

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

THURSDAY, THE 3RD DAY OF SEPTEMBER 2015/12TH BHADRA, 1937

Crl.Rev.Pet.No. 437 of 2006 ()

**AGAINST THE JUDGMENT IN CRL.A.NO.324/2005 of ADDL.SESIONS COURT,
FAST TRACK COURT - II, ALAPPUZHA DATED 28-10-2005**

**AGAINST THE JUDGMENT IN S.C.NO.173/2004 of ADDL.ASST.SESIONS COURT,
ALAPPUZHA DATED 08.04.2005**

REVISION PETITIONER(S)/APPELLANT/ACCUSED.:

**VASUDEVAN ACHARI, S/O.KUTTAPPAN,
KUTTY AYYATHU VEEDU, DEVIKULANGARA MURI,
PUTHUPPALLI VILLAGE, KAYAMKULAM.**

BY ADV. SRI.A.SHAFAEEK

RESPONDENT(S)/COMPLAINANT.:

**STATE OF KERALA
REP.BY SUB INSPECTOR OF POLICE, KAYAMKULAM THROUGH THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT.M.G.LISHA.

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
18.08.2015, THE COURT ON 03-09-2015, PASSED THE FOLLOWING:**

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RAJA VIJAYARAGHAVAN V, J.

Crl.R.P.No.437 of 2006

Dated this the 03rd day of September, 2015

ORDER

The sole accused in S.C.No.173/2004 on the file of the Additional Assistant Sessions Judge, Alappuzha who stands convicted under section 55(a) of the Abkari Act and sentenced to undergo simple imprisonment for 2 years and to pay a fine of Rs.1,00,000/- and in default to undergo simple imprisonment for 6 months, has come up in revision.

2. The case of the prosecution, tersely, is as follows:-

Based on reliable information, the Circle Inspector of Police, Kayamkulam searched the house of the petitioner on 27.12.2002 at about 7.45 p.m after complying with all formalities. A black can of 10 litres capacity containing

arrack was detected. The contraband articles, some bottles and a glass found nearby were seized as per Ext.P1 mahazar. The petitioner was duly arrested and Crime No.713/2002 was registered. Investigation was conducted by PW7, and he laid charge before the court under section 55(a) of the Abkari Act.

3. To bring home the charge, the prosecution examined as many as 7 witnesses. Exts.P1 to P 13 were marked. MO' s 1 to 3 were produced and identified. The learned Assistant Sessions Judge, on an evaluation of the entire evidence, came to the conclusion that the prosecution had succeeded in establishing its case and convicted the petitioner under section 55(a) of the Abkari Act. Challenge raised by the petitioner against the conviction and sentence before the Court of Sessions resulted was repelled. The above concurrent findings are under challenge in this Criminal Revision.

4. I have heard Shri.A.Shafeek, the learned counsel appearing for the petitioner and also the learned Public Prosecutor.

5. The learned counsel, at the outset, submitted that the petitioner was aged 55 years when the offence was detected and was a watch repairer by profession. He also submitted that the petitioner is partially paralyzed and produced a certificate evidencing the same. According to the learned counsel, though the contraband articles were detected from his house, there were other inmates and this aspect was suppressed by the detecting officer and ignored by the courts below. It was finally urged by the learned counsel by placing reliance on various precedents that conviction entered cannot be sustained in view of the fact that the seizure of the contraband as well as the seizure was not forthwith reported before the learned magistrate and the undue delay in producing the contraband before court without offering a proper explanation for the same

warranted an acquittal. According to the learned counsel judgment reported in **Ravi Vs. State of Kerala [2011 (3) KLT 353]** and **Raju Vs. State of Kerala [2012 (2) KLD 912]** applies to the facts and circumstances.

6. On the other hand, the learned Public Prosecutor has contended the records would reveal that Ext.P1 mahazar as well as Ext.P7 First Information Report had reached the court on the next day of seizure and this would prove that there is no falsity in the case of the prosecution. According to the learned Public Prosecutor, the evidence let in by the prosecution was consistent and the same was appreciated by the trial court as well as the appellate court and a concurrent finding of guilt was arrived at against the petitioner. It is the contention of the learned Public Prosecutor that interference in revision was unwarranted.

7. The only question before this court is whether the concurrent findings entered into by the courts below

warrants interference in revision.

8. Though re-appreciation of the evidence is not warranted while exercising revisional jurisdiction, the learned counsel appearing for the petitioner fervently requested this court to analyse the materials minutely to appreciate his contention that conviction was wrongly entered into against the petitioner.

9. The evidence let in would reveal that the Circle Inspector of Police, Kayamkulam who was examined as PW7, received information that on 27.12.2002 at 7.45 p.m., the petitioner was dealing with in illicit arrack from his house. On the basis of the said information, he proceeded along with PW3 - and other police personnel to the house of the petitioner. When the police party reached the aforementioned house, the petitioner was seen standing outside. The search memo was prepared and the same was dispatched to the court and thereafter, search was

conducted inside the house. Search revealed that a can having a capacity of 10 litres and a glass was kept beneath the cot found in the southern most room of the said house. The can contained 4 litres of illicit arrack and after detection of the contraband, the petitioner was arrested at 8.25 p.m. PW7 has sampled the arrack in 2 bottles and thereafter, the can containing illicit arrack, 2 bottles of samples and the glass found near to the can were seized as per Ext.P1 mahazar. He thereafter, registered the crime. The evidence of PW7 is corroborated by PW3 who was the Police Constable attached to the special squad of the Circle Inspector of Police, Kayamkulam. He has deposed in tune with what PW7 has stated before court. The said officer has also identified the material objects which were marked before court.

