Mohanan Vs. State of Kerala

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Court : Kerala

Decided On : Sep-03-2015

Judge : Honourable Mr. Justice K.Ramakrishnan

Appellant : Mohanan

Respondent : State of Kerala

Advocate for Pet/Ap. : Sri. Blaze.K.Jose

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN THURSDAY, THE3D DAY OF SEPTEMBER201512TH BHADRA, 1937 CRL.A.No. 2037 of 2005 ( ) ---------- AGAINST THE

ORDER
/

JUDGMENT
IN SC5192001 of ADDITIONAL DISTRICT COURT (ADHOC), TRIVANDRUM DATED3110-2005 APPELLANT(S)/ACCUSED.: ---------- MOHANAN, S/O.GOPIN, VILAYIL VEEDU STATION KADAVU, VAYAKALATHU MURI, ATTIPRA PAKUTHY THIRUVANANTHAPURAM TALUK. BY ADV. SRI.BLAZE K.JOSE RESPONDENT(S)/COMPLAINANT.: ---------- THE STATE OF KERALA,

REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA REPRESENTING CHARGE SHEET LAID BY THE EXCISE INSPECTOR, KAZHAKKUTTOM EXCISE RANGE. THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON0309-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: sab K. RAMAKRISHNAN, J ========== Crl.Appeal No.2037 of 2005 ========== Dated this the 3rd day of September, 2015

ORDER

Accused in S.C No.519/01 on the file of the Additional Sessions Court Fast Track No.l, Thiruvananthapuram is the appellant herein.

2. The appellant was charge sheeted by the Excise Inspector, Kazhakuttom Excise Range in C.R No.18/98 of Kazhakuttom Excise Range u/s 8(i) and 58 of the Abkari Act.

3. The case of the prosecution in naxal was that on 9.5.1998 on about 10.15 a.m the accused was found to be in possession of 22 litres of arrack and found transmitting the same along the road in front of St. Vincent High School in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under Sections 8(i) and 58 of the Abkari Act.

4. After investigation final report was filed before the Judicial First Class Magistrate Court No.I, Attingal where it was taken on file as C.P No.203/2000. The learned Magistrate committed the case to the Crl.Appeal No.2037 of 2005 - :

2. :- Sessions Court, Thiruvananthapuram u/s 209 of the Code of Criminal Procedure (hereinafter called the Code) and it was taken on file as S.C No.519/2001 and thereafter made over to Assistant Sessions Court, Attingal for disposal. Thereafter it was withdrawn and made over to Additional Sessions Court, Fast Track No.I, Thiruvananthapuram for disposal by the learned Sessions Judge.

5. When the accused appeared before the Court below, after hearing both sides, charge u/s 55(a) of the Abkari Act was framed (probably it could be only a mistake as for possession of arrack ought to have been framed u/s 8(i) of the Abkari Act

and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, PWs1 to 3 were examined and Exts.P1 to P5 and MO1 were marked on the side of the prosecution. After closure of the prosecution evidence, the accused was questioned u/s 313 of the Code and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that he had not committed any offence and no article was seized from his possession and he has been falsely implicated in the case. Since the evidence did not warrant and acquittal u/s 232 of the Code, the accused was called upon to enter on his defence but no defence evidence was adduced on his side. After considering the evidence on records, the court below found the appellant guilty u/s 55(a) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for Crl.Appeal No.2037 of 2005 - :

3. :- three years and also to pay a fine of Rs. 1 lakh and in default to undergo rigorous imprisonment for one year. Set off was allowed for the period of detention already undergone u/s 42 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

6. Heard Sri. Blaze.K.Jose, learned counsel for the appellant and Smt. Seena Ramakrishnan, learned Public Prosecutor appearing for the State.

7. The counsel for the appellant submitted that the independent witness to the seizure has not been either cited or examined and it was admitted by PW3, the Investigating Officer that their names were not mentioned in the final report filed and he had also submitted that he could not trace out one of the witnesses for questioning as well. That shows that there was no independent witnesses to the seizure and non examination of the independent witness is fatal and the seizure cannot be said to be legal. He has also argued that there was no spot sample taken and there is no evidence adduced on the side of the prosecution as to from where the sample was taken and as such the prosecution has failed to prove that Ext.P5 chemical analysis report relates to the representative sample taken from the contraband article alleged to have been seized from the possession of the accused and as such the court below coming to the conclusion that the

prosecution has proved beyond reasonable doubt that the accused was found to be in possession of Crl.Appeal No.2037 of 2005 - :

4. :- arrack and consequential conviction entered by the court below are unsustainable in law and the same is liable to be set aside.

8. On the other hand, the learned Public Prosecutor submitted that the evidence of Pws1 and 2 will go to show that the arrack was seized from the possession of the accused. Further, any defect in the investigation is not a ground for acquittal as well.

