

Simon vs State of Kerala

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Court : Kerala

Decided On : Feb-26-2020

Judge : Honourable Mr.Justice T.V.Anilkumar

Appeal No. : CRL.A/111/2008

Appellant : SIMON

Respondent : State of Kerala

Judgement :

Crl.Appeal.111/2008 1

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE T.V.ANILKUMAR
WEDNESDAY, THE 26TH DAY OF FEBRUARY 2020 / 7TH
PHALGUNA, 1941 CRL.A.No.111 OF 2008 AGAINST THE JUDGMENT
IN SC 183/2006 DATED 14-12-2007 OF ADDITIONAL SESSIONS
COURT-III (ADHOC-1), THODUPUZHA

APPELLANTS/ACCUSED: 1 SIMON,S/O.VARGHESE,
MANGALASSERIL HOUE, 8TH ACRE BHAGAM, KALLAR KARA,
ANAVIRATTY VILLAGE 2 JOHNY,S/O.MATHEW, NJARALAKKATTU
HOUSE, UDUMBANNOOR KARA, UDUMBANNOOR VILLAGE,

THODUPUZHA. BY ADVS. SRI.K.K.CHANDRAN PILLAI
SRI.A.S.SAJUSH PAUL RESPONDENT/COMPLAINANT: STATE OF
KERALA, REP.BY THE DIRECTOR GENERAL OF PROSECUTION,
HIGH COURT OF KERALA, ERNAKULAM. SMT. MAYA M N, PUBLIC
PROSECUTOR THIS CRIMINAL APPEAL HAVING BEEN FINALLY
HEARD ON 25-02- 2020, THE COURT ON 26-02-2020 DELIVERED
THE FOLLOWING: Crl.Appeal.111/2008 2

JUDGMENT

Dated this the 26th day of February 2020

The appellants are accused Nos.1 and 2 in S.C.No.183/2006 on the file of 3rd Additional Sessions Judge (ADHOC-I), Thodupuzha. Both appellants were tried for charges under Section 55 (a) and (i) and Sec.64 A of Abkari Act (for short 'the Act'). The first accused was found guilty of offence punishable under Section 55(a) alone and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rupees one lakh followed by default sentence of another simple imprisonment of six months. He was acquitted of the offence punishable under Sec.55(i) of the Act.

2. The second appellant was convicted for the offence punishable under Section 64 A of the Act and sentenced to pay fine of Rs.25,000/- with default sentence of simple imprisonment of six months.

3. The appellants were charge sheeted by the Sub Inspector of Police, Adimaly, on the allegation that Crl.Appeal.111/2008 3

the first accused stored, for sale, 20 liters of toddy in MO1 Can, on 26.03.2006 at 6 pm, in a building bearing Door No. PP 10/398 situated in 8th Acre, 60th Mile Panchayat Road in a coffee plantation close to the road, occupied by second accused and with his permission against the provisions of the Act.

4. The prosecution case is that the patrol party

consisting of CW12, the Sub Inspector of Police, Adimaly and PW1 and PW10, Assistant Sub Inspectors of Police attached to the same police station along with others came to the building upon receipt of reliable information of unauthorized use of the building and found the 1st accused being present in possession of MO1 Can containing 20 litres of toddy.

5. In the presence of independent witnesses, PWs 2 and 3 claimed to have subjected the liquor to smell

and taste test and samples were simultaneously collected in three bottles of 375ml each by CW12, the detecting officer, who later passed away before the commencement of the trial of the case. Since CW12 was satisfied that the toddy seized was stored and sold in an unlicensed premises occupied by the 2nd accused and Crl.Appeal.111/2008 4 without the 1st accused possessing necessary licence or permit for sale of toddy, he was arrested at 6 pm on 26.03.2004. MO1 Can was taken into custody along with bucket, cups and other utensils seen in the building itself under Ext.P1 Mahazar prepared on the spot itself. Currency notes indicating sale of toddy were also seized from the possession of the 1st accused. Sample bottles were labelled in accordance with law and MO1 Can was also labelled and sealed along with the sample bottles.

6. CW12 prepared Ext.P7 suo motu report and conducted preliminary investigation. He prepared Ext.P8 property list and Ext.P9 forwarding note and

produced them before the committal court. The arrestee was also produced before the concerned court in accordance with law. Later part of the investigation was taken over by PW9, Sub Inspector of Police, Adimaly. He submitted final report before the committal court from where the case was made over to Court of Sessions, Thodupuzha from where it came to be tried before the 3rd Additional Sessions Court (ADHOC- I), Thodupuzha, where the charge was framed against Crl.Appeal.111/2008 5 appellants for offences punishable under Sections 55(a)(i) and 64A of the Abkari Act.

