IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

MONDAY, THE 1ST DAY OF JUNE 2015/11TH JYAISHTA, 1937

Crl.Rev.Pet.No. 298 of 2003 ( )

CRL.A 156/1999 of ADDL.SESSIONS COURT (ADHOC-II)KASARAGOD
SC 170/1998 of ASST. SESSIONS COURT, KASARAGOD

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REVISION PETITIONER(S)/APPELLANTS/ACCUSED:

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1. KANDANKUNHI, S/O.PANIKKAR, AGED 56 YEARS, ADKATHBAIL, KASARAGOD.

2. K.K.SUKUMARAN, AGED 60 YEARS, S/O.KUNHAPPU, KARUMCHATTA, NADUVILKARA.

BY ADVS.SRI.M.RAMESH CHANDER
SRI.V.TEKCHAND

RESPONDENT(S)/RESPONDENTS/COMPLAINANTS:

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1. STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

2. STATION HOUSE OFFICER, KASARAGOD.

BY PUBLIC PROSECUTOR SMT. MADHU BEN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 01-06-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

OKB

K.HARILAL, J.

Crl.R.P. No.298 of 2003

Dated this the 1st day of June, 2015.

<u>O R D E R</u>

The revision petitioners are the accused in S.C.No.170/98 on the files of the Assistant Sessions Judge, Kasaragod. They were charge sheeted and prosecuted for the offence punishable under Section 55(a) of the Abkari Act. After trial, the learned Assistant Sessions Judge found the revision petitioners guilty of the said offence and convicted thereunder. They were sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.1 lakh each and in default to undergo simple imprisonment for one year. Aggrieved by the conviction and sentence, though the revision petitioners had preferred Crl.A.No.156/99 before the Addl. Sessions Judge, (Ad hoc)-II, Kasaragode, after re-appreciating the evidence on record, the learned Sessions Judge also concurred with the verdict of guilt and confirmed the conviction as such, without any interference. The legality and propriety of the concurrent findings of conviction and sentence are challenged in this revision petition.

2. The prosecution case, in brief, is that on 19.7.1997 at 6 p.m. the Sub Inspector of Police, Kasaragod while searching an unnumbered shed in the possession of the accused situated within the jurisdiction of Kasaba police station found that the accused were engaged in the sale of toddy unauthorisedly and without licence, thereby the accused committed the offence punishable under Section 55(a) of the Abkari Act. P.Ws.1 to 8 were examined and Exts.P1 to P7 and M.Os.1 to 11 were marked. Exts.D1 and D2 were also marked from the side of the defence. The accused pleaded not guilty. They were questioned under Section 313 Cr.P.C. and they denied all the incriminating circumstances against them in the prosecution evidence.

3. The learned counsel for the revision

petitioners advanced arguments assailing the concurrent findings of conviction on various grounds. The learned counsel mainly focussed on the point that the charge has been framed under Section 55(a) of the Abkari Act. But no offence has been proved so as to convict the accused under the said section. Secondly, the evidence available on record are not sufficient to prove that the accused were engaged in the sale of toddy. It is also contended that no charge has been framed for the offence under Section 55(i) of the Abkari Act.

4. Per contra, the learned Public Prosecutor advanced arguments justifying the concurrent findings of conviction and sentence. According to the learned Public Prosecutor, the prosecution successfully proved the charge against the revision petitioners beyond the shadow of doubt. It is also contended that even though the prosecution is not sustainable under Section 55(a) of the Abkari Act, the act done by the accused would come under Section 58 of the Abkari Act

and even though no charge had been framed for the offence under Section 58 of the Abkari Act, there is no illegality in convicting the accused for the offence under Section 58 of the Abkari Act instead of Section 55(a).

5. The scope of enquiry under revisional jurisdiction contemplated under Sections 397 and 401 of the Cr.P.C. is limited and confined to examination of legality, propriety and correctness of the findings of the court below. Under revisional jurisdiction this Court is not expected to re-appreciate the entire records unless it is found that the appreciation of evidence is tainted by any kind of perversity. Needless to say, even if an alternate view is also possible, this Court cannot substitute its own views, which had already been taken by the courts below. With this yardstick, I have meticulously scrutinised the impugned judgment.

