

Babu Vs. State of Kerala

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Court : Kerala

Decided On : Nov-19-2014

Judge : Honourable Mr. Justice a.Hariprasad

Appellant : Babu

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALAAT ERNAKULAM PRESENT: THE HONOURABLE MR. JUSTICE A.HARIPRASAD WEDNESDAY,THE19H DAY OF NOVEMBER201428TH KARTHIKA, 1936 CRL.A.No. 1448 of 2004 (A) ----- AGAINST THE

JUDGMENT

IN S.C.NO. 248/1999 of ADDITIONAL DISTRICT AND SESSIONS COURT (ADHOC) II, KOLLAM DATED2308-2004 APPELLANT(S)/ACCUSED.: ----- BABU, S/O.SHANMUGHAN, THUNDU MATTEL VEEDU, KIDAPRAM MURI, MANTROTHURUTHU VILLAGE KOLLAM DISTRICT. BY ADV. SRI.B.MOHANLAL RESPONDENT(S)/COMPLAINANT.: ----- STATE OF KERALA, REPRESENTED BY THE SUB INSPECTOR OF POLICE, EAST KALLADAPOLICE STATION, KOLLAM DISTRICT, THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY PUBLIC PROSECUTOR SHRI K.K.RAJEEV THIS CRIMINALAPPEAL HAVING BEEN FINALLYHEARD ON1911-2014, THE

COURT ON THE SAME DAY DELIVERED THE FOLLOWING: A.HARIPRASAD,
J.

----- Crl.Appeal No.1448 of 2004
----- Dated this the 19th day of November, 2014.

JUDGMENT

Challenge in this appeal raised by the appellant is against the finding of guilty under Section 55(a) and (i) of the Abkari Act (in short, "the Act") by the trial court. Prosecution case, in nut-shell, is that the appellant was found possessing about 3.5 litres of arrack in a can having ten litre capacity and a glass tumbler on 26.05.1998. He was sighted by PW5 and the officers accompanying him.

2. Court below tried the appellant after completing the formalities. In the trial, five witnesses were examined and five documents were marked by the prosecution. MOs 1 and 2 are the material objects. There was no defence evidence.

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

4. Learned counsel for the appellant contended mainly that the conviction is illegal as the identity of the accused/appellant was not established by any reliable evidence. Secondly it is contended that there is unexplained delay of three days in producing the sample before the court. Third submission is regarding the non-establishment of identity of the place Crl.Appeal No.1448/2004 2 from where the accused was allegedly apprehended. It is submitted fourthly that the offence under Section 55(a) of the Act is not attracted for any reason.

5. Before considering these aspects, I will go through the oral evidence. PWs 1 and 2 are the independent witnesses cited to prove the detection. They turned hostile to the prosecution. No reliance can be placed on their evidence to find guilt of the appellant.

6. PW3 was a Police Constable in the party of PW5, the detecting officer. It is his evidence that on 26.05.1998, he, along with PWs 4 and 5 while on patrol duty, got a reliable information that the appellant was selling illicit arrack. On receiving the information, the Police party led by PW5 went to the informed place. They parked

their jeep slightly away from the place where the appellant was reported to be standing. They went on foot to the informed place and on seeing the Police Officers, the appellant jettisoned the can and glass tumbler and ran away. Even though, the detecting officer and party chased him for a short distance, they could not apprehend him. It is the version of PWs 3 and 4 that they could identify the person who escaped from the scene. PW4 also stated the same version and thereby rendered support to PW3. Both PWs 3 and 4 would say that they knew the appellant even prior to the incident and he was Crl.Appeal No.1448/2004 3 habitually involving in sale of illicit liquor. In cross-examination, they did not say that any case had been registered against the appellant in connection with illicit sale of arrack.

7. PW5 is the detecting officer. He also deposed in tune with the recitals in Ext.P2 mahazar and the testimony of PWs 3 and 4. According to his evidence, when the accused abandoned the can containing illicit arrack and the glass tumbler, he took 350 ml. liquid from the can as sample and it was properly sealed. His personal seal was affixed on the bottle. After preparing the material documents and Ext.P2 mahazar, the contraband was removed to the Police Station. Thereafter, he completed the investigation. He submitted Ext.P3 first information report and Ext.P4 property list. It can be seen from Ext.P4 property list that it was produced before the Magistrate only on 29.05.1998. Learned counsel for the appellant argued that the delay of three days is not explained by PW5. It is interesting to note that no question was put in cross-examination on PW5 to show that the sample was not properly kept during the period of three days. The detection of offence was after 3.00 p.m on 26.05.1998. It can be legitimately assumed that on that day it could not have been possible to produce the contraband before the court before 5.00 p.m. Then what is remaining the delay of two days. In the absence of any material brought Crl.Appeal No.1448/2004 4 out in cross-examination that the delay might have caused prejudice to the accused, I am unable to accept the contention of the learned counsel that the accused is entitled to get acquittal on the basis of three days delay alone. Not only that, the chemical analysis report (Ext.P5) would show that the chemical lab received a properly sealed and secured sample bottle containing 350 ml. of liquor involved in the crime for analysis. On analysis, it was revealed that it was arrack. Hence, I find no

reason to hold that the conviction of the appellant under Section 55(i) of the Act was illegal as he was in full preparedness for vending arrack.

8. The contention raised by the learned counsel that identity of the place of detection was not established cannot be accepted in view of the prosecution case that the appellant was found in physical possession of the contraband. In other words, it is not the case of the prosecution that a can containing arrack was recovered from a property belonging to the appellant. Therefore, the identity of the land where the offence was detected assumes no importance.

9. However, there is an illegality committed by the court below. Section 55(i) of the Act deals with selling and storing for sale of any liquor. Section 55(a) of the Act deals with transport, transmit or possession of liquor for the purpose of import or export. As submitted by the learned Crl.Appeal No.1448/2004 5 counsel for the appellant, there is no case for the prosecution that the accused was possessing liquor for import or export and therefore, the conviction of the appellant under Section 55(a) of the Act cannot be sustained. Moreover, the court below erroneously found that in the offence under Section 55(i) of the Act, possession is involved and therefore, even though a conviction is entered under Section 55(a) of the Act, no sentence is required. Both these reasonings are incorrect. The conviction of appellant under Section 55(a) of the Act cannot be legally sustained. Further, if there is a conviction, it is settled principle that it should be followed by a sentence. However, as I interfere with the conviction under Section 55(a) of the Act, I find no reason to consider about the quantum of sentence thereunder.

10. Learned counsel for the appellant submitted that the sentence awarded under Section 55(i) of the Act is very harsh. Reckoning the entire facts and circumstances, I find that some leniency can be shown in the matter of sentence. In the result, the appeal is partly allowed. Conviction of the appellant under Section 55(a) of the Act is set aside. His conviction under Section 55(i) of the Act is affirmed. The appellant shall undergo rigorous imprisonment for a period of one year under Section 55(i) of the Act. He is Crl.Appeal No.1448/2004 6 also liable to pay a fine of `1,00,000/- (Rupees one lakh only). In default of payment of fine, he shall undergo simple imprisonment for a period of six months. The appellant is

entitled to get the benefit of set off under Section 428 of the Code of Criminal Procedure. Court below shall take urgent steps to execute the sentence. All pending interlocutory applications will stand dismissed. A. HARIPRASAD, JUDGE.
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