

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. 2601 of 2003 ()

**AGAINST THE JUDGMENT IN CRL.A.NO.467/2001 of SESSIONS COURT, KOZHIKODE
DATED 29-08-2003**

**AGAINST THE JUDGMENT IN C.C.NO.893/1998 of JUDICIAL FIRST CLASS MAGISTRATE
COURT, KOYILANDY, DATED 09-08-2001**

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

**CHERIYA RARU,
S/O.KORAPPAN,
PERUMTHODI HOUSE,
KEDAVOOR AMSOM,
PONNOOR DESOM,
KOYILANDY TALUK.**

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENT(S)/COMPLAINANT & STATE:

- 1. THE EXCISE INSPECTOR, BALUSSERY**
- 2. 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:**

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RAJA VIJAYARAGHAVAN V, J.

Crl.R.P.No.2601 of 2003

Dated this the 19th day of October, 2015

O R D E R

In this Criminal Revision Petition filed under S.397 r/w S.401 of the Code of Criminal Procedure, the revision petitioner challenges the concurrent findings of guilt arrived against him.

2. Skeletal facts necessary for the disposal of the criminal revision petition is that on 12.09.1995 at about 5.30 p.m., while the Excise Inspector, Balussery Excise Range along with his party were on patrol duty and when they reached the northern part of the road near to the house of one Joy, they had occasion to see the petitioner coming from the east carrying a plastic can having a capacity of 2.5 litres. The petitioner was detained on suspicion and when the can was examined, it was revealed

that it contained illicit liquor. The petitioner was arrested and the contraband article was seized. Sample was taken as per Ext.P1 seizure mahazar. Later, investigation was conducted and charge was laid before the jurisdictional court.

3. In order to prove the case of the prosecution, as many as 4 witnesses were examined as PWs 1 to 4. Exts. P1 to P4 were marked. MO1 can was produced and identified. The learned magistrate, on an appreciation of the oral as well as the documentary evidence, came to the conclusion that the prosecution has been able to prove that the petitioner has committed the offence as alleged and he was convicted under S.58 of the Abkari Act and was sentenced to undergo simple imprisonment for 2 months and to pay a fine of Rs.15,000/- in default to undergo simple imprisonment for 2 months. Against the said judgment, conviction and sentence, the revision petitioner herein preferred Crl.Appeal No.467/2001 before the Court of

Session, Kozhikode Division. As per judgment dated 29.08.2003, the learned Sessions Judge, after re-appreciating the evidence, came to the conclusion that, there was sufficient evidence to warrant the conviction and sentence passed by the learned magistrate was confirmed. It is against the above concurrent findings of guilt that the petitioner is preferred this criminal revision petition.

4. I have heard the learned counsel appearing for the revision petitioner and also the learned Public Prosecutor.

5. The learned counsel appearing for the revision petitioner has submitted that the conviction arrived at against the petitioner for having committed offence under S.58 of the Abkari Act cannot be sustained under law. According to the learned counsel, there is total absence of allegation that the petitioner without lawful authority, was in possession of any quantity of liquor or intoxicating drug, knowing that the same to have been unlawfully imported,

transported or manufactured, or knowing that the duty, tax or rental payable not to have been paid therefor. It is further submitted that there is undue delay in the contraband articles reaching court which would also aid the petitioner to canvass for an acquittal. It is further contended that the contraband articles which were allegedly seized on 12.09.1995 has reached the court only on 18.09.1995 and there is absolutely no explanation from the side of the prosecution as to where these items were retained till the same was produced before the learned magistrate. It is the further contention of the learned counsel that the prosecution has failed to prove any satisfactory link to show that the contraband articles which were seized from the appellant had eventually found their way into the hands of the Chemical Examiner.

