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Court : Kerala

Decided On : Jul-12-2011

Judge : V. Ramkumar & P.Q. Barkath Ali

Appeal No. : Crl.A.No.634 of 2003

Appellant : Ravi

Respondent : State of Kerala and Another

Judgement :

V. Ramkumar, J.

In this appeal filed under Sec.374 (2) Cr.P.C. the appellant, who was the accused in S.C.No.495/2000 on the file of the Addl. Sessions Court (Fast Track-II), Kozhikode for an offence punishable under Section 55(a) of the Abkari Act, challenges the conviction entered and the sentence passed against him for the said offence. He was sentenced to rigorous imprisonment for two years and to pay a fine of `1,00,000/- and on default to pay the fine to suffer simple imprisonment for six months.

2. When this appeal came up for hearing before a learned Single Judge (K.Hema, J.), it was contended that the delay of 16 days in producing the seized properties before the court was fatal in view of Section 102(3) Cr.P.C. The decisions in Dominic v. State of Kerala (1989(1) KLT 601), Alex v. State of Kerala (2003(1) KLT SN 9), Kunhikannan v. State of Kerala (2006(4) KLT 469) and Vikraman v.

State of Kerala (2007(1)KLT 1010) were relied on. Adverting to the aforesaid decisions the learned Single Judge felt that the view taken in the aforesaid decisions that the property seized should be forthwith produced before the Court was not justified since Section 102(3)Cr.P.C only provides for reporting the seizure forthwith. Likewise, it was contended before the learned Judge that production of the accused person and the seized property before an officer holding charge of the Excise Inspector but lower in rank than that of the Excise Inspector is violative of Section 40(3)(b) of the Abkari Act. The said proposition canvassed before the learned Judge was also taken exception to by the learned Judge. Hence this reference.

3. The questions referred for decision are

1. Is it necessary that article seized under Section 34 of the Act be produced before the Magistrate's Court "forthwith" either by virtue of Section 102 (3) of the Code or any other provision in Abkari Act or Manual?

2. Does production of arrested person and the seized property before an officer, who is in charge of Excise Inspector, at the relevant time violates Section 40(3)(b) of the Act and whether accused can be acquitted on that ground?

4. We heard Advocate Sri.V.V.Surendran, the learned Counsel appearing for the appellant and Advocate Sri.M.S.Breeze, the learned Public Prosecutor who defended the State.

5. In Dominic V. State of Kerala (1989(1) KLT 601) a learned Single Judge of this Court referring to the provisions in the Excise Manual Volume II read with Section 36 of the Abkari Act, took the view that if those provisions are read together it is clear that seizure of property should be reported to the Court "forthwith" and request for sending a sample for analysis to be made expeditiously. Paragraphs 17,26,34,49 and 77 of the Excise Manual were relied on in this connection. The above view was reiterated by another Single Judge of this Court in Alex v. State of Kerala (2003(1) KLT SN 9). In Kunhikannan v. State of Kerala (2006(4) KLT 469) also yet another Judge of this Court held that the delay of 14 days in producing the seized articles before the Court was fatal to the prosecution. In Vikraman v. State

of Kerala (2007(1)KLT 1010) which was overruled on another point in Subash v. State of Kerala (2008(2) KLT 1047 DB), it was observed that even though under Section 102(3) Cr.P.C the property seized should be forwarded to the Court "forthwith", the said provision does not contain the consequence of non-compliance and therefore, if proper explanation for the delay is offered, such delay by itself is not fatal to the prosecution.

Section 102(3) Cr.P.C reads as follows:-

"Every police officer acting under sub-section(1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be, conveniently transported to the Court or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in the Police custody may not be considered necessary for the purpose of investigation, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same."

There is no statutory mandate under the above provision to "forthwith" produce the properties before the Court. What is insisted on is that the seizure of the property should be forthwith reported to the Court. But that does not mean that the detecting or Investigating Officer can produce the property leisurely, particularly when the nature and contents of the property can be convincingly established only through expert opinion obtained either in the form of chemical analysis or the report of a forensic or other expert for which the property should reach the court without unreasonable delay. Delayed production before court of the seized property (wherever it is practicable) is likely to be frowned upon by Courts because of the possible misuse or tampering with of such property while in the custody of the officer concerned. There is also the chance of such property getting misplaced.

