

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

THURSDAY, THE 20TH DAY OF AUGUST 2015/29TH SRAVANA, 1937

Crl.Rev.Pet.No. 235 of 2003 ()

**AGAINST THE JUDGMENT IN CRL.A.NO.361/2002 of ADDL.SESIONS COURT,KOTTAYAM
AGAINST THE JUDGMENT IN C.C.NO.479/1998 of JUDICIAL FIRST CLASS MAGISTRATE
COURT, PALA**

REVISION PETITIONER(S)/PETITIONER/APPELLANT/ACCUSED:

**RARICHAN MATHEW,
MADAPPALLIL HOUSE, BHARANANGANAM, PALA.**

BY ADV. SRI.K.GOPALAKRISHNA KURUP

RESPONDENT(S)/RESPONDENT/COMPLAINANT:

**STATE OF KERALA, REP.BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT.M.G.LISHA.

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 20-08-
2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

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RAJA VIJAYARAGHAVAN V, J.

Crl.R.P.No.235 of 2003

Dated this the 20th day of August, 2015

O R D E R

The instant revision petition is filed under section 397 read with S.401 of the Code of Criminal Procedure, challenging the conviction and sentence entered against the petitioner in C.C.No.479/1998 on the file of Judicial First Class Magistrate Court, Pala. The petitioner was convicted under section 55(a) of the Abkari Act and sentenced to undergo simple imprisonment for one year and to pay a fine of Rs.5,000/-. The said finding was confirmed in appeal as well.

2. The gist of the prosecution case is that, on 14.02.1997 while the Excise Inspector of the Pala Excise Range and his party were engaged in patrol duty, information was received that the petitioner was dealing

with illicit liquor in the precincts of his house. Ext.P2 search memorandum was prepared and after dispatch of the same to court, search was conducted in the residential home occupied by the accused. 5 liters of spirit in a 22 litre black plastic jar, 5 liters of arrack in a 10 litre plastic jar, one 10 liter empty jar with smell of arrack, one plastic bottle having a capacity of 750 ml and one 200 ml glass which had the smell of arrack were found under the cot in the middle room. The house stood in the name of Achamma Mathew, the mother of the petitioner. The contraband articles were seized as per Ext.P1 mahazer and samples were taken in two 180 ml bottles. Ext. P4 occurrence report was prepared and the contraband articles seized were produced before the learned Magistrate on the same day. The sample bottles seized were forwarded to the Chemical Examiner and Ext.P5 Chemical Analysis report revealed the presence of ethyl alcohol. On the basis of the above, the petitioner was proceeded against for having committed offence under S.55 (a) of the Abkari Act.

3. The petitioner pleaded not guilty when the charge was read over and explained to him. The prosecution in their endeavor to prove its case examined three witnesses through whom Exts.P1 to P5 were marked. MOs 1 to 5 were produced and identified. After the close of prosecution evidence, the incriminating materials were put to the accused under section 313 of Cr.P.C. He denied the materials and asserted that he was innocent. On the side of the defence, DW1 was examined and Ext.D1 was marked.

4. The learned magistrate, on an appreciation of the oral and documentary evidence adduced by the prosecution, came to the conclusion that the prosecution had succeeded in bringing home the charge under section 55(a) of the Abkari Act and convicted him. The appeal preferred against the conviction and sentence was dismissed as per judgment dated 25.11.2002, by the learned Additional Sessions Judge, Kottayam. The above concurrent findings are under

challenge in this Criminal Revision Petition .

5. I have heard Adv.Shri.V.K.Sunil, the learned counsel appearing for the petitioner as well the learned Public Prosecutor.

6. The argument advanced by Sri V.K. Sunil, the learned counsel appearing for the petitioner can be summarized as follows :-

(a) The petitioner has no connection with the residential home from where seizure has been effected.

(b) Prosecution has not let in any evidence to prove conclusively that house No.BP-I/255 is occupied by the petitioner or Achamma Mathew, the mother of the petitioner.

(c) No evidence has been let in to show that the contraband articles which were allegedly seized by PW1 on 14.02.1997 were produced before court .

(d) Ext.P5 Chemical analysis certificate is not related to the articles seized as per Ext.P1 and the failure to produce

the forwarding note will prove fatal .

(e) The Absence of label and seal in the Material objects produced belatedly, and that too after the chief examination had commenced would reveal the falsity of the prosecution.

(f) No evidence has been let in by the prosecution to prove the despatch of the illicit articles from the court to the chemical examiners lab and the prosecution has failed to prove the identity of the articles dispatched.

(g) Failure to put questions in the 313 statement with regard to the possession by the petitioner of the house bearing No.BP-I/255 is fatal.