6. The evidence adduced by the prosecution would reveal that PW1, who was the Excise Inspector along with PW2, the Excise Guard had detected the offence while on

patrol duty. It is also seen that the accused was arrested at the spot and the seizure was effected promptly. Though PW3, the independent witness had not supported the case of the prosecution, he has admitted his signature in Ext.P1 mahazar. The Chemical Analysis Examiner's report also revealed that the sample contained 33.03% by volume of ethyl alcohol. Though there is some delay in producing the seized articles before court, it is clear from the prosecution records that the seizure has been reported before the jurisdictional court forthwith. The prosecution evidence does reveal that the formalities as regards search and seizure were promptly complied with. As held in **Ravi V. State of Kerala and Another [2011 (3) KHC 121]**, it is not necessary to produce the articles seized forthwith but the statute only mandates that the seizure should be reported forthwith and therefore the contention of delayed production of seized articles by itself will not aid the defence to canvass for an acquittal.

7. The only question is whether the proven facts would bring the offensive act committed by the petitioner within the ambit of S.58 of the Abkari Act.

8. In the instant case, detection of the offence was on 12.09.1995. It was by Act 4 of 1996 which came into force on 27/03/1996, that after clause 6 of S.3, clause 6A was inserted defining arrack. S.8 was also inserted providing prohibition of manufacture, import, export, transport, transit possession, storage and sale of arrack. Under S.8, no person shall manufacture or import, export, transport, transit, possess storage, distribute, bottle or sell arrack in any form. Therefore, by virtue of S.8 there is a prohibition for possessing arrack in any form came into force w.e.f. 27/03/1996. It was only by amendment Act 16 of 1997, which came into effect on 03/06/1997 sub-section (2) of S.8 was inserted after renumbering original S.8 as sub-section (1) of S.8 providing punishment for contravention of sub-section (1) of S.8. Therefore, before 03/06/1997, no

specific punishment was provided for contravention of the provisions of S.8 as it then stood. As rightly contended by the learned counsel appearing for the revision petitioner, in order to attract S.58 of the Act, there should be specific allegation that the petitioner had without lawful authority, was in possession of any quantity of liquor or any intoxicating drug knowing that the same to have been unlawfully imported, transported or manufactured, or knowing that the duty, tax or rental payable not to have been paid therefor.

9. I have gone through the specific allegations in the charge leveled against the revision petitioner and also the evidence of PWs 1, 2 & 4. 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. Faced with such a situation, the learned Public Prosecutor submitted that S.63 of the Act would squarely apply and he can be convicted under that section as has been held in Josekutty (supra). S.63 provides that, whoever is guilty of any act or intentional omission in contravention of any of the provisions of the Act, or of any rule or order made under the Act, and not otherwise provided for in the Act shall, on conviction be punished for each such willful act or omission with fine each at the time of commission of the offence may extend to two thousand rupees. The incident was detected on 12.09.1995, and at that time, arrack was

not prohibited. The permissible quantity of arrack that one could have possessed without permit was 750 ml. 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 possession of 2.5 liters of arrack.

10. In the instant case, the revision petitioner was found in possession of arrack in excess of the permissible quantity. Therefore, he can be found guilty of possession of illicit arrack in contravention of S.10 & 13 of the Abkari Act under the above mentioned notification issued by the Government which is punishable under S.63 of the Abkari Act. In view of the above, I set aside the conviction of the revision petitioner under S.58 of the Abkari Act and convict him under S.10 & 13 of the Abkari Act r/w.S.63 of the Abkari Act.

11. As the conviction under S.58 of the Abkari Act

has been set aside and as the petitioner has been convicted under S. 63 of the Abkari Act, the sentence imposed by the trial court as confirmed in appeal by the learned Sessions Judge has to be necessarily set aside. The petitioner is sentenced to pay a fine of Rs.2,000/- in default to undergo simple imprisonment for a period of 1 month under S.63 of the Abkari Act. It is submitted by the learned counsel that he has deposited a sum of Rs.5,000/- towards fine as directed by this court at the time of admission. The amount deposited in excess of Rs.2,000/- imposed by way of fine shall be refunded within a period of 3 months.

In the result, the criminal revision petition is allowed in part.

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

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[True copy]

P.A to Judge