Usha vs State of Kerala

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Court : Kerala

Decided On : Oct-31-2023

Judge : Honourable Mrs. Justice Sophy Thomas

Appeal No. : Crl.Rev.Pet/2491/2005

Appellant : USHA

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE SOPHY THOMAS TUESDAY, THE 31ST DAY OF OCTOBER 2023 / 9TH KARTHIKA, 1945 CRL.REV.PET NO. 2491 OF 2005 CRL.A NO.96/1995 OF ADDITIONAL SESSIONS COURT (ADHOC)-II, PATHANAMTHITTA CC 166/1992 OF JUDICIAL MAGISTRATE OF FIRST CLASS, RANNI

REVISION PETITIONER/APPELLANT/ACCUSED: USHA, D/O.KUNJAMMA, MELASSERIL VEEDU, KUMARAMPEROOR, VADASSERIKKARA. BY ADV SRI.S.SANTOSH KUMAR (PERUNAD) RESPONDENT/RESPONDENT/COMPLAINANT: THE STATE OF KERALA REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. SHRI M.C.ASHI, PUBLIC

PROSECUTOR THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HARD ON 31.10.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOW : Crl.R.P No.2491 of 2005 2

ORDER

This revision is at the instance of the accused in C.C.No.166 of 1992 on the file of the Judicial First Class Magistrate, Ranny, assailing the judgment in Crl. Appeal No.96 of 1995, on the file of the Additional District and Sessions (Adhoc) Judge Fast Track Court II, Pathanamthitta, which upheld her conviction and sentence under Section 55(g) of the Abkari Act.

2. The prosecution case is that on 18.08.1990 at 05.00 p.m., the revision petitioner was found in possession of 15 litres of wash at

her house bearing No.268 of Vadasserikkara Panchayat. PW1, Preventive Officer of Ranny Excise Range and party detected the offence. The revision petitioner was arrested then and there, sample was taken from the wash, and it was sealed and labelled as per law. The revision petitioner along with the records and articles were produced before the Excise Range Office, and thereafter before the jurisdictional Magistrate. After investigation, charge was laid against the revision petitioner under Section 55(g) of the Abkair Act.

3. The trial court examined PWs 1 and 2, marked Exts. P1 to P5

and identified MOs I and II to prove its case. The revision petitioner denied the incriminating evidence brought on record, in 313 Cr.P.C. examination, but no defence evidence was adduced. On analysing the Crl.R.P No.2491 of 2005 3

facts and evidence, the trial court found the revision petitioner guilty

under Section 55(g) of the Abkari Act and she was sentenced to undergo rigorous imprisonment for six months.

4. Aggrieved by the conviction and sentence, she preferred Crl.

Appeal No.96 of 1995. The appellate court found that the conviction and sentence imposed by the trial court was just and proper, though fine also should have been formed part of the sentence for an offence under Section 55 (g) of the Abkari Act. The appellate court dismissed the appeal upholding the conviction and sentence, against which she preferred this revision petition.

5. This Court is aware of the fact that the power of revision is

not wide enough and exhaustive to re-appreciate the evidence to enter into a contra finding. This Court is called upon to find out whether the conviction and sentence imposed by the courts below are wholly unreasonable or perverse and also to find out whether there is non-consideration of any relevant material.

6. Heard learned counsel for the revision petitioner and learned Public Prosecutor.

7. The main ground urged by the revision petitioner is that

though the revision petitioner was found in the house, from where the wash was seized, there is nothing to show that, she was in possession of the article seized. He would point out that, even the name of the Crl.R.P No.2491 of 2005 4

husband of the revision petitioner was not mentioned in the prosecution records. The ownership of the house, from where the wash was seized, also was not proved by the prosecution. So according to him, mere presence of the revision petitioner in that house when the Excise Officials seized wash from there, was not sufficient to implicate her in this case. He is relying on the decision of the Apex Court in Gunwantlal v. The State of M.P. [1972 KHC 464], to say that Possession does not mean only physical or actual possession but includes constructive possession. If there is any disputed question of possession, specific facts admitted or proved will alone establish the existence of the dominion of the person over it necessary to determine whether that person was or was not in possession of the thing in question. In the case on hand though two independent witnesses were sited, they were not examined by the prosecution. No documents were produced to prove the ownership of the house from where the wash in question was seized. The Village Officer was not even cited as a witness and no documents were

obtained from the concerned village office to prove the ownership of the house from where the wash was seized.

8. In Ravi C. v. State of Kerala [2011 (3) KHC 427], this Court held that only because an article is found kept or stored in a building or house, the owner or occupier of such building cannot be Crl.R.P No.2491 of 2005 5

said to have stored the article, nor can it be said that he is in possession of such article. Even if owner or occupier of the house was present in the house at the time of seizure, he cannot be presumed to be in possession of the article, or stored the same. Paragraphs 22 to 25 of that judgment read as follows:

> 22. Thus, it will be clear that only because an article is found kept or stored in a building or house, the owner or occupier of such building cannot be said to have stored the article, nor can it be said that he is in possession of such article. There is also no presumption either on facts or in law that an article which is seen kept or stored in a building or house is stored or possessed by the owner or occupier of the building. Even if owner or occupier of the house was present in the house at the time of seizure, he cannot be presumed to be in possession of the article or stored the same.

