

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

TUESDAY, THE 6TH DAY OF JANUARY 2015/16TH POUSHA, 19361

Crl.Rev.Pet.No. 2936 of 2003 ()

AGAINST THE JUDGMENT IN CRA 223/2000 of COURT OF ADDL.SESIONS
JUDGE, MANJERI DATED 08-04-2003

AGAINST THE JUDGMENT IN CC 328/1998 of COURT OF JUDICIAL FIRST CLASS
MAGISTRATE, MALAPPURAM DATED 16-09-2000

REVISION PETITIONER/APPELLANT/ACCUSED:

BINU KUMAR, S/O.BHASKARAN,
PRAMEELA BHAVAN, THOZHICKAL,
NEYYATTINKARA TALUK,
THIRUVANANTHAPURAM DISTRICT.

BY ADVS.SRI.N.MANOJ KUMAR
SRI.M.RISHIKESH SHENOI

RESPONDENT/RESPONDENT/COMPLAINANT:

STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM,
REPRESENTING EXCISING INSPECTOR,
MALAPPURAM.

BY PUBLIC PROSECUTOR SRI.N.SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
06-01-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

Crl.Rev.Pet.No. 2936 of 2003

APPENDIX

PETITIONER'S EXHIBITS:

ANNEXURE-A(1): CERTIFIED COPY OF THE JUDGMENT IN CRL.APPEAL NO.223 OF 2000 DATED 8.4.2003 OF THE SESSIONS JUDGE, MANJERI.

ANNEXURE-A(2): PHOTOCOPY OF THE JUDGMENT IN C.C.NO.328/98 DATED 16.9.2000 OF J.F.C.M., MALAPPURAM.

// TRUE COPY //

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P.S. TO JUDGE

C.T.RAVIKUMAR, J.

Crl.R.P.No.2936 of 2003

Dated 6th January, 2015

ORDER

The revision petitioner is the accused in C.C.No.328 of 1998 on the files of the Judicial First Class Magistrate, Malappuram. He was tried for an offence punishable under Section 55(a) of the Abkari Act. The case of the prosecution was that on 28.4.1997 at about 6.15 p.m. PW1, the Circle Inspector of Excise of Malappuram Narcotic Cell Special Squad found the petitioner standing in front of the Canara Bank building at Kunnummal in Malappuram District holding a big shopper. His demeanour created suspicion and thereupon, PW1 examined the big shopper and found 23 bottles, each having 180ml of Indian made foreign liquor, in the possession of the petitioner. Since the petitioner was not having a licence or permit PW1 opened one bottle and after tasting and smelling identified it as brandy and then took sample after complying with the formalities for sending it for chemical analysis. He seized the bottles with the big shopper and produced them and the sample along with the revision petitioner before PW3. Thereupon, C.R.No.16 of 1997 was registered at Excise Range, Malappuram.

Earlier, he prepared Ext.P1 mahazar for the seizure of the bottles with big shopper and for the drawing of sample. Ext.P2 occurrence report was also prepared. Ext.P3 requisition for chemical analysis was forwarded along with the samples to the court for the purpose of getting the sample chemically analysed. Ext.P4 is the chemical analysis report. As per the report it is certified that the sample of the liquid contained 43.05% by volume of Ethyl Alcohol. After completing the investigation PW3 laid the charge sheet before the court. Cognizance was taken on the report and it was taken on file and registered as C.C.No.328 of 1998. To prove the charge against the petitioner the prosecution examined PWs 1 to 3 and marked Exts.P1 to P4. MOs 1 to 3 were identified. After closing the prosecution evidence the petitioner was questioned under Section 313 Cr.P.C. and he denied all the incriminating circumstances put to him. The petitioner did not adduce any defence evidence. After evaluating the evidence adduced by the prosecution and after hearing the arguments advanced by both sides the learned Magistrate found that the prosecution has succeeded in establishing commission of an offence under Section 55(a) of the Abkari Act by the petitioner and consequently, convicted him thereunder. Upon such conviction, he was sentenced to undergo simple imprisonment for a period of six months and to pay a fine of ₹ 25,000/- and in default of payment of fine to undergo simple imprisonment for a further period of six months. The petitioner herein

