IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

FRIDAY, THE 11TH DAY OF DECEMBER 2020 / 20TH AGRAHAYANA, 1942

CRL.A.No.442 OF 2008

AGAINST THE JUDGMENT IN S.C.NO.67/2007 DATED 07-02-2008 ON THE FILES OF THE ADDITIONAL SESSIONS COURT (SPECIAL COURT FOR N.D.P.S ACT CASES), THODUPUZHA

APPELLANT/ACCUSED:

RAMANAN,
S/O.PADMANABHAN,
PADINJARAYIL,
MULLARINJADU KARA, VANNAPPURAM, VILLAGE,
THODUPUZHA.

BY ADV. ADV DHEERANDRA KRISHNAN FOR ADV. SRI.S.RAJEEV

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REP.BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,,
ERNAKULAM, (CRIME NO.3/2005 OF EXCISE RANGE OFFICE,
THODUPUZHA).

BY SRI.P.K. BABU, SR. PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11.12.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 11th day of December 2020

The accused in S.C.No.67 of 2007 on the files of the Additional Sessions Court (Special Court for N.D.P.S. Act Cases), Thodupuzha assails his conviction and sentence imposed by judgment dated 07.02.2008. As per the impugned judgment, the accused has been sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs.1,00,000/- for the offences under Section 8(1) and 8(2) of the Abkari Act, 1077.

2. The case of the prosecution is that on 11.03.2005, at about 12.15p.m, on receipt of a secret information, a search was conducted by PW3 at the house of the accused. Though, the accused was absent in the house during the search, his wife was present. Within the compound of the house, a heap of straw was found covered by a tarpaulin under which a black can was detected. PW3, the Excise Inspector on being convinced that the liquid inside the can was arrack, sample was taken, labels affixed and the contraband article was seized as per Ext.P1 mahazar. After

completing the procedures, the accused was charge sheeted and later the case was committed to the Sessions Court for trial.

3. In order to prove the prosecution case, PWs 1 to 6 were examined and Exts.P1 to P11 were marked apart from MO1, which was the black can containing the arrack. Though the defence did not adduce any evidence, Exts.D1 to D3 were marked on their side.

4. After analyzing the evidence adduced in the case, the learned Sessions Judge came to the conclusion that the accused is guilty of the offences alleged and imposed a sentence as mentioned earlier.

5. I have heard Adv. Sri. K. K. Dheerendra Krishnan for the appellant and the learned Public Prosecutor Adv. Sri. P. K. Babu on behalf of the State.

6. Adv. Sri. K. K. Dheerendra Krishnan invited my attention to Ext.P1 seizure mahazar and contended that the presence of Crime No.3/2005 in Ext.P1 mahazar is not only startling but raises doubt about the prosecution case. It was also contended that the delay in producing MO1, can before Court strikes at the root of the prosecution case. It was also

argued that Exts.P1 and P2 did not contain the seal of the Detecting officer, and absence of the seal in the mahazar as well as in Ext.P2 paper slip has effectively disabled the Court from verifying whether the article seized and sample taken were the same as the one forwarded to the chemical analyst. The learned counsel also vehemently argued that in the absence of any evidence to directly connect the possession of the accused, he is entitled to be given the benefit of doubt. Failure of the prosecution to prove the identity of the person who drew the sample from MO1, also, according to the counsel stares at the prosecution. The learned counsel in support of his aforesaid contentions relied upon the decisions in **Rafeeque v. Sub Inspector of Police, Kunnamkulam Police Station and Another** [2020 (3) KHC 715] and **Lalitha v. State of Kerala** [2012 (1) KHC 554].

7. The learned Public Prosecutor Sri.P.K.Babu controverted all the aforesaid contentions of the appellant and submitted that the presence of the Crime Number in the mahazar cannot be viewed seriously especially in the light of the explanation offered by PW3 during his evidence, the delay of three days in producing MO1 before the Court was

sufficiently explained and the same was considered by the learned Sessions Judge, who arrived at the conclusion that there was no delay, which remained unexplained. The learned Public Prosecutor further submitted that the prosecution is entitled to get the benefit of presumption under Section 64, especially since the contraband article was seized from the property of the accused, which compels him to explain or account for the said presence of can in his courtyard. It was also argued that the the learned Sessions Judge had considered the evidence properly and the same needs no interference.

