

Sathyan vs State of Kerala

Sathyan vs State of Kerala

SooperKanoon Citation : sooperkanoon.com/1361771

Court : Kerala

Decided On : Mar-10-2023

Judge : Honourable Mr.Justice V.G.Arun

Appeal No. : Crl.MC/3506/2019

Appellant : Sathyan

Respondent : State of Kerala

Judgement :

CR

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE V.G.ARUN FRIDAY, THE 10TH DAY OF MARCH 2023 / 19TH PHALGUNA, 1944 CRL.MC NO. 3506 OF 2019 SC 167/2014 OF ADDITIONAL SESSIONS COURT - III, MAVELIKKARA PETITIONER/S:

1 SATHYAN AGED 48 YEARS S/O. VASUDEVAN THAYYIL VEEDU, PEROORKARAZHMA MURI, THAMARAKULAM VILLAGE, MAVELIKKARA THALUK. 2 VISWAMBARAN, AGED 56 YEARS S/O. NARAYANAN GOKULAM HOUSE, KOTTAKKATTUSSERY MURI,

THAMARAKULAM VILLAGE, MAVELIKKARA TALUK 3
VISWANATHAN.N., AGED 54 YEARS S/O. NARAYANAN, AVANI
VEEDU, PEROORKARAZHMA MURI THAMARAKULAM VILLAGE,
MAVELIKKARA THALUK. BY ADVS. R.PADMAKUMAR
SRI.NISHIL.P.S. SRI.S.RAMESH BABU (SR.)

RESPONDENT/S: STATE OF KERALA REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM
682 031. BY ADV GOVERNMENT PLEADER OTHER PRESENT:
SR.PP. RENJITH GEORGE THIS CRIMINAL MISC. CASE HAVING
BEEN FINALLY HEARD ON 06.03.2023, THE COURT ON 10.03.2023
PASSED THE FOLLOWING: -2- CR

ORDER

Dated this the 10th day of March, 2023 The petitioners are the accused in Crime No.65 of 2012 of the Mavelikkara Excise Range, registered for the offences punishable under Sections 55(a), 55D and 67(B) of the Kerala Abkari Act. The crime is registered on the allegation that, at about 11.15 a.m on 01.07.2012, while the Excise Circle Inspector and party were conducting the routine checking of vehicles near the Government UP Girls School on the Thattarambalam-Kayamkulam Road, the accused tried to avoid the checking by speeding away in their car. Being suspicious of the accused' action, the car was intercepted and stopped. On checking the car, two cans were found concealed between the front and rear seats. On inspection, -3- the contents of the can was identified as spirit. Thereupon, the contraband and vehicle were seized and the accused arrested. On questioning, accused Nos.1 and 2 stated that the liquor was being transported for handing over to one Vishwananthan and hence that person was arrayed as the third accused. After completing investigation, the final report was filed and the case was numbered as SC No.167 of 2014 on the files of the Additional Sessions Court-III, Mavelikkara. This CrI.M.C is filed seeking to quash Annexure A1 final report and all further proceedings in the sessions case.

2. Heard, Senior Advocate S.Ramesh Babu for the petitioners and Senior Public Prosecutor Renjith George for the State.

3. Learned Senior Counsel assailed the criminal proceedings mainly on two grounds;

(i) The inventory of the contraband was not prepared and submitted before the Magistrate by -4- an authorised officer, as mandated under Section 53A(2) of the Abkari Act;

