

(2006) 11 KL CK 0025
In the High Court Of Kerala
Case No : Criminal A. No. 22046 of 2004

Vikraman @ Diksoo

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 23-11-2006

Acts Referred:

Abkari Act, 1970 — Section 36A(1), 50, 50(2), 55
Criminal Procedure Code, 1973 (CrPC) — Section 102(3), 173(2), 232, 313(1)
Evidence Act, 1872 — Section 45

Citation : (2006) 4 ILR (Ker) 932 : (2008) 1 KLJ 169

Hon'ble Judges : V. Ramkumar, J

Bench : Single Bench

Advocate : R. Renjith, for the Appellant; Sivakumar, PP, for the Respondent

Final Decision : Dismissed

Judgement

V. Ramkumar, J.—The 2nd accused in S.C. No. 1969/2002 on the file of the Court of the IIIrd Addl. Sessions Judge, Kollam challenges the conviction entered and the sentence passed against him by that court for offences punishable under Sections 55(a) and 55(i) of the Abkari Act.

2. The case of the prosecution can be summarized as follows:

On 24-12-1999 at 5.30 p.m. a police party from Kottiyam Police Station headed by the Sub Inspector PW. 4 while on patrol duty found both accused Nos. 1 and 2 at the residential property of the 1st accused situated near Kay avil culvert in Akkolil cheri of Mayyanadu village. The police party found the 1st accused holding a glass and the 2nd accused holding a plastic kit containing 35 covers, each containing 100 ml. of illicit arrack. The accused has thereby committed offences punishable under Sections 55(a) and 55(i) of the Abkari Act.

3. On the accused pleading not guilty to the charge framed against them by the court below for the aforementioned offences, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 5

witnesses as PWs. 1 to 5 and got marked 5 documents as Exts. P1 to P5 and 4 material objects as M.Os. 1 to 4.

4. After the close of the prosecution evidence the accused were questioned u/s 313(1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against them in the evidence for the prosecution. They denied those circumstances and maintained their innocence. The appellant had the following to submit before court:

For the past 10-15 years he was a domestic servant in the house of the 1st accused's mother. While he was working there, there was an altercation and scuffle between the 1st accused and his wife. The wife of the 1st accused left his house after taking the 1 1/2 year old child. Thereupon the 1st accused snatched the child and ran away. The whereabouts of the 1st accused were not heard of and he was in the hiding. While so, the mother-in-law of the 1st accused lodged a complaint against the 1st accused before the police. After three days while he was standing in the Mayyanadu bus stand, the mother-in-law of the 1st accused and two police constable came in an autorickshaw. The 1st accused's mother-in-law told the policemen that this accused, if taken into custody, could reveal the whereabouts of the 1st accused. He was thus taken in an autorickshaw. He revealed to the police that he does not know the whereabouts of the 1st accused or his child. The police told him that he will be released from custody only if he showed the 1st accused and his child. After three days he was produced before court. Thereafter he was in jail. It was only after 14 days he realized that he was falsely implicated in an abkari case. His wife and children were unaware of his whereabouts until then. He wrote a letter to his wife from the prison and she came and got him enlarged on bail. He has absolutely no connection with this abkari case. After the above incident there was no re-union between the 1st accused and his wife. The 1st accused has married another lady and he is residing with her. This accused is innocent.

5. Since the court below did not think it fit to record an order of acquittal u/s 232 Cr.P.c., the accused were called upon to enter on their defence and to adduce any evidence which they might have in support thereof. They did not adduce any defence evidence. The learned Sessions Judge, after trial, as per judgment dt. 31-7-2004 acquitted the 1st accused but convicted the appellant/the 2nd accused for the offence punishable u/s 55(a) of the Abkari Act. He was, however, acquitted of the offence punishable u/s 55(i) of the Abkari Act. For his conviction u/s 55(a) of the Abkari Act, the appellant was sentenced 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 rigorous imprisonment for another ten months. It is the said judgment which is assailed in this appeal.

