

Subramanyan vs the State of Kerala

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Court : Kerala

Decided On : Sep-30-2023

Judge : Honourable Mr.Justice Viju Abraham

Appeal No. : Crl.Rev.Pet/629/2008

Appellant : Subramanyan

Respondent : The State of Kerala

Judgement :

Crl.R.P.No.629 of 2008 1

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE VIJU ABRAHAM
SATURDAY, THE 30TH DAY OF SEPTEMBER 2023 / 8TH ASWINA,
1945 CRL.REV.PET NO. 629 OF 2008 AGAINST THE JUDGMENT CRA
1131/2004 DATED 19.10.2005 ON THE FILE OF ADDITIONAL
SESSIONS JUDGE (ADHOC) I ERNAKULAM AND THE JUDGMENT
OF SESSIONS CASE NO.166/2002 DATED 30.11.2004 ON THE FILE
OF THE PRINCIPAL ASSISTANT SESSIONS JUDGE, NORTH
PARAVUR REVISION PETITIONER/APPELLANT/ACCUSED:
SUBRAMANYAN, AGED 40 YEARS, S/O.CHATHAN, VARAYIL
HOUSE, THOTTUVA KARA, KODANADU VILLAGE. BY ADVS.

RESPONDENT: THE STATE OF KERALA PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. OTHER PRESENT: PP - M.C.ASHI THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 30.09.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING: Crl.R.P.No.629 of 2008 2 VIJU ABRAHAM,J ----- Crl.R.P.No.629 of 2008 ----- Dated this the 30th day of September, 2023

ORDER

The revision petitioner is the accused in Crime No.153 of 1999 of Kodanad Police Station alleging commission of offence punishable under Sections 55(a) of the Abkari Act.

2. The allegation against the accused is that on

19.10.1999, at about 12'O clock in the noon, the accused was found keeping a cannas containing about 7 litres of illicit arrack and a glass for the purpose of sale in the bank of river near Thottuva kadavu, Kodanadu village, by the patrol duty party headed by CW7 and thereby committed the above-said offence.

3. To prove the case of the prosecution, PWs.1 to 5 were examined and Exts.P1 to P5 were marked and MO1 was identified.

4. The trial court, on consideration of the Crl.R.P.No.629 of 2008 3 evidence adduced, found that the accused is guilty

of the charges levelled against him

Rs.1,00,000/- and in default of payment of fine to undergo simple imprisonment for 6 months.

5. Aggrieved by the said conviction and sentence, the revision petitioner filed an appeal as

Crl.Appeal No.1131 of 2004 before the Additional Sessions Judge, Ernakulam and the appellate court though confirmed the conviction and sentence passed by the trial court, the sentence passed by the trial court was modified and the appellant was sentenced to undergo simple imprisonment for a period of one year and imposed a fine of Rs.1 lakh and in default of payment of fine, to undergo simple imprisonment for 6 months.

6. Though it is true that the scope of

interference by this court exercising revisional jurisdiction is limited, it does not preclude this Crl.R.P.No.629 of 2008 4 court from examining whether there is strict compliance with the statutory formalities mandated as per the Abkari Act. This court in Baburaj v. State of Kerala, 2021 (6) KLT 416, has held that given the stringent nature of the provisions of the

Act and the harsh sentence provided, strict compliance of the statutory formalities specified in the Act is necessary. The presumption of official acts to have been performed regularly and properly, as provided in Section 114 (e) of the Evidence Act, has no application if official acts are not shown to be performed properly, as held in Sathi v. State of Kerala, 2007 (1) KLT SN 57. In this backdrop, it is to be considered as to whether the prosecution has

proved the guilt of the accused without any reasonable doubt.