6. Section 36 of the Abkari Act only mandates that all searches under the said Act can be made in accordance with the Cr.P.C. Section 40 of the Abkari Act reads as follows:-

Procedure on arrest and seizure:-(1)(a)

Any Officer arresting a person under Section 31, Section 34 or Section 35 shall inform him of the grounds for such arrest.

(b) Where an Abkari Officer arrest without warrant any person other than a person suspected of, or accused of, any non-bailable offence under this Act, such Officer shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

(2) Every person arrested under Section 30 shall be produced before and the article seized under that section shall be forwarded to, without unnecessary delay, the Magistrate or the Commissioner, as the case may be, by whom the warrant was issued.

(3) Every person arrested under Section 31 or Section 34 or Section 35 shall be produced before, and article seized under Section 34 shall be forwarded to, without unnecessary delay,-

(a) to the Officer in charge of the nearest Police Station or

(b) to the Officer empowered under Section 5A, or to the Abkari Inspector.

(4) The authority or officer before whom any person is produced under Sub section (2) or sub section (3) shall, take expeditious steps as provided in Section 41.

(5) The authority or Officer to whom any article is forward under sub section (2) or sub section (3) shall, with all convenient despatch, take necessary steps in accordance with law for disposal of such article.

Under sub-section 3 of Section 40 it is provided that every person arrested and every article seized shall be forwarded without unnecessary delay to the officer in charge of the nearest Police Station or to the officer empowered under Section 5A of the Abkari Act or to the Abkari Inspector. Here also there is no statutory mandate to "produce" the property before the Court "forthwith". But the very fact that the statute insists on production of the property before an officer of a particular designation or rank is to ensure that there is no misuse of the property. Likewise,

unless the property is before Court, there cannot be a proper ascertainment of the nature and content of the property by questioning the service of an expert through the instrumentality of the Court. Hence, production of the property before Court without unreasonable delay is also a necessary requirement of law. Delay in producing the property before Court, by itself, cannot be fatal to the prosecution if the delay can be satisfactorily explained (See *Vikraman v. State of Kerala* (2007(1)KLT 1010)).

7. A closer examination of the scheme under Chapter VIII of the Abkari Act will reveal that ordinarily, by reason of Section 30 of the Act, on receiving credible information to the effect that there exists reason to believe the commission of an offence under the Act, a search for any liquor, intoxicating drug, materials, stills, utensil, implement or apparatus in respect of which the alleged offence is committed, can be made only on the strength of a search warrant issued by the Commissioner of Excise or a Magistrate, unless-

i. it is an urgent situation covered by Section 31 of the Act and which cannot brook any delay.

OR

ii. it is a public thoroughfare or open place (other than a dwelling house) falling under Section 34 of the Act.

Where a search has been made and seizure of contraband substance has been affected, whether in pursuance of a search warrant or otherwise, the law enjoins that the custody of such contraband substance is with a proper authority. But when the seized property is produced before the officer in charge of the Excise Range Office, it cannot be insisted that the person in charge of the Excise Range Officer should be of a particular rank. Whatever be his rank, he is to be treated as an officer in charge of the Excise Range office. His position is analogous to that of an officer-in-charge of a police station or a Station House Officer.

8. We, therefore, answer the reference as follows:-

1. It is not necessary to produce the article seized under Section 34 of the Abkari Act before the Magistrate "forthwith" either by virtue of Section 103(2)Cr.P.C or by virtue of any of the provisions of the Abkari Act or the Abkari Manual. What is enjoined by the statute is only that the seizure of the property should be reported forthwith to the Court. But we hasten to add that the production of the property before Court (wherever it is practicable) should also take place without unnecessary delay. There should be explanation for the delay when there is delayed production of the property.

2. There is no violation of Section 40 (3)(b) of the Abkari Act if the arrested person or the seized property is produced before an officer who is holding charge of the Excise Inspector, notwithstanding the fact that he is of a rank lower than that of an Excise Inspector.

9. We now proceed to consider the merits of the case on hand. The case of the prosecution is that the appellant was found, at the Azhiyoor Excise Check Post, Vadakara, in possession of 2.4 litres of Indian Made Foreign Liquor (IMFL) comprising of 3 bottles each of 500 ml of brandy and 5 bottles each of 180 ml of rum at 11.45 am on 24.8.1997. The above bottles were found concealed around his abdomen and inside his shirt. There is no dispute that the quantity possessed by the appellant was within the permissible limit. Indian Made Foreign Liquor is not a prohibited liquor and possession of that liquor simpliciter is not an offence under Section 55(a) of the Act (vide Thomas v. State of Kerala (2005 KHC 1786).

