

Suresh Kumar vs State of Kerala

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Court : Kerala

Decided On : Sep-30-2022

Judge : Honourable Mr.Justice K. Babu

Appeal No. : CRL.A/2212/2011

Appellant : Suresh Kumar

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU FRIDAY, THE 30TH DAY OF SEPTEMBER 2022 / 8TH ASWINA, 1944 CRL.A NO. 854 OF 2022 AGAINST THE ORDER/JUDGMENT IN SC 195/2003 OF ADDITIONAL SESSIONS COURT (ABKARI CASES), KOTTARAKKARA CP 91/2001 OF JUDICIAL MAGISTRATE OF FIRST CLASS - I, KOTTARAKKARA

APPELLANT/2ND ACCUSED: 1 RANGAN @ SREERANGAN, AGED 53 YEARS, S/O. SREEDHARAN, KARTHIKA VEEDU, THEKKEVILA CHERRY, MUNDAKKAL VILLAGE, KOLLAM BY ADV SUNNY ZACHARIAH RESPONDENT/COMPLAINANT STATE OF KERALA

REPRESENTED BY THE DEPUTY SUPERINTENDENT OF POLICE SPIRIT SMUGGLING CASES, TRIVANDRUM THROUGH THE LEARNED PUBLIC PROSECUTOR, HIGH COURT OF KERALA. BY ADV. SMT.REKHA.S (SR.P.P) THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30.09.2022, ALONG WITH CRL.A.49/2012, 57/2012 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU FRIDAY, THE 30TH DAY OF SEPTEMBER 2022 / 8TH ASWINA, 1944 CRL.A NO. 49 OF 2012 AGAINST THE ORDER/JUDGMENT IN SC 194/2003 OF ADDITIONAL SESSIONS COURT (ABKARI CASES), KOTTARAKKARA

APPELLANT/ACCUSED: RANGAN @ SREERANGAN, S/O.SREEDHARAN, KARTHIKA VEEDU, THEKKEVILA CHERRY, MUNDAKKAL VILLAGE, KOLLAM. BY ADV SRI.SUNNY ZACHARIA
RESPONDENT/COMPLAINANT: STATE OF KERALA, REPRESENTED BY THE DEPUTY SUPERINTENDENT OF POLICE, SPIRIT SMUGGLING CASES, TRIVANDRUM, THROUGH THE LEARNED PUBLIC PROSECUTOR, HIGH COURT OF KERALA. BY ADV SMT.REKHA.S, SR.PP THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30.09.2022, ALONG WITH CRL.A.854/2022 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU FRIDAY, THE 30TH DAY OF SEPTEMBER 2022 / 8TH ASWINA, 1944 CRL.A NO. 57 OF 2012 AGAINST THE ORDER/JUDGMENT IN SC 195/2003 OF ADDITIONAL SESSIONS COURT (ABKARI CASES), KOTTARAKKARA
APPELLANT/ACCUSED(A1): RAJU, S/O.KUNJU KUNJU,NILAMVILA