7. On the appellants denying charge against them, the prosecution examined PWs 1 to 10 and marked Exhibits P1 to P10 and Mos 1 to 10. While the appellants were

questioned under Section 313 Cr.PC, they submitted that they were falsely implicated in the crime. The 1st accused said that liquor was seized while he was transporting it in a Can received from DW3 a toddy tapper, about a few yards away from T.S.No.5/2003-04, where he was employed as a toddy worker. He regularly used to collect toddy tapped from

DW3 who is a tapping worker. The 2nd accused denied that the building from where the contraband liquor was seized either belonged to him or was it ever occupied by him at any point of time. On the side of the appellants, DWs 1 to 4 were examined and exhibits D1 to D6(a) were marked.

8. The court below after hearing both parties and on appreciating evidence on record, found that there was enough evidence to prove that the 2 nd accused was in occupation of building bearing No.PP.10/398 Crl.Appeal.111/2008 6 from where MO1 allegedly containing toddy and other

materials were seized. It also found that the 1 st accused was arrested from the building and he stored toddy without obtaining necessary licence or permit under the provisions of the Act from the concerned

authorities. The court below did not accept the allegation of the prosecution that the toddy stored was proved to be for sale and accordingly 1 st accused was absolved of charge under Section 55(i) of the Act. Absolution of 1st accused from the said charge has become final in as much as the State has not come up in appeal challenging the same.

9. What survives in this appeal is the

correctness of the finding of the court below as to whether the 1st and 2nd accused are guilty of offence punishable under Section 55(a) and under Section 64A of the Act respectively.

10. I heard the learned counsel for the appellants and also the learned Public Prosecutor.

11. The learned counsel for the appellants submitted that the 1st accused was not arrested nor the contraband seized from his possession but he was taken
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to police custody at a time when he was transporting liquor in a Can to T.S.No.5/2003-04, where he had been employed as a toddy worker and he had no connection with the 2nd accused or the building from where the liquor was allegedly seized. It was submitted that the seizure mahazar, suo motu report, property list as well as forwarding note relied on by the court below were not legally proved in as much as CW12, the author of these documents was not available for examination

at the time of trial following his demise. It is one of his contentions that the samples of toddy alleged to have been kept in MO1 Can were not sealed at all. Nor the seals claimed to have been affixed on the samples were convincingly proved or substantiated. It was submitted that the detecting officer failed to

prepare arrest records and this has rendered

reported in Ramankutty v. Excise Inspector [2013 (3) KLT (SN) 83]. It is also one of his contentions that there was inordinate delay in production of Material Objects in court, which is not explained at all by the Crl.Appeal.111/2008 8 prosecution and in this respect he relied on a decision reported in Ravi v. State [2019(1) KLJ 31]. The learned counsel for the appellants argued that the

alleged search was conducted without

according to the learned counsel, prosecution case of alleged seizure of toddy from unlicensed premises cannot be regarded as trustworthy. As regards the alleged occupation of building, it was contended that no convincing evidence was available on record to connect 2nd accused.

12. On the other hand the learned Public Prosecutor sought to sustain the impugned order of conviction and sentence relying on the testimonies given by PWs 1 and 10, the Sub Inspectors of Police attached to Adimaly Police Station, who accompanied the detecting officer CW12, who later passed away before the

commencement of trial. It was contended that Ext.P7 report, Ext.P8 property list as well as Ext.P9 forwarding note sufficiently proved that samples were properly sealed and adequate safeguards Crl.Appeal.111/2008 9

were taken by the detecting officer to ensure that the sample bottles reached the committal court in a tamper free condition. It was argued that there was no delay at all in production of the Material Objects and the appellants could not take advantage of purported delay at all. It was further submitted that non-preparation of search memo was not fatal when entire evidence on record was considered in as much as the totality of evidence was sufficient to establish that prosecution case of seizure of contraband from the unlicensed premises was reliable and trustworthy. It was also submitted that the records prepared by CW12 were proved through PW9 who succeeded CW12 in investigation. Relying on the testimonies given by PWs 5 and 6 and Ext.P4 Mahazar as well as Ext.P5 ownership concerning building No.PP.10/398, it was contended that these materials would adequately connect the 2nd accused with occupancy of the building.