7. I have gone through the judgment of the courts below and also the documents produced in support of the case of the prosecution and also heard the learned public prosecutor. As per the Crl.R.P.No.629 of 2008 5 prosecution case, the occurrence was on 19.10.1999 and a perusal of Ext.P4 property list would reveal

that the alleged contraband, though seized on 19.10.1999, the same was produced before the court only on 1.11.1999, i.e, after a delay of 20 days, which is not explained by the prosecution. PW4 would admit in evidence that there is a delay of 20 days and that there is no specific reason for not producing the same before the court within time. This court in Ramachandran v. State of Kerala (2021

(1) KLT 793 has held that unexplained delay is fatal to the prosecution case since it cannot be said that the sample produced before the court and analysed in

the laboratory was a sample drawn from the contraband seized from the petitioner when there is no evidence with regard to the safe custody of the sample till its production before the court. In view of the same, I am of the opinion that there is no proper explanation for the delay and the same is fatal to the case of the prosecution.

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8. A perusal of Ext.P2 seizure mahazar would reveal that no specimen seal is seen affixed in the seizure mahazar nor there is description of the nature of the seal affixed on the sample. It is also seen that no forwarding note is produced and marked on the side of the prosecution. The purpose of putting the specimen seal impression in the seizure mahazar is to give an opportunity to the court to

verify the same and satisfy that the seized substances reach the court without any tampering. The specimen seal is provided in the forwarding note so as to enable the chemical examiner to compare it with the seal on the sample and to come to the

conclusion that it reached the laboratory without

any tampering. In this case, no specimen seal is seen affixed in the seizure mahazar and the forwarding note itself is not produced and marked. This court in Vijayan v. State of Kerala, 2021 (5) KLT 321, has enumerated the steps to be followed by the officer collecting the sample, the Thondy Clerk Crl.R.P.No.629 of 2008 7 who is authorized to receive the thondy and the measures to be ensured by the chemical examiner and

held that the specimen seal shall be affixed on the

mahazar, sample bottle, bottle containing the remaining part of the contraband and the forwarding note and further held that while collecting sample

the officer shall describe the nature

contraband was sent for chemical analysis is also

not produced and marked. In *Nadarajan v. State of Kerala*, 2020 (3) KLT OnLine 1030, it is held that when the specimen seal is not affixed on the seizure mahazar and in the forwarding note (in the present case no forwarding note is produced and marked), there is no assurance that the very same sample which was allegedly drawn at the spot of occurrence was produced before the court and sent for analysis as per the forwarding note and it has reached the laboratory in a tamper proof condition and tested

Crl.R.P.No.629 of 2008 8 there. A similar view was taken by this court in *Gopalan v. State of Kerala*, 2016 (3) KLT SN 24, *Prakasan v. State of Kerala* (2016 (1) KLT SN 89 (C.No.96) and *Ramachandran v. State of Kerala*, 2021

(1) KLT 739. A similar view was taken by this court in *Moothedath Sivadasan v. State of Kerala*, 2021 (1) KLT 744 and held that since no specimen impression of seal is seen affixed in the seizure mahazar, it is very difficult to hold that the sample of the contraband allegedly seized from the accused has in fact reached the Chemical Examiner

for analysis.

This court in *Sasidharan v. State of Kerala*

seized from the accused eventually reached the hand of the chemical examiner in a tamper-proof condition. Relying on the judgment of the Apex Court in *State of Rajasthan v. Daulat Ram*, AIR 1980

SC 1314, this court in Sasidharns case supra held

Crl.R.P.No.629 of 2008 9 that when the sample changed several hands before reaching the chemical examiner, the prosecution has to necessarily examine the various officials who handled the sample to prove that while in their

custody, the seal of the sample has no

production of a laboratory report that the sample

tested was the contraband substance can

similar view was taken by this court in Udayan v. State of Kerala, 2023 (1) KLT 371. In view of the lacuna pointed out above, it is to be held that the prosecution could not establish the link evidence connecting the accused with the contraband seized and the sample analysed in the laboratory and in the said circumstances, the revision petitioner is entitled to the benefit of doubt.

9. The above vital aspects were not considered Crl.R.P.No.629 of 2008 10 by the courts below while appreciating the evidence and consequently convicting and sentencing the revision petitioner/accused. Therefore, the conviction and sentence imposed by the courts below cannot be sustained. In the result, the revision petition is allowed, setting aside the conviction and sentence

passed by the courts below and the re

cancelled and he is set at liberty. sd/- VIJU ABRAHAM, JUDGE pm

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