

Krishnankutty Vs. State of Kerala

Krishnankutty Vs. State of Kerala

SooperKanoon Citation : sooperkanoon.com/726131

Court : Kerala

Decided On : Apr-05-2005

Reported in : 2005(3)KLT568

Judge : J.M. James, J.

Acts : Kerala Abkari Act, 1077 - Sections 10, 13, 20, 50 and 55; Narcotic Drugs and Psychotropic Substances Act - Sections 27; Punjab Excise Act; Code of Criminal Procedure (CrPC) - Sections 313; Foreign Liquor Rules - Rule 11

Appeal No. : Crl. A. No. 1142 of 2004

Appellant : Krishnankutty

Respondent : State of Kerala

Advocate for Def. : P.M.A. Kalam, Public Prosecutor

Advocate for Pet/Ap. : Shaji Thomas Porkkattil, Adv.

Disposition : Appeal allowed

Judgement :

J.M. James, J.

1. The accused has faced trial for the offence under Section 55(a) of the Abkari Act before the Additional Sessions Court (Ad Hoc-1), Thodupuzha. He was found

guilty and, therefore, convicted and sentenced thereunder to undergo rigorous imprisonment for six months and to pay a fine of rupees one lakh, or in default, to undergo simple imprisonment for three months. The same is under challenge.

2. The facts of the case are that on 21-8-2000, at about 3.30 P.M., the appellant was found carrying 5.25 litres of Indian made foreign liquor, in MO.2 series, six bottles of 750 ml. each and MO.3 series, two bottles of 375 ml. each, along the Thodupuzha - Muvattupuzha road. In front of the Village Office, Thodupuzha, MO.2 series and MO.3 series were seized by the Excise officials under Ext.P1 mahazar, attested by PW.2. C.R. No. 13 of 2000 was registered and, PW.3, the Excise Inspector, conducted investigation. He obtained Ext.P5 chemical analysis report. The trial court accepted the evidence and convicted and sentenced the appellant as stated above.

3. The question that has been raised by the learned counsel Mr.Shaji Thomas Porkkattil, is that Ext.P5 chemical analysis report shows that out of eight bottles of Indian made foreign liquor seized, sample was taken only from one bottle of 750 ml. capacity. Therefore, it is submitted that the prosecution has not established whether the remaining bottles were of Indian made foreign liquor or not. Counsel, hence, submitted that, as only one bottle of 750 ml. capacity was found containing Indian made foreign liquor, it comes within the permitted capacity of 1.5 litres. Therefore, the prosecution failed to prove the offence alleged against him under Section 55(a) of the Abkari Act, is the submission. Hence, counsel prayed to set aside the conviction and sentence.

4. The counsel relied on Gaunter Edwin Kirrher v. State of Goa : 1993 CriLJ1485 . That was a case where two pieces of charas weighing seven grams and five grams respectively, were found in the possession of the accused, a German National, at Calangute Beach near Panjim, Goa. PW.3, the Sub Inspector of Police seized the same. One of the pieces, weighing less than five grams, was sent for chemical analysis. The other piece, weighing 7 grams, or a part there of, by way of sample, was not sent for chemical analysis. PW. 1, the scientist, after examination, certified that the specimen was charas. PW. 2, the panch witness supported the case of the prosecution. When the accused was examined under Section 313

Cr.P.C., he maintained that he did not possess charas, but had only a pouch containing tobacco, and the case was falsely foisted against him. During the trial it was contended that even if the prosecution case is accepted, it could only be a case of possession of five grams of charas, which is a small quantity and, therefore, the accused was entitled to the benefit of Section 27 of the Narcotic Drugs and Psychotropic Substances Act, in short 'the Act'. However, the trial court convicted the accused, accepting the evidence of the prosecution. The contravention of Section 50 of the Act was not found favour with the High Court. The Apex Court also accepted the same.

5. But, an important question was raised before the Apex Court, viz., as only one out of the two pieces of the contraband seized, weighing five grams, alone was chemically examined, and the remaining substance or part thereof not having been subjected to chemical examination, to establish the same also was charas, a narcotic drug, in the absence of any other acceptable evidence, the remaining non-examined substance could only be regarded as some other material, like tobacco, which is not covered by the Act. In that situation, the contraband seized and proved through chemical examination comes under small quantity, within Section 27 of the Act. Analysing Section 27 of the Act, the Apex Court came to the conclusion that five grams of charas possessed by the accused, a foreign national, was for his personal use and comes under Section 27 of the Act, because of the non-availability of analytical report from an expert for the remaining seven grams of the material seized. The conviction of the accused under Section 20(h)(ii) of the Act and sentence of rigorous imprisonment for ten years thereunder, were set aside and the accused was directed to undergo rigorous imprisonment for six months and to pay a fine of rupees one lakh under Section 27 of the Act.

