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John @ Babu vs State of Kerala

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Court : Kerala

Decided On : Jan-03-2023

Judge : Honourable Mr.Justice K. Babu

Appeal No. : CRL.A/1166/2007

Appellant : John @ Babu

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU TUESDAY, THE 3RD DAY OF JANUARY 2023 / 13TH POUSHA, 1944 CRL.A NO. 1166 OF 2007 AGAINST THE JUDGMENT IN SC 83/2002 OF ADDITIONAL DISTRICT COURT (ADHOC), MAVELIKKARA APPELLANT/S:

JOHN @ BABU ARUNOOTTIMANGALAM, VETTIYAR VILLAGE,, MAVELIKKARA. BY ADVS. SRI.GEORGE VARGHESE(PERUMPALLIKUTTIYIL) SRI.A.R.DILEEP RESPONDENT/S: 1 STATE OF KERALA PUBLIC PROSECUTOR, HIGH COURT OF KERALA. 2 EXCISE INSPECTOR MAVELIKKARA EXCISE RANGE, MAVELIKKARA. OTHER PRESENT: REKHA,GP;RAJESH A,SPL.GP THIS CRIMINAL APPEAL HAVING

COME UP FOR ADMISSION ON 03.01.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: ..2..

JUDGMENT

Aggrieved by the judgment dated 31.05.2007, passed by the Additional Sessions Court, Fast Track -II (Adhoc), Mavelikkara, in Sessions Case No. 83/2002, the accused has preferred this appeal. The appellant was convicted under Sections 8(2) and 55(a) of the Abkari Act and sentenced to undergo rigorous imprisonment for a term of one year and pay a fine of Rs. One Lakh.

2. The prosecution case is that on 22.09.1999, at

5.30 PM, the accused was found in possession of 750 ml of arrack at his house bearing No.213 of Ward No.XII, in Vettiyar Village, 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 8(2) and 55(a) of the Abkari Act before the jurisdictional Magistrate. The case was ..3..

committed to the Sessions Court from where it was made over to the trial Court. On the appearance of the accused charges were framed against him for the offences punishable under Sections 8(2) and 55(a) of the Abkari Act. The accused pleaded not guilty to the charges and therefore, he came to be tried by the trial Court for the aforesaid offences.

4. The prosecution examined PWs 1 to 5 and proved Exts. P1 to P9 and MOs 1 to 3.

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. Exts.D1 to D3 were marked on the side of the defence. The trial Court, after hearing the arguments addressed on both sides, found the accused guilty of the offences under

..4.. Sections 8(2) and 55(a) of the Abkari Act and convicted him thereunder.

6. Heard Sri. George Varghese Perumpallikuttiyil, the learned counsel appearing for the appellant/accused and Smt. Rekha S., the learned Senior Public Prosecutor.

7. The learned counsel for the appellant challenges the judgment of conviction and sentence on the following grounds:-

(i) The prosecution failed to establish the conscious possession of the contraband substance by the accused.

(ii) The prosecution has failed to prove that the contraband substance allegedly seized from the place of occurrence eventually reached the Chemical Examiners Laboratory.

8. The learned counsel for the appellant

contended that the prosecution has not succeeded in establishing the conscious possession of the contraband substance by the accused. According to the prosecution, ..5.. on 22.09.1999, the Detecting Officer searched Building No.213 of Ward No.XII of Thazhakkara Gramapanchayat in Mavelikkara Taluk. The Detecting Officer arrested the accused from the building. They recovered the contraband substance from one of the bed rooms of the building.

9. Admittedly, the prosecution has no case that the contraband substance was in the physical possession of

the accused. At the time of search, the accused was found on a step on the premise of the building. Thereafter, the Detecting Officer searched the building and recovered 750 ml of illicit arrack. It has come out in evidence that the building was in the name of another person. The prosecution has not given evidence that the

accused is residing in that building. Another person is residing in the building.

10. In order to fasten the liability on the appellant/accused, the prosecution has to establish the conscious possession of the contraband substance by him. ..6..