13. After hearing both sides, I find my way hard to accept the case of the 2nd appellant that he has no connection with the building bearing No.PP 10/398 situated in 8th Acre, 60th Mile Panchayat Road in the Crl.Appeal.111/2008 10

coffee plantation close to the road. Ext.P4 Mahazar prepared by the detecting officer and proved through Ext.P9, discloses that there was a rental arrangement made as between 2nd accused and PW4 though the rent deed was not produced in court. PW4 said that he let out the building to the 2nd accused on a monthly rent of 500/-. It appears that in fact the building was assessed in the name of PW5, the brother of PW4 as is proved by Ext.P5 certificate issued by PW7 Secretary of Pallivasal Grama Panchayat. PW5 came and said that though the building was in his name, the property

belonged to his younger brother, PW4. After having gone through the evidence let in by prosecution, I have reason to agree with the court below that on the date of occurrence, building from where the alleged liquor was seized was in occupancy of 2nd appellant. Therefore, if there is evidence to establish that the contraband liquor was seized from the building proved to be in the occupancy of 2 nd

appellant, the conviction issued under Section 64A is incapable of interference. In this context, the evidence let out by prosecution

to establish the arrest of 1st appellant and also Crl.Appeal.111/2008 11 seizure of MO1 from his alleged possession is also worthy of consideration as well as of much relevance.

14. We do not have the advantage of the evidence

of CW12 who detected the crime since he is reported dead. The only evidence available to prove seizure and arrest are the testimonies of PWs 1 and 10. Their testimonies show that the 1st accused was arrested on 26.03.2004 at 6 pm and MO1 containing toddy was seized

from his possession. In this context,

Irrespective of the question whether in strict sense of law preparation of search memo was necessary or not in the facts of the present case, the conduct of the patrol party conducting search of the premises without previous preparation of search memo is a matter to be taken serious notice of.

15. Even assuming that there was seizure of

contraband liquor from the place of occurrence also, the material question for consideration is whether the alleged contraband was proved to be toddy as claimed by the prosecution. It is true that Ext.P10 chemical Crl.Appeal.111/2008 12

report has proved that the samples

larger question is whether the alleged samples taken from MO1 Can were kept in a tamper free condition and whether necessary safeguards were taken to ensure that the samples were collected from MO1 Can itself. Appellants do not admit that liquor seized from first accused was kept in MO1. It is in this context, the contention of the learned counsel for the appellant that seals were not affixed on sample bottles becomes relevant. No evidence was brought forth to prove that the samples that reached the laboratory were those collected from MO1.

16. Looking at Ext.P1 Mahazar, it is transparently clear that the sample bottles were not sealed by the detecting officer; even though there is

sufficient mention of seal in the documents subsequently prepared. Ext.P8 property list mentioned that the sample bottles were sealed. Ext.P9 forwarding note also contains impression of the seal used to seal the sample bottles. But it is worth noticing that Crl.Appeal.111/2008 13 Exts.P8 and P9 reached the court only on 02.04.2004 after an intervening delay of seven days. This delay stands unexplained by the prosecution. In my opinion, on going through these materials, there is nothing to

ensure that the sample bottles con

disclose that sample bottles were sealed in accordance with law. The mere mention of affixture of seal on the sample bottles in Exts.P8, P9 and subsequent documents is not sufficient to confirm the reliability of prosecution case. Ext.P1 being the foremost document prepared first in a point of time simultaneously with the alleged seizure of liquor, it should clearly have recited that the seals were affixed on the sample bottles. In the absence of mention of such a material

fact in Ext.P1 seizure Mahazar,

bottles were produced before the Court in a tamper free condition. This has materially affected the reliability of prosecution case and in my opinion the Crl.Appeal.111/2008 14 appellants are entitled to get at least benefit of reasonable doubt.

17. Since prosecution has failed to prove that MO1 contained contraband liquor as contended, the 1st appellant cannot be fastened with any criminal liability under Section 55(a) of the Act. In the event of the charge of seizure failing, the benefit of doubt will ensure in favour of 2nd accused also notwithstanding the fact that he was proved to be the occupier of the building. The Court below failed to appreciate these material aspects and it simply assumed without evidence that sample bottles were sealed in accordance with law and they were forwarded to chemical laboratory for examination in tamper proof

state. Therefore, impugned order of conviction and sentence require to be interfered with and appellants to be found not guilty of offences punishable under Sections 55(a) and 64A of the Act.

18. In the result, appeal succeeds and order of conviction and sentence are set aside and they are acquitted of offences punishable under Sections 55(a) and 64A of the Abkari Act. They are set at liberty Crl.Appeal.111/2008 15 forthwith and the bail bond executed by them will stand cancelled. Sd/- T.V.ANILKUMAR DG JUDGE

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