

**IN THE COURT OF THE JUNIOR CIVIL JUDGE-CUM-JUDICIAL MAGISTRATE
OF FIRST CLASS : KAMALAPURAM**

Present : Smt. Nakka Lavanya,
Judicial Magistrate of I Class, Kamalapuram
Tuesday, the 09th day of July, 2024

C.C.No.551 of 2022

Between: -

The State Represented through the Sub Inspector of
Police, Kamalapuram Police Station.

... Complainant.

And

Karthikam Ramu, age 24 years, S/o.Guru Prasad,
Coolie, R/o.Gangavaram Village, Kamalapuram Mandal,
YSR Kadapa District.

...Accused

This case is coming on 03.07.2024 for final hearing before me, in the presence of Assistant Public Prosecutor for the State and of Sri B.Pushparaju, Advocate for the Accused, perusing the material available on record, and upon hearing the argument on both side I am delivering the following Judgment:

J U D G M E N T

1. The Sub-Inspector of Police, Kamalapuram PS., filed charge sheet against the accused in Cr.No.28/2022 for the offence punishable under Section 34(a) of A.P. Excise (Amendment) Act, 2020.

2. The brief averments of the charge sheet are as follows:

On 21.02.2022 at 7.30 am., on credible information about illegal selling of liquor bottles without having any valid license, P.W.2 along with P.W.1, L.W.1, L.W.2 left Kamalapuram PS., and reached to left side of Harinath Reddy layout, Near Gangavaram Arch, Kamalapuram to Khajipeta main road, Kamalapuram madnal, YSR Kadapa District and found the accused was standing by keeping one white colour bag, on seeing the police accused tried to escape, but police caught hold of accused. On enquiry, the accused admitted that he is in possession of liquor bottles and voluntarily confessed that he selling the liquor bottles illegally with higher prices for illegal gain. Then P.W.2

tried to secure mediators but in vain. Then P.W.2 interrogated the accused, then accused revealed his identity particulars as noted in this case and selling the liquor bottles in surrounding villages of Kamalapuram at high rates by purchasing the same from Karnataka State. On verification of PW.2, he found accused is in possession of 58 packets of Double Kick fine whisky of 90 ML in a white colour plastic bag and the accused failed to produce any valid license to carry/possess/sell the said liquor bottles from concerned authorities. Hence, P.W.2 took the accused into the custody and seized above said liquor from his possession under Ex.P.1 police proceedings. Among the liquor bottles, one liquor bottle was kept in separate for chemical analysis and pasted the identification slip on it. Basing on Ex.P.1, P.W.2 registered a case in Cr.No.28/2022 under Section 34(a) of A.P. Excise Act, and submitted copies of FIR to all concerned officers and took up investigation. After completion of all legal formalities and informing the accusation of the accused once again, sent the accused to judicial custody for remand.

During the course of investigation P.W.2 sent the sample for chemical analysis and in turn he received opinion from Regional Prohibition and Excise Laboratory, Kurnool as sample is Indian made Liquor and fit for human consumption. Later P.W.2 received confiscation proceedings from Superintendent of Police, Kadapa with instructions to confiscate the seized property. After completion of investigation L.W.6 filed charge sheet against the accused for the offence punishable under Section 34(a) of A.P. Excise (Amendment) Act, 2020.

3. This case was taken cognizance for the offence under section 34(a) of A.P Excise (amendment) Act, 2020 against the Accused and issued summons to the accused.

4. On appearance of accused before this Court copies of documents furnished to the Accused as contemplated under Section 207 Cr.P.C. and when he was examined under Section 239 Cr.P.C., about the substance of allegation leveled against him in the charge sheet the accused denied the same and

hence a charge under Section 34 (a) of A.P Excise (amendment) Act, 2020 was framed, read over and explained to him in Telugu under section 240(2) Cr.P.C. for which he pleaded not guilty and claimed to be tried.

5. On behalf of the prosecution P.Ws.1 and 2 were examined and Exs.P.1 to P.4, M.O.1 got marked.

6. After closure of the prosecution evidence, the Accused was examined under Section 313 Cr.P.C. explaining the incriminating circumstances appearing against him in the evidence of prosecution witnesses for which he denied and further stated that he did not commit any offence and he was implicated in a false case due to statistical purpose. The accused did not choose to examine any defence witness nor marking documents.

7. Heard arguments of learned Assistant Public Prosecutor for the state and the learned counsel for the accused.

NOW THE POINT THAT AROSE FOR DETERMINATION IS AS FOLLOWS:

1. Whether the prosecution brought home the guilt of accused beyond reasonable doubt for the offence punishable under Section 34 (a) of A.P Excise (amendment) Act, 2020?

POINT No.1:-

8. The allegation against the accused by the prosecution is that, the accused keeping one white colour plastic bag containing 58 packets of Double Kick fine whisky of 90 ML in it and the accused failed to produce any valid license to carry/possess/sell the said liquor bottles from concerned authorities. Further, argued that as per the recent amendment of A.P. Excise Act and as per the G.O.Ms.No.411 issued by the Excise Department in September, 2019 one person has to carry 3 bottles of any size of Indian made liquor, but herein in the present case the accused is having 58 packets of Double Kick fine whisky of 90 ML in a white colour plastic bag which are more than the prescribed quantity. And argued that as per section 42 of AP Prohibition Act the court shall presume that accused is committed offence unless contrary is proved Hence prays to convict the accused for the offence charged against him.

