IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

THURSDAY, THE 29TH DAY OF JANUARY 2015/9TH MAGHA, 1936

Crl.Rev.Pet.No. 1780 of 2003 ( )

AGAINST THE JUDGMENT IN CRL.A. 73/2002 of ADDL. SESSIONS COURT (ADHOC), KALPETTA DATED 08-04-2003

AGAINST THE JUDGMENT IN CC 597/2001 of J.M.F.C.-II, MANANTHAVADY DATED 10-06-2002

REVISION PETITIONER(S):APPELLANTS/ACCUSED

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1. MATHEW, AGED 42 YEARS
   S/O.THOMAS, PUTHUSSERY VEEDU
   KAYAKUNNU, NADAVAYAL.

2. THOMAS, AGED 72 YEARS
   PUTHUSSERY VEEDU
   KAYAKUNNU, NADAVAYAL.

BY ADV. SRI.P.K.ABOOBACKER(EDATHALA)

RESPONDENT(S):RESPONDENT/COMPLAINANT

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

BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 29-01-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

C.T. RAVIKUMAR, J.

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Crl.R.P. No.1780 OF 2003

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Dated this the 29th day of January, 2015

ORDER

This revision petition is directed against judgment dated 8.4.2003 in Crl.Appeal No.73 of 2002 of the Court of the Additional Sessions Judge (Ad hoc), Kalpetta confirming the conviction and sentence imposed on the revision petitioners in C.C.No.597 of 2001 by the Court of Judicial First Class Magistrate-II, Mananthavady. They were tried for an offence under section 55(h) of the Abkari Act and convicted thereunder and sentenced to undergo simple imprisonment for a period of six months each and to pay a fine of ₹25,000/- each. In default of payment of fine, they were directed to undergo simple imprisonment for a further period of six months each.

2. The case of the prosecution is that on 19.5.1997 when PW1 Sub Inspector of Police, Kumbalakkad Police Station was on

law and order patrol duty along with patrolling party, he obtained information regarding the sale of Indian Made Foreign Liquor by accused persons, without any license. Thereupon, they reached Nadavayal Village where they found the first revision petitioner effecting sale of Indian Made Foreign Liquor and the second revision petitioner collecting money. Since they were engaged in the said action without any license, they were arrested in the presence of independent witnesses and the contraband articles found in their possession were seized under Ext.P1 mahazar. On smelling and tasting, the liquid in the bottle was identified as brandy and thereafter, the sample drawn from the bottles seized from the possession of the revision petitioners were sealed. The accused and the articles were brought to Kumbalakkad Police Station and Exts.P2 FIR was registered against the petitioners. Ext.P4 chemical analysis report revealed that the samples sent for analysis contained 42.89% by volume of ethyl alcohol. PW5 conducted the investigation and on its completion he filed the final report. To prove the charge against the accused, the prosecution has examined PWs 1 to 5 and marked Exts.P1 to P4. MOs 1 to 3 were identified. On closure of prosecution evidence, the revision petitioners herein were questioned under section 313 of the Code of Criminal Procedure. They denied all the incriminating circumstances put to them. Finding that they were not entitled to be acquitted, they were asked to enter on their defence. However, they did not adduce any evidence in defence. After hearing both sides and appreciating the evidence on record, the learned Magistrate found the revision petitioners guilty under section 55(h) of the Abkari Act based on the oral testimonies of PWs 1, 3 and 5 with contemporaneous documents. Based on such finding, they were convicted and sentenced as aforesaid. The revision petitioners filed Crl.Appeal No.73 of 2002 before the Court of Additional Sessions Judge (Ad hoc), Kalpetta. The appellate court on evaluation of the evidence found no infirmity or illegality in the judgment of the trial court and thereupon, confirmed the conviction as also the sentence. This revision petition is filed in the said circumstances.

3. I have heard the learned counsel for the revision petitioners and the learned Public Prosecutor. As noticed hereinbefore, the case of the prosecution is that on 19.5.1997, PW1, the then Sub Inspector of Kumbalakad Police Station obtained an information regarding the sale of Indian Made Foreign Liquor without any licence and when they reached at Kayakunnu in Nadavayal Village found the first accused/first revision petitioner selling Indian Made Foreign Liquor and the second accused/second revision petitioner collecting money. Evidently, after the investigation, final report was filed alleging commission of offence by the revision petitioners under section 55 (h) of the Abkari Act. A perusal of the judgments of the courts below would reveal that the definite case of the prosecution was that the revision petitioners have committed offence under section 55(h) of the Abkari Act. A specific contention has been taken in ground (C) in this revision petition that the offence alleged and held as proved is under section 55(h) of the Abkari Act

