

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

WEDNESDAY, THE 19TH DAY OF AUGUST 2015/28TH SRAVANA, 1937

Crl.Rev.Pet.No. 2896 of 2003

CRA 78/2000 of ADDL.DISTRICT AND SESSIONS COURT, FAST TRACK (AD
HOC-I), KOZHIKODE
CC 183/1997 of JUDL.MAG. OF FIRST CLASS, PAYYOLI

REVISION PETITIONER(S):

GOPALAN, S/O CHOYIKUTTY,
VALIYA PARAMBIL VEEDU, KIZHUR AMSOM DESOM

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENT(S):

STATE OF KERALA, REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA

BY PUBLIC PROSECUTOR SMT. BINDU GOPINATH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 19-08-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

RAJA VIJAYARAGHAVAN.V. J

Crl.R.P.2896 of 2003

Dated 19th August, 2015

ORDER

1. The instant revision petition is directed against the conviction and sentence passed against the petitioner for offence punishable u/s 55(a) of the Abkari Act (for brevity "the Act"). He was sentenced to undergo simple imprisonment for two months and to pay a fine of Rs.25,000/- and in default, simple imprisonment for two months.

2. The case of the prosecution is that on 20.11.1995, information was received that the petitioner was conducting sale of arrack without licence. PW1, the Sub Inspector of police along with his party proceeded to Samskarika Nilayam at Melady. They found the petitioner engaged in the sale of arrack with about 35 bottles of arrack

together with empty bottles and glasses. Petitioner was arrested and the contraband articles were seized. Ext.P2 mahazar was prepared and crime was registered. On the next day, the seized articles and the accused were handed over to the excise. The investigation was conducted by PW4, the Excise Inspector, Quilandy who laid charge before Court.

3. In order to prove the case of the prosecution, PW1 to 5 were examined and Exts.P1 to P6 were marked. MO1 to 10 were produced and identified. The learned Magistrate on an evaluation of the evidence let in by the prosecution came to the conclusion that the petitioner was found in possession of arrack without valid license and found him guilty u/s 55(a) of the Act and sentenced him as aforesaid. The appeal, preferred against the conviction and sentence passed by the learned

Magistrate, was dismissed confirming the conviction and sentence. It is against the concurrent findings that the petitioner is before this Court.

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

5. The learned counsel appearing for the petitioner assailed the impugned judgements on various grounds. According to the learned counsel, conviction of the petitioner is bad as the prosecution has failed to provide the link evidence to prove convincingly that the contraband articles seized from the possession of the petitioner was actually analysed by the chemical examiner. There are several discrepancies in the records produced , which according to the learned counsel was sufficient

enough to dislodge the concurrent findings of guilt. The learned Public Prosecutor, on the other hand, contended that the prosecution by examining PW1 to 6 and by marking Exts.P1 to P5 convincingly proved the culpability of the petitioner. It was further contended that the contraband articles were produced before the Court without any undue delay and Ext.P6 chemical analysis report revealed the presence of ethyl alcohol in the sample. According to the learned Public Prosecutor, there was no reason to interfere with the concurrent findings entered by the Courts below.

6. I have anxiously considered the rival contentions. The records would reveal that the offence was detected by PW1, the Sub Inspector of police and he was accompanied by PW2, the Head Constable. PW3 and 5 are the two independent

witnesses who were examined to prove the seizure. They also gave evidence in support of the prosecution. It can be seen from the evidence that four 375 ml bottles , twelve 180 ml bottles and nineteen 100 ml bottles filled with arrack and in addition a number of empty bottles, glasses, plastic mug, buckets, tray etc., were seized from the possession of the petitioner by PW1 the Sub Inspector of police on 20.11.1995. The evidence of PW1 would reveal that he had prepared Ext.P2 mahazar evidencing the seizure. In Ext.P2 mahazar, the items seized from the possession of the petitioner are mentioned in detail. The said officer had registered crime No.214 of 1995 on 20.11.1995 itself u/s 55(a) of the Act based on the seizure. PW1 would further say that after effecting the seizure and after registration of the crime, the items seized and the accused were handed over to the

Excise Inspector, Quilandy, on the next day, ie., on 21.11.1995.

7. The evidence of PW4 would reveal that he was the Excise Inspector, Quilandy and on 21.11.1995 he had taken custody of the seizures as well as the accused who was arrested in crime No.214 of 1995. On the same day itself, Ext.P4 occurrence report was prepared by PW4. The argument of the learned counsel centres around Ext.P4 occurrence report. According to the learned counsel, Ext.P4 occurrence report would reveal the falsity of the case of the prosecution.

