

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

THURSDAY, THE 6TH DAY OF AUGUST 2015/15TH SRAVANA, 1937

Crl.Rev.Pet.No. 1682 of 2003 ()

**AGAINST THE JUDGMENT IN CRL.A.NO. 243/1999 of ADDITIONAL SESSIONS COURT,
FAST TRACK (AD HOC) NO.II, THIRUVANANTHAPURAM, DATED 01-07-2003**

AGAINST THE JUDGMENT IN C.C.NO.445/1997 of J.M.F.C.-I,ATTINGAL, DATED 31-05-1999

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

**SUKUMARAN, S/O.KUNJAN,
KUTTUMVATHUKKAL ALAYIL VEEDU,
SARKARA, SARKARA VILLAGE,
CHIRAYINKEEZH TALUK
THIRUVANANTHAPURAM**

**BY ADVS.SRI.G.GOPALAKRISHNAN NAIR
SMT.R.BINDU (SASTHAMANGALAM)**

RESPONDENT(S)/RESPONDENT/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT.BINDU GOPINATH

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 06-08-
2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

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RAJA VIJAYARAGHAVAN V, J.

Crl.R.P.No.1682 of 2003

Dated this the 06th day of August, 2015

O R D E R

The instant revision is preferred by the sole accused in C.C.No.445/1997 on the files of the Judicial First Class Magistrate Court - I, Attingal. The said case was taken cognizance by the learned Magistrate on the basis of the complaint filed by the Preventive Officer, Excise Range office, Chirayinkeezh alleging offence punishable under section 58 of the Abkari Act as against the petitioner.

2. The case of the prosecution is that, on 16.08.1996 at 11.15 a.m., the petitioner was found carrying 3 litres of illicit arrack in a 10 litre plastic can. The offence was detected by PW1 - the Excise Inspector, Chirayinkeezh.

3. On the accused pleading not guilty to the charge framed as against him by the court below, the prosecution

was permitted to adduce evidence and they have examined PWs 1 to 5 through whom Exts.P1 to P3 were marked. MO1 was also got identified. After the closure of prosecution evidence, the incriminating materials arising out of the prosecution evidence was put to the accused under section 313 of Code of Criminal Procedure. He denied the same and maintained his innocence. Since the learned Magistrate did not consider that the case is one of no evidence, the accused was called upon to enter upon his defence. The accused examined DW1 on his side.

4. The learned Magistrate, as per Judgment dated 31.05.1999, found the petitioner guilty and he was sentenced to undergo simple imprisonment for six months and also to pay a fine of Rs.15,000/- and in default to undergo simple imprisonment for one and a half months.

5. Against the conviction and sentence, the petitioner

herein preferred appeal before the Additional Sessions Judge, Fast Track (Ad hoc) No.II, Thiruvananthapuram. The learned Additional Sessions Judge, as per judgment dated 01.07.2003, confirmed the finding of the learned Magistrate.

6. It is against the above judgment, conviction and sentence that the instant Criminal Revision is preferred.

7. I have heard Adv.Shri.M.P.Prasanth, the learned counsel appearing for the petitioner and Smt.Bindu Gopinath, the learned Public Prosecutor who appeared for the State.

8. The only point which arises for consideration in this revision petition is to whether the conviction entered and the sentence passed against the petitioner is sustainable or not.

9. The learned counsel appearing for the petitioner raised the following contentions in his endeavour to set aside

the concurrent findings and to canvass for an acquittal.

(a) The failure of the prosecution to prove with certainty that the item seized as per Exhibit P1 mahazar was the one forwarded for analysis is fatal.

(b) There is total lack of evidence as regards sampling of the contraband article.

(c) Failure on the part of the prosecution to prove that the arrest was in accordance with law and at the place and time alleged is fatal in view of the specific defense contention that he was picked up from Sam Hotel at Pandakasala for extraneous reasons

10. On the other hand, the learned Public Prosecutor would argue that the prosecution has produced all the contemporaneous records prepared by the investigating officer and the accused as well as the seized articles were produced on the same day itself before the learned Jurisdictional Magistrate. This, according to the learned

Public Prosecutor would vouchsafe the fact that the detection and sampling of the contraband articles was conducted in a legal manner by PW1.

11. On an anxious consideration of the oral and documentary evidence adduced in this case, I am of the considered view that the contention raised by the learned counsel is liable to be accepted.

12. The prosecution case is that on 16.08.1996 at 11.15 a.m., while PW1 was on patrol duty, he had come across the accused who was coming through the Pandakasala Pulimootukadavu road carrying 10 litre can. On seeing the Excise party, the accused attempted to flee which raised suspicion and he was promptly restrained by PW1 and MO1 can held by him was seized. On examination of the contents resembling liquid contained in MO1 that it was realized that it contained illicit arrack and the same was seized as per Ext.P1

Mahazar. This version of PW1 was sufficiently corroborated by PW5 his subordinate officer.