6. In support of his arguments, the learned counsel for the revision petitioners cited Surendran v.

Excise Inspector [2004 (1) KLT 404] and Sabu v. State of Kerala [2007(4) KLT 169]. So the question to be considered is whether there is any illegality or impropriety in the finding that the accused had committed offence punishable under Section 55(a) of the Abkari Act. For a better appreciation of evidence, it is appropriate to extract the relevant section which reads as follows:

> "Section 55 of Abkari Act reads as follows:
>
> **Section 55**
>
> **For illegal import, etc:-** Whoever in contravention of this Act or of any rule or order made under this Act. [xxx]"
>
> (a) imports, exports, [transports, transits or possesses] liquor or any intoxicating drug; or"

7. It is the specific case of the prosecution that the revision petitioners were in possession of 33 bottles and a bucket containing toddy and other utensils were used for the sale of toddy. Needless to say, the revision petitioners have no case that the said possession was in the course of illegal import, export, transport or transit as contemplated under

Section 55(a) of the Abkari Act. In this context, the decisions laid down by this Court in Mohanan v. State of Kerala [2007(1) KLT 845) = (2007(4) KLT 408] is relevant. The proposition laid down in Mohanan's case (supra) can be summarized as follows:

> "If S.55 (a) is applicable to all kinds of transport or possession of liquor (without licence), separate provisions need not have been made for transport or possession of liquor. Heading of S.55 gives an indication of the legislative intent. In a case where licensee violates the conditions of licence or commits misconduct by selling the liquor in a holiday, it will come only under S.56 as specific provision for misconduct of licence is mentioned under S.56 and the above offence. will not come under S.55 of the Act. Possession of liquor knowingly that it was illegally imported or knowing that it was not duty paid or illegally transported or manufactured, the offence will come under S.58, but, knowledge that it was illegally imported or transported or manufactured or tax was not paid on that liquor is a condition under S.58. Therefore, mere possession even with knowledge that possession was illegal will not attract a higher penalty. S.55(a) of the Act deals with only illegal import, export or transport, transit etc. on such import or export. It was made clear that S.55(a) is applicable only when persons illegally imports or transport liquor or in possession of liquor while illegally importing. It is true that if a licensee illegally manufacture liquor or intoxicating drugs, apart from S.56, he may be guilty under S.55(b). Further, if he makes or sells denatured spirit fit for human consumption or adulterated liquor, he will be punishable under the other sections also like sections 57, 57A etc. But, S.55(a) will not be attracted merely because he sells the liquor on a prohibited day, but, punishment can be imposed under S.56. As far as S.55 is concerned, sub-clause (a) deals with illegal imports and exports of liquor or intoxicating drugs or transports or possesses such liquor covered under import or export. Sub-clause (b) deals with manufacture of the same. Sub-clauses (d) and (e) deal with illegal toddy tapping or drawing of toddy from trees. S.55(f) deals with engagement in construction or works relating to illegal distillery, brewery

> etc. and clause (g) deals with possession of utensils or implements or apparatus for manufacturing illegal liquor. S.55(h) deals with bottling of liquor for the purposes of sale without licence and clause (i) deals with illegally storing of liquor for selling the same. Other abkari offences are specifically dealt with in various other provisions."

8. Another Single Bench of this Court also had taken the above view in Mohanan's case (supra). In the absence of prosecution case that the alleged possession was in connection with illegal import, export, transport, transit etc., no conviction can be entered for the offence under Section 55(a) of the Abkari Act. Here, the prosecution case is that toddy, which was found kept in a shed, was seized by the police. It is true that the person who possesses illicit liquor can be prosecuted under Section 58 of the Abkari Act also. But on an analysis of the ingredients constituting the offence, it is incumbent upon the prosecution to prove that the possession must be with the knowledge that the contrabands have been unlawfully imported, transported or manufactured under the Abkari Act. In the instant case, the prosecution has no such case attracting

Section 58 of the Abkari Act also. It is pertinent to note that toddy is not a banned liquor. The prosecution must prove that the accused possessed toddy with the knowledge that it was illegally imported, transported, manufactured, etc. But the prosecution has miserably failed to bring home guilt of the accused either under Section 55(a) or Section 58 of the Abkari Act. So also, though the prosecution alleged sale of toddy, no reliable evidence was forthcoming to prove sale of toddy, so as to bring home guilt under Section 55(i) of the Abkari Act. Consequently, I find that conviction and sentence imposed on the revision petitioners are illegal, unsustainable and liable to be set aside and I do so.

In the result, this criminal revision petition is allowed and the revision petitioners will stand acquitted of the offence under Section 55(a) of the Abkari Act.

K. HARILAL, JUDGE

okb.