

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

MONDAY, THE 19TH DAY OF OCTOBER 2015/27TH ASWINA, 1937

Crl.Rev.Pet.No. 300 of 2004 (B)

**AGAINST THE JUDGMENT IN CRL.A.NO.351/1998 of ADDL. SESSIONS COURT, AD HOC-I,
THALASSERY DATED 04-12-2003**

**AGAINST THE JUDGMENT IN C.C.NO.372/1996 of ADDL.CHIEF JUDICIAL MAGISTRATE
COURT, THALASSERY DATED 02-09-1998**

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

**RAMESHAN, S/O.KUNHIKANNAN,
EDAKKAD, KANNUR.**

**BY ADVS.SRI.E.V.NAYANAR
SMT.VIDHYA. A.C**

RESPONDENT(S)/COMPLAINANT AND STATE.:

**1. EXCISE INSPECTOR,
KANNUR RANGE, KANNUR.**

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

BY PUBLIC PROSECUTOR SMT.S.HYMA.

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 19-10-
2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

Bb

RAJA VIJAYARAGHAVAN V, J.

Crl.R.P.No.300 of 2004

Dated this the 19th day of October, 2015

O R D E R

This revision petition is filed under S.397 r/w S.401 of the Code of Criminal Procedure.

2. The revision petitioner is the 1st accused in C.C.No.372/1996 on the file of the Additional Chief Judicial Magistrate Court, Thalassery and the appellant in Crl.Appeal No.351/1998 on the file of the Court of Sessions, Thalassery. In this revision petition, he challenges the judgment of the learned magistrate dated 02.09.1998 convicting him under S.55(a) of the Abkari Act and sentencing him to undergo simple imprisonment for 6 months and to pay a fine of Rs.25,000/- in default to undergo simple imprisonment for 6 months. The said finding of conviction was confirmed by the learned Sessions

Judge in Crl.Appeal.No.351/1998.

3. The case of the prosecution as revealed from the prosecution records and the evidence is that, on 17.06.1996 at about 1.45 p.m., the Excise Range Inspector, Kannur while on patrol duty, received reliable information that the petitioner was dealing with toddy in building No.4/218 at Chala bazar. A search was conducted in the premises of the building and it was found that the petitioner herein was dealing with toddy in the rear room of the aforesaid building. Search revealed 30 litres of toddy in a plastic can and 30 litres each of toddy in 2 other cans kept in the same room. Several empty glass bottles, 2 glasses and aluminium vessel and a plastic funnel were also seen in the said room. The petitioner was arrested and the contraband articles were seized as per Ext.P2 search list. Ext.P3 mahazar was prepared at the spot. Samples were taken as is revealed from Ext.P3 mahazar. The accused was arrested and the contraband articles and records were produced

before the Excise Office, Kannur. Later, a crime was registered as Crime No.10/1996. The investigation revealed that the second accused in the aforesaid crime was the licensee of the toddy shop No.76/1996-1997 of the Excise Range and the said second accused had taken premises bearing No.IV/280 from one Chappila. It was further revealed on investigation that the petitioner was assisting the second accused in dealing with toddy which was not licensed by the authorities. In view of the above, the licensee was arrayed as the second accused. The sample which was sent for analysis revealed that it contained ethyl alcohol. After investigation, charge was laid before the learned Additional Chief Judicial Magistrate, Thalassery who took cognizance of the offence.

4. In order to prove the case of the prosecution, PWs 1 to 4 were examined and Exts. P1 to P9 were marked. MOs 1 to 3 were produced and identified by the prosecution. After the close of prosecution evidence, the incriminating

materials were put to the accused. The accused denied the incriminating materials and maintained that he is innocent. No defence evidence was adduced. On the basis of the evidence adduced by the prosecution, the learned magistrate concluded that the prosecution had succeeded in proving that the accused was guilty of the offence punishable under S.55(a) of the Abkari Act r/w rule 6(1) of Abkari Shops (Disposal in Auction) Rules, 1974 and both the accused were convicted.

5. Separate appeals were preferred by the accused Nos.1 & 2 before the Court of Sessions. The learned Sessions Judge, after having considered the relevant materials, came to the conclusion that in so far as the second accused was concerned, evidence was deficient and hence the benefit of doubt was extended to him. As far as the petitioner herein is concerned, the learned Sessions Judge came to the conclusion that there was no reason to interfere with the findings of the learned magistrate.