(ii) The inventory is certified by the

Judicial Magistrate, whereas the competent authority to certify the inventory, as per Section 53(3), is the Executive Magistrate. In elaboration of the first contention, the following submissions were made; Section 53A deals with disposal of seized liquor, intoxicating drugs or articles. As per Section 53A(1), the State Government may specify the liquor, intoxicating drug or article which are to be disposed of immediately after seizure by the authorised officer referred to in Section 67B. Under Section 53A(2), the authorised officer has to prepare an inventory of such liquor, intoxicating drug or article. The inventory should contain materials relevant to identify the liquor, intoxicating drug or article in any proceeding under the Act. Thereupon, the -5- authorised officer should make an application to the Magistrate having jurisdiction to certify the correctness of the inventory. It is thus clear that the provision envisages preparation of the inventory by the authorised officer referred to in Section 67B. As per Section 67B(1), the authorised officer should be an officer not below the rank of Assistant Excise Commissioner, as notified in the Gazette by the Government. In the petitioners' case, the inventory was prepared by the Excise Range Inspector and submitted through the Excise Deputy Commissioner. In *Chandran @ Chandrashekhara v. State* [2016 (5) KHC 650], a learned Single Judge, after careful analysis of Section 53A and 67B categorically held that an inventory report prepared by an officer other than an authorised officer cannot be acted upon. The above position is reiterated in *Balakrishna Rai v. State of Kerala* [2020 (3) KHC 286], -6- *Abhilash v. State of Kerala* [2021 KHC 2446] and *Kusuma v State of Kerala* [2022 KHC 556].

4. To drive home the second contention, reference is made to Section 3(4) of the Code of Criminal Procedure, which reads as under; 3. Construction of references.

(4) Where, under any law, other than this Code, the function exercisable by a Magistrate relate to matters,-

(a) which involve the appreciation or

sifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or

(b) which are administrative or executive

in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate.

It is contended that, as per Section 3(4), only -7- functions involving appreciation or sifting of evidence or the formulation of decisions, which expose persons to punishment or penalty or detention pending inquiry or trial or decisions that would have the effect of sending the person for trial before any Court, can be exercised by a Judicial Magistrate. On the other hand, functions which are administrative or executive in nature, like granting, suspension or cancellation of licence, sanctioning or withdrawing a prosecution etc are to be exercised by the Executive Magistrate. Certification of the correctness of an inventory prepared under Section 53A (2) is purely an administrative function and should therefore be done by the Executive Magistrate. In the instant case, the certification was done by the Judicial First Class Magistrate, Mavelikkara rendering the whole procedure illegal. In support of this contention, reliance is placed on the -8- decisions in Mammoo v. State of Kerala [1979 KHC 348 [F.B], Thankappan v. State of Kerala [1995

(2) KLT 691] and Santhosh T.A and another v. State of Kerala [2017 (5) KHC 107].

5. Finally, it is contended that the

illegality in the preparation and certification of the inventory cannot be corrected since the seized contraband was destroyed immediately after preparation of the inventory. As such, there is no legally acceptable evidence regarding seizure and production of the contraband before the court. Continuance of the criminal proceedings, without satisfying the above basic requirement, amounts to an abuse of process of court.

6. Learned Senior Public Prosecutor

contended that the inventory was submitted in court by the Deputy Excise Commissioner, who is an authorised officer. Further, certification of inventories are usually done by the judicial -9- Magistrates and even accepting the contention based on Section 3(4) of the Code, such certification is not a patent illegality requiring this Court to quash the proceedings by exercising the power under Section 482 of Cr.P.C.

7. The issue arising for consideration from the rival contentions require a careful scrutiny of Section 53A of the Abkari Act, extracted hereunder;

53A. Disposal of seized liquor, intoxicating drugs or articles. - (1) Notwithstanding anything contained in this Act, the State Government may having regard to the nature of the liquor, intoxicating drug, or article, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant consideration, by notification in the official Gazette, specify such liquor, intoxicating drug or article which shall, as soon as may be after their seizure, be disposed of by the authorised officer referred to in section 67B, in such manner as the Government may, from time to time determine after following the procedure hereinafter specified.

-10-

(2) Where any such notified liquor,

intoxicating drug or, article has been seized under this Act, the authorised officer shall prepare an inventory of such liquor, intoxicating drug or article containing such details relating to their description, quality, quantity, mode of packing, marks, numbers of such other identifying particulars of the liquor, intoxicating drug or article or the packing containers in which they are kept, place of origin and other particulars, as the authorised officer may consider relevant to identify the liquor, intoxicating drug or article in any proceedings under this Act and make an application to any Magistrate for the purpose of,-

- (a) certifying the correctness of the inventory so prepared; or
- (b) taking, in the presence of such Magistrate photographs of such liquor, intoxicating drug or article and certifying such photographs as true; or
- (c) Allowing to draw representative

samples of such liquor, intoxicating drug or article in the presence of such Magistrate and certifying the correctness of any list of samples so drawn . (3) Where an application is made under sub-section (2) the Magistrate -11- shall, as soon as may be, allow the application.