6. Counsel further relied on the decision in *Mahajan v. State of Himachal Pradesh* (2003 Cr.L.J. 1346), wherein the accused was caught with eight bottles of XXX Rum. Samples were taken only from three bottles. As the quantity seized was in excess of the permitted quantity, he was proceeded under the Punjab Excise Act, which was applicable to the State of Himachal Pradesh as well. As per the notification issued by the Himachal Pradesh Government, a family living in a separate and distinct premises could possess six bottles of Indian made foreign

liquor of 750 ml. each at one time. As only three bottles were subjected to chemical analysis, the court held that there is no evidence to show that the remaining five bottles, allegedly recovered from the accused, also contained Indian made foreign liquor. The court came to the conclusion that the prosecution had failed to prove that the accused was in conscious possession of Indian made foreign liquor in excess of the prescribed limit of six bottles of 750 ml. each. Therefore, the conviction and sentence passed by the trial court was set aside by the High Court.

7. It is relying on the above principle of law that the learned counsel for the appellant submitted that the prosecution has proved that the appellant had possessed only 750 ml. of Indian made foreign liquor and the remaining seven bottles cannot be treated to be Indian made foreign liquor. Therefore, counsel prayed to set aside the conviction and sentence.

8. As a question of daily importance, having wide implications on the investigation, is involved in this case, I have elaborately heard the matter. It is the duty of the prosecution to establish beyond the shadow of doubt that there is violation of a particular provision of an Act under criminal law. The offence under Section 55(a) of the Abkari Act is alleged against the appellant for having possessed eight bottles (MO.2 series and MO.3 series) of Indian made foreign liquor. Rule 11 of the Foreign Liquor Rules prescribes that no quantity of foreign liquor, in excess of the quantity notified by the Government under Sections 10 and 13 of the Abkari Act, shall be transported from one place to another, within the State, without valid permit. The occurrence was on 21 -8-2000. The permitted quantity, as notified at the relevant time, was 1.5 litres. PW.3, the investigating officer, also speaks of the same. Accepting the principles contained in Gaunter Edwin Kircher's case and Mahajan's case (supra), the prosecution has established that the accused possessed only 750 ml. of Indian made foreign liquor. As the remaining seven bottles not having been subjected to chemical examination, the same cannot be treated as liquor. Therefore, 750 ml. being within the permissible limit of 1.5 litres, the possession thereof will not be an offence.

9. The learned Public Prosecutor, at this point, submitted that this interpretation will have a lot of adverse effect on the existing cases as well. The Prosecutor further submitted that the labels affixed on all the bottles seized showed that all the bottles, contained Sivas Fine Brandy and, therefore, chemical analysis of the contents of every bottle is not required. I am unable to accept this contention. It is necessary for the prosecution to establish as per law that the accused was in possession of Indian made foreign liquor in excess of the permissible limit, by subjecting the contraband seized from the accused or samples taken therefrom to chemical analysis and obtaining a report from an expert. Then alone the Court will be able to come to a definite conclusion that what was found in the possession of the accused was Indian made foreign liquor and not any other material.

10. Under criminal jurisprudence, mere suspicion or presumption is not acceptable to come to a definite conclusion that the accused committed the offence alleged against him. In the case at hand, as discussed above, the prosecution has proved that the accused had possessed only 750 millilitres of Indian made foreign liquor. The other seized bottles had same label and, therefore, they are also to be accepted as similar as the tested brand is not acceptable in criminal law. There must be proof that the remaining materials were liquor and prohibited under the Act and Rules. Therefore, I hold that the prosecution has not established that the accused was in possession of Indian made foreign liquor in excess of the permissible quantity of 1.5 litres.

In the result, this appeal is allowed and the conviction and sentence passed against the accused is set aside. The appellant, accused in S.C. 72/2003 on the file of the Addl. Sessions Court (Ad Hoc 1), Thodupuzha, be set at liberty forthwith, if he is not wanted in connection with any other case.

Communicate a copy of this judgment to the Superintendent, Central Prison, Viyyur.