examined. The trial Court, after hearing the arguments addressed on both sides, found the accused guilty of the offence punishable under Section 8(2) of the Abkari Act and convicted him thereunder.

6. Heard Sri.N.J.Antony, the learned counsel appearing for the appellant/accused and Smt. Rekha S. the learned Senior Public Prosecutor appearing for the respondent.

7. The judgment of conviction and sentence is

challenged on the ground that the prosecution has miserably failed to establish that the contraband substance allegedly seized from the place of occurrence eventually reached the Chemical Examiners Laboratory.

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

(1) The delay in the production of properties including the sample has not been satisfactorily explained by the prosecution.

(2) The prosecution failed to establish the genuineness of the sample produced before the Court.

(3) There is every possibility that the sample subjected to chemical analysis was not the one drawn from the contraband allegedly seized from the possession of the accused.

9. The alleged seizure was effected on 25.03.2006.

PW3, the Excise Range Inspector, Kalpetta, detected the offence. According to PW3, he had arrested the accused along with the contraband substance from the scene of occurrence and that he had drawn the sample from the contraband seized. The properties including the sample were produced before the Court only

on 27.03.2006, which is evident from Ext.P4 Property List. The prosecution has not offered any explanation for the delay in the production of the properties including the sample.

10. In Ravi v. State of Kerala [2011 (3) KHC 353], on the question of delay in the production of properties, a Division Bench of this Court held as follows: 8. We, therefore, answer the reference as follows:

1. It is not necessary to produce the article seized under

S.34 of the Abkari Act before the Magistrate 'forthwith' either by virtue of S.102(3) Cr.PC or by virtue of any of the provisions of the Abkari Act or the Abkari Manual. What is enjoined by the statute is only that the seizure of the property should be reported forthwith to the Court. But we hasten to add that the production of the property before Court (wherever it is practicable) should also take place without unnecessary delay. There should be explanation for the delay when there is delayed production of the property. (Emphasis supplied) In Ravi's case (supra) the Division Bench held that

production of the property before the Court should take place without unnecessary delay and that there should be explanation for the delay when there is delayed production of the property.

11. There is no satisfactory explanation for the delay in

the production of properties before the Court. The unexplained delay in the production of properties would lead to the conclusion that tampering with samples could not be ruled out.

12. Ext.P2 is the mahazar prepared at the scene of

occurrence to evidence seizure. The detecting officer had not narrated the nature and description of the seal stated to have been affixed on the bottle containing the sample in Ext.P2 seizure mahazar and that he has not given evidence as to the nature of the seal used. The detecting officer had also not produced the specimen

of the seal at the time of production of the properties including the sample before the Court.

13. The detecting officer, who had drawn the sample,

has to give evidence as to the nature of the seal affixed on the bottle containing the sample. The nature of the seal used shall be mentioned in the seizure mahazar. The specimen of the seal shall be produced in the Court. The specimen of the seal shall be provided in the seizure mahazar and also in the forwarding note so as to enable the Court to satisfy the

genuineness of the sample produced in the Court {Vide: Bhaskaran K. v. State of Kerala and another (2020 KHC 5296), Achuthan v. State of Kerala [2016(1) KLD 391], Krishnadas v. State of Kerala (2019 KHC 191)}.

14. As mentioned above, the sample was produced

before the Court only on 27.03.2006. Ext.P7, Certificate of Chemical Analysis shows that two sealed 375ml bottles despatched as per letter dated 25.03.2006 of the Chief Judicial Magistrate Court, Kalpetta were subjected to analysis in the Chemical Examiners Laboratory. The prosecution has not given any explanation for this anomaly. Therefore, the necessary conclusion is that the prosecution failed to establish

that the arrack allegedly seized from the possession of the accused was subjected to analysis in the Chemical Examiners Laboratory. Therefore, Ext.P7 Certificate of Chemical Analysis has no evidentiary value.

15. 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. It is the duty of the prosecution to establish that the sample seized and that tested are the same.

16. 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]}.

17. In the instant case, the prosecution was unable to establish the link connecting the accused with the contraband seized and the sample analysed in the laboratory. The accused is entitled to the benefit of doubt arising from the absence of link evidence as discussed above.

18. The conviction and sentence recorded by the trial

Court cannot be sustained. In the result, the accused is acquitted of the offence alleged. He is set at liberty. Any amount deposited by the appellant/accused as per the directions of this Court shall be disbursed to him as per law. The appeal is allowed as above. Sd/- K.BABU JUDGE VPK

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