6. I heard Adv. Sri. R. Ranjith, 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. Adv. Sri. R. Ranjith, the learned Counsel appearing for the appellant on State Brief made the following submissions before me in support of his fervent plea for acquittal of the appellant:

Under Section 50 of the Abkari Act it is an Abkari Officer who should forward a report u/s 173(2) Cr.P.C. to the Magistrate competent to take cognizance of the offence. By virtue of S.R.O. 321/1996, all officers of and above the rank of Sub Inspectors alone have been empowered as abkari officers. The officer who conducted the latter part of the investigation and laid the final report in this case is PW. 5 who is only an Assistant Sub Inspector. Hence he was not an officer empowered within the meaning of Section 50(2) of the Abkari Act. Such an officer was incompetent to file the report and it vitiates the trial has to be treated as non est. The following decisions are relied on:

1. 1992 (2) KIT 860 Prabhakaran v. Excise Circle Inspector.
2. 1993 (1) KLT 72 Varkey v. State of Kerala.
3. ILR 2001 Ker 540 K. Muhammed v. K. Sukumaran.
4. 1994 (1) KLT 59 Joy v. State of Kerala.
5. 1990 (1) KLT 44 Ramachandran Nair v. State.

Apart from the above illegality there was delay of 18 days in sending the material objects to the court, thus violating Section 102(3) Cr.P.C. which enjoins that material objects seized in such cases should be sent to the court forthwith. The following decisions are relied on:

1. 2001 (2) KLT 389 Ali v. State of Kerala
2. 2003 (1) KLT 9 Alex v. State

9. I am afraid that I cannot agree with the above submissions. PW. 1 is an independent witness who is an attester to Ext. P1 mahazar prepared by the detecting officer. He turned hostile to the prosecution. But he admitted his signature in Ext. P1 mahazar. PW. 2 Harikumar who is the other attester to Ext. P1 mahazar also followed suit. He also admitted his signature to Ext. P1 mahazar and he would say that he only saw the appellant sitting in the jeep. Much strain is not needed to conclude that PWs. 1 and 2 were turning out to be cunning performers in the witness box evidently to jettison the accused from his criminal liability. Courts are not unfamiliar with such witnesses turning hostile to the prosecution. If the evidence of the detecting officer is credible and believable, then the hostility shown by an independent mahazar witness need not deter the court from considering the testimony of the detecting officer and proceeding

accordingly See 1981 KLT 9 Sivaraman v. State of Kerala, Suresh v. State 1995 (1) KLT 636, Modan Singh v. State of Rajasthan 1979 SCC (Cri) 56, Sama Alana Abdulla Vs. State of Gujarat, , Balbir Singh v. State 1997 SCC (Cri) 134.

10. PW. 3 is the police constable who was in the patrol party of PW. 4. He proved M.O. 1 can and M.O. 3 glass as well as M.O. 3 plastic kit in which 35 covers containing the illicit arrack were filled.

11. PW. 4 is the Sub Inspector of Police, Kottiyam who detected the offence. What is unravelled by the prosecution evidence is the following:

On 24-12-1999 PW. 4, along with PW. 3 and others, was proceeding on patrol duty. At about 5.20 p.m. when they reached Panayil Junction, PW. 4 got credible information to the effect that the two accused persons were vending illicit arrack from the property of the 1st accused. When the police jeep reached the said place at about 5.30 p.m., the 1st accused was found holding a glass and the 2nd accused was found holding M.O. 4 black plastic kit containing 35 covers each containing 100 ml. of illicit arrack. Seeing the police party 1st accused broke the glass and made good his escape. The 2nd accused/appellant who was holding the plastic kit made an unsuccessful attempt to make good his escape. However, he was restrained and taken into custody by the police party. PW. 4 questioned him with regard to the contents of the packets found inside the plastic kit. 2nd accused revealed that it was arrack. He also disclosed to PW. 4 that the person who had made good his escape was Rajeevan, S/o. Saraswathy. He further confessed that he had come there to assist the 1st accused and that they were selling arrack charging Rs. 20/- per cover. PW. 4 then seized the contraband covers. One of the covers was opened and its contents was confirmed to be arrack through smell and taste. The olfactory and gustatory abilities of experienced police and excise officials to identify certain well known contraband substances have been judicially recognised vide Joseph v. State of Kerala 1998 (2) KLT 848, State of Kerala v. Raman Nair 1966 KLT 889, Georgekutty v. State of Kerala 1991 (2) KLT 570 and Mary Vs. State of Kerala, . But it is always in the interest of the prosecution as well as the accused that the contraband article is sent to the chemical analyst for ascertaining whether it contains alcohol or not See Muthan Ankamuthu v. State of Kerala 1970 KLT 427. Merely trusting the smelling sense of the probation officers without relying on the better proof by a technical person who has considered the matter from a scientific point of view, may not be sufficient State of Andhra Pradesh Vs. Madiga Boosena and Others, . But where the Excise Inspector who had put in 21 years of service as such had tested the samples of liquor and illicit liquor and whose competence to test the composition and strength of the liquid was not questioned at all, it was held that he could be treated as an expert within the meaning of Section 45 of the Evidence Act Sri Chand Batra Vs. State of U.P., . PW. 4 then opened all the remaining covers and poured the contents into a can having a capacity of 5 litres. He poured the contents of the first cover opened by him also into the can. Thereafter he drew a sample of 200 ml. in the presence of the witnesses. The