23. The Supreme Court in Ismailkhan Aiyubkhan

> Pathan v. State of Gujarat, 2000 KHC 1611 : (2000) 10 SCC 257 held thus: There is no statutory provision for drawing any presumption that a person who was present at any particular place shall be presumed to be in possession of the narcotic or psychotropic substance. No presumption under law can be drawn even under S.114 of the Evidence Act merely because these persons were present when PW 7 went there.

24. Thus, the question whether a person stored the

article which is found kept in his house, or whether he is in possession of such article does not depend merely on ownership or possession of the house. An

owner or occupier Crl.R.P No.2491 of 2005 6 of the building or house cannot be held liable for storing or for possession of such article, for the sole reason that he is the owner or occupier of the building or house.

25. The person who stores an article in a building or

house need not be in possession of the same. Like wise, the person who is in possession of an article might not have stored it in the building. Therefore, possession does not follow storage nor does storage follows possession.

Possession and storing connote different things. The facts

to be proved to constitute possession and storing are different. Possession as well as storing of arrack are prohibited under the Act. Illegal possession and storing of arrack constitute independent offences under S.8(2) of the Act and each such act calls for separate punishments also.

9. In Santhosh v. State of Kerala [2021 (5) KHC 214], it

was held by this Court that 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 the accused. Even though the revision petitioner was present at the house when the Excise Officials effected recovery of 15 litres of wash, the prosecution failed to prove that the revision petitioner was in actual or constructive possession of the same.

10. In the case on hand in Ext.P2 mahazar, it is not mentioned who are all residing in that house. If the husband of the revision petitioner also was residing there, no investigation as to his involvement and dominion over the contraband was not seen done. So Crl.R.P No.2491 of 2005 7

relying on the decisions cited (supra) and also from the facts

mentioned above, this Court is unable to find that the wash seized from house No.268 of Vadasserikkara Panchayat was in actual possession and control of the revision petitioner.

11. Now coming to the evidence, as already stated, the

independent witnesses cited by the prosecution could not be examined as they did not turn up, in spite of coercive steps, as born out from the trial court judgment. The remaining evidence is of PWs 1 and 2. PW1 prepared Ext.P2 mahazar. But in the mahazar, no specimen seal is affixed which is mandatory. In Bhaskaran v. State of Kerala [2020 KHC 5296], this Court held that, the detecting officer, who has 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 court.

12. In Moothedath Sivadasan v. State of Kerala [2021 (1)

KLT 744] this Court held that, when the specimen impression of the seal affixed on the seizure mahazar was not produced before the court, it was difficult to hold that, the sample which reached the Chemical Examiners Lab was the sample taken from the contraband Crl.R.P No.2491 of 2005 8 allegedly seized from the possession of the accused.

13. In the case on hand, the property list reached the court only

on 21.08.1990, though the detection and seizure were on 18.08.1990. The delay in sending the properties seized to the jurisdictional Magistrate is not at all explained, which is fatal to the prosecution case.

14. Though Ext.P4 chemical analysis report is available, no

forwarding note was seen produced before the Court. In Rajamma v. State of Kerala [2014 (1) KLT 506] this Court held that in the absence of convincing evidence as to the production of the specimen impression of the seal to the Chemical Examiner, no evidentiary value can be attached to the Chemical analysis Report. In Rajammas case cited (supra) this Court held that in this case no forwarding note or requisition for sending the samples for chemical analysis is

prepared and filed before the court. If a formal requisition or forwarding note is prepared and filed before the court, the same would have contained the sample seal, of the seal allegedly affixed by PW1 on the sample bottle. The investigating officer has also deposed that he is not aware whether any specimen seal is produced before the court. So, absolutely there is no evidence to convince the court that, the prosecution has proved that the sample seal or specimen impression of the seal, alleged to have been affixed in the sample by PW.1 has been

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provided to the chemical examiner for their verification, and to ensure that the sample seal, so provided, is tallying with the seal affixed on the sample bottle. In spite of the above fact and in the absence of sample seal, however in Ext.P3, it is certified that the seal of the sample bottle is in tact and tallied with sample seal provided. Therefore, according to me, no evidentiary value can be given to Ext.P3 chemical analysis report. In the absence of any link evidence to show that the very same sample drawn from the contraband article, allegedly seized from the possession of the accused, reached the hands of the chemical examiner, it is unsafe to convict the appellant who is a lady.

15. From the foregoing discussion, this Court is of the view that,

the prosecution failed to prove that the sample taken from the contraband seized from House No.268, was the sample produced before court, which was subsequently forwarded to the Chemical Examiner for analysis. So the link evidence could not be established beyond any shadow of doubt. Mere presence of the revision petitioner at the house from where the contraband was seized was not sufficient to prove her involvement in the crime, since her possession over the contraband was not proved beyond doubt. For all these reasons, this Court is of the view that the conviction and sentence imposed on the revision petitioner by the courts below are liable to be set aside. She

Crl.R.P No.2491 of 2005 10 is found not guilty of the offence punishable under Section 55(g) of the Abkari Act and she is acquitted thereunder. Her bail bond is

cancelled and she is set at liberty forthwith. The revision petition is allowed accordingly. Sd/- SOPHY THOMAS, JUDGE DSV/-