9. On the other hand the learned defence counsel vehemently argued that as per the prosecution case the accused keeping one white colour plastic bag containing 58 packets of Double Kick fine whisky of 90 ML in it and the accused failed to produce any valid license to carry/possess/sell the said liquor bottles from concerned authorities. But the confession recorded in the presence of Police is hit by Section 26 of Indian Evidence Act. Therefore confession cannot be taken into consideration. Hence prayed to acquit the accused.

10. One of the argument of prosecution is as per section 42 of AP Prohibition Act the court shall presume that accused is committed offence unless contrary is proved. Here accused has to disprove the case of prosecution. To that I am reiterating section 42 of AP Excise Act.

42. Presumption as to commission of offence in certain cases. - In prosecutions under Section 34, Sections 37 and 37-A it shall be presumed until the contrary is proved, that the accused person has committed the offence punishable under that section in respect of,-

(a) any intoxicant; or

(b) any still, utensil, implement or apparatus whatsoever in the manufacture of any intoxicant other than toddy; or

(c) any materials which have undergone any process towards the manufacture of an intoxicant or from which an intoxicant has been manufactured; for the possession of which he is unable to account satisfactorily.

11. In general Presumption of innocence is one of the fundamental principles of criminal natural jurisprudence which axiomatically enunciates that an accused is presumed to be innocent until proven guilty. This principal by default applies to general and special statutes unless a provision stating otherwise exists in the statute. For instance, Exceptions to have principle are contemplated in general statutes like Indian Penal code, by virtue of section

111A, 113A &B, 114A etc of the Indian Evidence Act., 1872 similarly, certain provision in special statutes like Narcotic Drugs and psychotropic substances Act, Prevention of corruption Act, and Protection of children from sexual offences Act. Requires the courts to presume the existence of certain circumstances which point towards the guilt of the accused, thereby carving out an exception to the principle. For example a person charged with an offence under NDPS Act would have to rebut the presumption against him and the burden of proof would lie on him to show that he has not committed the act constituting an offence. But whether mere charge under the statute enough for the reverse burden/presumption to apply, to that I am relying on Nareshm Kumar Vs. State of Himachal Pradesh 2017 AIR(SC) 3859

The Honorable Supreme court of India set aside the conviction imposed by the High Court against the accused who was charged under Sections 20 and 61 of the NDPS Act wherein the allegation against the Appellant was that two kilograms of charas was recovered from a bag in his possession. The Apex Court observed-

"9. The presumption against the accused of culpability under Section 35 and under Section 54 of the Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt....

*that the right of the accused to a fair trial could not be whittled down under the Act was considered in **Noor Aga v. State of Punjab, (2008) 16 SCC 417**, observing:-*

"58.....An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution

is “beyond all reasonable doubt” but it is “preponderance of probability” on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt.”

in ***M/s Seema Silk and Sarees v. Directorate of Enforcement SLP (Criminal) No. 6812 of 2007*** _it was observed-

*“Reverse burden as also statutory presumptions can be raised in several statutes as, for example, the Negotiable Instruments Act, Prevention of Corruption Act, TADA, etc. Presumption is raised **only when certain foundational facts are established by the prosecution.** The accused in such an event would be entitled to show that he has not violated the provisions of the Act.”*

12. Thus, it is pellucid that unless the foundational facts are not established by the prosecution, a mere charge under a statute would not be enough for the presumption to apply. As per the above rulings of supreme court of India, the prosecution has to establish the foundational facts beyond all reasonable doubts. That the prosecution has to establish that accused is in possession more than 3 liquor bottles. And the prosecution has to establish that they have followed the procedure while seizing of liquor bottles and recording confession of accused which are foundational facts of the case.

13. The prosecution in order to establish the foundational facts got examined the Police Constable, Kamalapuram PS., as P.W.1 and the Sub-

Inspector of Police, Kamalapuram PS., as PW.2. The evidence of PW.1 and PW.2 by and large is on similar lines. Both of their evidence show that P.W.2 along with P.W.1 and L.W.1 conducted raids at left side of Harinath Reddy layout, Near Gangavaram Arch, Kamalapuram to Khajipeta main road, Kamalapuram Mandal, YSR Kadapa District and found the accused was standing by keeping one white colour bag and on seeing them the accused tried to escape, but PW.2 and his staff detained the accused. On enquiry, the accused admitted that accused is in possession of 58 packets of Double Kick fine whisky of 90 ML in a white colour plastic bag and the accused failed to produce any valid license to carry/possess/sell the said liquor bottles from concerned authorities. As per the confession of accused police arrested the accused and seized 58 liquor packets. Admittedly, as per evidence of P.Ws.1 and 2 the scene of offence is busy locality. When that being so, why they failed to secure independent mediator at scene of offence, though the scene of offence being busy locality. Non-securing independent mediators at the place of search and seizure itself creates a doubt with regard to seizure of liquor bottles from the possession of accused. As per Sec.100(4) and (5) Cr.P.C it provides the process for conducting search and seizure. Sec.59 of A.P.Excise Act also provides whenever an officer conducting search and seizure he has to follow the procedure contemplated under the Code of Criminal Procedure. For better appreciation Sec.100(4) (5) Cr.P.C reads as follows:

“Section 100. Persons in charge of closed place to allow search.-

(4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

(5) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless especially summoned by it.

