

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

MONDAY, THE 10TH DAY OF AUGUST 2015/19TH SRAVANA, 1937

Crl.Rev.Pet.No. 2988 of 2003

CRA 352/2001 of THE SESSIONS COURT,KOZHIKODE DIVISION
CC 134/1998 of J.M.F.C.,KOYILANDY

REVISION PETITIONER(S):

RAMANI, W/OKARUNAKARAN,
KIZHAKKEKARA, UNNIKULAM AMSOM AND DESOM,
KOYILANDY TALUK, KOZHIKODE DISTRICT

BY ADVS.SRI.R.SUDHISH
SMT.MANJU SUDHISH

RESPONDENT(S):

1. EXCISE INSPECTOR, BALUSSERY,
KOZHIKODE.

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

PUBLIC PROSECUTOR SMT. BINDU GOPINATH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 10-08-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

RAJA VIJAYARAGHAVAN.V. J

Crl.R.P.2988 of 2003

Dated 10th August, 2015

ORDER

1.This revision petition is preferred u/s 397 and 401 of the Code of Criminal Procedure by the accused in C.C.No.134 of 1998 on the files of the Judicial Magistrate of First Class, Koyilandi. She was proceeded against u/s 55(a) of the Abkari Act (for short "the Act") and as per judgment dated 30.5.2001, the learned Magistrate convicted the petitioner and sentenced her to undergo simple imprisonment for three months and to pay a fine of Rs.25,000/- in default thereof, to undergo simple imprisonment for two months.

2.The case of the prosecution in a nutshell is that on 23.12.1996 on 9.25 pm., the Preventive Officer of Excise Enforcement and Anti Narcotic Special

Squad, Kozhikode, conducted a raid and searched the house of the accused bearing No.VI/820 in Unnikulam Village in Unnikulam Panchayat, Koyilandi Taluk and in the course of the raid, detected and seized two litres of illicit arrack concealed in the kitchen which was contained in a five litre can. The said container was seized and after sampling and sealing, the accused was arrested. She was released then and there. Thereafter, crime was registered and as the scene of occurrence was within the limits of Balussery Excise Range, the contraband articles as well as the case records were transferred to the concerned range office. Later, investigation was conducted by PW5, the Excise Inspector, Balussery Excise Range, who filed report before the Court.

3.Before the trial Court, PW's 1 to 5 were examined

and Exts.P1 to P7 were marked. MO1 was identified. After the close of the prosecution evidence, incriminating materials arising out of the prosecution evidence were put to the accused u/s 313 of the Cr.P.C. The accused denied the circumstances arising as against her and maintained that she is innocent. No evidence was adduced by the defence.

4.The learned Magistrate on an appreciation of the oral and documentary evidence, came to the conclusion that the accused was guilty of the offence punishable u/s 55(a) of the Act and convicted her accordingly. Against the judgment conviction and sentence Crl.A.352 of 2001 was preferred by the petitioner before the Court of Sessions, Kozhikode Division. As per judgment dated 14.8.2003, the learned Sessions Judge

confirmed the conviction and sentence and dismissed the appeal. It is against the concurrent findings of the Court below, that the instant revision is preferred.

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

6.It is contended that the prosecution of the petitioner is vitiated by gross illegalities. According to the learned counsel, the search and consequent seizure effected by PW3 are vitiated insofar as the mandatory formalities were not complied with. It is pointed out that no arrest memo was prepared or produced before the Court below to evidence the fact that the petitioner was in fact arrested on 23.12.1996, from her house. Though the seizure is effected from the residential home of the petitioner

between sunset and sunrise, the service of woman police constable is not seen availed. It is further submitted that it is the admitted case of the prosecution that the petitioner was arrested from her house where she was staying along with her husband and two children. Further, it was contended that the prosecution has not produced even a scrap of paper to evidence the fact that the petitioner was residing in the house from where the seizure was effected and the failure of the prosecution in that regard has to be considered as fatal. Finally, it was contended that though the seizure was effected on 23.12.1996 on 9.25 pm by PW3, the detecting officer, the contraband seized was produced before the Court below only on 27.12.1996. This according to the learned counsel, was an inordinate delay and failure to explain the same by the prosecution will be fatal.