- (4) Where any liquor or intoxicating drug

or article under this Act has been kept under the custody of any court in connection with any offence committed under this Act, before the commencement of the Abkari (Amendment) Ordinance, 2002 or has been brought before a Magistrate without complying the procedure laid down in sub-section (2), the authorised officer shall obtain prior permission of the court or Magistrate before initiating proceedings under sub-section (2).

- (5) Notwithstanding anything contained in

the Indian Evidence Act 1872 (Central Act 1 of 1872) or the Code of Criminal Procedure, 1973 (Central Act 2 of 1974) any Court trying an offence under this Act, shall treat the inventory, the photographs of liquor, intoxicating drug or article and any list of samples drawn under sub sections (2) and (4) and certified by the Magistrate, as primary evidence in respect of such offence.

Explanation. - 'Article' for the purpose of this section includes jaggery and other like substances, the value of which depreciates in passage of time.

A plain reading of the provision shows that -12- inventory is to be prepared by an authorised officer. This requirement cannot be met by some other officer preparing the inventory report and submitting that report through the authorised officer. The legal position is no longer res integra in the light of the decision in Chandran (supra), the relevant portion of which reads as under;

10. Sub-section (1) of S.53A of the Abkari Act provides that the authorised officer under S.53A of the Abkari Act is the authorised officer referred to in S.67B of the Abkari Act. S.67B provides that the authorised officer must be an officer authorised by the Government by notification in the Gazette and the said officer is an officer not below the rank of an Assistant Excise Commissioner. S.R.O. No.671/75 provides that the Assistant Commissioners in charge of Excise Divisions are authorised officers under sub-section (1) of S.67B of the Abkari Act for the purpose of S.67B within their respective jurisdiction. In this case, PW1 was admittedly not an authorised officer under S.67B of the Abkari

-13-

Act. Therefore, he was not an authorised officer competent to prepare the inventory under sub-section (2) of S.53A of the Abkari Act. Since Ext.P7 (a) was prepared by an officer not authorised under the Abkari Act, Ext.P7(a) cannot be acted upon as the same is patently illegal.

When Ext.P7(a) cannot be acted upon, the entire contraband should have been produced before the court. However, in this case, the contraband articles were not produced before the court and instead of that, the prosecution relied on Ext.P7(a) inventory, which is patently illegal and consequently, the revision petitioner is entitled to acquittal.

8. In this context, it is also profitable to read the following discussion in Balakrishna Rai (supra), regarding the purpose of 53A;

17. Section 53A of the Act comes into play when the liquor seized under the Act has to be disposed of by the authorised officer immediately after its seizure. In such cases, the authorised officer shall prepare an inventory of such liquor. The inventory so prepared shall contain necessary details which are relevant to identify the liquor in any proceedings under the Act. The authorised

-14- officer shall then make an application to the Magistrate concerned for any of the following three purposes, namely, (a) certifying the correctness of the inventory so prepared; or

(b) taking photographs of the liquor in the

presence of the Magistrate and to certify such photographs as true; or (c) to allow drawing of representative samples of the liquor in the presence of the Magistrate and to certify the correctness of any list of samples so drawn. The certificate so issued by the learned Magistrate shall be treated as primary evidence during the trial in respect of the offence.

20. The very purpose of the provisions

contained in S.53A of the Act is disposal of large quantity of seized contraband liquor immediately after the seizure on retaining evidence

regarding its seizure. If the authorised officer and the Magistrate follow the mandate under S.53A of the Act strictly and scrupulously, it is not necessary for the prosecution to produce the bulk quantity of seized material before the Court during the trial of the case and mark it as material object. Then the certificate issued by the Magistrate in respect of the inventory of liquor and the list of samples drawn in his

-15- presence shall be treated by the court as primary evidence of the offence.