and that the prosecution has failed to prove the essential ingredient to prove the said offence that the petitioners were indulging in bottling any liquor for the purposes of sale. Section 3(19A) of the Abkari Act defines expression “Bottle”. “Bottle” means to transfer liquor from a cask or other vessel to bottle, jar, flask or similar receptacle for the purpose of sale, whether any process of manufacture be employed or not, and includes rebottling. The specific case of the prosecution and also the charge framed against the revision petitioners would reveal that there was absolutely no allegation of bottling any liquor for the purpose of sale as alleged against them. It was found that the prosecution has succeeded in establishing the seizure of MO2 empty bottles and MO3 bottles containing Indian Made Foreign Liquor and ₹200/-, from the possession of the revision petitioners herein. In other words, the case of the prosecution was not that they were transferring liquor from cask or other vessel to bottle, jar, flask or similar receptacle for the purpose of sale or that they were indulging in rebottling. On the other hand, the specific case of the prosecution was that the petitioners were seen engaged in the sale of Indian made foreign liquor. In such circumstances, the revision petitioners are justified in taking up the contention that the charge under section 55 (h) would not lie against them in view of the specific case of the prosecution. At the same time, the question is whether they could claim setting aside of the conviction and sentence solely based on a defective charge and because the conviction was under section 55(h) of the Abkari Act. There cannot be any doubt with respect to the position that interference with conviction and sentence on the ground of defective charge is possible and permissible only in a case where based on such defective charge and consequent trial, prejudice has been caused to the accused. In such circumstances, it is for the revision petitioners herein to prove that on account of defective charge prejudice has been caused to them. In this case, it is evident that though commission of offence under section 55(h) of the Abkari Act is alleged in the final report and charge was also framed thereunder, the very case of the prosecution as revealed from the final report and the particulars of the court charge were to the effect that the revision petitioners were found indulged in selling of Indian Made Foreign Liquor without any licence. The revision petitioners did not have and in fact, cannot have a case that they were not let known about the said case and the charge did not contain such indication explicitly. In such circumstances, the petitioners cannot be heard to contend that they were not aware of the fact that the very case against them was one for effecting sale of Indian Made Foreign Liquor without any valid licence. In such circumstances, owing to the fact that the offence mentioned against them was under 55(h) of the Abkari Act that by itself cannot be a reason for them to claim an acquittal if there is evidence to support a conviction for the said accusation especially when the petitioners faced the trial with full knowledge of such allegations. In such circumstances, the revision petitioners cannot be heard to contend that owing to the defective charge, prejudice has been caused to them and that they were entitled to get acquittal.

4. In case of an eventuality like the case on hand the question is whether the particulars of the charge read out to accused would fall within any of the offences under the Abkari Act. Whether accused persons have participated the trial with such knowledge also have to be looked into. If the answers to those questions are in the affirmative the next questions would be whether there is evidence to support a conviction for such offence and whether the conviction of the petitioners could be altered to one under section 55(i) of the Abkari Act. To prove charge that the petitioners have effected sale of Indian Made Foreign Liquor without any licence, the prosecution got examined PWs 1 to 5. PW1 is the detecting officer and PW3 is the Police Constable who accompanied PW1 during patrolling and at the time of detection. PWs 2 and 4 are respectively the attesting witnesses to Ext.P1 seizure mahazar and Ext.P3 scene mahazar. Both independent witnesses turned hostile to the prosecution. Thus, it is evident that only PW1, PW3 and PW5 supported the prosecution case and all of them are official witnesses. True that there is no reason to

hold that a conviction based on the evidence of the official witnesses is not possible or permissible in law and in fact, it is possible provided their evidence are reliable and trustworthy. PW5 conducted the investigation and laid the final report against the revision petitioners. PW1, at the time of detection, was working as Sub Inspector of Police at Kumbalakkad Police Station. In such circumstances, he would definitely fall within the expression Abkari Inspector under section 4 (d) of the Abkari Act. Going by the provisions under section 4(d), the officers specified thereunder are the officers vested with the power under sections 40 to 53 of the Abkari Act. Government of Kerala issued SRO 234/67 dated 10.8.1967 and going by the same, all officers not below the rank of Excise Inspectors are vested with the powers under sections 40 to 53 and in such circumstances, officers from and above the rank of Excise Inspector would fall within the expression Abkari Inspector and thereby vested with the powers under sections 40 to 53 of the Abkari Act. Later, SRO No.321/96 dated 29.3.96 was issued by the Government appointing all Police Officers of and above the rank of Sub Inspectors of Police-in-charge of Law and Order and working in the General Executive Branch of Police Department within their respective jurisdiction and all Revenue Officers of and above the rank of Deputy Collectors, as Abkari Officers vested with the power under sections 40 to 53 of the Abkari Act. In short, it is evident that PW1 who detected the crime was empowered under the Act as an Abkari Inspector. PW1 would depose that on 19.5.1997 he was conducting law and order patrolling duty along with PW3 and other police men and on getting credible information to the effect that persons are effecting sale of Indian Made Foreign Liquor without any licence, he reached at Kayakunnu in Nadavayal Village and there he found the first revision petitioner engaged in selling of Indian Made Foreign Liquor and the second revision petitioner collecting money. He would also depose that in such circumstances, he arrested the revision petitioners in the presence of independent witnesses and the seized samples under Ext.P1 mahazar along with the accused persons were taken to Kumbalakkad

