

Anil Kumar vs State of Kerala

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Court : Kerala

Decided On : May-31-2022

Judge : Honourable Mr.Justice K. Babu

Appeal No. : CRL.A/940/2008

Appellant : Anil Kumar

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU TUESDAY, THE 31ST DAY OF MAY 2022 / 10TH JYAISHTA, 1944 CRL.A NO. 940 OF 2008 AGAINST THE JUDGMENT IN SC 408/2007 OF ADDITIONAL DISTRICT COURT (ADHOC), FAST TRACK COURT NO.I, THRISSUR APPELLANTS/ACCUSED 1 & 2: 1 ANIL KUMAR, S/O. VELAYUDHAN, KOOTTALA HOUSE, KANATTUKARA DESOM, AYYANTHOLE VILLAGE, THRISSUR TALUK. 2 ASHOK KUMAR, S/O. VELAYUDHAN, KOOTTALA HOUSE, KANATTUKARA DESOM, AYYANTHOLE VILLAGE, THRISSUR TALUK. BY ADV P.VIJAYA BHANU P.MAYA RESPONDENT/COMPLAINANT: STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,

ERNAKULAM. BY ADV SMT. REKHA.S (SR.P.P) THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 31.05.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.BABU, J.

----- Criminal Appeal No.940 of 2008
----- Dated this the 31st day of May, 2022

JUDGMENT

Aggrieved by the judgment dated 12.05.2008, passed by the

Additional Sessions Court (Adhoc), Fast Track Court No.1, Thrissur in S.C.No.408/2007, the two accused have preferred this appeal. The appellants/accused were convicted under Sections 55(a) and 58 of the Abkari Act and sentenced to undergo rigorous imprisonment for a term of three years each and pay a fine of Rs.1 Lakh each under Sec.55(a) of the Abkari Act. They were also sentenced to undergo rigorous imprisonment for a term of three years each and pay a fine of Rs.1 Lakh each under Sec.58 of the Abkari Act. The sentences were ordered to be run concurrently.

2. The prosecution case is that on 24.07.2002 at 1.20 a.m, the

appellants and the other accused were found in possession of illicit liquor and spirit in the building with door No.37/722 of Thrissur Corporation, situated at Kanattukara Desom in Ayyanthole village.

3. After completing the investigation, final report was submitted

against the appellants for the offences punishable under Sections 55(a), 55(b), 55(g), 55(h), 55(i) and 8(2) of the Abkari Act before the jurisdictional Magistrate. The case was committed to the Sessions

Court from where it was made over to the Trial Court. On the appearance of the accused, charges were framed against them for the offences punishable under

Sections 55(a) and 58 of the Abkari Act. The accused pleaded not guilty to the charges, and therefore, they came to be tried by the Trial Court for the aforesaid offences.

4. The prosecution examined PWs 1 to 7 and proved Exts.P1 to P9 and MOs 1 to 76.

5. After the closure of the prosecution evidence, the statements

of the accused under Section 313 Cr.P.C. were recorded. They pleaded innocence. The Trial Court heard the matter under Section 232 Cr.P.C. and found evidence against the accused and hence they were called upon to enter on their defence and adduce evidence, if any, they may have in support thereof. On the side of defence, Ext.D1 was marked. After hearing the arguments addressed on both sides,

the Trial Court convicted the appellants/accused for the aforesaid offences.

6. Heard Sri. P.Vijaya Bhanu, the learned Senior Counsel appearing for the appellants/accused and Smt. Rekha.S, the learned Senior Public Prosecutor appearing for the respondent.

7. The learned Senior Counsel for the appellants challenged the

judgment of conviction and sentence on the following grounds:-

(i) The delay in the production of the articles, including the samples, before the Court has not been satisfactorily explained by the prosecution.

(ii) The prosecution has not succeeded in establishing that the contraband substance allegedly seized from the place of occurrence was eventually subjected to analysis in the Chemical Examiner's laboratory.

(iii) The officer who detected the offence was not empowered to effect arrest and seizure.

(iv) The arrest of the appellants/accused is doubtful.

8. The alleged seizure and arrest were effected on 24.07.2002. The arrest and seizure were done by the Excise team headed by the Excise Inspector, Excise Enforcement and Anti Narcotic Special

Squad, Thrissur (PW3). The properties, including the sample, were produced before the Court only on 26.07.2002, as is evident from Ext.P9 property list. The prosecution has not offered any satisfactory explanation for the delay in the production of the properties before the Court.