9. In *Abhilash (supra)*, yet another well considered decision, the exposition on the point is as under;

10.Ext.P10 would inter alia show that it was not prepared by the authorized officer. The authorized officer, as per the scheme of Act, is the Deputy Commissioner of Excise. In the case on hand, PW 1 himself has prepared an inventory in a printed form, which is seen counter signed by the authorized officer. Going by the scheme of 53A of the Act, the authorized officer is obliged to prepare an inventory and the same shall be produced before the magistrate having jurisdiction for the purpose of certifying the correctness of the inventory so prepared. In the case on hand, it was not done. Going by the endorsement of the learned magistrate, it is evident that the learned magistrate did not apply his mind to certify the inventory in accordance with S.53A of the Act. The learned magistrate failed to note the date of certifying the correctness of the inventory in Ext.P10.

The legal position was again reiterated in *Kusuma -16- (supra)*, the relevant portion of which is extracted below;

9. Going by the decision highlighted by the learned counsel for the appellant, subsequently followed in the decision reported in *Balakrishna Rai v. State of Kerala (2020 (3) KLT 727 = 2020 (3) KLT OnLine 1006)*, the legal position is emphatically clear that S.53A(2) of the Kerala Abkari Act mandates that the inventory shall be prepared by the authorised

officer. S.67B provides that the authorised officer must be an officer authorised by the Government by notification in the Gazette and the said officer is an officer not below the rank of Assistant Excise Commissioner.

In view of the legal position emanating from the above judgments, the challenge based on violation of the procedure prescribed under 53A, in relation to the submission of inventory and application for certification, is liable to be upheld.

10. With respect to the contention based on

the powers conferred on the Judicial and Executive Magistrates under Section 3(4) of the -17- Code, a detailed discussion is not warranted in view of the Full Bench decision in Mammoo (supra). The contextually relevant portion of that judgment reads as under;

7. The functions exercisable by the Executive Magistrates under the Code of 1973 are not necessarily executive. They are invested with judicial functions also under the Code. Under S.133 of the Code Executive Magistrates have the power to order the removal of nuisance. Under S.145 of the Code they have power to determine disputes concerning land or water if such dispute is likely to cause breach of the peace. Evidently therefore the functions of the Executive Magistrates while acting under the Code are not necessarily executive. But when acting under any law other than the Code the Executive Magistrates could exercise only executive or administrative functions. Similarly when Judicial Magistrates were called upon to act under the provisions of any law other than the Code their functions are to be only judicial in character. This is the new scheme brought about by S.3(4) of the Code of Criminal Procedure. That reads as follows: 3(4) Where, under any law, other

than this Code, the functions exercisable by a Magistrate relate to matters (a) which involve the appreciation or sifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or (b) which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate. The sub-section indicates that a judicial Magistrate when acting under any law other than the Code can exercise functions which (1) involve the appreciation or sifting of evidence (2) involve the formulation of any decision which exposes any person to any punishment or penalty or detention in custody or (3) involve any decision that would have the effect of sending any person for trial before any court. That subsection also indicates that when an Executive Magistrate exercises powers under any law other than the

-19-

Code the functions exercisable by him are administrative or executive in nature. This is illustrated by reference to functions such as grant, suspension or cancellation of licences and sanctioning of or withdrawing from prosecutions. An Executive Magistrate cannot, after the commencement of operation of the Code of 1973, exercise any function other than that of an administrative or executive nature while functioning outside the purview of the Code of Criminal Procedure. We have already indicated that his functions under the Code may be executive, administrative or judicial.

Later, in Thankappan (supra), the court held as under:

5. So going by the provisions contained in the Code, it is clear that administrative matters are to be dealt with by Executive Magistrates and not by Judicial Magistrate. The counsel for the petitioner contends that in case of violation of an order passed under S.8 of Travancore Cochin Public Safety Measures Act, there would be punishment of imprisonment or fine, and therefore those provisions are punitive in nature and hence to be dealt with by a Judicial Magistrate. This contention is not correct. Powers under the

-20-

S.8 of the Act only enables a Magistrate to direct the cutting of the branches of any trees which are causing nuisance or annoyance to the neighbouring property owners. It is further stated in the section that the Magistrate can act either on application by the party or on a report made by a police officer, or on such enquiry as he deems fit, he shall pass an order. So the procedure culminates in passing of an order under S.8, and that is purely of an executive nature. Hence, as per S.3(4)(b) of Code of Criminal Procedure it is to be dealt with by an Executive Magistrate and not by a Judicial Magistrate. By the impugned order the Magistrate has only directed the petitioner to cut the branches of his trees which are actually projecting to the property of the third respondent.

