Rajan vs State of Kerala

Rajan vs State of Kerala

SooperKanoon Citation : sooperkanoon.com/1609182

Court : Kerala

Decided On : Sep-30-2021

Judge : Honourable Mr.Justice K. Babu

Appeal No. : CRL.A/1554/2007

Appellant : RAJAN

Respondent : State of Kerala

Judgement :

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 AGAINST THE ORDER/JUDGMENT IN SC 405/2006 OF ADDITIONAL SESSIONS COURT (ADHOC-I), MANJERI, MALAPPURAM

APPELLANT: RAJAN, S/O JANARDHANAN ELLUMKALAYIL HOUSE, KURUMBALANGODE, NILAMBUR, MALAPPURAM DISTRICT. BY ADV SRI.BABU S. NAIR RESPONDENT: STATE OF KERALA THE EXCISE INSPECTOR, NILAMBUR EXCISE RANGE, THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, KOCHI-31. OTHER PRESENT: SRI M C ASHI-PP THIS CRIMINAL APPEAL

HAVING COME UP FOR ADMISSION ON 30.09.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.BABU, J.

=================== Crl. A. No. 1554 of 2007 =================== Dated this the 30th day of September, 2021

JUDGMENT

Aggrieved by the judgment dated 06.08.2007, passed by the Additional Sessions Court (ADHOC-I), Manjeri in SC.No.405/2006, the accused has preferred this appeal.

2. The trial court convicted the accused for the offence punishable under Section 8(2) of the Kerala Abkari Act.

3. The prosecution case is that, on 23.02.2004 at about 5.30 p.m., the accused was found in possession of 3 litres of arrack in a 5 litre can on the Neelanhi-Ambalappadi road.

4. After completion of the investigation, the final report was submitted against the accused for the offence

punishable under Section 8(2) of the Abkari Act before the Judicial First Class Magistrate, Nilambur. The case was committed to the Sessions Court, Manjeri from where it was made over to the trial court. On the appearance of the accused charge was framed against him for the aforesaid offence. The accused pleaded not guilty and therefore, he came to be tried by the trial court.

5. The prosecution examined PWs 1 to 4 and proved Exts.P1 to P8 and MO 1. Exts. D1 to D3 were marked on the side of defence.

6. After closure of the evidence on behalf of the

prosecution, the statement of the accused under Section 313 Cr.P.C was recorded. He pleaded innocence. The trial court heard the matter under Section

232 Cr.P.C. and found that there was evidence against the accused and hence he was called upon to enter on his defence and to adduce evidence, if any, he may have in support thereof. The trial court, after hearing the arguments addressed from both

sides, found that the accused is guilty of offence under Section 8 (2) of the Abkari Act and he was convicted thereunder. The accused was sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs. 1 lakh.

7. Heard Sri.Bharath Mohan, the learned counsel appearing for the appellant/accused and Sri.M.C.Ashi, the learned Public Prosecutor appearing for the respondent.

8. The learned counsel for the appellant/accused contended that, the prosecution failed to establish that the contraband substance allegedly recovered from the scene of occurrence was actually subjected to analysis in the Chemical Examiner's Laboratory.

9. The learned Public Prosecutor, per contra, submitted that, sufficient materials are there to establish the charge against the accused.

10. The only point that arises for consideration is whether the conviction entered and the sentence passed against the accused/appellant are sustainable or not.

11. PW1, a Preventive Officer, Excise Range, Nilambur

on 23.02.2004 detected the offence. He gave evidence that on the date of occurrence at 5.30 p.m, the accused was found in possession of a plastic can containing 3 litres of illicit arrack at Kurabilangod on the Ambalappadi-Neelenhi road. PW1 ascertained that, the plastic can contained illicit arrack. He seized the contraband substance from the possession of the accused and prepared Ext.P3 mahazar. The accused was arrested from the spot. PW2, the excise

guard who had accompanied PW1, supported the prosecution.

12. PW3, the independent witness, did not support the prosecution. PW4, the Excise Inspector, Excise Range office, Nilambur conducted investigation and

submitted the final report.

13. The learned counsel for the appellant/accused contended that, the prosecution failed to establish that the

contraband substance allegedly recovered from the place of occurrence was produced before the Court and forwarded to the Chemical Examiner's Laboratory for analysis.

14. The learned counsel for the appellant/accused relied on the following circumstances to substantiate his contentions; a) The quantity of sample drawn by the detecting

officer at the scene of occurrence was 200 ml of arrack, whereas the sample that was subjected to analysis in the laboratory was 375 ml of liquor alleged to be arrack. b) Though the sample was forwarded to the laboratory on 23.02.2004 it reached there only on 01.03.2004 and the delay occurred across the transit has not been explained.

15. PW1, the Preventive Officer gave evidence that, he

had drawn 200 ml of illicit arrack from the contraband substance found in the possession of the accused as sample in a 375 ml bottle. Ext. P6-property list shows that, 375 ml

bottle containing 200 ml of arrack was produced before the Court as sample. But, Ext.P8 Chemical analysis report shows that, 375 ml of clear colorless liquor alleged to be arrack was subjected to analysis in the laboratory. The prosecution has not offered any explanation for this discrepancy. The genuineness of the sample which was subjected to analysis in the laboratory is doubtful in view of this discrepancy. The necessary inference is that the sample drawn at the scene of

occurrence was not the one forwarded to Chemical Examiner's Laboratory.

16. The prosecution has not given evidence as to the

date on which the sample was forwarded to the Chemical Examiner's Laboratory. Ext.P7 copy of the forwarding note shows that, the sample was forwarded to the laboratory on 23.02.2004. This is more evident from Ext.P8-chemical analysis report which would show that, as per letter dated 23.02.2004 of the Judicial First Class Magistrate, Nilambur, the sample was forwarded to the laboratory. It is further

seen from Ext.P8 certificate of analysis that, the sample reached the laboratory only on 01.03.2004, through an Excise Guard, by name Sri. K. Vasudevan. The custody of the sample during this interregnum has not been explained by the prosecution. Sri. K.Vasudevan, the Excise Guard, who delivered the sample to the laboratory has not been examined as witness.

17. 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.

18. In the absence of any satisfactory explanation for

the delay in the production of the sample before the laboratory, after the same was forwarded from the Court, it cannot be concluded that, the sample reached the laboratory in a tamper-proof condition.

19. Another aspect to be considered is the delay in the

analysis of sample. Though the sample reached the laboratory on 01.03.2004, it was subjected to analysis only on 20.10.2005. On the question of delay in the analysis of the sample, in Krishnadas v. State of Kerala (2019 KHC 191) this Court 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.

20. In the instant case, the delay of more than 20 months in analysing the sample has not been explained by the prosecution.

21. In view of the discrepancies regarding the quantity of the sample drawn at the scene of occurrence and the quantity of the sample subjected to analysis in the laboratory no evidentiary value can be given to Ext.P8 chemical analysis report.

22. 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.

23. In the instant case, the prosecution was unable to establish the link connecting the accused with the

contraband seized and the sample analysed in the laboratory. The accused is entitled to the benefit of doubt arising from the absence of link evidence and other circumstances discussed above.

25. 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. The appellant/accused is, therefore, not guilty of the offence punishable under Section 8 (2) of the Abkari Act. He is acquitted of the charge. He is set at liberty. The appeal is allowed as above. Sd/- K.BABU, JUDGE LU