

**Lalitha Vs. State of Kerala**

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**Court :** Kerala

**Decided On :** Dec-14-2011

**Judge :** P.S. Gopinathan

**Appeal No. :** CRA.No. 1702 of 2003

**Appellant :** Lalitha

**Respondent :** State of Kerala

**Judgement :**

P.S. GOPINATHAN, J.

1. The appellant was convicted by the Additional Sessions Judge, Adhoc-I, Thiruvananthapuram in SC. No.1013/2001 for offence under Section 55(a) of the Abkari Act read with Section 8(1) and (2) of Abkari Amendment Act, 1997 and sentenced to rigorous imprisonment for two years and a fine of Rs. One lakh with a default sentence of rigorous imprisonment for six months. Assailing the above conviction and sentence, this appeal is preferred.

2. The prosecution case is that at 10 a.m., on 25.4.2000, PW2, the Excise Inspector attached to Excise Enforcement and Anti-narcotic Special Squad, Thiruvananthapuram, found the appellant walking along the Pattoor-Pettah road with MO1 plastic bottle with full of liquid. Being got suspicious, the appellant was intercepted and the contents in MO1 was tested by smell and taste and convinced that it was arrack. The appellant was arrested and MO1 was seized for which,

Ext.P1 seizure mahazar was prepared. The appellant was taken to the Excise Office wherein, PW3 was the Circle Inspector. He registered a case for which Ext.P3 crime and occurrence report was prepared. The investigation was taken over by PW5, who, after completing the investigation, submitted the charge-sheet before the Additional Chief Judicial Magistrate, Thiruvananthapuram alleging the above said offence. Since the offence alleged is exclusively triable by a court of session, the case was committed to the court of session, Thiruvananthapuram, by order dated 7.5.2001. The case was subsequently made over to the Additional Sessions Judge.

3. Responding to the process issued, the appellant entered appearance. She pleaded not guilty, when the charge was framed and explained. Therefore, she was sent for trial. PWs 1 to 5 were examined and Exts.P1 to P4 were marked. MO1 was also marked. When questioned under Section 313 of the Code of Criminal Procedure, the appellant took a defence of total denial. No defence evidence was let in. On appraisal of the evidence, the learned Additional Sessions Judge arrived at a finding of guilt. Consequently, the appellant was convicted and sentenced as above.

4. I have heard Adv. Sri.Thoshin V.S., the learned counsel appearing for the appellant and Sri.Reji Joseph, the learned Government Pleader. Perused the judgment and the evidence on record.

5. PW1, who is an independent witness and an attestor to Ext.P1 seizure mahazar, turned hostile. PW2, the detecting officer, had given evidence in support of the prosecution case. PW4, who was accompanying PW2, also had given supporting evidence. Their evidence would show that they had seen the appellant walking along the Pattor- Pettah road with MO1 bottle in her hand and that it was seized from her for which Ext.P1 seizure mahazar was prepared. Both of them would harmoniously depose that when the contents was tested by smell and taste, they were convinced that it was arrack. They arrested the appellant and produced before PW3 along with MO1 and Ext.P1.

6. PW3 would depose that he had forwarded the material objects to the committal court along with a forwarding note. So also, the appellant was produced before the

committal court. PW5 would depose about the process of completing the investigation and submitting the charge-sheet.

7. None of the witnesses has got a case that they had taken any sample from MO1 or that the sample was forwarded to the Chemical Examiner. However, in coming to a conclusion against the appellant, the learned Additional Sessions Judge had given reliance to Ext.P4 report of the Joint Chemical Examiner to the Government of Kerala wherein it is certified that she had received one bottle containing 180ml of clear and colourless liquid alleged to be arrack involved in this case and on examination it was found that the sample contained 38.36% by volume of Ethyl Alcohol. The evidence on record didn't disclose as to who took the sample. There is no case that either PWs 2, 3, 4 or 5 had taken any sample. That being so, it seems to be a mystery as to who took the sample. Therefore, no reliance can be given to the report of the Chemical Examiner to conclude that the liquid contained in MO1 is arrack. Such being the materials on record, I find that it is not safe to sustain the conviction. The learned Government Pleader submitted that PWs 2 and 4 had satisfied that the liquid contained in the bottle is arrack by smell and taste. It is only their observation about the liquid. The suggestion in cross examination to PW2 is that possession of Indian Made Foreign Liquor upto a quantity of 1.5 litres is permissible as on the date of seizure. The possibility for the liquid being Indian Made Foreign Liquor cannot also be ruled out. In the above circumstance, I find that the conviction under challenge is not sustainable.

8. In the result, the appeal is allowed. While setting aside the conviction and sentence under challenge the appellant would stand acquitted. The appellant is directed to execute a bail bond for Rs.20,000/- (Rupees twenty thousand only) with two solvent sureties each for like amount to the satisfaction of the trial Judge under Section 437A of the Code of Criminal Procedure undertaking to appear before the court.

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