

Rajan Vs. State of Kerala

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Court : Kerala

Decided On : Nov-21-2014

Judge : Honourable Mr. Justice a.Hariprasad

Appellant : Rajan

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR. JUSTICE A.HARIPRASAD FRIDAY,THE21T DAY OF NOVEMBER201430TH KARTHIKA, 1936 CRL.A.No. 787 of 2004 ()
----- AGAINST THE

ORDER

IN SC2652001 of ADDITIONAL DISTRICT AND SESSIONS COURT - I (ADHOC), PATHANAMTHITTA DATED2204-2004. APPELLANT(S)/ACCUSED ::
----- RAJAN, AGED36YEARS, S/O. AYYAPPAN, KURAVARAYYATHU VEETTIL, MUDIYOORKONAM MURI, PANDALAM VILLAGE, ADOOR TALUK. BY ADV. SRI.V.PHILIP MATHEW. RESPONDENT(S)/COMPLAINANT:: ----- STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY PUBLIC PROSECUTOR SMT.MADHU BEN. THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON2111-2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: amk

JUDGMENT

Appellant is challenging the conviction and sentence imposed on him by the trial court for an offence under Section 8 of the Abkari Act.

2. Heard the learned counsel for the appellant and the learned Public Prosecutor.

3. Prosecution case in brief is that on 11-12-1997 at about 6.00 p.m., when the Excise Inspector and party of Adoor Excise Range were conducting patrol duty, they found the appellant walking through a public road carrying a can having a capacity of 5 litres. On seeing the Excise party, the appellant got perplexed and attempted to retreat. On suspicion, he was prevented and the can possessed by him was examined. It was found that it contained 4 litres of illicit arrack. Hence, the accused was arrested after complying with the formalities.

4. On the side of the prosecution, four witnesses Crl.Appeal No.787 OF20042 testified and eight documents were marked. DW1 is the defence witness. MO1 is the can allegedly recovered from the possession of the appellant.

5. Learned counsel for the appellant submitted that the prosecution evidence is not sufficient to find that the accused is guilty of the offence. That apart, there are glaring irregularities going to the root of the matter, which would affect the strength of the prosecution case. It is further submitted that even going by the testimony of the material witnesses, no sample was taken from the place of detection. It is also not established as to who took the sample, which was sent for analysis to obtain Ext.P8 chemical examiner's report. No requisition or forwarding note is produced and marked. Moreover, no officer of the court was examined to prove drawal and sealing of the sample.

6. PW's 1 and 2 are the independent witnesses cited to prove the detection. They turned hostile. There is no material Crl.Appeal No.787 OF20043 available in their evidence, which can be relied on by the prosecution to establish their case.

7. PW3 is the Excise Range Officer and PW4 is the Preventive Officer. It is their evidence that on 11-12-1997, they found the accused at about 6.00 p.m when they were on patrol duty. At that time, the accused was walking through the side of a public road with a can in his hand. On feeling suspicion, he was questioned and the can possessed by him was examined to find that he was carrying illicit arrack. PW3 arrested him. Ext.P2 is the arrest memo. Ext.P1 is the seizure mahazar stated to have been prepared from the place of detection. In Ext.P1, PW's 1 to 4 have affixed their signatures. Thereafter, the crime was registered, the occurrence report is Ext.P5. Ext.P6 is the remand application. Ext.P7 is the property list. PW3 conducted the investigation. He recorded the statements of witnesses. It is an admitted case that the entire contraband was produced before the Crl.Appeal No.787 OF20044 court. There is no forwarding note or requisition for drawing sample produced and marked at the time of trial.

8. Learned counsel for the appellant submitted that in the absence of any certainty regarding the seal that was used to seal the contraband article and in the absence of a forwarding note showing the sample seal, it cannot be assumed that the same contraband allegedly recovered from the accused was sent up to the chemical laboratory for analysis. It is very important to note that none of the Officers of the Magistrate Court, who would have drawn the sample was examined. Hence the ratio in Sasidharan v. State of Kerala (2007 (1) KLT720 and Ravi v. State of Kerala and Another (2011(3) K.L.T353 have been clearly violated in this case. That apart, it has been held by a learned Single Judge of this Court in Sathi v. State of Kerala (2007(1) K.H.C778 that presumption under Section 114(e) of the Evidence Act can be applied only if the official acts are Crl.Appeal No.787 OF20045 shown to have been performed. Here in this case, there is no evidence to show that a sample was drawn from the contraband possessed by the accused and it was sent up for analysis to the chemical examiner's laboratory.

9. Learned counsel for the appellant relied on a decision in Rajan v. State of Kerala (2013(3) KHC448 to contend a proposition that it was not proper to draw sample from the court in a case of this nature. Learned Single Judge held that it will not be a healthy practice to allow to the ministerial staff of the court to take sample and forward it for chemical analysis. The learned Judge is of the view that it would be easy then to allege manipulations on their part. Regretfully, I may say that I cannot agree with the above observations. Since that is only an obiter made in the judgment, I do not consider it as a binding precedent. There is no bar in drawing sample from the court. But only thing is that it must be properly established by evidence. Crl.Appeal No.787 OF20046 However, in the light of the above mentioned infirmities, I do not find any reason to sustain the conviction. In the result, the appeal is allowed. Conviction of the appellant under Section 8 of the Abkari Act imposed by the court below is hereby set aside. He shall be set free forthwith, if not wanted in any other case. His bail bond shall stand cancelled. If any amount has been deposited by the appellant as a condition for securing bail, it shall be returned to him. All pending interlocutory applications will stand dismissed. Sd/- A.HARIPRASAD, JUDGE. amk //True copy// P.A to Judge

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