Paravan Vs. State of Kerala

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Court : Kerala

Decided On : Dec-05-2006

Reported in : 2007(1)KLT396

Judge : V. Ramkumar, J.

Acts : Kerala Abkari Act, 1077 - Sections 3(10), 8(1), 8(2) and 55; Evidence Act - Sections 25; Code of Criminal Procedure (CrPC) - Sections 232, 313(1) and 428; Kerala Abkari (Disposal of Confiscated Articles) Rules, 1996 - Rule 2

Appeal No. : Crl. A. No. 1127 of 2006

Appellant : Paravan

Respondent : State of Kerala

Advocate for Def. : K.S. Sivakumar, Public Prosecutor

Advocate for Pet/Ap. : Latheesh Sebastian, Adv. (S.B.)

Disposition : Appeal dismissed

Judgement :

V. Ramkumar, J.

1. In this appeal preferred from the Central Prison, Kannur the appellant, namely, Paravan who was the sole accused in S.C. No. 110/2004 on the file of the Addl.

Sessions Court (Fast Track No. I), Manjeri challenges the conviction entered and the sentence passed against him for an offence punishable under Section 55(g) of the Abkari Act.

2. The case of the prosecution is that on 30-08-2002 at about 8.25 a.m. the accused was found in possession of 20 litres of wash kept in two plastic pots, each of 10 litres capacity, and utensils for the purpose of manufacturing illicit arrack and two empty bottles having the smell of arrack, at Vettilappara within the limits of the Manjeri Excise Range. The accused has, thereby, committed an offence punishable under Section 55(g) of the Abkari Act.

3. On the accused pleading not guilty to the charge framed against him by the court below for offences punishable under Section 8(1) and 8(2) read with Section 55(g) of the Abkari Act, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 7 witnesses as PWs. 1 to 7 and got marked 11 documents as Exts.P1 to P11 and 5 material objects consisting of two plastic jars, two empty bottles and one aluminium pot with a hole, marked as M.O.1 series.

4. After the close of the prosecution evidence the accused was questioned under Section 313(1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence. Since the court below did not consider this a fit case for recording an acquittal under Section 232 Cr.P.C, the accused was called upon to enter on his defence. He did not adduce any defence evidence.

5. The learned Additional Sessions Judge, after trial, as per judgment dt. 2-7-2005 found the appellant guilty of the offence punishable under Section 55(g) of the Abkari Act and sentenced him to undergo rigorous imprisonment for three years and to pay a fine of Rs. 1 lakh and, on default to pay the fine, to undergo simple imprisonment for one year. It is the said judgment which is assailed in this appeal.

6. I heard Adv. Sri. Latheesh Sebastian, the learned Counsel who defended the appellant on State Brief, and Adv. Sri. Sivakumar, the learned Public Prosecutor who defended the State.

7. The only point which arises for consideration in this appeal is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not

The Point

8. P.W. 1 was the Excise Inspector, Manjeri, who detected the offence. Exts.P1 to P5 and M.O.1 series were got marked through him. PW.2 was the Excise Preventive Officer who was in the patrol party of PW.1. He also deposed in terms of the prosecution case. PWs. 3 and 4 are the independent witnesses who figured as attestors to Ext.P2 mahazar and Ext.P4 arrest memo. However, both of them turned hostile to the prosecution. PW.5 was the Excise Inspector, who registered Ext.P6 occurrence report and conducted the investigation. During the course of investigation he produced the properties on the next day as evidenced by Ext.P7 property list. He also filed Ext.P8 forwarding note requesting the despatch of the samples to the chemical examiner for analysis. PW.6 was the Village Officer who proved Ext.P9 scene plan. PW.7 was the Excise Inspector who laid the charge. Ext.P10 chemical examination report was marked through him.

9. The learned Counsel appearing for the appellant made the following submissions before me in support of his fervent plea for acquittal of the accused:

The contraband liquor was admittedly seized from an unnumbered thatched shed at Vettilappara. There is nothing to show that the appellant is the owner of the said shed. When the case of the prosecution is that the appellant had stored the contraband liquor for the purpose of distilling arrack, it was obligatory for the prosecution to prove that the appellant was the owner of the shed where the contraband liquor was stored. In the absence of such evidence, the conviction recorded against the appellant cannot be sustained. PWs.3 and 4 who are the independent witnesses to the alleged search and seizure have not supported the prosecution. Similarly, it is not indicated in the evidence of PW. 1 as to which sample was taken from which plastic pot and going by Ext.P10 chemical examination report, the first sample contained 4.98% by volume of ethyl alcohol whereas the second sample contained 9.66% by volume of ethyl alcohol.

