

(2020) 12 KL CK 0089
In the High Court Of Kerala
Case No : Criminal Appeal No. 2119 Of 2007

Raju @ Kootta Raju

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 04-12-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 232, 313, 313(1)(b), 374(2), 386(b)(i)
Abkari Act, — Section 58, 58(a)

Citation : (2020) 12 KL CK 0089

Hon'ble Judges : K. Haripal, J

Bench : Single Bench

Advocate : C.P. Peethambaran, D. Chandrasenan

Final Decision : Allowed

Judgement

1. In this appeal preferred under Section 374(2) of the Code of Criminal Procedure, hereinafter referred to as 'the Cr.P.C.', the legality and correctness of the judgment of the learned Additional Sessions Judge, Ad- hoc-I, Thalassery in S.C.No.678/2005 dated 06.10.2007 are under challenge. The precise allegation against the appellant is that on 20.10.2003 at 4.30 p.m., the Sub Inspector of Kolavallur police station and party found the appellant illegally transporting 31 bottles of Indian Made Foreign Liquor, each containing 180 mls. The place of occurrence was on the public road in front of house No.TPX288, where Lakshmi w/o Sankaran of Chakkittakandiyil at Vadakkepoyiloor in Thrippangottoor amsom is residing. The contraband was seized under a mahazar, the appellant was arrested and Crime 422/2003 of that police station was registered. After investigation, the charge sheet was laid before the Chief Judicial Magistrate, Thalassery where C.P.37/2004 was registered. After completing the procedural

formalities, the learned Magistrate committed the case to the Sessions Court, Thalassery from where it was made over to the trial court.

2. After hearing counsel on both sides, the learned Additional Sessions Judge framed charge alleging offence punishable under Section 58 of the

Abkari Act, read over and explained to the appellant, to which he pleaded not guilty. He was on bail. The counsel engaged by him defended him.

3. Four witnesses were examined on the side of the prosecution as PWs 1 to 4. Exts.P1 to P7 were marked. Material objects were identified and

marked as MOs 1 to 4. On completion of evidence when examined under Section 313(1)(b) of the Cr.P.C., the appellant maintained the same stand.

As the learned Judge found the appellant not acquittable under Section 232 Cr.P.C., he was called upon to enter on his evidence in defence. But no

evidence was adduced by him. After hearing counsel on both sides, by the impugned judgment, the court found him guilty under Section 58(a) of the

Abkari Act and convicted and sentenced to undergo simple imprisonment for three months and to pay a fine of Rs.1,00,000/-, in default to undergo

simple imprisonment for 15 days. That conviction and sentence are now under challenge.

4. When heard, the learned counsel for the appellant contended that the prosecution has not produced or proved the property list so that no evidence

has been tendered as to when the material objects were produced before court. So also, it was argued that the independent witnesses have turned

hostile to the prosecution and conviction has been arrived on the basis of the interested testimony of PW3. According to her, both these aspects are

fatal to the prosecution and the appellant is entitled to be acquitted.

5. As noticed, the specific allegation is that the appellant was found in illegal possession of 5.58 litres of Indian Made Foreign Liquor, which was

saleable only in Pondicherry, and transporting through the territory of the State, violating the provisions of the Abkari Act. PWs 1 and 2 are

independent occurrence witnesses. PW1 Ajith identified his signature found on Ext.P1 seizure mahazar. He also proved the Ext.P2 arrest memo

under which the appellant was arrested from the said place.

However, he denied having witnessed the incident in which the liquor was seized from the appellant. PW2 Balan, the other independent witness

denied his signature in Ext.P1, but agreed that he had signed the Ext.P2 arrest

memo. He also denied having witnessed the incident in question. Both of them were declared hostile to the prosecution and were cross-examined by the Public Prosecutor. PW3 is the Additional Sub Inspector who conducted the investigation and laid the charge sheet. He proved Exts.P3 and P4 documents and also identified the MOs. PW4 M.K. Damodaran is the Sub Inspector who detected the offence. According to him, the items were saleable in Pondicherry State only, since the appellant was found possessing and conveying the item and since he could not give explanation as to its possession, the items were seized in the presence of independent witnesses, after preparing Ext.P1 mahazar. He also identified MO1 to 4 items. His cross-examination was cryptic and the testimony could not be disturbed.

6. In other words, the oral testimony of PW4 the detecting officer, coupled with Exts.P1 and P2 contemporaneous documents clearly indicate that the items were seized from the possession of the appellant as alleged. True that both independent witnesses PWs 1 and 2 have turned hostile to the prosecution. But, from the partial support rendered by them, it is evident that the documents were prepared contemporaneously when the appellant was intercepted and arrested from the said place as alleged by the prosecution. In that view, the partial support rendered by PWs 1 and 2 is sufficient to accept the testimony of PW4.

7. At the same time, that will not salvage the prosecution case.

As rightly pointed out by the learned counsel for the appellant, we are in darkness as to when the material objects had reached the court. In such cases, importance of the material objects reaching the court need not be over emphasised. Material objects have to be produced before the court without undue delay. Even if some delay occurs, the investigating agency has a duty to explain the delay and also to state that, during the period, it was kept in safe custody of a responsible officer and was not accessible to all and sundry. That part of the evidence could be brought in only if the property list is produced before the court along with the material objects. Even though the property list is not formally marked, I could find out a property list among the trial court records. But the question is whether it can be reckoned to fill in the lacuna happened on the side of the prosecution.

8. In this connection, two views can be discerned from the reported decisions of this Court. In *Joseph v. State of Kerala* [2016 (2) KLT 288] this

Court held that even in the absence of formal marking of the property list, when the list is available with the records, the court can take judicial notice

of it and ignore non-marking. On the other hand, in *Manikantan Pillai v. State of Kerala* [2014 (1) KLJ 267] etc., it has been held that in the absence

of property list having been let in evidence, adverse inference has to be drawn against the prosecution.

9. For the mere reason that an important document is available in the case records is not a substitute for evidence without formally marking it. It will

become part of evidence only if formally marked. It is certainly an incriminating piece of evidence and can be read in evidence only after putting it to

the accused under Section 313 Cr.P.C. In my view, in the absence of evidence proving the production of material objects before court, failure to

tender the property list in evidence is fatal to the prosecution. In other words, there is no evidence on record to say when the property had reached the

court or that till it reached the court the investigating officer/detecting officer had secured and ensured its safe custody. In the absence of evidence on

that score the prosecution is bound to fail. On the sole ground the appellant is entitled to the benefit of doubt.

In the result, the conviction and sentence imposed on the appellant are set aside and the appeal is allowed. In reversal of the finding of conviction, the

appellant is found not guilty and acquitted under Section 386(b)(i) Cr.P.C. He shall be set at liberty. Bail bond shall stand cancelled. Fine amount, if

any, realised shall be refunded.