9. The case of the prosecution as emerged from the prosecution witnesses was as follows. On 9.5.1998 at about 10.15 a.m while PW1 the Excise Inspector along with PW2 Preventive Officer and the party were doing patrol duty and when they reached the place of occurrence, they saw the accused coming with MO1 cannas in his hand, carrying the same on his shoulders and on seeing the Excise Party, he was found perplexed. So PW1 stopped him and when he examined the contents of the cannas, he found that it contained 22 litres of some liquid and he tasted the same and convinced that it was arrack and he convinced the same to the witnesses present as well. Thereafter, he seized the same as per Ext.P1 Mahazar and arrested the accused and prepared ExtP2 arrest memo and gave Ext.P3 arrest intimation. Thereafter, he came to the Excise office and registered Ext.P4 crime and occurrence report as Crime No.18/98 against the accused u/s 8 (i) and 58 of Abkari Act. Thereafter, the investigation was conducted by PW3 who questioned the witnesses and obtained Ext P5 chemical analysis report and submitted final report.

10. The evidence of PWs 1 and 2 will go to show that they have Crl.Appeal No.2037 of 2005 - :

5. :- arrested the accused along with MO1 cannas which according to them contained 22 litres of arrack. It was admitted by PW1 that he did not take spot sample and according to him, it was not necessary to take spot sample. He had also admitted that he did not take any steps to take sample as well. He had further stated that he did not know who had taken the sample, from where it was taken,

etc. as well. PW3 also did not State about the manner in which the sample was taken, etc.

11. There is some force in the submission made by the counsel for the appellant that non examination of the witnesses is fatal in this case. It is true that in Ext.P1 Mahazar names of 2 witnesses were shown as independent witnesses and their signatures were obtained. But in the final report they were not cited as witnesses. There is no explanation forthcoming from the side of the Investigating Officer, PW3 as to why they were not cited as witnesses as well. So that creates doubts regarding the genuineness of the seizure of the contraband articles alleged to have been seized from the possession of the accused.

12. It is true that even if the independent witnesses turned hostile, there is nothing wrong for the court to rely on the official witnesses to prove the seizure, if it is believable and trust worthy. But such a principle will not be applicable in a case where the independent witnesses were not even cited as witnesses and examined before the court. Further, there is no spot sample taken and there is no evidence adduced on the side of the prosecution as to from where the sample was Crl.Appeal No.2037 of 2005 - :

6. :- taken as well. Even assuming that the seizure was proved by the prosecution, unless it is proved by the prosecution that the chemical analysis report relates to the representative sample taken from the contraband articles alleged to have been seized from the possession of the accused. It cannot be said that prosecution has proved the case beyond reasonable doubts so as to convict the accused for the offence alleged.

12. In the decision reported in Sasidharan vs. State of Kerala 2007(1) KLT720 this Court has held that without the link evidence of actual sampling by the concerned Clerk of the court by drawing sample from the can and sending the same in a sealed packet to the chemical examiner with a specimen seal sent separately for tamper proof despatch, the prosecution cannot be held to have brought home the offence against the appellant. The prosecution had a duty to prove that it was the sample taken from the contraband article seized from the accused which had reached the hands of the chemical examiner in a full proof condition. In the same

decision, it has been further observed that Committing Magistrates have to take care that contemporary proceedings evidencing the drawing of sample and sending the same to the chemical examiner in a tamper proof condition are recorded in the Crl.Appeal No.2037 of 2005 - :

7. :- proceedings before court. The Sessions Judge trying such cases also should ensure that the concerned member of the staff who had drawn the sample and despatched the same to the chemical examiner duly packed with seal under the covering letter of the Magistrate is examined before the court during trial. The Public Prosecutor in charge of the case also had a duty to file an additional witness list for examining the Thondy Section Clerk (Property Clerk) concerned so as to establish nexus between the contraband substance and the accused.

13. In view of the dictum laid down by the above decision and in the absence of spot sample taken and absence of evidence regarding the manner in which the sample was taken and sent for chemical analysis report, it cannot be said that prosecution has proved the link between the contraband article and the accused and that the chemical analysis report relates to the contraband article alleged to have been seized from the possession of the accused and that benefit must be given to the accused. If this is not proved by the prosecution, then the finding of the court below that the prosecution has proved the case beyond reasonable doubt that the accused was found to be in possession of arrack and consequential conviction entered by the court below against the appellant u/s 55 Crl.Appeal No.2037 of 2005 - :

8. :- (a) of the Abkari Act (Probably wrongly for Sec.8(i) of the Abkari Act) and consequential sentence imposed by the court below are unsustainable in law and the same are liable to be set aside. The appellant is entitled to get acquittal of the charge levelled against him, giving him to the benefit of doubt. So the appellant succeeds and the appeal is allowed. The order of conviction and sentence passed by the court below against the appellant u/s 55(a) of Abkari Act are hereby set aside and the appellant is acquitted of the charge levelled against him giving him the benefit of doubt. He is set at liberty. The bail bond executed by him will stand cancelled. The fine amount, if any, remitted by the appellant is directed to be

returned to him on making necessary application for that purpose by the appellant before the court below. Office is directed to communicate the order to the concerned court immediately. sd/- sab K. RAMAKRISHNAN, JUDGE