In view of the above statutory provisions, it is clear that whenever any search and seizure is conducted by any officer, he has to take effective steps to secure the presence of at least two respectable inhabitants of the locality. In this case, though according to prosecution, PW.2 started from the police station exclusively to conduct raids at the scene of offence, he ought to have secured two independent mediators. Here Police is conducting search in a busy locality where there is possibility of securing the presence of independent mediators and in those circumstances, PW.2 ought to secure two independent respectable inhabitants of the locality by issuing notice to the public. Therefore, either PW.1 or PW.2 not made any efforts to secure local respectable inhabitants of the locality in strict compliance of provisions of Sec.100(4) Cr.P.C. If for any reason the local inhabitants of the locality did not co-operate the police officials, PW.2 is authorized to issue an order in writing asking them to act as mediators as per Sec.100(4) Cr.P.C. The object of Sec.100 Cr.P.C is to ensure confidence in the neighbors and in the public that a genuine search has been made and the incriminating material is found and not planted. Therefore, the presence of independent respectable mediators at the time of search is always desirable and the presence of mediators of that locality is more suggestible. But where, in a case, the police officials, having an opportunity to take respectable mediators, did not make any efforts to take such mediators, certainly it casts a doubt about the prosecution version. In this case, admittedly no efforts were made to secure the presence of the local mediators. As already stated above, PW.2 did not make any efforts to secure the presence of local mediators. In this regard, it is relevant to mention a decision between ***Gajamker Narayan Vs State of A.P.*** wherein our Hon'ble High Court while dealing with Excise case held as follows:

“Thus, from the evidence on record, it is clear that the Excise Officials picked up punch witnesses at the police station and took along with them to the scene of offence situated at a distance of three kilometers. Neither the testimony of P. W. 1 nor that of P. W. 3 discloses that they tried to secure independent respectable inhabitants of the locality where the offence was allegedly committed, to act

as mediators. Ex. P-1, Panchanama, also does not disclose that any effort was made by Excise Officials to secure independent respectable inhabitants of the locality. Therefore, in the absence of specific evidence in that regard, I am bound to come to the conclusion that the provisions of section 100(4) Cr. P. C. are not followed by the Excise Officials while seizing the plastic can containing I. D. liquor. Therefore, the seizure made in this case is illegal.”

14. In the present case, as already discussed above, PW.2 did not make any efforts to secure the independent respectable inhabitants of the locality. Therefore the prosecution failed to establish seizure of liquor bottles from the possession of accused.

15. Now come to the evidence of police officials, i.e., P.Ws.1 and 2, in general police officials are interested to see that the accused is to be convicted with a view to get fruitful result to the part of their investigation. Police officials evidence must be corroborated by independent witness, without corroboration of independent witness it is not safe to convict the accused merely basing on the evidence of police officials as they are interested parties to the case and wants to convict the accused.

16. For the foregoing reasons and by pursuing the records this court has no hesitation to hold that prosecution miserably failed to prove the case and guilt of the accused beyond all reasonable doubt for offence under Section 34 (a) of A.P. Excise Act.

17. In the result, the accused is found not guilty for the offence punishable under Section 34(a) A.P. Excise (Amendment) Act, 2020 and hence he is acquitted of the same under Section 248(1) Cr.P.C. The bail bonds of accused shall be in force for a period of six months as per Section 437-A Cr.P.C.

The M.O.1 i.e., one sample bottle of Double Kick fine whisky of 90 ml., shall be destroyed after expiry of appeal time.

Directly typed to my dictation by Stenographer Gr-III, corrected and pronounced by me in the open Court, on this the 09th day of July, 2024.

Sd/- N.Lavanya
JUDL. MAGISTRATE OF I CLASS,
KAMALAPURAM.

APPENDIX OF EVIDENCE
WITNESSES EXAMINED FOR

PROSECUTION:

PW.1 : Y. Bala Obula Reddy
PW.2 : R. Venkata Konda Reddy

DEFENCE:

-None-

EXHIBITS MARKED

PROSECUTION:

Ex.P1: Police proceedings
Ex.P2: First Information Report
Ex.P3: Chemical Analysis report
Ex.P4: Attested copy of proceeding in R.C.No.159/Confiscation/DCRB/SEB-KDP/
2022, dt.31.07.2022.

DEFENCE:

-NIL-

EXHIBITS MARKED FOR DEFENCE

-NIL-

MOS MARKED FOR PROSECUTION

M.O.1 : one sample bottle of Double Kick fine whisky of 90 ml.,

Sd/- N.Lavanya
J.M.F.C,
Kamalapuram.