10. I am afraid that I cannot agree with the above submission. It is true that the prosecution has not proved the ownership of the shed in question. But then, it was an unnumbered thatched shed which was evidently not assessed to building tax. Hence it may not be possible to prove the ownership of the shed. That apart, what is relevant to be proved is as to whether the appellant was found in possession of the contraband liquor. Even if the shed belonged to somebody else, if the appellant was found in possession of the contraband liquor and he was not able to account for his possession of the same or offer any satisfactory explanation for his possession, it can legitimately be presumed that the appellant was in possession of the contraband liquor. Going by the evidence of PW. 1, the detecting officer, it is clear that seeing the excise party, the appellant who was standing in front of the shed in question became perplexed and made an attempt to make good his escape. To that effect are the recitals in the contemporaneous mahazar prepared by PW.1 and marked as Ext.P2. If the appellant had nothing to do with the shed or the contraband liquor kept inside the shed, there was no reason for him to become fidgety. In Ext.P2 mahazar it is mentioned that when the appellant was questioned about the contraband liquor, he confessed that it was kept by him for the purpose of manufacturing arrack. Since PW. 1 is not a police officer, the above confession made to him by the appellant is not hit by Section 25 of the Evidence Act. Hence, the evidence of PW. 1 which is amply corroborated by the testimony of PW.2 and the recitals in Ext.P2 mahazar can be safely relied on to conclude that the appellant was found in possession of the two plastic pots containing 20 liters of wash.

11. No doubt, PWs.3 and 4, who are the independent witnesses to the search and seizure, turned hostile to the prosecution. Both of them admitted their signatures in Ext.P2 mahazar and Ext.P4 arrest memo. But they did not support the prosecution case regarding the search as well as the seizure of the contraband liquor from out of the possession of the appellant. Much strain is not necessary to conclude that PWs.3 and 4 were turning out to be cunning performers in the witness box evidently with a view to jettison the appellant from his criminal liability. Courts are not unfamiliar with such witnesses (vide Sivaraman v. State of Kerala 1981 KLT SN P.9 and Suresh v. State 1995 (1) KLT 636.

12. The further evidence adduced by the prosecution will indicate that from the spot itself PW. 1 had taken two samples, each of 500 ml. in two bottles, and packed and sealed the same and after arresting the accused he and his excise party took the accused along with the contraband liquor, sample bottles and seizure documents to the excise office from where PW.5, the Excise Inspector, received the accused as well as the material objects and seizure documents and registered Ext.P6 occurrence report as Crime No. 18/2002 of Manjeri Excise Range. On the very next day PW.5 produced the material objects including the sample bottles before the committal court as evidenced by Ext.P7 property list. The properties were received in court as item No. 191/2002 on 31-8-2002. Due to paucity of space in the court, the properties other than the two sample bottles were entrusted with the Excise Inspector on 3-9-2002 for safe custody until further orders. On 31-8-2002 itself the two sample bottles were forwarded from the committal court to the chemical examiner's laboratory where they were received after cross checking the seals on them and the specimen seals sent separately to find that the seals were intact. The samples were tested and one sample contained 4.98% by volume of ethyl alcohol and the other contained 9.66% by volume of ethyl alcohol.

13. The above evidence proves that the samples taken from the bulk quantity were 'liquor' as defined under Section 3(10) of the Abkari Act. Going by the definition of 'wash' in Rule 2(g) of the Kerala Abkari (Disposal of Confiscated Articles) Rules, 1996, 'wash' means a sacharine solution from which spirit is obtained by distillation and it also includes fresh wash or wort. Under Rule 2(h) 'wort' or 'fresh wash' means a mixture of water and sacharine material before fermentation. Thus, wash is a sugar solution which, after fermentation, can be converted into spirit or arrack through distillation. Even otherwise, going by the ordinary connotation of the expression 'wash', also, it is fermented liquor ready for the distillery. Arrack is a strong oriental liquor distilled from rice, molasses etc. (see Funk and Wagnalls Standard Dictionary, International Edition). Thus, 'wash' is the raw-material for preparation of arrack which is a potable liquor containing alcohol. A perusal of Ext.P7 property list shows that both the sample bottles were received in court with the seals intact on the very next day of their detection and P.W. 1 has deposed that until then they were in his personal custody. It was these two samples which

were forwarded post-haste to the chemical examiner through court on 31-8-2002 itself. Hence it can safely be concluded that the samples drawn from the contraband liquor which was found in the possession of the applicant was despatched in a tamper proof condition to the chemical examiner who found them to contain ethyl alcohol of different percentages. Thus the prosecution has been able to prove that the appellant was found in possession of 20 litres of wash. If so, the conviction recorded by the court below under Section 55(g) of the Abkari Act does not call for any interference and the same is confirmed.

13. What now survives for consideration is the legality and extent of sentence imposed on the appellant. Having regard to the facts and circumstances of the case I am of the view that the appellant who was aged 77 years as on the date of detection does not deserve such a deterrent sentence as has been imposed by the court below. I am of the view that rigorous imprisonment for two years and a fine of Rs. 1 lakh would be commensurate with the gravity of the offence and the age of the appellant. On default to pay the fine, he shall undergo simple imprisonment for five months instead of one year. He shall also be entitled to set off under Section 428 Crl. P.C.

In the result, this appeal is dismissed confirming the conviction entered but altering the sentence imposed on the appellant as above. The Registry shall communicate a copy of this judgment to the prison where the appellant is housed.