

Prasad and Another vs State of Kerala

Prasad and Another vs State of Kerala

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Court : Kerala

Decided On : Jan-12-2023

Judge : Honourable Mr.Justice K. Babu

Appeal No. : CRL.A/831/2008

Appellant : Prasad and Another

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU THURSDAY,
THE 12TH DAY OF JANUARY 2023 / 22ND POUSHA, 1944 CRL.A NO.
831 OF 2008 AGAINST THE JUDGMENT IN SC 175/2002 OF SPECIAL
COURT FOR ABKARI ACT CASES, KOTTARAKKARA CP 19/1998 OF
JUDICIAL MAGISTRATE OF FIRST CLASS -III, PUNALUR
APPELLANTS: 1 PRASAD AND ANOTHER KIIZHAKKETHIL VEEDU,
VILLOOR MURI,MELILA VILLAGE. 2 BALAKRISHNA PILLAI S/O.
RAMAN PILLAI,, BIJU BHAVAN,VILLOOR MURI,, MELILA VILLAGE.
BY ADVS. S.RAJEEV K.K.DHEERENDRAKRISHNAN
RESPONDENT/S: STATE OF KERALA REPRESENTED BY PUBLIC
PROSECUTOR,, HIGH COURT OF KERALA,, ERNAKULAM. BY SR

PUBLIC PROSECUTOR SMT REKHA B THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 12.01.2023, ALONG WITH CRL.A.925/2008, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: -2-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU THURSDAY, THE 12TH DAY OF JANUARY 2023 / 22ND POUSHA, CRL.A NO. 925 OF 2008 AGAINST THE ORDER/JUDGMENTSC 175/2002 OF SPECIAL COURT FOR ABKARI ACT CASES, KOTTARAKKARA

APPELLANT/S: OMANA AMMA KAKKAKOTTOOR MURI, EZHUKONE VILLAGE,, KOTTARAKKARA TALUK. BY ADV SRI.ALAN PAPALI
RESPONDENT/S: STATE OF KERALA KUNNICODU POLICE STATION),, REPRESENTED BY THE PUBLIC PROSECUTOR,, HIGH COURT OF KERALA, ERNAKULAM. OTHER PRESENT: REKHA,GP;RAJESH SPL GP THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 12.01.2023, ALONG WITH CRL.A.831/2008, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: -3-

JUDGMENT

These two appeals arise from the judgment dated

25.04.2008, passed by the Additional Sessions Court (Abkari Act cases), Kottarakkara, in Sessions Case No.175/2002. The appellants in Crl. A. No.831/2008 are accused Nos. 1 and 2 and the appellant in Crl. A. No.925 of 2008 is accused No.3. The appellants/accused Nos. 1 to 3 were convicted under Sections 55(a) and 55(i) of the Abkari Act and accused No.3 was also convicted under Section 57(a) of the Abkari Act also. Appellants/ accused

Nos. 1 to 3 were sentenced to undergo simple imprisonment for a term of five years each and pay a fine of Rs. One Lakh each. Accused No.3 was sentenced to undergo simple imprisonment for a term of one year and pay a fine of Rs.50,000/-

under Section 57(a) of the Abkari Act in addition to the above sentence.

2. The prosecution case is that on 03.12.1997 at 6 p.m., the accused were found in possession of 3 litres -4- of arrack in a jerry can in the toddy shop No.8 of Thazham, Chakkuvackal.

3. After completing the investigation, final report

was submitted against the accused for the offences punishable under Sections 55(a) and 55 (b) 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 charges were framed against them for the offences punishable under Sections 55(a), 55(i) and 57(a) of the Abkari Act. They pleaded not guilty to the charges and therefore, they 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 P5 and MOs 1 to 3.