VEEDU,CHENGAMANAD, MELILA VILLAGE. BY ADVS. SRI.S.RAJEEV SRI.K.K.DHEERENDRA KRISHNAN RESPONDENT/STATE: STATE OF KERALA, REP.BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM (CRIME NO.721/2000 OF KOTTARAKKARA POLICE STATION, KOLLAM DISTRICT) BY ADV SMT.REKHA.S, SENIOR PUBLIC PROSECUTOR THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30.09.2022, ALONG WITH CRL.A.854/2022 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU FRIDAY, THE 30TH DAY OF SEPTEMBER 2022 / 8TH ASWINA, 1944 CRL.A NO. 58 OF 2012 AGAINST THE ORDER/JUDGMENT IN SC 194/2003 OF ADDITIONAL SESSIONS COURT (ABKARI CASES), KOTTARAKKARA APPELLANT/ACCUSED (A1): UNNIKRISHNA PILLAI @ KALAN UNNI S/O.RAGHAVANPILLAI, PLAVILA KIZHAKKETHIL VEEDU, CHETHADI MURI, MELILA VILLAGE. BY ADVS. SRI.S.RAJEEV SRI.K.K.DHEERENDRA KRISHNAN RESPONDENT/S: STATE OF KERALA REP.BY PUBLIC PROSECUTOR,HIGH COURT OF KERALA,ERNAKULAM (CRIME NO.715/2000 OF KOTTARAKKARA POLICE STATION, KOLLAM DISTRICT) BY ADV SMT.REKHA.S, SENIOR PUBLIC PROSECUTOR THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30.09.2022, ALONG WITH CRL.A.854/2022 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU FRIDAY, THE 30TH DAY OF SEPTEMBER 2022 / 8TH ASWINA, 1944 CRL.A NO. 2209 OF 2011 AGAINST THE ORDER/JUDGMENT IN SC 194/2002 OF ADDITIONAL SESSIONS COURT (ABKARI CASES), KOTTARAKKARA

APPELLANT/ACCUSED NO.9: SURESH KUMAR,
S/O.KARUNAKARAN, SREEVILASOM BUNGLOW, (KARUNAKARA
VILASOM), EZHUKONE VILLAGE, KOTTARAKKARA. BY ADVS.
SRI.C.C.THOMAS (SR.) SRI.NIREESH MATHEW
RESPONDENT/COMPLAINANT: STATE OF KERALA, REPRESENTED
BY DEPUTY SUPERINTENDENT OF POLICE, SPIRIT SMUGGLING
CASES, THIRUVANANTHAPURAM, REPRESENTED BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY ADV
SMT.REKHA.S, SENIOR PUBLIC PROSECUTOR THIS CRIMINAL
APPEAL HAVING BEEN FINALLY HEARD ON 30.09.2022, ALONG
WITH CRL.A.854/2022 AND CONNECTED CASES, THE COURT ON
THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU FRIDAY, THE
30TH DAY OF SEPTEMBER 2022 / 8TH ASWINA, 1944 CRL.A NO.
2212 OF 2011 AGAINST THE ORDER/JUDGMENT IN SC 195/2003 OF
ADDITIONAL SESSIONS COURT (ABKARI CASES), KOTTARAKKARA
APPELLANT/ACCUSED NO.9: SURESH KUMAR,
S/O.KARUNAKARAN, SREEVILASOM BUNGLOW, (KARUNAKARA
VILASOM), EZHUKONE VILLAGE, KOTTARAKKARA. BY ADV
SRI.C.C.THOMAS (SR.) RESPONDENT/COMPLAINANT: STATE OF
KERALA, REPRESENTED BY DEPUTY SUPERINTENDENT OF
POLICE, SPIRIT SMUGGLING CASES, THIRUVANANTHAPURAM,
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM. BY ADV SMT.REKHA.S, SENIOR PUBLIC
PROSECUTOR THIS CRIMINAL APPEAL HAVING BEEN FINALLY
HEARD ON 30.09.2022, ALONG WITH CRL.A.854/2022 AND
CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

K.BABU, J.

----- Criminal Appeal Nos.57 of 2012,
58 of 2012, 2209 of 2011, ----- Dated
this the 30th day of September, 2022

COMMON JUDGMENT

These appeals arise from the common judgment dated

14.12.2011 passed by the Additional Sessions Court (Abkari Cases), Kottarakkara in S.C Nos.194/2003 and 195/2003. Accused No.1 in S.C.No.194/2003, accused No.1 in 195/2003 and accused Nos.2 and 9, who are common in both the Sessions cases, are the appellants. Accused No.1 in S.C.No.195/2003 is the appellant in Crl.A.No.57/2012.