10. PW1 is the Excise Guard who allegedly detected the offence while checking vehicles at the check post where the appellant is said to have come walking. PW1 arrested the appellant, seized the bottles of IMFL and produced him along with the contraband liquor before PW3 at 7.30 pm on the same day. PW3 was the Preventive Officer holding the charge of Excise Inspector, Vadakara Excise Range. PW3, who was holding charge only for a day, produced the appellant before the J.F.C.M, Vadakara at 10 pm on 24.8.1997 itself and the appellant was remanded to judicial custody. On 25.8.1997, PW3 entrusted the contraband liquor with PW4 who was also a Preventive Officer holding charge of the Excise Inspector, Vadakara on that day. PW4 produced the seized properties before the

Magistrate on 09.09.1997, that is, after 16 days of detection. PW5, the Excise Inspector submitted Ext.P6 forwarding note dated 4.12.1997 before the Magistrate and the sample bottles of 500 ml of brandy and 180 ml of rum were forwarded to the Government Chemical Examiner as per letter dated 23.6.1998 by the Magistrate. Ext.P7 is the report of Chemical analysis showing that the 500 ml bottle contained 42.39% by volume of ethyl alcohol and 180 ml bottle contained 33.22% by volume of ethyl alcohol. It was on the strength of the above evidence that the learned Additional Sessions Judge convicted the appellant for the aforesaid offence.

11. Even though several contentions were urged before us, we are of the view that the appellant is entitled to succeed on a short point, namely, the inordinate delay in the production of properties before the Court and the want of a proper explanation for the same.

12. As already mentioned, PW4 was admittedly a Preventive Officer holding charge of the Excise Inspector, Vadakara on 25.8.1997. PW3 who was his predecessor-in-office entrusted the properties to PW4 on 25.8.1997. But PW4 produced the properties before the Magistrate only on 9.9.1997 that is 16 days after the detection. PW4 has admitted that he was in custody of the properties from 25.8.1997 till 09.09.1997. He would assert that he had produced the properties before Court on 25.8.1997, i.e the very next day of detection and seizure, but the Thondy Section Clerk (property clerk) asked him to take back the properties since he was too busy. Thereafter, according to PW4, it was on 09.09.1997 that he produced the properties before Court. PW4 also confessed that there is no reason for not producing the properties before Court in between 25.8.1997 and 09.09.1997. He further admitted that there is no record to show that from 25.8.1997 till 09.09.1997 the properties were in his custody.

13. It is difficult for us to believe that PW4 had produced the properties on 25.08.1997 and the Thondy Section Clerk refused to receive the properties on the ground that he was too busy. Even assuming that such a thing happened, we would have expected the prosecution to examine the Thondy Section Clerk to substantiate the above explanation. For reasons best known to the prosecution the

Thondy Section Clerk was not examined. If so, it cannot be assumed that the property was in the safe custody of PW4 until their production before Court after 16 days. There is the possibility that the properties would have been tampered with. The prosecution, in a case of this nature can succeed only if it is shown that the contraband liquor which was allegedly seized from the accused ultimately reached the hands of the Chemical Examiner by change of hands in a tamper-proof condition. (Vide State of Rajasthan v. Daulath Ram (AIR 1980 SC 1314 and Valsala v. State of Kerala (1993(2) KLT 550 (SC)). No conviction can be entered against the accused in a prosecution as the present one unless it is proved that the sample which was analysed in the Chemical Examiner's laboratory was the very same sample drawn from the contraband liquor allegedly found in the possession of the accused (See Sathi v. State of Kerala (2007(1)KLT (SN) 57) and Sasidharan v.State of Kerala (2007(1) KLT 720). There is no satisfactory link evidence to show that it was the same bottles seized from the appellant which eventually found their way into the hands of the Chemical Examiner and that there was no meddling or tampering with the bottles while they were in the custody of PW4. Hence, the result of Ext.P7 Chemical Analysis cannot be applied against the appellant.

14. The conviction recorded and the sentence passed by the court below, overlooking the above vital aspects of the matter, cannot be sustained. The appellant is accordingly found not guilty of the offence punishable under Section 55(a) of the Abkari Act and is acquitted thereunder. The appellant is set at liberty forthwith.

The above Crl.Appeal is allowed as above.

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