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Baburaj vs State of Kerala

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Court : Kerala

Decided On : Sep-30-2021

Judge : Honourable Mr.Justice K. Babu

Appeal No. : CRL.A/1523/2007

Appellant : Baburaj

Respondent : State of Kerala

Judgement :

CR

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU THURSDAY, THE 30TH DAY OF SEPTEMBER 2021 / 8TH ASWINA, 1943 CRL.A NO. 1523 OF 2007 AGAINST THE JUDGMENT IN SC.NO.1850/2001 OF ADDITIONAL SESSIONS JUDGE FOR TRIAL OF ABKARI ACT CASES,NEYYATTINKARA, THIRUVANANTHAPURAM CP.NO.135/2000 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II, NEYYATTINKARA, THIRUVANANTHAPURAM APPELLANT/ACCUSED: BABURAJ, S/O.HAREES NADAR, KULATHINKARA VEEDU, KALLIYODE, PARASUVAIKKAL VILLAGE. BY ADV SRI.M.SREEKUMAR RESPONDENT/COMPLAINANT: STATE

OF KERALA REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. OTHER PRESENT: SRI MC ASHI-PP, SRI.P.VIJAYABHANU, AMICUS CURIAE THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 29.09.2021, THE COURT ON 30.09.2021 DELIVERED THE FOLLOWING: CR K. BABU J. ---------- ---------- Dated this the 30th day of September, 2021

J U D G M E N T

Aggrieved by the judgment dated 25.07.2007 passed by the learned Additional Sessions Judge for Trial of Abkari Act Cases, Neyyattinkara in S.C.No.1850 of 2001, the accused has preferred this appeal.

2. The accused has been convicted of the

offence under Section 58 of the Abkari Act and sentenced to undergo rigorous imprisonment for a term of two years and to pay a fine of Rs.1,00,000/- by the impugned judgment.

3. On 25.07.1999, at about 06.00 p.m., the

Sub Inspector of Police, Parassala Police Station (PW5), found the accused carrying a 5-liter jerry-can at Parasuvaikkam. PW5 inspected the can in possession of the accused and ascertained that it contained 4 litres of illicit arrack. The accused was also holding a glass tumbler. PW5 seized the contraband substance from the possession of the accused and arrested him. PW5 registered FIR.No.174 of 1999 of Parassala Police Station against the accused, alleging offence punishable under Section 58 of the Abkari Act. After completion of the investigation, the final report was submitted before the Judicial First Class Magistrate Court-II, Neyyattinkara.

4. The case was committed to the Sessions

Court, Thiruvananthapuram, from where it was made over to the trial court. On the appearance of the accused, charge was framed against him for the offence

punishable under Section 58 of the Abkari Act. The accused pleaded not guilty, and therefore, he came to be tried by the trial court.

5. The prosecution examined PWs.1 to 6 and proved Exts.P1 to P9 and MO1.

6. The trial court found that the accused is guilty of the offence alleged and passed the impugned judgment of conviction and sentence.

7. Heard Shri M.Sreekumar, the learned counsel for the accused, and Shri M.C.Ashi, the learned Public Prosecutor.

8. The learned counsel for the accused contended that the prosecution failed to establish the link connecting the accused with the contraband allegedly seized from the place of occurrence. The

learned counsel challenges the legality of the procedure in which the sample was drawn from the contraband substance by the property clerk as per the directions of the learned Magistrate.

9. The learned Public Prosecutor contended that strict compliance of the provisions of the Abkari Act and the formalities to be followed in sampling need not be insisted, but only substantial compliance is sufficient.

10. This Court requested the learned Senior Counsel Shri.P.Vijayabhanu to address arguments on the questions of law involved. The learned Senior Counsel submitted that as the punishment for offences under the Abkari Act is draconian, it

follows as a logical corollary that strict compliance to the statutory formalities specified in the Act is necessary. The learned Senior Counsel further submitted that the Magistrate undertaking the act of taking sample with the assistance of the property clerk could not be comprehended at all.

11. The issue that falls for consideration is whether the learned Magistrate is empowered to draw sample from the contraband produced before him by the detecting officer.

12. I shall first consider whether strict compliance with the statutory formalities stipulated under the Abkari Act is mandatory for a successful prosecution.

13. Substantial amendments were incorporated in the Abkari Act in 1997 by way of Act 16 of 1997.

14. The statement of objects and reasons for enacting Act 16 of 1997 is relevant and states as follows:

> The Government in their Abkari Policy for the year 1997-98 have decided to make offences relating to manufacture, export, import, transport, transit, possession, storage, distribution, bottling or selling liquor in any form, without permit or licence, cognizable, non-bailable and non-compoundable and also to enhance the punishment for offences under the Abkari Act. In order to give effect to the above proposal, amendments to the various provisions of the Abkari Act were necessary.

