

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 13TH DAY OF AUGUST 2015/22ND SRAVANA, 1937

Crl.Rev.Pet.No. 861 of 2004 (C)

AGAINST THE JUDGMENT IN CRA 137/1998 of ADDL.DISTRICT COURT (ADHOC),
KASARAGOD DATED 30-01-2004

AGAINST THE JUDGMENT IN CC 296/1996 of J.M.F.C.-II, HOSDRUG
DATED 22-06-1998

REVISION PETITIONER/APPELLANT/ACCUSED:

MANGALOTT RADHA, W/O. SUNDARAN,
RESIDING AT OMANAMANGALAM, PARAPPA VILLAGE.

BY ADVS.SRI.M.THAMBAN
SMT.T.SUDHAMANI

RESPONDENTS/COMPLAINANT AND STATE:

1. THE CIRCLE INSPECTOR,
HOSDURG EXCISE RANGE.

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

BY P.P.SRI.JIBU P. THOMAS

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
13-08-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. RAMAKRISHNAN, J.

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Crl.R.P.No.861 of 2004
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Dated this the 13th day of August, 2015.

O R D E R

The accused in C.C.No.296/1996 on the file of the Judicial First Class Magistrate Court-II, Hosdurg, is the revision petitioner herein. The revision petitioner was charge sheeted by the Excise Inspector, Hosdurg under section 58 of the Abkari Act.

2. The case of the prosecution in nutshell was that on 9.10.1995 at about 3 p.m the accused was found to be in possession of 6 litres of illicit arrack and found carrying the same in violation of the provisions of the Abkari Act and thereby she had committed the offence punishable under section 58 of the Abkari Act.

3. After investigation, final report was filed and it was taken on file as C.C.No.296/1996 on the file of the Judicial First Class Magistrate Court-II, Hosdurg. When the accused appeared before the court below, particulars of the offence were read over and explained to her and she pleaded not guilty. In order to prove the case of the prosecution, Pws 1 and 2 were

examined and Exts.P1 to P3 and MO 1 were examined on their side. After closure of the prosecution evidence, the accused was examined under section 313 of the Code of Criminal Procedure and she denied all the incriminating circumstances brought against her in the prosecution evidence. She had further stated that she had not committed any offence and she has been falsely implicated in the case. No defence evidence was adduced on her side. After considering the evidence on record, the trial court found the revision petitioner guilty under section 58 of the Abkari Act, convicted her thereunder and sentenced her to undergo rigorous imprisonment for three months and also to pay a fine of ₹15,000/-, in default to undergo rigorous imprisonment for one month. Aggrieved by the same, she filed Crl.A.No.137/1998 before the Sessions Court, Kasaragod and the learned Additional Sessions Judge (Adhoc-I), Kasaragod dismissed the appeal confirming the order of conviction and sentence passed by the court below. Aggrieved by the same, the present revision has been filed.

4. Heard counsel for the petitioner and the Public Prosecutor and perused the records.

5. The Public Prosecutor submitted that both the courts

below have concurrently found that the accused has committed the offence and that finding does not call for any interference.

6. The case of the prosecution as emerged from the prosecution witnesses was that on 9.10.1995 at about 3 p.m while PW2, the Excise Inspector, along with the excise party was doing patrol duty and when they reached the place of occurrence, they saw the accused coming with MO1 cannas in her hand and on seeing the excise party, she found perplexed and immediately they stopped her and on examining the contents of the cannas, they were satisfied that it was arrack. They had taken sample of 180 ml and sealed the same and thereafter sealed MO1 cannas and seized the same as per Ext.P1 seizure mahazer in the presence of PW1 and another. Thereafter he arrested the accused and came to the office and registered Ext.P2 occurrence report as Cr.No.268/1995 against the accused under section 58 of the Abkari Act. He completed the investigation and produced the occurrence report, seizure mahazer and forwarding note with application to send the sample for chemical analysis and the thondi articles before court on 10.4.1996. The sample was sent from court for analysis and Ext.P3 report was obtained which showed that it

contained 24.30% volume of ethyl alcohol.

7. PW1 is an attester to Ext.P1 mahazer. Though he had admitted his signature in Ext.P1, he denied having seen the seizure. But he had admitted that he knew the accused. So it is clear from the evidence that he is trying to help the accused and that was the reason why he is not supporting the case of the prosecution.