took up the matter in appeal as Crl.A.No.223 of 2000 before the Court of Session, Manjeri. The appellate court considered the question whether the judgment convicting the revision petitioner by the Court of Judicial First Class Magistrate, Malappuram is legally sustainable and whether the sentence awarded was excessive. It was found that the prosecution has succeeded in proving that 23 bottles of Indian made foreign liquor were found in the possession of the petitioner. It was found that though PWs 1 to 3 were cross examined nothing could be elicited by the defence to discredit their oral testimonies and that the uncontroverted testimonies of PWs 1 and 2 corroborated each other and are sufficient to prove the guilt of the accused. It was also found that the sentence imposed on the petitioner could not be said to be excessive and consequently, the appeal was dismissed confirming the order of conviction and sentence. This revision petition is directed against the said judgment in Crl.A.No.223 of 2010 confirming the order of conviction passed by the learned Magistrate in C.C.No.328 of 1998.

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

3. Evidently, in this case, there is concurrent findings of conviction and sentence against the revision petitioner. Normally, in

such circumstances, unless appreciation of evidence by the trial court as also the appellate court are utterly perverse or totally against the weight of evidence or against any position of law exercise of the revisional power is not warranted. True that, even if there is concurrent finding of fact and if that concurrent finding of fact was based on an illegal appreciation of evidence it could not be said that it is a question of fact. But, it will form a question of law. In such circumstances, it will be within the revisional jurisdiction of this Court to interfere with such conclusion arrived at based on illegal appreciation of evidence in the light of the decision in **Daungarshi Madanlal Zunzunwala v. M/s.Deviprasad Omprakash Bajoria and another (1985 CrI.L.J. 1943 (Bom))**. The learned counsel appearing for the revision petitioner submitted that a proper appreciation of the evidence in the light of the relevant provisions under Section 55(a) of the Abkari Act would reveal that the conclusions arrived at by the courts below are not only erroneous but also totally against the weight of evidence and in fact, they are the outcome of utter perverse appreciation of evidence. To support the said contention the learned counsel relied on a Division Bench decision of this Court in **Mohanan v. State of Kerala (2007(1) KLT 845)**. The Division Bench after considering the provisions under Section 55 of the Abkari Act held that Section 55(a) deals only with illegal import, export or transport, transit etc. on such import or export

and therefore, Section 55(a) is applicable only when persons illegally imports or transports liquor or in possession of liquor while illegally importing. In other words, it was found that to attract the offence under Section 55(a) of the Abkari Act the prosecution must establish that the contraband articles found in possession of the accused were in connection with import, export or transport, transit and the possession of liquor while importing the same illegally. It is also found that if the offence is only possession of excess quantity of liquor permissible under law, though purchased from Kerala State Beverages Corporation, in the light of the decision of this Court in **Sabu v. State of Kerala (2003 (2) KLT 173)** it would attract only an offence under Section 63 of the Abkari Act and at any rate, it would not attract an offence under Section 55(a) of the Abkari Act. Evidently, in this case, the petitioner was found in possession of 23 bottles of Indian made foreign liquor on 28.4.1997 and obviously, at that point of time, in accordance with law, a person could have kept in possession of a maximum of only three litres of Indian made foreign liquor. Thus, it is evident that as against the permissible limit of three litres the petitioner was having excess quantity in his possession that is, 4.140 litres. Applying the dictum laid down by this Court in **Sabu's** case (supra) as also in **Mohanan's** case (supra) a conclusion that the revision petitioner herein had committed an offence under Section 55(a) of the Abkari Act could not have been reached. True

that, the evidence adduced by the prosecution through PWs 1 to 3 would reveal that on 28.4.1997 the petitioner was found in possession of 23 bottles of Indian made foreign liquor each having 180 ml and thus totalling a quantity of 4.140 litres. When it is evident that the permissible limit is three litres and he was found in possession of excess quantity of liquor permissible under law and the said bottles were purchased from Kerala State Beverages Corporation (in this case it is established that the case of the prosecution is that it is purchased from the Kerala Beverages Corporation) a proper appreciation of the evidence in the light of the provisions under Section 55(a) would have revealed the fact that the charge under Section 55(a) would not lie against the petitioner. In the context of the contentions, it is relevant to refer to Section 63 of the Abkari Act which reads thus:-