8. It is seen from Ext.P4 occurrence report that 16 items were described to have been seized by the Police Inspector of Payyoli police station. The 16 items seized are described in detail in Ext.P4. There

is no evidence whatsoever in the crime and the occurrence report that the seized materials were in fact forwarded to the Court by PW4. The prosecution has not produced either the property list nor any covering letter addressed by the said officer to the learned Magistrate to bring out the fact that the items seized as per Ext.P2 or as evidenced by Ext.P4 crime and occurrence report were in fact produced before the learned Magistrate. The prosecution relies on Ext.P5, the forwarding note as per which the sample bottles were forwarded to the Chemical examiner to prove the fact that the sample bottles, 4 in number, were actually forwarded to the chemical examination Lab. The main contention urged by the learned counsel for the petitioner is that the link evidence, to show that the items seized as per Ext.P2 occurrence seizure mahazar and Ext.P4 occurrence report were in fact the items which were

actually forwarded to the Chemical examination Lab, is absent. The learned counsel invited the attention of this Court to the 'thondy' list prepared by Excise Inspector, Quilandy, allegedly on 21.11.1995 and which is seen forwarded to the Chief Judicial Magistrate Court, Kozhikode. According to the learned counsel, the said document has not been marked by the prosecution for unjust reasons. The said document was suppressed from the eyes of the Court, with obvious malicious motive according to the learned counsel.

9. I have perused the 'thondy' list involved in crime No.120 of 1995 by Quilandy Excise Range which originated from crime No.214 of 1995 of Payyoli police station which is initialled by the Excise Inspector and also by the learned Magistrate . It is seen from the 'thondy' list that the same was

originally produced before the learned Magistrate on 22.11.1995 as seen from the endorsement made by the learned Magistrate. It is seen from the list that the same was returned on the same day itself because of the absence of the specimen seal. It is also seen from the said document that the property list was re-submitted after obtaining the specimen seal on 23.11.1995 by the Excise Inspector, Quilandy. The property list as well as the 'thondy' list were re-submitted after making further correction and with two sample bottles of 100 ml capacity which apparently are among the sample bottles which were sent for analysis. The endorsement made on the back side of the property list would reveal that on the date of production of the seized items, there was no specimen seal. It is also seen from the said document that the sample bottles were later produced before the Magistrate

along with the specimen seal. It is also seen that neither in Ext.P2 seizure mahazar or in the occurrence report, a copy of the specimen seal was seen endorsed. A Division Bench of this court in **Ravi v. State of Kerala (2011 (3) KLT 353)** observed as follows:-

"The prosecution in a case of this nature can succeed only if it is shown that the contraband liquor which was allegedly seized from the accused ultimately reached the hands of the Chemical Examiner by change of hands in a tamper proof condition. No conviction can be entered against the accused in a prosecution as the present one unless it is proved that the sample which was analysed in the Chemical Examiner's laboratory was the very same sample drawn from the contraband liquor allegedly found in the possession of the accused."

10. As has been held in the above judgment no conviction can be entered against the accused in a prosecution unless it is proved that the sample which was analyzed in the Chemical Examination Lab

was the same sample drawn from the contraband liquor allegedly found in the possession of the accused. I find that though the detection and seizure was proper, the prosecution has not succeeded in proving successfully that the items seized from the possession of the petitioner on 22.11.1995 was exactly the same item which were despatched to the Chemical Examination Laboratory for the purpose of analysis. There are gross discrepancies in the records produced before the Court below which would create serious doubt in the case of the prosecution. In **Sasidharan v. State of Kerala (2007 (1) KHC 275)** this Court has held as follows:-

" It is not known as to whether the said sample was drawn from the Jerry Can , allegedly seized from the accused and produced before court . Even if the said sample was drawn from the Jerry Can , there is no evidence to show who drew the sample and on what date. There is also no evidence before court to show the date of despatch of the sample . In a case of this nature the prosecution can only succeed if it establishes that the sample which had

*changed several hands had ultimately reached the hands of the chemical examiner in a tamper proof condition and that it was the same sample which was drawn from the contraband liquor allegedly seized from the accused . (Vide **State of Rajasthan V Daulat Ram 1980 (3) SCC 303**)*

11. Similar is the situation in this case . When the consequences are grave, the courts are bound to analyse all materials to ascertain whether the prosecution has succeeded in bringing home the guilt. There is absolutely no evidence to establish that the samples were drawn from the bottles which were actually seized from the possession of the petitioner and that the very same samples had reached the chemical examiner. The suppression of the documents which are normally produced to establish the link evidence by the prosecution will exacerbate the case even further. I am unable to concur with the findings of the courts below that the prosecution has established its case beyond the

shadow of doubt.

12. In view of the above, conviction recorded and the sentence passed by the Courts below overlooking the above vital aspects cannot be sustained and the petitioner is found not guilty u/s 55(a) of the Act and he is acquitted. The petitioner is set at liberty.

The revision petition is allowed as above.

Sd/-

RAJA VIJAYARAGHAVAN.V.
Judge

MrCS

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P.S To Judge