13. I have gone through Ext.P1 Mahazar which reveals that PW1 had seized a 10 litre can containing 3 litres of arrack on 16.08.1996 at 11.15 a.m. There is no whisper in Ext.P1 that the contraband articles were sampled, sealed or labelled. No document was produced or any evidence let in by the prosecution to prove the fact that the arrack contained in MO1 can was sampled, and that too in a bottle having a capacity of 180 ml by the officer. The prosecution will be able to succeed only if they are able to prove that Ext.P3 chemical Examination Report relate to the items seized by the investigating officer on the relevant date as per Exhibit P 1 mahazar.

14. As is obvious from Ext.P1, PW1 has not drawn any sample from the 10 litre can allegedly containing contraband

arrack. It is also not discernible as to who had taken the samples and the mode in which it was done. Without the forwarding note or a requisition by the investigating officer, there was absolutely no occasion or necessity for the magistrate to take or dispatch any sample for analysis. Ext.P3 Chemical Examination Report reveals that one sealed bottle containing 180 ml of a clear and colourless liquid was received by the Lab and it was this material which after analysis was found containing 18.98% by volume of Ethyl alcohol. The prosecution has not made any effort to convince the court as to whether any sample had been drawn by a member of the court staff or whether the said sample was forwarded to the Chemical Examiner for analysis. In other words, the court is kept in the dark on which date the sample was taken or the person who had taken the samples.

15. It is evident that the court has not been appraised as to the date on which the sampling was done and the

manner in which it was done. For reasons best known to the prosecution they have not even produced the property list before court which would exacerbate the case even further. It prevents the court from coming to a finding as regards to the date of production of the property before the court and its condition at the time of production.

16. In an identical situation, this Court, in **Joseph Vs. State of Kerala [2009 (4) KHC 537]** has held as follows:

17. *"Even assuming that the samples were drawn from MO3 can, there is absolutely no evidence as to the date when the properties were produced before the Magistrate. The property list (thondi list) as per which the properties were allegedly produced before the JFCM-I, Sulthan Bathery was neither marked nor produced. Even a perusal of the lower Court records shows that there is no such property list available in the records. But PW7, the Investigating Officer would say that the property list was produced before Court on 18/08/1997 and until then the properties were in the custody of PW1. PW7 had not dealt with the properties. He had not even seen the properties. PW1 who detected the offence has no case that the properties were produced before Court on 18/08/1997 or that they were in his safe custody until the date of production. Even if there were records to show that the properties were produced before Court on 18/08/1997, there is absolutely no explanation forthcoming regarding the inordinate delay in producing the properties before the Court. There is no acceptable material to show that the properties including the sample bottle reached the Court with their seals in tact.*

18. *Yet another infirmity in the prosecution case is that there is no request or forwarding note either produced or marked*

to indicate that a request was made to the Magistrate to send the sample bottle to the chemical examiner for analysis. PW6 who conducted the investigation, has no case that he had made any such request or had filed any forwarding note. Likewise, PW1 also has no case that he had made a request to the Magistrate to send the sample bottle to the chemical examiner. Ext.P4 certificate analysis dated 24/11/1997 is relied on by the prosecution to show that the sample bottle was duly despatched to the chemical examiner for analysis. In the absence of any forwarding note or requisition, it is not explained as to how the Magistrate forwarded a sample bottle to the chemical examiner as per his covering letter dated 19/08/1997 referred to in Ext.P4 certificate. Even the office copy of the covering letter has not been produced. The thondi section clerk who was the custodian of the properties before the Magistrate, was not examined to prove matters such as the date of receipt of the property before the Magistrate, the condition in which those properties were received in Court including the fact whether a sample bottle was received and if so, whether the seals if any on such bottle were in tact, the date of despatch of the sample to the chemical examiner and the nature of the custody of the sample bottle until then. The prosecution can succeed in securing a conviction against the appellant only if it is shown that the sample which was subjected to chemical analysis as evidenced by Ext.P4 certificate was the very same sample which was drawn from the bulk quantity of contraband liquor allegedly held by the accused and which after change of hands, eventually reached the hands of the chemical examiner (See..State of Rajasthan v. Daulat Ram, AIR 1980 SC 1314: 1980 (3) SCC 303: 1980 SCC (Cri) 683: 1980 CriLJ 929, Valsala v. State of Kerala, 1993 KHC 798: 1993 (2) KLT 550 (SC): 1993 Supp (3) SCC 665: 1993 SCC (Cri) 1082: AIR 1994 SC 117: 1993 (2) Crimes 267 and Sasidharan v. State of Kerala, 2007 KHC 3404: 2007 (1) KLT 720)."

17. In view of the above fatal defect, I am of the considered view that the conviction entered and sentence passed by the courts below overlooking the above vital aspect on the matter cannot be sustained under law.

18. The revision petition is allowed and the appellant is acquitted of the offence under section 58 of the Abkari Act and he shall be set at liberty.

The fine amount deposited by the petitioner at the time of filing of the revision petition shall be released back to the petitioner.

Sd/-
RAJA VIJAYARAGHAVAN V,
JUDGE.

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[True copy]

P.A to Judge