

Mallika vs State of Kerala

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Court : Kerala

Decided On : Jan-18-2023

Judge : Honourable Mr.Justice K. Babu

Appeal No. : CRL.A/1328/2007

Appellant : Mallika

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU WEDNESDAY, THE 18TH DAY OF JANUARY 2023 / 28TH POUSHA, AGAINST THE JUDGMENT IN SC 617/2004 OF ADDITIONAL DISTRICT COURT (ADHOC) III, TRIVANDRUM APPELLANT MALLIKA MUNDAVANKUNNUPUTHENVEEDU, AZHAMKAL, MUKUNDARA DESOM, KALLIKKAD VILLAGE. BY ADVS. SRI.T.A.UNNIKRISHNAN SRI.K.SATHEESH KUMAR RESPONDENT/S: STATE OF KERALA REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,, ERNAKULAM. OTHER PRESENT: SMT REKHA SR PP THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 18.01.2023, THE COURT ON THE SAME DAY DELIVERED THE

FOLLOWING: ..2..

JUDGMENT

Aggrieved by the judgment dated 21.06.2007, passed by the Additional Sessions Court, (Fast Track - III), Thiruvananthapuram in Sessions Case No.617 of 2004, the accused has preferred this appeal. The appellant was convicted under Section 8(2) of the Abkari Act and sentenced to undergo simple imprisonment for a term of one year and pay a fine of Rs.1 Lakh.

2. The prosecution case is that on 11.02.2004, the accused was found in possession of 5 litres of arrack near Paruthipally Siva Temple 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 55(a) of the Abkari Act before the jurisdictional Magistrate. The case was committed to the Sessions Court from where it was made over to the ..3.. 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 6 and proved Exts.P1 to P2(a) and P3 to P9(a) and MO1.

5. After the closure of the evidence on behalf of

the prosecution, 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 to adduce evidence, if any, she may have in support thereof. The trial Court, after hearing the arguments addressed on both sides, found the accused guilty of the offence under Section 8(2) of the Abkari Act and convicted her thereunder.

6. Heard Sri.T.A. Unnikrishnan, the learned ..4..

counsel appearing for the appellant/ accused, Smt. Rekha S., the learned Senior Public Prosecutor and Sri. Rajesh A., the learned Special Government Pleader (Vigilance) appearing for the respondent.

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

(i) The very arrest of the accused as pleaded by the prosecution is doubtful.

(ii) The prosecution failed to establish that the arrack allegedly seized from the place of occurrence was subjected to analysis in the Chemical Examiners Laboratory.

8. The prosecution case is that the accused was arrested from the place of occurrence along with the contraband substance. The learned counsel for the appellant contended that the foundation of the prosecution case is shattered in view of the presence of the crime number in the arrest memo. It is contended ..5.. that the arrest is doubtful. Ext.P3 is the arrest memo

prepared by the Detecting Officer. The arrest memo contains the number of the crime registered against the accused. While dealing with a similar fact situation this Court in Santhosh v. State of Kerala [2021 (5) KHC 214], held thus:-

14. The presence of crime number in the arrest memo prepared by the detecting officer at the place of occurrence points to the following possibilities ; either the first information report was registered prior to the alleged recovery of the contraband substance or the number of the first information report was inserted in the arrest memo after its registration.

15. In either case, the veracity of the prosecution version

regarding the incident proper is doubtful. It is for the detecting officer to offer explanation in this regard. In the instant case, it is alleged by the

prosecution that the seizure was effected and the accused was arrested prior to the registration of the first information report ; then there could not be the crime number in the arrest memo. This creates doubt about the genesis of the prosecution case. The seizure of the contraband substance and the arrest of the accused, resultantly come under cloud. [See :Karunakar Bindhani v. State of Kerala (2016 KHC 758: 2017(1) KLD 48) and Rafeeqe v. Sub Inspector of Police, Kunnankulam Police Station and another (2020(3) KHC 715)].

9. In the absence of any satisfactory explanation offered by the prosecution with regard to the presence of ..6.. the crime number in Ext.P4 arrest memo, a doubt arises as to the manner in which the seizure and arrest were effected.

10. The learned counsel further contended that the

prosecution has not succeeded in proving that the contraband allegedly seized from the place of occurrence eventually reached the Chemical Examiners Laboratory.

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

(a) The specimen of the seal was not produced before the Court.

(b) Ext.P1 seizure mahazar does not contain the seal stated to have been affixed on the contraband seized from the place of occurrence.

(c) Drawing of the sample by the Property Clerk of the jurisdictional Magistrate has no sanction of law. ..7..

12. The detecting officer has prepared Ext.P1 seizure mahazar at the scene of occurrence. 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 not given evidence as to the nature of the seal used. There is nothing on record to show that the specimen of the seal was produced before the Court at the time of production of the sample

to ensure the genuineness of the same.

13. Admittedly, the detecting officer had not taken sample from the scene of occurrence. He produced the bulk quantity of the contraband substance seized from

the scene of occurrence before the Court. PW4, the property clerk of the jurisdictional Court, gave evidence that he had drawn the sample from the contraband produced by the detecting officer before the Court. The legality of the act of drawing sample by the property Clerk of the Court was considered by this Court in ..8.. Baburaj v. State of Kerala [2021 (6) KHC 92]. In Baburaj v. State of Kerala, this Court held thus:-

35. Drawing the sample and sealing the same are acts within the exclusive province of the Police official or the Excise official concerned. The learned Magistrate undertaking the act of taking the sample from the contraband himself is irreconcilable. The water-tight compartments provided for the investigator and the court in a criminal prosecution cannot, at any rate, be allowed to be traversed or interchanged. It is pertinent to note that the detecting officer, after investigation, is to file the final report before the Magistrate. If the Magistrate himself undertakes the act of taking the sample from the contraband produced before him, the question of independent consideration of final report laid by the investigating officer before the learned Magistrate, which is cardinal to criminal jurisprudence, would fail. This finding is fortified by the decision of this Court in Smithesh v. State of Kerala [2019 (2) KLT 974], wherein this Court held that the Magistrate has no power or authority to collect samples from the contraband produced before him. In Baby v. State of Kerala [2020 (2) KLT 590], this Court had an occasion to consider whether the Magistrate has the power or authority to direct the investigating officer to draw the sample from the contraband produced before the court for sending to the chemical examiner. This Court

held that the learned Magistrate had traversed the

jurisdictional limits by issuing orders to take samples from the contraband produced before him for the purpose of sending it to the Chemical Examiner's laboratory.

36. The course adopted by the learned Magistrate

undertaking the act of taking samples through the property clerk is not a procedure established by law. The necessary conclusion is that the Magistrate is not empowered to draw sample from the contraband produced before him by the detecting officer. ..9..

14. In Baburaj this Court further held that as the procedure adopted in drawing sample from the contraband substance has no sanction of law, the genuineness of the sample forwarded to the Chemical Examiner's laboratory becomes doubtful and no evidentiary value can be given to Chemical Analysis Report obtained based on the sample so drawn.

15. In the present case, the prosecution could not

establish that the contraband substance seized from the place of occurrence eventually reached the Chemical Examiners Laboratory. Therefore, Ext.P8 Certificate of Chemical Analysis has no evidentiary value. The prosecution failed to establish the link connecting the accused with the contraband seized.

16. 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 ..10.. therefore, found not guilty of the offence punishable under Section 8(2) 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 offence alleged ;

(iv) She is set at liberty ;

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

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