5. After the closure of the evidence on behalf of the prosecution, the statements of the accused under Section -5-

313 Cr.P.C. were recorded. They pleaded innocence. The trial Court heard the matter under Section 232 Cr.P.C. and found evidence against the accused and hence they were called upon to enter on their defence and adduce evidence, if any, they may have in support thereof. DW1 was examined on the defence side. The trial Court, after hearing the arguments addressed on both sides, found accused Nos. 1 to 3 guilty of the offences under Sections 55(a) and 55(i) of the Abkari Act. Accused No.3 was also found guilty under Section 57(a) of the Abkari Act. They were convicted accordingly.

6. Heard Sri, S. Rajeev, the learned counsel

appearing for appellants 1 and 2, Shri. Alan Papali, the learned counsel appearing for appellant No.3 and Smt. S. Rekha, the learned Senior Public Prosecutor appearing for the respondent. -6-

7. The learned counsel for the appellants challenge

the judgment of conviction and sentence on the ground that the prosecution failed to establish that the arrack allegedly recovered from the place of occurrence was eventually subjected to analysis in the Chemical Examiner's Laboratory.

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

(a) The Detecting Officer has not produced the specimen of the seal at the time of production of properties before the Court.

(b) The contemporaneous documents prepared at the scene of occurrence do not refer to the nature of the seal stated to have been affixed on the bottle containing the sample. -7-

(c) The Detecting Officer has not given evidence as to the nature of the seal used.

(d) There is nothing to show that the specimen of the seal was forwarded to the Chemical Examiner for verification.

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

9. The alleged seizure was effected on 03.12.1997

by the Sub Inspector of Police, Kunnikkode. The Detecting Officer arrested accused Nos. 1 and 2 at the scene of occurrence. They had drawn the sample from the bulk quantity of the contraband substance seized from the place of occurrence. Ext.P2 is the seizure mahazar prepared by the Detecting Officer. The Detecting Officer has not narrated the nature and -8- description of the seal stated to have been affixed on the bottle containing the sample in Ext. P2. He has not given evidence as to the nature of the seal. The specimen of the seal was also not produced before the Court at the time of production of the sample before the Court.

10. In Bhaskaran v. State of Kerala [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. In *Ravi v. State of Kerala* [2011 (3) KHC 121] on the question of delay in production of properties a Division Bench of this Court held thus:

"8. We, therefore, answer the reference as follows: 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 -9-

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." 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.

12. As mentioned above, the specimen of the seal

was not produced before the Court at the time of production of the properties. There is also no evidence to show that the specimen of the seal was forwarded to the Chemical Examiner for comparison to ensure the genuineness of the sample produced before the laboratory for comparison. Forwarding note/requisition for sending sample has not been produced and marked.

13. In *Rajamma v. State of Kerala* [2014 (1) KLT 506], this Court held that if the specimen of the seal -10- 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.

14. In Ramachandran v. State of Kerala [2021

(1) KLT 793] while dealing with a case in which forwarding note/requisition for sending sample to the

laboratory was not produced and marked, this Court held

that the prosecution could not establish the tamper-proof despatch of the sample to the laboratory as there was no satisfactory link evidence to show that it was the same sample that was drawn from the contraband seized eventually reached the Chemical Examiner's laboratory.

15. The properties including the sample remained in the custody of the property clerk till 24.01.2001 as is -11-

evident from Ext.P5 Certificate of Chemical Analysis. The bottles containing the sample reached the laboratory only on 25.01.2001. The sample was delivered in the laboratory by a police constable No.3391. Neither the property clerk nor the police constable who delivered the

sample in the laboratory was examined by the prosecution to rule out the possibility of the sample being changed or tampered with. Non-examination of the various officials who handled the sample during its transit from the Court to the laboratory is fatal to the prosecution. This view is fortified the by the decision of Apex Court in State of Rajasthan v. Daulat Ram (AIR

(1980) SC 1314].

15. As the prosecution has not succeeded in proving that the contraband allegedly seized at the scene of occurrence eventually reached the hands of the

Chemical Examiner, Ext.P5 Certificate of Chemical Analysis has no evidentiary value. Therefore, the -12- prosecution failed to establish the link connecting the accused with the contraband seized. 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 are acquitted of the offences alleged:

(iv) They are set at liberty:

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

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