6. It may be noticed that even otherwise

the third respondent is entitled to see that the branches of the tree standing on the neighbouring property are not projecting to his property. The ownership and possession of land bring with them the ownership and possession of the column of space above the surface ad-indefinitum. The owner of the land has in private law the right to use for his own purposes, to the exclusion of other

-21- persons the air space above it. It has been

held as early as in Lemmon v. Webb (1895 A.C.

1) that the owner of the land may cut the over hanging branches of a tree growing in his neighbour's land whether they do him harm or not. In this case the finding of the Sub Divisional Magistrate is only to the effect that the branches of the petitioner's trees which project to the property of the third respondent and cause nuisance to him be cut and removed.

The following erudite discussion at paragraph 11 of Santhosh T.A. (supra) is also to the same effect;

11. The only provision in the Act for drawing a sample is Section 53A, which was inserted by Act 1 of 2003. a) The Section may be invoked only when it is necessary to dispose of seized liquor, intoxicating drug, articles etc. b) The Section is applicable only to the liquor, drug, article etc specified in notification published in a gazette c) Disposal under the Section can be made only by the authorised officer referred to in Section 67B of the Act d) The authorised officer shall make an application to the Magistrate concerned e) One of the two

-22-

purposes for which an application may be filed is to request the Magistrate to allow the authorised officer to take samples of the seized liquor, intoxicating drug or article in the presence of the Magistrate. The Section does not stipulate that more than one samples should be taken. It may also be noted the Magistrate referred to in the Section is not a Judicial Magistrate, but an executive Magistrate, which is clear from sub-section

(4) of Section 3 of the Code of Criminal

Procedure, which runs as follows: Where under any law, other than this Code, the functions exercisable by a Magistrate relate to matters (a) which involve the appreciation or shifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or (b) which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive

-23-

Magistrate. A Judicial Magistrate cannot entertain an application under Section 53A Abkari Act since the act contemplated by it is not a judicial one, but executive. This view is supported by two decisions of this court. In *Mammoo v. State of Kerala* (1979 KLT 801 (F.B.)) after referring to Section 3(4) Cr.P.C. a Division Bench held: Similarly when Judicial Magistrates are called upon to act under the provisions of any law other than the Code their functions are to be only judicial in character. In *Thankappan v. State of Kerala & Ors.* (1996 CrL L.J. 1754) it is observed: So going by the provisions contained in the Code, it is clear that administrative matters are to be dealt with by Executive Magistrates and not by Judicial Magistrates.

The challenge against certification of the inventory by the Judicial magistrate instead of the Executive Magistrate is liable to be upheld in the light of the settled legal position.

11. As rightly contended by the learned

Senior Counsel, the illegality committed in preparing and certifying the inventory cannot now -24- be corrected, the contraband having been destroyed. I also find

considerable merit in the contention that, in the absence of evidence regarding the seized contraband, either in the physical form or in the form of an inventory containing essential details like description, quality, quantity etc of the seized liquor, further proceedings in the case pending against the petitioners will be an empty formality and hence an abuse of process. For the aforementioned reasons, the CrI.MC is allowed. Annexure A1 final report in Crime No. 65 of 2012 of Mavelikkara Excise Range and all further proceedings in S.C.No.167 of 2014 of the Additional Sessions Court-III, Mavelikkara, are quashed. Sd/- V.G.ARUN JUDGE ScI/ -25- APPENDIX OF CRL.MC 3506/2019 PETITIONER ANNEXURES ANNEXURE A1 CERTIFIED COPY OF THE CHARGE REPORT DATED 7.10.2013 ANNEXURE A2 CERTIFIED COPY OF THE INVENTORY DATED 3.11.2012.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com