7. Per contra, the learned Public Prosecutor appearing for the State has argued that the contemporaneous records prepared by the investigating officer would reveal that the contentions raised by the counsel in the revision petition are baseless. According to the learned Public Prosecutor, the occurrence report as well as the mahazar prepared

contemporaneously at the time of seizure reveals that the seizure was effected from house bearing No.1/255 of Bharanamganam Panchayat. This house admittedly belonged to Achamma Mathew of Madappallil, the mother of the petitioner. Achamma Mathew is blind and since the petitioner herein is the son who was residing with her, the ownership of the illicit article found in the house can constructively be placed on the petitioner. It was further submitted that the contraband articles were forwarded to the court on the same day itself and though there is some delay in forwarding the sample to the chemical examiners lab that will not affect the case of the prosecution. According to the learned Public prosecutor, the failure of the prosecution to produce the forwarding note in the facts of the instant case is not fatal.

8. I have carefully considered the arguments of the learned counsel appearing for the petitioner. The evidence let in by the prosecution by examining PW1 - the excise

inspector, and PW2 - the preventive officer, who accompanied PW1 on the date of search reveals in unmistakable terms that the petitioner along with his blind mother and wife were residing in house bearing number No.BP-I/255 of Bharanaganam Panchayath. An argument was raised by the learned counsel that no evidence was let in by the prosecution to connect the petitioner with the possession of the house detailed in the search memorandum and also in the mahazer. It appears that there is reference to house number 225 in the judgment rendered by the learned magistrate. Ext.P1 and Ext.P3 would reveal that the house number is 1/255 and not 1/225. The defence examined DW1 to bring out the fact that house number 1/225 of Bharanganam panchayat was in the possession of Manager, State bank of Travancore. Ext. D1 marked through DW1 would also reveal that house number 1/255 stood in the name of Achamma Mathew, who according to the prosecution, is the mother of the petitioner. In view of the above, the contention raised by the counsel for the

petitioner that there is no evidence to show that the room is in the exclusive possession of the petitioner so as to fasten the criminal liability on him cannot be accepted.

9. With regard to the search and seizure, the evidence let in by the prosecution would reveal that search of the house possessed by the petitioner resulted in the detection of illicit arrack and spirit from under the cot found in the middle room of the house bearing number BP number 1/255. The contemporaneous records prepared by the excise officials does not reveal any illegality. Moreover, both the courts below concurrently held that the evidence let in by the prosecution was eminently reliable and trustworthy. I do not think there is any reason to take a different view.

10. The learned counsel for the revision petitioner also raised a contention with regard to the identity of the samples which were seized. According to the learned

counsel, the prosecution has not produced any reliable evidence to show that the contraband articles seized as per Ext.P1 mahazar were the ones which were sent for analysis to the Chemical Examiner's lab. This argument was advanced as it was brought out in cross-examination when PW1 was examined that on the date of examination of the detecting officer , the material objects when not before court. The contemporaneous records prepared by the detecting officer reveals that the contraband articles along with the accused were produced before the court on the same day of detection at 10:30 PM. It is also borne out from the records that an order was passed by the learned magistrate directing the excise inspector to produce the thondy articles on the next day. As directed, all the items were produced before the court on 15.2.1997. On that day, an order was passed by the learned magistrate directing that the excise inspector Pala be entrusted with item numbers 1 to 5 in the list for safe custody until further orders. The two bottles of 180 ml capacity taken as sample

were retained in the court itself. These samples were dispatched to the Chemical Examiner's lab as per letter No. 42/97 on 21.8.1997 as is revealed from the certificate of chemical analysis. There is no challenge with regard to these aspects and it is too late in the day for the defense to raise such challenges at the stage or revision.

11. Much argument was raised with regard to absence of labels as also the seal which were said to have been affixed at the time of seizure. All these contentions does not deserve consideration specially because the contraband articles were produced before court with the seizure records on the date of seizure itself. At any rate the presumption under S.64 of the Abkari Act will stare at the face of the petitioner in the absence of any rebuttal evidence let in by the defense to justify his case.

12. None of the contentions raised by the petitioner deserve any merit.

13. Now the question is with regard to the quantum of sentence. The learned counsel appearing for the petitioner submitted that the crime was detected on 14.02.1997. His mother is completely blind and he has a family to look after. It has not been reported that he has involved himself in similar cases. Section 55(a) as it stood then was punishable with imprisonment for a term which may extend to two years and fine which may extend to five thousand rupees. In the absence of special and adequate reasons, the imprisonment awarded was not to be less than six months and the fine was not to be less than Rs.1,000/- for first offence. In the instant case, the petitioner has been convicted to undergo simple imprisonment for 1 year and to pay a fine of Rs.5,000/-.

14. Taking note of the fact that the incident was detected about 2 decades back and having regard to the fact that the petitioner's mother is blind and also the quantity seized, I am of the considered view that the sentence

imposed by the learned magistrate and confirmed by the learned Sessions Judge can be modified.

In the result, the conviction entered into against the petitioner shall stand confirmed. In modification of the sentence imposed, the petitioner shall undergo simple imprisonment for 1 month and shall pay a fine of Rs.5,000/- and in default shall undergo simple imprisonment for 2 months. The petitioner shall be entitled to set off as provided under S.428 of the Code of Criminal Procedure.

The revision petition is dismissed but, after modification of sentence as aforesaid.

Sd/-
**RAJA VIJAYARAGHAVAN V,
JUDGE.**

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[True copy]

P.A to Judge