The appellant in Crl.A.No.58/2012 is accused No.1 in S.C.No.194/2003. The common accused No.9 is the appellant in Crl.A Nos.2209/2011 and 2212/2011. The common accused No.2 is the appellant in Crl.A Nos.49/2012 and 854/2022. The sessions cases were charge sheeted by the Deputy Superintendent of Police, Special Investigation Team for Spirit Smuggling Cases, Thiruvananthapuram. PROSECUTION CASE S.C No.194/2003:

2. On 24.09.2000 at 8.30 p.m, the Additional Sub Inspector of

Police, Kottarakkara seized two cans of 10 litre capacity with arrack and another can containing 2 litres of arrack along with a glass tumbler and a sum of Rs.350/- from the possession of the accused No.1 who was serving as salesman in Toddy Shop No.11 of Kottarakkara Range. S.C.No.195/2003: 2.1. On 30.09.2000, the Assistant Sub Inspector of Police, Kottarakkara conducted a raid in T.S.No.11 of Kottarakkara Range at 3.30 p.m and detected 32 litres of arrack in four cans along with a glass tumbler and a sum of Rs.1110/- from the possession of the accused No.1 therein, who was a salesman in the toddy shop.

2.2. Two separate FIRs were registered in respect of the two seizures effected as mentioned above. Crime No.715/2000 was registered based on the seizure effected on 24.09.2000. Crime No.721/2000 was registered in respect of the seizure effected on 30.09.2000. Accused No.1 in both cases were arrested on the

respective dates of the seizure itself.

3. The Deputy Superintendent of Police, Special Investigation

Team for Spirit Smuggling Cases, Thiruvananthapuram was entrusted with the investigation of the cases. He completed the investigation and submitted two separate final reports before the Judicial Magistrate of First Class-I, Kottarakkara against the appellants and the other accused. The cases were committed to the Sessions Court, Kollam from where it was made over to the Trial Court. The Trial Court consolidated both the sessions cases and proceeded with a single trial.

4. On the appearance of the accused charges were framed

against them for the offences punishable under Sections 55(a), 55(b), 55(i) and 8(2) read with 8(1) of the Abkari Act and Section 120B of the Indian Penal Code. The accused pleaded not guilty to the charges, and therefore, they came to be tried by the Trial Court for the aforesaid offences.

5. The prosecution examined PWs 1 to 35 and proved Exts.P1 to P62 and MOs 1 and 2 series and MO3.

6. 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.

7. At the closure of the trial, the Court below convicted

accused No.1 in both cases and the common accused Nos.2 and 9 under Section 55(i) and 8(2) of the Abkari Act. The other accused were acquitted of the charges [As accused No.8 did not face the trial the case against him was split up and refiled]. The Trial Court sentenced the appellants to undergo rigorous imprisonment for a period of three years each and pay a fine of Rs.1 Lakh each under section 8(2) of the Abkari Act. No separate sentence was awarded under Section 55(i) of the Abkari Act.

8. Heard Sri.Nireesh Mathew, the learned counsel appearing

for the appellant/accused No.9 in CrI.A Nos.2212/2011 and 2209/2011, Sri.S.Rajeev, the learned counsel appearing for appellants/accused No.1 in CrI.A Nos.57/2012 and 58/2012 and Sri.Sunny Zachariah, the learned counsel appearing for the appellant/accused No.2 in CrI.A Nos.854/2022 and 49/2012 and Smt. Rekha.S, the learned Senior Public Prosecutor appearing for the respondent.

9. The learned counsel for the appellants challenged the impugned judgment of conviction and sentence on the following grounds:

(a) The prosecution failed to establish that the contraband substance allegedly seized from the place of occurrence reached the hands of the Chemical Examiner.

(b) The arrest of accused No.1 is doubtful.

(c) The officer, who conducted the investigation, is incompetent to investigate the matter and submit final report.

10. The prosecution relies on the seizures of the contraband substance effected on 24.09.2000 and 30.09.2000 in T.S No.11 of Kottarakkara Excise Range. According to the prosecution, the detecting officers on 24.09.2000 seized 22 litres of arrack stored in two cans from the possession of the accused No.1 in S.C.No.194/2003 and 32 litres of arrack on 30.09.2000 from the

possession of accused No.1 in S.C No.195/2003. As per the prosecution case, samples were drawn from the scene of occurrence from the contraband substances and produced before the Court for sending them for chemical examination.