8. Then the evidence available is that of PW2, the detection cum investigating officer. He had categorically stated that on the date on which he had conducted the patrol duty, he found the accused coming with MO1 kannas and he stopped her as she was found to be perplexed on seeing them and on verification of contents of kannas, it was revealed that it was arrack. So he arrested the accused and taken sample and after sealing the kannas and the sample bottle, seized the same as per Ext.P1 mahazer and came to the office and registered Ext.P2 occurrence report. It was admitted by PW2 that articles were produced before court along with the occurrence report and the final complaint which was filed on 10.4.1996 and he had stated that there is no reason for the delay in producing the same. The incident occurred on 9.10.1995. Even assuming

that the entire prosecution case is admitted, unless it is proved by the prosecution that articles were produced before court without tamper proof condition and the chemical analysis report relates to the representative sample taken from that article, it cannot be said that the prosecution has proved beyond reasonable doubt that the accused was found to be in possession of arrack so as to convict her for the offence alleged. In this case, the alleged incident occurred on 9.10.1995, but the seizure mahazer, property list and the thondi articles were produced before court only on 10.4.1996. There is no explanation forthcoming from the side of the prosecution for the delay. The forwarding note was prepared on 6.4.1996 ie, after more than five months of the alleged seizure.

9. It is settled law that merely because the prosecution proved that some liquid was seized from the possession of the accused, that alone is not sufficient to come to a conclusion that the prosecution has proved beyond reasonable doubt that the accused was found to be in possession of arrack. It must be proved by the prosecution that the chemical analysis report produced before court relates to the representative sample that has been taken from the liquid alleged to have been seized

from the possession of the accused. Further, it must be proved by the prosecution that the articles reached the court without tamper proof. This was so held in the decision reported in ***Ravi v. State of Kerala & another*** (2011(3) KHC 121). It may be mentioned here that though in the evidence, PW2 had stated that he had affixed label, there is nothing mentioned in Ext.P1 seizure mahazer regarding the affixture of any label containing signatures of the accused and the witnesses on the sample bottle or on MO1 kannas. Further, in Ext.P1 the nature of seal affixed was also not mentioned which are necessary for the purpose of coming to a conclusion that the article was kept in tact and reached court without any tampering to conclude that the articles seized were the same articles which were produced before court. But, in this case in the absence of affixture of label mentioned in Ext.P1 mahazer and finding label on MO1 produced before court create doubt regarding genuineness of the article said to have been seized from the possession of the accused. So under the circumstances, the courts below were not justified in coming to the conclusion that the prosecution has proved beyond reasonable doubt that the accused was found to be in possession of arrack and thereby she had

committed the offence punishable under section 58 of the Abkari Act .

10. Further in the decision reported in ***Josekutty v. State of Kerala*** (2013 (1) KHC 241), a Division Bench of this Court has held that in order to convict the accused for the offence under section 58 of the Act prior to amendment namely 3.6.1997, it must be alleged and proved by the prosecution that the accused was found to be in possession of illicit arrack knowing that it was illegally manufactured. Such an allegation was not there in the complaint though it was mentioned that she was found to be in possession of illicit arrack. The fact that it was illicit arrack can be gathered by the investigating officer only after getting chemical analysis report which was obtained by the court after the final complaint was filed in court. So under the circumstances, the court below was not justified in convicting the accused for the offence under section 58 of the Abakri Act and she is entitled to acquittal of the charge levelled against her giving her the benefit of doubt and the order of conviction against the revision petitioner under section 58 of the Abkari Act is set aside. In view of the finding that the accused is entitled to get acquittal, the sentence imposed by

the court below is not proper and the same is liable to be set aside.

In the result, the revision petitioner succeeds and the revision is allowed. The order of conviction and sentence passed by the court below against the revision petitioner under section 58 of the Abkari Act are set aside and she is acquitted of the charge levelled against her giving her the benefit of doubt. She is set at liberty. The bail bond executed by the petitioner shall stand cancelled. The court below is directed to refund the fine amount if any deposited by the accused on making such an application before that court.

Office is directed to communicate a copy of this order to the concerned court immediately.

Sd/-

K. RAMAKRISHNAN, JUDGE.

/true copy/

P.S to Judge

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