"63. For offences not otherwise provided for.- Whoever is guilty of any act or intentional omission in contravention of any of the provisions of this Act, or of any rule or order made under this Act, and not otherwise provided for in this Act shall, on conviction before a Magistrate, be punished for each such wilful act or omission with fine which may extend to five thousand rupees or with imprisonment for a term which may extend to two years or with both."

At the relevant point of time, going by the provisions under Section 63 of the Abkari Act, for offences otherwise provided for in the Act a

punishment of imposition of fine up to ₹ 2,000/- (Rupees Two thousand only) alone was permissible and no substantive sentence of imprisonment was contemplated. An amendment was brought in Section 63 incorporating provision for imposition of imprisonment and the amount was enhanced to ₹ 5,000/- (Rupees five thousand only) as per Act 16 of 1997 with effect from 3.6.1997. In this case, evidently, the occurrence was on 28.4.1997 that is, prior to the coming into force of Act 16 of 1997. True that, at the relevant point of time, in terms of the amendment Act 10 of 1975 the import, transport and possession have been incorporated under Section 55(a). It is interpreting the said amendment that the Division Bench in **Mohanani's** case (supra) found that the possession of liquor to attract Section 55 should be one done while illegally importing the liquor. The term 'import' has been defined under Section 3(16) of the Abkari Act as 'to bring into the State'. In such circumstances, it cannot be said in this case that the petitioner was illegally importing the liquor. As going by the very case of the prosecution he had purchased the said quantity of Indian made foreign liquor from the Kerala State Beverages Corporation and it was not brought to the State of Kerala from outside. There is also no case for the prosecution that he was taking it out of the State. In such circumstances, in the light of the decision of the Division Bench in **Mohanani's** case (supra) it could not have been found that the petitioner

was found in possession of liquor while illegally importing and consequently, it could not have been found that the petitioner had committed an offence under Section 55(a) of the Act. Going by the provision of law the actual act committed, in this case, by the petitioner is a compoundable offence. As noticed hereinbefore, the maximum punishment which could have been imposed under Section 63 at the relevant point of time was ₹ 2,000/- and under orders of this court the petitioner had already remitted amount in excess of the same. In the said circumstances, it can only be said that the finding of guilt against the petitioner under Section 55(a) of the Act by the trial court as also the appellate court was based on a palpably wrong appreciation of the evidence made without giving due regard to the provisions under Section 55(a). If that be so, in the light of the decision in **Daungarshi Madanlal Zunzunwala's** case (supra) the fact that the conviction and sentence imposed on the petitioner is concurrent cannot stand in the way of this Court for exercising the revisional jurisdiction. The outcome of the discussion is that the finding by the trial court which was confirmed by the appellate court is liable to be reversed.

4. In the result, the petitioner is found not guilty under Section 55(a) of the Act. But, in the circumstances, it is found that he is guilty under Section 63 of the Abkari Act. Accordingly, the conviction is

modified as one under Section 63 of the Abkari Act. Consequently, the petitioner is sentenced to pay a fine of ₹ 2,000/-. The petitioner had already remitted the amount in excess of what could be imposed as fine for the offence under Section 63 as on 28.4.1997, pursuant to the orders of this Court. The trial court shall verify the amount deposited by the revision petitioner under orders of this Court and make proper entry in the fine register and the amount remitted in excess shall be refunded to the revision petitioner, on proper application and in accordance with law. The judgments in C.C.No.328 of 1998 of the Court of Judicial First Class Magistrate, Malappuram and in Crl.A.No.223 of 2000 of the Court of Session, Manjeri are interfered with and modified to the above extent.

This revision petition is allowed to the aforesaid extent.

Sd/-
C.T.RAVIKUMAR
Judge

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