sample as well as the remaining contraband liquor were all sealed and packed and seized under a mahazar which is Ext. P1. The 2nd accused was arrested from the spot. The factum of arrest was communicated to his friend Vijayan and also his wife Sobhana and his father as well. On the strength of Ext. P1 mahazar PW. 5 registered a crime. Ext. P2 is the F.I.R. The properties were produced before court on 11-1-2000 until which date they were in his personal custody in his capacity as the station house officer. The rest of the investigation viz. the examination of witnesses etc. were conducted by PW. 5 ASI of Kottiyam who, in the absence of the Sub Inspector, laid the final report before court.

12. PW. 3 who was the Constable who was in the patrol party of PW. 4, has given full corroboration to the testimony of PW. 4 which itself gains corroboration from the contemporaneous mahazar Ext. P1 prepared by PW. 4 from the spot itself. In the face of the credible testimony of PWs. 3 and 4, the unfriendliness shown by PWs. 1 and 2 who are independent witnesses who turned hostile to the prosecution is of no consequence.

13. It is true that PW. 5 who laid the final report is only an Asst. Sub Inspector and is not an officer of and above the rank of Sub Inspector of Police who alone have been notified as "Abkari Officers" as per S.R.O. 321/1996. But then the main detection, search and seizure and sampling etc. were done by PW. 4 who is admittedly an empowered officer. The only role of PW. 5 was to question the witnesses and lay the final report. Merely because the officer who conducted the latter part of the investigation and laid the charge is not an empowered officer, that cannot vitiate either the investigation or the trial. The want of proper empowerment for the officer does not affect the competence of the court to take cognizance of the offence and that cannot be a circumstance to acquit the accused unless it has resulted in miscarriage of justice see H.N. Rishbud and Inder Singh Vs. The State of Delhi, , The State of Madhya Pradesh Vs. Veereshwar Rao Agnihotry, , A.R. Antulay v. Ramdas Srinivas Nayak 1984 SCC (Cri.) 277 and Balan Vs. State of Kerala, . Most of the decisions cited on behalf of the appellant were rendered under the Narcotic Drugs and Psychotropic Substances Act 1985 whereunder cognizance taken on complaints filed by officers who were not even generally authorised to do so u/s 36-A(1)(d) of the said Act was found to be non est from the very inception. Those cases are clearly distinguishable.

14. What now survives for consideration is the question of delay in sending the material objects to the court. The trial Judge has considered the explanation offered by PW. 4 to the effect that the material objects were in his safe custody in his capacity as the Station House Officer for 18 days till he produced the same before the court. Even though the wording of Section 102(3) Cr.P.C. is that the property seized should be forwarded to the court forthwith, the said provision does not contain the consequence of non-compliance. Every delay cannot be fatal to the prosecution especially when there is a satisfactory explanation offered for the delay. If PW. 4 could be trusted with regarding his evidence of detection,

there is no reason why PW. 4 should not be believed when he says that until he produced the material objects before the court they were in his safe custody in his capacity as the Station House Officer. The decision reported in C.H. Kunhikannan Vs. State, my conclusion that mere delay in forwarding the material objects cannot by itself be fatal to the prosecution.

15. The sample drawn by PW. 4 from the spot itself and which was produced before court along with the other material objects and contemporaneous records was sent by the JFCM-II, Kollam (committal court) to the chemical examiner for analysis. As per Ext. P3 certificate the sample was found to contain 17.75 by volume of ethyl alcohol which confirms the case of the prosecution that what was seized from the appellant was illicit arrack. The conviction was rightly recorded against the appellant.

16. The sentence imposed on the appellant also cannot be said to be harsh or disproportionate to the gravity of the offence having regard to the magnitude of the offence and the deleterious effect of the contraband liquor on the community at large.

17. In the result this appeal fails and is accordingly dismissed confirming the conviction entered and sentence passed.