6. I have heard the learned counsel appearing for the revision petitioner as well as the learned Public Prosecutor.

7. The learned counsel appearing for the revision petitioner has submitted that a perusal of the charge laid by the prosecution before the court below would reveal that the ingredients of the offence under S.55(a) of the Abkari Act was not attracted. Relying on a catena of decisions of this Court from **Surendran Vs. Excise Inspector [1994 (1) KLT 404]**, **Rajeevan Vs. Excise Inspector [1995 (1) KLT 38]**, **Purushan Vs. State of Kerala [2002 (2) KLT 661]** and also **Mohanan Vs. State of Kerala [2007 (1) KLT 845]**, it was submitted that S.55(a) of the Abkari Act is applicable only when a person illegally imports or transports liquor or is in possession of liquor while illegally importing. It is further submitted that it has been further held in **Josekutty Vs. State of Kerala, [2013 (1) KHC 241]** that the case shall fall within the ambit of S.55(a) of the Abkari

Act only when a person is found to be in possession of liquor in the course of import, export, transport or transit of the goods. It is further contended that in this case, as the prosecution has failed to prove that the possession was with the knowledge of goods having been illegally imported, manufactured etc., it would fall within the mischief of S.58 of the Act. It was further submitted by the learned counsel that grave travesty of justice has resulted as the prosecution case was that the second accused was the licensee of the toddy shop and it was at his instance that the toddy was sold in the instant premises. In appeal, on the ground that evidence is deficient, the benefit of doubt has been extended to the second accused and the petitioner has been found guilty. After referring to the court charge, the learned counsel has submitted that the court charge primarily centers around the second accused as the licensee of the toddy shop and the allegation against the petitioner is only that he had assisted the second accused in dealing with toddy from the premises which was taken on lease by the

second accused from one Chappila.

8. After having gone through the judgments rendered by the learned magistrate and upheld by the learned Sessions Judge, I am of the view that both the courts below have not considered the judgments which were rendered subsequently by this Court circumscribing the circumstances under which S.55(a) of the Abkari Act will be attracted in the fact situation of the case. As is rightly argued by the learned counsel appearing for the petitioner, there is absolutely no allegation that the possession of toddy by the petitioner was in course of illegal import, export, transport, transit etc., as enumerated in S.55 of the Act. As held in the above decisions, S.55(a) will be applicable only when the person illegally imports or transports liquor or is in possession of liquor while illegally importing it. At the most, possession of liquor knowing that it was illegally imported or knowing that it was not duty paid or illegally transported or manufactured, the offence will come only under S.58 of the

Act. But at the same time, there is no allegation that the petitioner was in possession of the contraband articles without lawful authority knowing the same to have been unlawfully imported, transported or manufactured or knowing that the tax, duty or rental payable under the Act has not been paid. As is clear from the section, mere possession of any quantity of liquor or intoxicating drug by itself is not sufficient to convict a person for the offence under S.58. The possession must first be without lawful authority and secondly, with the knowledge that it has been either unlawfully imported or unlawfully transported or unlawfully manufactured. (See ***Josekutty Vs. State of Kerala, [2013 (1) KHC 241]***). If that be the case, the petitioner cannot be found guilty under S.58 of the Abkari Act. In view of the above, the petitioner can only be found guilty for having violated S.63 of the Abkari Act.

9. In the case on hand, the offence was detected as early as on 17.06.1996. The permissible quantity of toddy

that one could have possessed without permit was 2.5 litres as per S.R.O.No.89/69 under G.O.(P)No.82/69/RD dated 19.02.1969 issued under S.10 & 13 of the Abkari Act. The petitioner is alleged to have been found in excess of the aforesaid quantity. Materials reveal that the petitioner herein was just the employee of the second accused, who was the licensee of toddy shop of that particular area. The prosecution charge is also that the premises was taken on lease by the second accused from one Chappila and violating the conditions of the licence, toddy was being stored by the 2nd accused. It was in the said circumstances that the accused were also charged under Rule 6 (1) of the Abkari Shops (Disposal in Auction) Rules, 1974. Due to the lapse on the part of the prosecution, the second accused who is the licensee has been acquitted. The learned counsel appearing for the petitioner has submitted that he is a poor casual labourer who was just assisting the second accused, the licensee, for the purpose of his business.

In view of the above facts and circumstances, I am of the considered view that the petitioner can only be convicted under S.63 of the Act. Hence, conviction and sentence under S.55(a) is set aside and the petitioner is convicted under S.63 and is accordingly sentenced to pay a fine of Rs.2,000/- and in default of fine to undergo simple imprisonment for one month. The amount if any deposited by the petitioner in course of proceedings shall be given credit.

The criminal revision petition is allowed in part.

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

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[True copy]

P.A to Judge