15. This statement identifies the inadequacy of the then-existing provisions insofar as the scheme of penalty is concerned. By way of amendment, various penalties provided in Chapter IX and Section 8 of the Abkari Act were enhanced with intent to make the penalties sufficiently deterrent.

16. Section 41A of the Abkari Act,

incorporated by way of Act 16 of 1997, makes all offences cognizable and offences punishable for a term of imprisonment of three years or more non-bailable, with stringent conditions for bail attached. Section 41A reads thus:

> 41A.Offences to be cognizable and non- bailable.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Central Act 2 of 1974),- (a)every offence punishable under this Act shall be cognizable; (b)no person accused of an offence punishable for a term of imprisonment of three years or more under this Act shall be released on bail or on his own bond unless- (i)the Public Prosecutor or the Assistant Public Prosecutor, as the case may be, has been given an opportunity to

oppose the application for such release, and (ii)where the Public Prosecutor or the Assistant Public Prosecutor, as the case may be, opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), or any other law for the time being in force on granting of bail..

17. Section 64 of the Abkari Act deals with presumption as to commission of offence in certain cases. Section 64 reads thus:

64. Presumption as to commission of offence

in certain cases. - In prosecutions under Section 55, Section 55B, Section 56A, Section 57, Section 58, Section 58A and Section 58B it shall be presumed until the contrary is proved, that the accused person has committed an offence under that section in respect of any liquor or intoxicating drug, or any still, utensil, implement or apparatus whatsoever for the manufacture of liquor other than toddy or of any intoxicating drug, or any such materials as are ordinarily used in the manufacture of liquor or of any intoxicating drug, of the possession of which he is unable to account satisfactorily; and the holder of a licence or permit under this Act shall be punishable, as well as the actual offender, for any offence committed by any person in his employ and acting on his behalf under Section 8 or Section 55 or Section 55B or Section 56 or 56A or Section 57 or Section 58 or Section 58A or Section 58B as if he had himself committed the same, unless he shall establish that all due and reasonable precautions were exercised by him to prevent the commission of such offence;

18. The statement of objects and reasons of

Act 16 of 1997, the provisions regarding bail contained in Section 41A and the rule of presumption provided in Section 64 refer to the Abkari Act as amended in 1997, being a stringent measure to compact the menace of the crime relatable to the contrabands referred to therein.

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.

20. In State of Punjab v. Balbir Singh [1994

(3) SCC 299], the Apex Court held that while dealing with the Acts prescribing stringent punishment, a balance must be struck in regard to the mode and manner in which the statutory requirements are to be complied with. In Union of India v. Balmukund [(2009) 12 SCC 161], the Apex Court held that where a statute confers drastic

powers and seeks to deprive a citizen of its liberty and making stringent provisions for grant of bail, scrupulous compliance with the statutory provisions must be insisted upon.

21. The Apex Court, in Kishan Chand v. State of Haryana [2013 (1) KLT 634 (SC)], in the context of the provisions of the NDPS Act held that it is settled cannon of interpretation that penal provisions, particularly with harsher punishment ought to be construed strictly, and the doctrine of substantial compliance cannot be pressed into service in such situation. It was further held that the principle of substantial compliance would be applicable in cases where the language of the provisions strictly or by necessary implications admits such compliance.

22. 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.

23. A legal obligation is cast on the prosecution to prove that it was 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 the contraband reaches the laboratory is required to be established by the prosecution.

24. 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 Rajastan v. Daulath Ram [AIR

1980 SC 1314] in Sasidharan (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 (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 (supra) and Sathi (supra) has been affirmed by a Division Bench of this Court in Ravi v. State of Kerala [2011 (3) KLT 353].

25. In Bhaskaran v. State of Kerala (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.

26. 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.

27. 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.

28. The Apex Court in Vijaya Pandey v. State of U.P. (AIR 2019 SC 3569) while examining the provisions of the NDPS Act held thus:-

the failure of the prosecution in the case to relate the seized sample with that seized from the appellant, makes the case no different from failure to produce the seized sample itself. In the circumstances the mere production of the Laboratory report that the sample tested was narcotics cannot be conclusive proof by itself.

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.

30. Coming to the facts of this case, PW5, the detecting officer, gave evidence that he found the accused at the place of occurrence holding a 5- liter can, and on further inspection, he found that it contained 4 litres of illicit arrack. His version is supported by PW3, who had accompanied him in the search and seizure. PWs1 and 2, the independent witnesses, did not support the prosecution. PW6, the property clerk of the court, stated that on 28.05.1999, he had received the

properties. According to him, he had verified the seal affixed on MO1 can that contained the illicit arrack and the specimen seal produced by the Police and found that it was tamper-proof. PW6 further gave evidence that he conducted sampling as per the directions of the learned Magistrate. According to him, he had drawn 180 ml of liquor from the can produced by the Police in another bottle and sealed the same, and forwarded it to the Chemical Examiner

after obtaining the signature of the learned Magistrate.