8. I have considered the rival contentions. The independent witnesses were examined as PW1 and PW2. Both of them turned hostile to the prosecution and stated that they had not seen the search or seizure. Even in the absence of independent witnesses, if the evidence of the official witnesses are sufficient to inspire confidence, Court can rely upon such evidence. However, Ext.P1 mahazar, is the document containing the name of PW1 and PW2 as witnesses though without their addresses. The attention of this Court was invited to the contents of Ext.P1 seizure

mahazar. A reading of Ext.P1 reveals that a Crime No.03/2005 is mentioned in Ext.P1 mahazar.

9. A mahazar is a document contemporaneous to the transaction mentioned in it. Seizure mahazar will explain the nature and details of transaction that was carried out while the detecting officer seized the contraband, in an abkari case. In a case where the Commission of an offence under the Abkari Act was detected only on seizure it is rather strange to find the crime number written on the mahazar. It is not a common practice while preparing mahazar to include the crime number in the mahazar even before the crime was detected, or before the crime was registered. The explanation offered by PW3 that he was aware about the next crime number to be registered is too fanciful a proposition for this Court to appreciate. It has come out in evidence that PW3 started from his office around 10.30 am and he had reached the house of the accused at 12.15 p.m. Many things could have happened within this period of two hours. Other crimes could have been detected and registered, even within that two hours interval.

10. When a seizure mahazar contains a crime

number, two possibilities are open for conclusion. The first possibility is that the crime was registered even before it was detected and the second is that the mahazar was not prepared contemporaneously to the seizure. In either situation, the prosecution case loses its credibility. The explanation offered by PW3 during cross-examination is not worthy of belief and is not convincing. This Court finds it difficult to accept the belated explanation of PW3 without a pinch of salt.

11. In this context, it may be apposite to refer to the decision in **Rafeeque V. Sub Inspector of Police, Kunnamkulam Police Station and Another** [2020(3) KHC 715], where this Court has referring to the presence of crime number in the arrest memo and in the absence of proper explanation held that such presence of the crime number gives rise to two inferences, one that the First Information Report was recorded prior to the alleged recovery of the contraband or that the number of the crime was inserted in the arrest memo after its registration and in both instances, it creates doubts upon the veracity of the prosecution version.

12. Though in the present case it is not the arrest memo, it is the seizure mahazar where the presence of the crime number is seen mentioned, according to me, the principle remains the same as at the time of seizure, on which the seizure mahazar is based there is no crime in existence. It is only during the seizure and thereafter that the crime is detected. So, at the time of seizure to have a crime number entered in the seizure mahazar creates doubts upon the seizure as well as the very basis of the prosecution case.

13. MO1, was allegedly seized on 11.03.2005 but was produced before the court on 14.03.2005. Though the delay is only three days, what is material in this case is the deposition of PW3. In his cross-examination, PW3 stated that though MO1 was produced before the Magistrate on 12.03.2005, it was returned on that day due to inconvenience of the Court. However, PW3 failed to explain who had custody of the material object from 12.03.2005 till it was produced in Court on 14.03.2005. The fact that MO1 was produced on 12.03.2005 but was returned is seen from the endorsement in Ext.P7. Even if it is assumed that the

absence of seal in Ext.P7 is not material and that MO1 was returned, the evidence of PW3 that after 12.03.2005, he saw MO1 only in Court makes it essential for the prosecution to explain the custody of MO1 once the same was returned from Court till it was reproduced on 14.03.2005. The absence of explanation for the two days of custody assumes significance because in any tampering with MO1 during the two days period could cause prejudice to the accused. All the more since the samples were sent for chemical analysis only subsequently. The failure to properly explain the custody of MO1 and the sample taken from 12.03.2005 till 14.03.2005 also entitles the accused to have the benefit of doubt in the nature of evidence adduced in the instant case.

14. In view of the aforesaid findings on the two points mentioned above, I am not entering into a consideration as regards the other contentions of the learned counsel regarding possession and failure to examine the person who drew the sample, since the above said two points alone are sufficient to doubt the veracity of the prosecution case, entailing benefit of doubt to the accused.

15. In the aforesaid circumstances, I find that

the accused is entitled to be acquitted and the appeal, to be allowed.

16. Accordingly, the order of conviction and the sentence imposed upon the accused in S.C.No.67 of 2007 on the files of the Additional Sessions Court, Thodupuzha is set aside and the accused is found not guilty. The bail bond executed, if any, shall stand cancelled and the fine amount or any part of it, if remitted by the appellant shall be refunded to him .

The appeal is allowed as above.

Sd/-

BECHU KURIAN THOMAS

JUDGE

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