11. The essential challenge of the appellants is that the

prosecution failed to establish that the contraband substances allegedly seized from the place of occurrence was subjected to analysis in the Chemical Examiner's Laboratory. The defence relied on the following circumstances to substantiate the said contention:

(i) In Exts.P18 and P27 search lists, the

contemporaneous documents prepared at the time of seizure to evidence seizure and drawing of sample etc, there was no mention of the specimen of the seal stated to have been affixed on the bottles containing the sample.

(ii) No forwarding notes/requisitions for sending sample were produced and marked.

(iii) The custody of the samples sent for chemical examination during the period from 15.12.2000 to 20.12.2000 has not been satisfactorily explained.

12. Exhibits P18 and P27 are the search lists prepared by the

detecting officer at the scene of occurrence. Either in the search lists or in any other documents prepared contemporaneously, there are no mention of the specimen of the seal stated to have been

affixed on the bottles containing the samples. The detecting officers have not given evidence as to the nature of the seal used. The forwarding notes/requisitions for sending sample to the laboratory were also not produced and marked during trial. There is nothing to show that the specimen of the seal was forwarded to the Chemical Examiner for facilitating the comparison of the same with the seal on the bottles containing the samples produced for chemical examination.

13. 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.

14. 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.

15. 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.

16. The prosecution has not given evidence as to the date on which the bottles containing the samples were forwarded to the

Chemical Examiner. Exhibits P57 and P58, the Certificates of Chemical Analysis, would show that the bottles containing the samples were forwarded in both cases as per letter dated 15.12.2000 of the Judicial First Class Magistrate- I, Kottarakkara. Exhibits P57 and P58 would further show that the bottles containing the samples were received in the laboratory only on

20.12.2000. It is mentioned in Exts.P57 and P58 that a Police Constable No.4711 delivered the bottles containing the samples in the laboratory. In the absence of any evidence as to the date on which the bottles containing the samples were forwarded to the laboratory, this Court has to infer that the samples were forwarded to the laboratory on 15.12.2000. This is the only possible inference in the absence of any contra evidence. The prosecution has not offered any explanation as to the delay of five days in bringing the sample before the laboratory after obtaining the same from the

Court. The Police Constable who delivered the bottles in the laboratory was not examined. The property clerk who was the custodian of the properties, including the samples, was also not examined. While dealing with a similar fact situation,

this Court in Viswanadhan v. State of Kerala [2016 (3) KHC 38] held thus:

Unless it is proved by the prosecution that the article reached the chemical examiner's lab without any tampering or in a tamper proof condition and explaining the delay in producing the same by examining the said police constable through whom it was forwarded to the lab, it cannot be said that the prosecution has proved beyond reasonable doubt that the sample reached the chemical examiner's lab in a tamper proof condition and the report relates to the representative sample said to have been taken from the contraband article alleged to have been seized from the possession of the accused. This benefit must be given to the accused..

17. In the absence of any satisfactory explanation regarding

the custody of the bottles containing the samples during the interregnum from 15.12.2000 to 20.12.2000 and non-examination of the custodians of the samples during this period would lead to the

conclusion that the prosecution failed to rule out the possibility of

the samples being changed or tampered with during the course of transit of the same from the Court to the laboratory. The necessary

conclusion is that the prosecution failed to establish that the

contraband substance stated to have been seized from the place of occurrence was subjected to analysis in the Chemical Examiner's laboratory, which would lead to the further conclusion that Exts.P57 and P58 Certificates of Chemical Analysis have no evidentiary value.