9. In Ravi v. State of Kerala [2011 (3) KLT 353], on the question of delay in the production of properties, a Division Bench of this Court

held as follows:

8. We, therefore, answer the reference as follows:

1. It is not necessary to produce the article seized under

S.34 of the Abkari Act before the Magistrate 'forthwith' either by virtue of S.102(3) Cr.PC or by virtue of any of the provisions of the Abkari Act or the Abkari Manual. What is enjoined by the statute is only that the seizure of the property should be reported forthwith to the Court. But we hasten to add that the production of the property before Court (wherever it is practicable) should also take place without unnecessary delay. There should be explanation for the delay when there is delayed production of the property. (Emphasis supplied)

In Ravis' case (supra) the Division Bench held that production of the property before the Court should take place without unnecessary delay and that there should be an explanation for the delay when there is delayed production of the property.

10. There is no satisfactory explanation for the delay in the

production of properties before the Court. The unexplained delay in the production of properties would lead to the conclusion that tampering with samples could not

be ruled out.

11. Exhibit P1 seizure mahazar does not contain the nature and

description of the seal stated to have been affixed on the bottles containing the sample. There is nothing to show that the specimen of the seal used at the scene of occurrence had been produced before the Court. PW3, the detecting officer and the other official witnesses have not given evidence as to the nature and description of the seal affixed on the bottles containing the sample. There is no evidence to show that the specimen of the seal was forwarded to the Chemical Examiner to ascertain the genuineness of the samples produced for analysis. The bottles containing the sample remained in the custody of the property clerk of the Court and the Excise official who received the bottles from the Court to be delivered in the Chemical Examiner's laboratory. None of these officials were examined by the prosecution to establish the tamper-proof despatch of the sample from the Court to the laboratory.

12. The crux of the offences under the Abkari Act, by its very

nature, is the seizure of the contraband. The prosecution in a case of this nature can succeed only if it establishes that the very same sample drawn at the place of occurrence was the sample tested in the Chemical Examiner's laboratory.

13. A legal obligation is cast on the prosecution to prove that

the contraband substance allegedly seized from the possession of the accused eventually reached the Chemical Examiner's laboratory in a tamper-proof condition. The chain of custody of the contraband commencing from the place of occurrence to the stage when it reaches the laboratory is required to be established by the prosecution.

14. In *Sasidharan v. State of Kerala* [2007 (1) KLT 720], this Court

had occasion to elucidate on the legal obligation cast on the prosecution to prove that the sample allegedly seized from the accused eventually reached the hands of the Chemical Examiner in a tamper-proof condition. Relying on *State of*

Rajasthan v. Daulat Ram [AIR 1980 SC 1314] in Sasidharan's case (supra) this Court held that where sample changed several hands before reaching the Chemical Examiner, the prosecution had to necessarily examine the various officials who handled the sample to prove that while in their custody the seals on the sample have not been tampered with. In Sathi v. State of Kerala [2007 (1) ILR 718 (Ker.)], this Court re-emphasized on the requirement of strict compliance with the statutory formalities in the matter of sampling/sealing, etc., of the contraband to be sent for

Chemical Examination. In Sathi's case (supra), this Court further held

that Courts could presume that an official act was regularly and properly performed only if the said act was shown to have been performed. This Court specified that the presumption under Section 114(e) of the Evidence Act has no application in circumstances where official acts are not shown to be performed properly. The ratio in Sasidharan's case (supra) and Sathi's case (supra) has been affirmed by a Division Bench of this Court in Ravi v. State of Kerala [2011 (3) KLT 353].

15. In Bhaskaran K. v. State of Kerala and another (2020 KHC

5296), this Court held that the nature of the seal used by the detecting officer shall be mentioned in the seizure mahazar and the specimen of the seal shall be produced in the Court so as to enable the Court to satisfy the genuineness of the sample produced in the Court.

16. In Rajamma v. State of Kerala [2014 (1) KLT 506], this

Court held that if the specimen of the seal affixed on the bottle containing the sample is not produced before the Court and forwarded to the Chemical Examiner for verification to ensure that the sample seal so provided is tallying with the seal affixed on the sample, no evidentiary value can be attached to the chemical analysis report.

17. In Ramachandran v. State of Kerala [2021 (1) KLT 793]

while dealing with a case in which forwarding note/requisition for sending sample to the laboratory was not produced and marked, this Court held that the prosecution could not establish the tamper-proof despatch of the sample to the laboratory as there was no satisfactory link evidence to show that it was the same sample that was drawn from the contraband seized eventually reached the Chemical Examiner's laboratory.

18. In the present case, the prosecution miserably failed to

establish that the contraband substance allegedly seized from the place of occurrence was eventually subjected to analysis in the Chemical Examiner's laboratory.

19. In *Vijay Pandey v. State of U.P* (AIR 2019 SC 3569) the Apex

Court 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 that tested have to be co-related.

20. It is settled that the prosecution in a case of this nature can

succeed only if it is proved that the sample which was analysed in the Chemical Examiner's laboratory was the very same sample which was drawn from the contraband substance said to have been seized from the possession of the accused {Vide: *State of Rajasthan v. Daulat Ram* [AIR 1980 SC 1314], *Sasidharan v. State of Kerala* [2007 (1) KHC 275]}.