No evidence was adduced to show that the accused was in the exclusive dominion and control of the contraband substance. While dealing with the question of possession in relation to offences under Abkari Act, this Court in

Santhosh v. State of Kerala [2021(5) KHC 214] held

thus:- 20.The word 'possession' is not defined in the Abkari Act. The Halsbury's Laws of England, (5th edition, para 834), defines 'possession' as follows:

> 834. Physical and legal possession distinguished. 'Possession' is a word of ambiguousmeaning, and its legal senses do not coincide with the popular sense. Its meaning depends upon the context in which it is used. In English law it may be treated not merely as a physical condition protected by ownership, but as a right in itself. The word 'possession' may mean effective, physical or manual control, or occupation, evidenced by some outward act, sometimes called de facto possession or detention as distinct from a legal right to possession.This is a question of fact rather than of law. 'Possession' may mean legal possession: that possession which is recognised and protected as such by law. The elements normally characteristic of legal possession are an intention of possessing together with that amount of occupation or control of the entire subject matter of which it is practically capable and which is sufficient for practical purposes to exclude strangers from interfering." 21.In order to establish 'possession', prosecution must prove that the person who is alleged to be in possession of a ..7..

contraband article has dominion or control over such article. See : Ravi C. v. State of Kerala (2011(3) KHC 427)].

22.In Gunwantlal v. State of M.P (1972 KHC 464), the Apex Court in the context of Section 25(1)(a) of the Indian ArmsAct held that the real test for determining whether a person is in possession of anything is whether he is in general control of it. 23.'Possession' of an article involves power to control and intent to control. The inevitable factor to be proved by the prosecution to establish 'possession' is, dominion or control over the contraband article by accused. A person may have dominion or control over the contraband article, if he is in actual possession of the article. Even if a person is not in actual or physical custody of a contraband article, it is well settled that prosecution can establish 'possession' if it can successfully prove that accused has control or dominion over such property. Such possession is referred to as 'constructive possession'. [See : Gunwantlal v. State of M.P in 1972 KHC 464 = 1972(2) SCC 194 Halsburys laws of England (supra)]. xxxxxxx

26. The accused faces a charge that attracts stringent

punishment. A balance, thus, must be struck while constructing the meaning of a word in the statute ('possession' in the present context) that takes in the basic ingredient of the offence alleged. The prosecution has to establish possession of wash by the accused to bring home the charge against him. Where the offence alleged seeks to deprive the accused of his liberty for a period extending to ten years, a word in the definition of the penal provision, that embraces within it the fundamental ingredient of the offence, is to be strictly constructed. Hence the prosecution has to establish the conscious possession of the contraband substance by the accused to attract the offence alleged.

11. In the present case, the prosecution has not ..8.. succeeded in showing that the accused was in conscious possession of the contraband substance. The prosecution must fail on that ground alone.

12. It is further contended that the prosecution failed to establish that the contraband substance allegedly seized from the place of occurrence eventually reached the Chemical Examiners Laboratory.

13. Ext.P1 is the seizure mahazar prepared at the

scene of occurrence. The Detecting Officer has not narrated the nature and description of the seal stated to have been affixed on the bottle containing the sample. He has not given evidence as to the nature of the seal used. The specimen of the seal was not produced before the Court at the time of production of properties. There is nothing to show that the specimen of the seal was forwarded to the Chemical Examiner for verification of the genuineness of the sample produced for analysis. The forwarding note/requisition for sending sample to the laboratory was not produced and marked.

..9..

14. In the instance case, as the prosecution failed

to show that the contraband seized from the place of occurrence was actually examined in the laboratory, Ext.P6 Certificate of Chemical Analysis has no evidentiary value. The prosecution failed to establish the link connecting the accused with the contraband seized.

15. 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. The appellant/accused is therefore found not guilty of the offences punishable under Sections 8(2) and 55(a) of the Abkari Act. In the result,

(i) The Appeal is allowed ;

(ii) The judgment of conviction and sentence passed against the accused is set aside ;

(iii) The accused is acquitted of the offences alleged ;

(iv) He is set at liberty ;

(v) Any amount deposited by the accused as per the ..10.. interim orders of this Court shall be disbursed to him as per law. Sd/- K. BABU, JUDGE kkj

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