

Suganthi vs 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/3676/2008

Appellant : Suganthi

Respondent : State of Kerala

Judgement :

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. 3676 OF 2008 AGAINST THE
ORDER/JUDGMENT SC 210/2000 OF ASST. SESSIONS
COURT, NEYYATTINKARA CRA 104/2005 OF ADDITIONAL DISTRICT
COURT (ADHOC) III, THIRUVANANTHAPURAM REVISION
PETITIONER/APPELLANT/ACCUSED: SUGANTHI D/O SARADA,
THAZHEVEETIL, OOTTARA, KAZHAVOOR DESOM,
KANJIRAMKULAM, VILLAGE, NEYYATTINKARA. BY ADV
SRI.G.SUDHEER

RESPONDENT/COMPLAINANT/STATE: STATE OF KERALA PUBLIC PROSECUTOR, HIGH COURT OF KERALA,, ERNAKULAM. BY P.P., SRI. RENJITH GEORGE THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 30.09.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: CrI.R.P. No. 3676 of 2008 :2:

VIJU ABRAHAM , J.

===== CrI.R.P. No. 3676 of 2008
===== Dated this the 30th day of September, 2023

ORDER

The revision petitioner herein is the accused in S.C. No. 210 of 2000 on the file of the Assistant Sessions Court, Neyyattinkara alleging commission of offence punishable under Section 58 of the Abkari Act.

2. The prosecution case is that on 19.08.1998 at 9.30

am, the accused was found with a jerry can of about three litres of arrack at Kayyalvilajathil-Oottara road and thereby the accused has committed the alleged offence.

3. The prosecution in support of their case examined

PWs 1 to 4 and Exts P1 to P4 were marked and MO1 was identified. The trial Court found the accused guilty and convicted her to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo imprisonment for a further period of one year.

4. Aggrieved by the conviction and sentence imposed by the trial Court, an appeal was preferred as CrI.Appeal CrI.R.P. No. 3676 of 2008 :3:

No.104 of 2005 which was allowed in part modifying the sentence to simple imprisonment for six months and to pay fine of Rs.1,00,000/- and in default of

payment of fine, to undergo further period of imprisonment for three months.

5. The learned Counsel for the revision petitioner

raised the following contentions. No arrest memo or arrest intimation is produced by the prosecution to prove the arrest of the petitioner and the seizure from her possession. Revision petitioner further contended that in Ext P1 mahazar, the specimen seal is not affixed and the details of the seal affixed on the sample have not been described in the mahazar. It is further contended that no forwarding note is seen produced. Based on the same, the learned Counsel for the revision petitioner contended that these circumstances will go against the case of the prosecution and the revision petitioner is entitled for the benefit of doubt.

6. Though it is true that the scope of interference by

this court exercising revisional jurisdiction is limited, it does not preclude this 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, Crl.R.P. No. 3676 of 2008 :4:

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. Let me consider the first contention that no arrest

memo or arrest intimation is produced by the prosecution to prove the arrest of the petitioner along with contraband. The Apex Court in D.K.Basu v. State of West Bengal (1997) 1 SCC 416, has held that preparation of arrest memo is a mandatory requirement and that it should be countersigned by the arrestee and shall contain the time and date of arrest. This court in Baburajs case cited supra

has held that the non-production of the arrest memo and arrest intimation will lead to an inference that the same was not prepared at the

time of the alleged arrest. The prosecution case has been CrI.R.P. No. 3676 of 2008 :5: built upon the foundation that the accused was arrested while possessing the contraband substance and therefore the noncompliance of mandatory requirements regarding arrest makes the alleged arrest doubtful. A similar view was taken

by this court in Ramankutty v. Excise Inspector, Chelannur Range, 2013 (3) KLT SN 83 which held that noncompliance of mandatory requirements to be complied with at the time of arrest is fatal to the prosecution as the seizure of the contraband has no existence without proving the factum of the arrest. This court in Rafeeqe v. Sub Inspector of Police, 2020 (4) KLT 188 has held that when the signature of the accused is not there in the arrest memo, the same is also fatal to the prosecution case. A similar view was taken by this court in Udayan v. State of Kerala, 2023 (1) KLT 371. Therefore, the noncompliance of this

mandatory requirement makes the prosecution case doubtful.

8. The second contention is that in Ext P1 mahazar,

the specimen seal is not affixed and the details of the seal affixed on the sample have not been described in the mahazar and that no forwarding note is produced and CrI.R.P. No. 3676 of 2008 :6:

marked. 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 come to the conclusion that it reached the laboratory without any tampering. 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 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 of the specimen seal in the mahazar. In the present case, the forwarding note by which the sample of the 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

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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 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*, 2007 (1) KLT 720 has considered and emphasized the legal obligation cast on the prosecution to prove that the sample allegedly seized from the accused eventually reached the hand of the chemical

examiner in a tamper-proof condition. Relying on the Crl.R.P. No. 3676 of 2008 :8:

judgment of the Apex Court in State of Rajasthan v.

Daulat Ram, AIR 1980 SC 1314, this court in *Sasidharan's* case supra held 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 not been tampered with. The Apex Court in *Vijay Pandey v. State of U.P.*, AIR 2019 SC 3569 has

held that mere production of a laboratory report that the

sample tested was the contraband substance cannot be conclusive proof by itself and that the sample seized and one tested are to be correlated. A 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 by the

courts below while appreciating the evidence a

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 revision petitioner/accused is acquitted of the charges levelled against her. The bail bond shall stand cancelled and she is set at liberty. Needless to say, if the revision petitioner/accused has deposited any amount before the trial court pursuant to an

order passed by this court or the appellate court, the same

shall be refunded to the revision petitioner in accordance with the law. Sd/- VIJU ABRAHAM JUDGE sbk/-

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