10. The independent witnesses who were examined before the prosecution case had turned hostile though they admitted their signatures in Ext.P1 mahazar. The

prosecution had also proved the ownership of the house from where the contraband was seized in the name of the petitioner. The Chemical Examiner to the Government of Kerala was also examined as PW5 to prove Ext.P5 - the certificate of Chemical Analysis.

11. In order to prove that there is a grave infirmity in the case of the prosecution, the learned counsel appearing for the petitioner relies on Ext.P11 - the property list which was forwarded to the learned magistrate by PW7. As earlier stated, the offence was detected by PW7 on 27.12.2002. At the time of detection, a can having a capacity of 10 litres and a glass was seized. At the item of detection itself, 2 samples were taken in 2 bottles having a capacity of 180 ml. These properties are listed in Ext.P11 property list which were sent to the magistrate.

12. In the instant case it is revealed that Ext.P11 property list detailing 4 items which were seized as per

Ext.P1 mahazar was produced before court only on 30.12.2002. There is no explanation whatsoever from the investigating officer as to why the samples seized or the contraband articles were not produced before court along with Ext.P1 or P7 which is produced before court on 28.12.2002. Ext.P11 was produced along with Ext.P12 requisition letter and forwarding note. Exts.P11 and 12 also reaches the court only on 30.12.2002. From Ext.P12, it is revealed that the sample bottle seized in the above crime was dispatched along with four other sample bottles which were seized in Cr.No.606/02. When PW7 was cross-examined a specific question was put as to why though the FIR and other records were reported before the learned magistrate on the next day itself, the samples seized, the requisition letter, the forwarding note etc., were not produced before court along with the same. The answer offered by the detecting officer who himself conducted the investigation is that he was not able to do that. This particular portion of the evidence is relied on by the learned

counsel appearing for the petitioner to advance his point that no proper explanation is offered for late production of the seized article before court. According to the learned counsel it is for the prosecution to establish by satisfactory evidence that samples taken from the contraband articles seized from the possession of the accused were actually forwarded to the chemical analyst for examination. According to the learned counsel it is not enough for the prosecution to examine the chemical analyst and prove that the same contained Ethyl alcohol. It is of the prosecution to provide the link evidence to show that the materials seized had ultimately reached the chemical analyst for the purpose of the examination of its contents. Failure to satisfactorily prove the links will be fatal to the prosecution because the violation entails serious repercussions in so far as the accused is concerned.

13. In **Rajan v. State of Kerala [2013 (3) KLT 654]** this court had held as follows:

"It is not necessary that the articles seized under Section 34 of the Abkari Act should be produced before the Magistrate Court "forthwith", whereas, it would be sufficient if the records relating to the seizure were produced "forthwith" before the learned Magistrate. Wherever it is practicable, the contraband should also be produced along with the records itself and in case of delay in the production of the contraband, there should be explanation for the delay."

14. Even though the testimony of PWs 3 and 7 can be relied on to hold that the a black can containing a liquid believed to be illicit arrack was kept by the petitioner in his house, the prosecution can succeed only if it is shown that a sample drawn from the can allegedly found and forwarded to the chemical examiner through the Court of the committal Magistrate was found to contain ethyl alcohol so as to conclude that it was illicit arrack. Ext.P1 mahazer would reveal that the can of capacity 10 litres was not sealed when the mahazer was prepared. Whereas exhibit P 11 property list would reveal that the can which is produced before the learned magistrate was a sealed one. Ext.P5 report of chemical analysis would reveal that it was as per

requisition letter dated 8.01.03 that the Sample bottle was dispatched by the learned magistrate to the lab for analysis. Neither in Ext.P1 mahazar nor in Ext.P11 property list is any specimen seal affixed. The requisition letter produced and marked as Ext.P12 also does not contain a copy of the specimen seal. These aspects will create doubts in the case of the prosecution as has been held in **Mohanan V State of Kerala [2014 (2) KLD 427]**.

15. In **Ravi Vs. State of Kerala [2011 (3) KLT 353]**, the question was whether it was necessary that article seized under section 34 of the Abkari Act be produced before court forthwith either by virtue of section 102(3) of the Code or any other provisions of Abkari Act or Abkari Manual. After considering all the relevant provisions, the Division Bench had answered the reference as follows:

"It is not necessary to produce the article seized under S.34 of the Abkari Act before the Magistrate "forthwith" either by virtue of S.102(3) Cr.P.C or by virtue of any of the provisions of the Abkari Act or the Abkari Manual. What is enjoined by the statute is only that the seizure of the property should be reported forthwith to the Court. But we

hasten to add that the production of the property before Court (wherever it is practicable) should also take place without unnecessary delay. There should be explanation for the delay when there is delayed production of the property."

16. In **Raju Vs. State of Kerala [2012 (2) KLD 912]**, a Single Judge of this Court has observed as follows:

"In Ravi's Case (Supra), the Division Bench categorically held that although the Act does not say that the contraband articles should be forwarded to the Court forthwith, it specifically prescribed that the seizure should be reported to the Court 'forthwith'. Here, although the seizure was on 30/10/1997, it was reported to the Court only on 03/11/1997. The witnesses have not even offered any explanation for the delay. For these reasons, I am of the opinion that the prosecution has failed to prove that the sample taken from the contraband was the one sent to the Chemical Examiner for analysis."

In view of the above, I am of the considered view that it may not be safe to record a conviction against the accused who is definitely entitled to the benefit of doubt arising therefrom. The conviction entered by the Court below overlooking these vital aspects of the matter cannot therefore be sustained and is accordingly dislodged. The

petitioner is, therefore, found not guilty of the offence punishable under S.55(a) of the Abkari Act and is acquitted there under. He is set at liberty.

The Revision Petition is allowed.

Sd/-
RAJA VIJAYARAGHAVAN V,
JUDGE.

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[True copy]

P.A to Judge