Police Station from where Ext.P2 FIR was registered. He would also depose that all the procedural formalities were complied with for seizing the contraband articles and also for sealing and labelling the same. PW3 is the Head Constable then attached to Kumbalakkad Police Station who accompanied PW1. Evidently, his version is corroborated with the version of the PW1. PW5, who, at the relevant point of time, was working as Assistant Sub Inspector of Police, Kumbalakkad Police Station conducted the investigation and filed the final report. This is evident from the records. In such circumstances, in view of the decision of this Court in **Sabu v. State of Kerala [2007(4) KLT 169]** which was affirmed by the Division Bench in **Subash v. State of Kerala [2008(2) KLT 1047]** the further question is whether cognizance could have been taken on the final report filed by PW5. If the answer is in the negative, the conviction as also consequential imposition of sentence on the revision petitioners would not be possible in law. Since I am of the view that the outcome of such consideration would decide whether the entire proceedings are vitiated or not and on account of the same whether the petitioners are entitled to get an acquittal the said question has to be considered first and the scope for consideration of the other aspects would arise only if the said question is answered in the negative. Before considering the said issue, it is relevant to refer to the scope of revisional jurisdiction. There can be no doubt with respect to the position that even in a case where concurrent finding of conviction and sentence are the outcome of utter perverse appreciation of evidence the revisional court is empowered to exercise the revisional jurisdiction to interfere with it. In such circumstances, if it is found that the appreciation of evidence is utterly perverse based on the evidence on record, the revisional court has to step in. I will now, revert to the question as to whether the learned Magistrate could have taken cognizance on the final report filed by PW5. The evidence on record would undoubtedly show that the investigation was conducted by PW5 and he filed the final report and it would also reveal that at that point of time, PW5 was only An Assistant Sub Inspector of Police. It is in the said context that the decisions in **Sabu**'s case (supra) and **Subash's** (supra) assumes relevance. In **Sabu**'s case, the fact that section 4 of the Abkari Act empowered the Government of Kerala to authorise an officer of the State to conduct or investigate an offence contemplated under the provisions of Abkari Act and in exercise of the said power the State of Kerala issued a notification as per G.O.(P) 69/96/TD dated 29.3.1996 (SRO 321/96) were taken into consideration. Going by the said notification, all police officers above the rank of Sub Inspector of Police-in-charge of Law and Order and working in General executive branch of the Police Department and all Revenue Officers of and above the rank of Deputy Collectors to be Abkari Officers under their respective jurisdiction for the purposes of Sections 31 to 53 and 59 of the Abkari Act. In the said circumstances, in the light of the said provision, it was held by this Court that an Assistant Sub Inspector of Police is not an officer competent to act as an abkari officer and therefore, such an officer is not empowered to investigate and file the final report. In **Subash**'s case (supra), the

Division bench considered the decision in **Sabu**'s case (supra) and further held that a Magistrate could not take cognizance of any offence under the Abkari Act based on a report filed by an Assistant Sub Inspector of Police as he is not an Abkari officer as defined under Abkari Act. When once it is found that the final report was laid by PW5 and he was then only an Assistant Sub Inspector of Police, in the light of the decision in **Sabu**'s case (supra) and **Subash'**s case (supra), the learned Magistrate could not have taken cognizance on the same. These aspects were not considered by the courts below though the evidence on record would reveal the same. Therefore, there is justification for the contention of the revision petitioners that the courts below have appreciated the evidence in utterly perverse manner and in such circumstances, this Court is bound to exercise the revisional power to do justice. When once it is found that PW5 was incompetent to conduct the investigation and to file a final report as he was not an abkari officer as defined under the Abkari Act, its natural sequel in the light of the decisions referred (supra) is that the learned Magistrate could not have taken cognizance on the said final report. When it is evident that despite such situation cognizance was taken and the revision petitioners were tried, convicted and sentenced for an offence under the Abkari Act the entire proceedings have to be quashed. In such circumstances, this revision petition is allowed. The judgment in Crl.Appeal No.73 of 2002 of the Court of Additional Sessions Judge (Ad hoc), Kalpetta confirming the conviction and sentence entered against the revision petitioners and the judgment in C.C.No.597 of 2001 passed by the Court of Judicial First Class Magistrate-II, Mananthavady are set aside. The petitioners are set at liberty. Their bail bonds stand cancelled.

Sd/-
C.T. RAVIKUMAR
(JUDGE)

spc/

C.T. RAVIKUMAR, J.

JUDGMENT

September, 2010