21. In the instant case, the prosecution was unable to establish

the link connecting the accused with the contraband seized and the samples analysed in the laboratory. The accused is entitled to the benefit of doubt arising from the absence of link evidence as discussed above.

22. The defence also challenges the arrest of the accused as

alleged. In *D.K.Basu v. State of West Bengal* [(1997) 1 SCC 416], the Apex Court directed that in all cases of arrest, preparation of 'arrest memo' is a mandatory

requirement. The Apex Court directed that the Police Officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest, and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

23. It is relevant to note that, in the instant case, the 'arrest

memo' and the 'arrest intimation' have not been placed before the Court. The prosecution has no case that the 'arrest memo' and 'arrest intimation' were prepared, but they could not be produced before the Court. The necessary inference is that the 'arrest memo' and 'arrest intimation' were not prepared at the time of the alleged arrest. The prosecution case has been built upon the foundation that the accused was arrested while possessing the contraband substance. The non-compliance with the mandatory requirements regarding arrest makes the alleged arrest doubtful. Where the prosecution has failed to establish arrest beyond reasonable doubt, the entire case set up by the prosecution falls to the ground.

24. This Court in *Ramankutty v. Excise Inspector, Chelannur*

Range [2013 (3) KHC 308] had considered a similar fact situation. This Court held that non-compliance 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. Therefore, in the absence of evidence regarding the preparation of the arrest memo and arrest intimation, the prosecution case regarding the arrest and seizure becomes doubtful.

25. Another aspect to be considered is the delay in the analysis

of the samples. Though the samples reached the laboratory on 31.07.2002, the samples were subjected to analysis only on 01.07.2004. On the question of delay in the analysis of the sample this Court in *Krishnadas v. State of Kerala* [2019 KHC 191] held thus:

6. Ext.P5 report of analysis shows that the sample was received at the laboratory only on 19.9.2003. The detection in this case was made on 26.06.2003. The report of analysis shows that the analysis was made in October, 2004. The report refers to a letter dated 23.7.2003 from the court of the learned Magistrate, Chittur, and the sample was taken to the laboratory by one Excise Guard, Rajeev. Though the sample was sent from the Court as early as on 23.07.2003, it reached the laboratory only in September, 2003. There is no explanation for this delay. Though the sample reached the laboratory in September, 2003, it was analysed only in October, 2004. For this delay of one year also, there is no explanation. These are all suspicious aspects, the benefit of which must go to the accused.

In the instant case, the delay of two years in analysing the sample has not been explained by the prosecution.

26. The learned Senior Counsel for the appellants/accused further contended that the detection was made by an incompetent officer which would result in the collapse of the entire prosecution

case. The learned Senior Counsel for the appellants relied on SRO.No.234/1967, a Government Notification issued under Section 4 of the Abkari Act, conferring powers to various officers under the Abkari Act. In the present case, the offence was detected by PW3, the Excise Inspector, Excise Enforcement and Anti Narcotic Special

Squad, Thrissur. The detection was made on 24.07.2002. The Government notification issued as SRO.No.234/1967 had authorised various categories of Excise officials to discharge the various functions under the Abkari Act as Abkari

officers. By the said notification only Abkari officials attached to Excise Range offices or Circles, or such officers in charge of distilleries, warehouses, wineries etc., were given powers as Abkari officers, besides the general powers given to the Commissioner of Excise, Assistant Commissioners and Joint Commissioners. Excise Officials of special wings or squads like Excise Enforcement and Anti Narcotic Special Squad, or the Excise Intelligence Squad were not given such powers under the 1967 Government Notification. In 2009, Government of Kerala issued another notification, SRO.No.361/2009 dated 08.05.2009, in supersession of the 1967 notification by which special categories like Excise officials of the Excise Enforcement and Anti Narcotic Special Squad and Excise Intelligence Squad were given powers of Abkari officers under the Abkari Act. The resultant conclusion is that as on the date of detection in the present case, the detecting officer who was an Excise Inspector, Excise Enforcement and Anti Narcotic Special Squad had no such powers.

27. The learned Senior Counsel for the appellants/accused submitted that since the detecting officer was an incompetent officer, all further proceedings in this case must collapse.

28. The learned Senior Counsel for the appellants/accused

relied on Suresh v. State of Kerala [2017 (2) KHC 891] to substantiate his contentions. While dealing with a similar fact situation, this Court in Suresh's case (supra) held that a case built on the detection made by an incompetent officer will have to collapse necessarily. On this ground also, the prosecution must fail.

29. The upshot of the above discussion is that the conviction

entered by the Court below overlooking these vital aspects of the matter cannot, therefore, be sustained. In the result, the accused are acquitted of the offences alleged. They are set at liberty. The appeal is allowed as above. Sd/- K.BABU, JUDGE KAS