18. The learned counsel for the appellants further raised a contention that the officer who conducted the investigation in the matter is an incompetent officer. This contention is based on Section 4 of the Abkari Act read with Notification

No.321/96. S.R.O No.321/96 reads thus:

S.R.O.No.321/96.-In exercise of the powers conferred by Section 4 of the Abkari Act, I of 1077 the Government of Kerala hereby appoint all police officers of and above the rank of Sub Inspector of Police in charge of Law and Order and working in the General executive branch of the Police Department and all Revenue Officers of and above the rank of Deputy Collectors to be Abkari Officers under their respective Jurisdiction for the purposes of Sections 31, 32, 33, 34, 35, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 59 of the Act and to exercise all the powers and to discharge all the duties conferred and imposed on Abkari Officers, in the sections aforesaid. This notification shall come into force with immediate effect [G.O.(P) No.69/96/TD dt. 29-3-1996]

19. As per the above extracted notification, the Government of

Kerala appointed Police officers of and above the rank of Sub Inspector of Police in charge of law and order and working in the General Executive branch of the Police department as Abkari officers under Section 4 of the Abkari Act. The Police officers of and above the rank of Sub Inspector were conferred with the powers of Abkari officers to exercise the functions under the Kerala Abkari Act as per the above extracted S.R.O. In *Sujith v. State of Kerala* [2016 (3) KHC 823] this Court had occasion to

consider a similar fact situation. In *Sujith's* case (*supra*) two Deputy Superintendents of Police, who were not in charge of law and order and were not working in the General Executive branch of the Police department, had conducted investigation and one of them

submitted final report. Relying on S.R.O No.321/96 this Court held

that the officers were incompetent to conduct the investigation and the Court had no jurisdiction to take cognizance of the offences under the Abkari Act based on such investigation.

20. In the present case, the prosecution has no case that

PW35, the Dy SP, who conducted the investigation, was a Police officer in charge of law and order and working in the General Executive branch of the police department during the relevant period.

21. The resultant conclusion is that PW35 was incompetent to

conduct the investigation and submit final report as he had no competence as an Abkari officer as provided in Section 4 of the Abkari Act. This view is fortified by the decision of this Court in *Jil v. State of Kerala* [2017 (3) KLT 156].

22. The learned counsel for the common accused No.2

[appellant in Crl.A Nos.854/2022 and 49/2012] further contended that in view of the fact that arrest memos in respect of accused No.2 were not produced, the arrest itself is doubtful.

23. The learned counsel relied on *Baburaj v. State of Kerala*

[2021 (6) KHC 92] to substantiate his contentions. In *Baburaj's* case (*supra*) this Court following *Ramankutty v. Excise Inspector, Chelannur Range* [2013 (3) KHC 308] held that 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.

24. The offences alleged against the accused are grave in

nature and the sentence provided is harsh. Strict compliance of the rigors of the statute and insistence on link evidence to ensure that the chain of allegations against the accused is substantiated to the fullest is the requirement of law. While dealing with these aspects, this Court in *Baburaj's* case (*supra*) held thus:

19. A balance between the enforcement of the provisions of the Abkari Act and the protection of the citizen from injustice is to be struck, given the stringent nature of the Act and the harsh sentence provided to the

offences. Such an approach is required in view of the doctrine of 'due process' as provided under Article 21 of the Constitution of India.

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29. A survey of the precedents on the subject

leads to the conclusion that strict compliance of the rigors of the statute and insistence on link evidence to ensure that the chain of allegations against the accused is substantiated to the fullest is the requirement of law and mandatory to establish a charge alleging the offence punishable under the Abkari Act.

25. 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.

26. 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]}.

27. In the present case the prosecution miserably failed to establish the link connecting the accused with the contraband substance seized from the place of occurrence. The accused are entitled to the benefit of doubt.

28. The conviction and sentence passed against the appellants are liable to be set aside. In the result, the appellants/accused are acquitted of the offences alleged. They are set at liberty.

29. Any amount deposited by the appellants towards fine shall be disbursed to them forthwith. The appeal is allowed as above. Sd/- K.BABU, JUDGE KAS

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