31. The procedure adopted by the learned Magistrate before whom the contraband was produced is reflected in the observation of the learned Session Judge which is extracted below:

> If the Magistrate's Court finds it tiresome to record an order for each case regarding sampling separately, it is probable and only reasonable for the said Court to pass common orders by way of an oral direction to the effect that sampling is to be carried out in each and every case, in which sample is not produced separately by the prosecuting agency.

32. The accused is challenging the legality of

the procedure adopted by the learned Magistrate authorizing the property clerk of the court to draw the sample from the contraband produced by the Police and send the same to the Chemical Examiner.

33. Under the Abkari Act, there is no specific

provision which deals with the procedure for sampling and sealing, etc. of the contraband. In practice and guided by the provisions of the Excise manual, normally sample is drawn at the spot by the detecting officer in which event, the procedure followed would be recorded in a seizure mahazar being a contemporaneous document. The sample, along

with the residue of the contraband and other properties, is produced before the court and the sample is sent to the laboratory from the court.

34. It appears from the materials available that the learned Magistrate, has orally authorised the property clerk of the court to draw the sample from the contraband produced by the detecting

officer. The act of the learned Magistrate authorizing the property clerk of the court to draw the sample and send the same to the laboratory is undoubtedly an act in which he has traversed the jurisdictional limits.

35. Drawing the sample and sealing the same

are acts within the exclusive province of the Police official or the Excise official concerned. The learned Magistrate undertaking the act of taking the sample from the contraband himself is irreconcilable. The water-tight compartments provided for the investigator and the court in a criminal prosecution cannot, at any rate, be allowed to be traversed or interchanged. It is pertinent to note that the detecting officer, after investigation, is to file the final report before the Magistrate. If the Magistrate himself undertakes the act of taking the sample from the contraband produced before him, the question of independent consideration of final report laid by

the investigating officer before the learne

fortified by the decision of this Court in Smithesh v. State of Kerala [2019 (2) KLT 974], wherein this Court held that the Magistrate has no power or authority to collect samples from the contraband produced before him. In Baby v. State of Kerala [2020 (2) KLT 590], this Court had an occasion to consider whether the Magistrate has the power or authority to direct the investigating officer to draw the

sample from the contraband produced before the court for sending to the chemical examiner. This Court held that the learned Magistrate had

traversed the jurisdictional limits by issuing orders to take samples from the contraband produced before him for the purpose of sending it to the Chemical Examiner's laboratory.

36. The course adopted by the learned Magistrate undertaking the act of taking samples

through the property clerk is not a procedure established by law. The necessary conclusion is that the Magistrate is not empowered to draw sample from the contraband produced before him by the detecting officer.

37. It is also very strange to note that the property clerk was taking samples based on the oral

directions of the Magistrate. No document was contemporaneously prepared to show the procedure followed in taking the sample. Also, there is no material to show that the sample was taken under the supervision or in the presence of any responsible officers. Even the date on which the sample was drawn is not recorded in any of the relevant records. The genuineness of the sample collected by the property clerk is under vehement challenge.

38. 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.

39. 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.

40. 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.

41. The genuineness of the contraband produced

before the court is also under challenge on the ground that the specimen impression of the seal stated to have been affixed by the detecting officer at the

scene of occurrence was not produced before the court. The detecting officer had not produced the specimen impression of the seal at the time of production of properties before the court. The specimen impression of the seal used by the detecting officer is essential to enable the court to ascertain the genuineness of the contraband produced before the court. [see Bhaskaran v. State of Kerala and another (2020 KHC 5296), Krishnadas v. State of Kerala (2019 KHC 191)]

42. As the procedure adopted in drawing the

sample from the contraband substance has no sanction of law, and the genuineness of the sample forwarded to the Chemical Examiner's laboratory is doubtful, no evidentiary value can be given to Ext.P6, the certificate of chemical analysis. Resultantly, the prosecution failed to establish the link connecting the accused with the contraband.

43. A person has a profound right not to be convicted of an offence that is not established by the evidential standard of proof beyond a reasonable doubt.

44. The learned Sessions Judge has disregarded these vital aspects while recording the impugned conviction and sentence.

45. The accused is, therefore, found not guilty of the offence punishable under Section 58 of the Abkari Act and is acquitted thereunder. He is set at liberty. The Criminal Appeal is allowed as above. Before parting with the case, this Court places on record its appreciation to the learned Senior Counsel Shri.P.Vijayabhanu, for his valuable assistance as Amicus Curiae. Sd/- K. BABU, JUDGE AS

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