7. Per contra, the learned Public Prosecutor has submitted that the petitioner was got arrested from her house and she was in possession of illicit arrack which was banned. According to the learned Public Prosecutor, the petitioner was involved in other case as well and it was on that premise that without even the documents evidencing the ownership of the premises, the prosecution case was initiated as against her. It is further submitted that s.64 of the Act will apply insofar as the petitioner is concerned and she was bound to rebut the said prosecution which was not done in the instant case. It was also argued that there is no illegality in the search or seizure conducted and it is evident that immediately after the seizure of the items, the petitioner was arrested and she was released on bail. It was also argued by the learned Public prosecutor that there is undue delay in

producing the seizure before Court and the delay of four days cannot be said to be inordinate. Finally it was contended that this Court will not be justified in interfering in revision as both the Courts below have concurrently found against the petitioner.

8.The prosecution case is that the preventive Officer of the Excise Enforcement and Anti Narcotic special Squad, Kozhikode, conducted a raid and searched the house of the petitioner bearing No.VI/820 of Unnikulam Village, along with his subordinates and seized illicitly distilled arrack concealed in the kitchen. it is the definite case of the prosecution that the petitioner was duly apprehended and the sample was taken and sent to the Excise Inspector, Balussery Excise Range. For reasons best known to the prosecution, the

arrest memo has not been produced. It is the specific case of the defence that no seizure was effected from the house of the petitioner and further no evidence was let in to establish that the house belonged to the petitioner. The significance of preparing an arrest memo and complying with the other directions issued by the Apex Court has been considered by this Court in **Ramankutty v. Excise Inspector, Chelannur Range (2013 (3) KHC 308)** and in **Sathyan v. State of Kerala (2015 (1) KLT 586)**.

9. In **Ramankutty** (supra) it was held as follows:-

"It is pertinent to note that the arrest memo, a crucial document which is required to be prepared contemporaneously at the time of arrest to show the genuineness of the arrest is not seen produced before the trial Court. Prosecution has no case that though the arrest memo had been prepared at the

time of the arrest and seizure, it could not be produced before the trial Court. So it can be safely concluded that it was not prepared at the time of alleged arrest. It is the violation of one of the mandatory requirements of arrest to be followed in all cases of arrest , which is made mandatory by the Supreme Court in D.K.Basu v. State of West Bengal.

.....

The prosecution has no case that they have complied with the said directions. I am of the opinion that the non compliance of the mandatory requirements to be complied at the time of arrest speaks volumes doubting the genuineness of the arrest and it is fatal to the prosecution case as the seizure of the contraband has no existence at all without proving the factum of arrest, beyond reasonable doubt.

10. There is yet another fatal flaw in the prosecution case. The contraband articles which were seized on 23.12.1996 were produced before Court only on 27.12.1996. There is no explanation from the prosecution as to in whose custody the contraband articles were kept till the same was produced

before Court on 27.12.1996. In the usual course of events, 4 days delay in producing the articles before Court cannot be said to be fatal. But in the instant case, the non compliance of the mandatory requirements to be followed at the time of arrest and the failure to explain cogently as to where the contraband articles were retained till the same was produced before Court will create grave doubts in the mind of the Court. Both the trial Magistrate as well as the learned Sessions Judge has casually held that the failure of the prosecution to prove that house No.VI/820 actually belonged to the petitioner will not prove fatal in view of the deposition of PW3 and 4. But the fact remains that no evidence was let in by the prosecution to prove that the petitioner had anything to do with the house from where the contraband articles were allegedly seized.

11.Thus, on an over all consideration of the evidence, I hold that the prosecution has failed to satisfactorily bring home the guilt against the petitioner beyond the shadow of reasonable doubt. In the result, the conviction entered into concurrently by the Courts below cannot be sustained.

12.The revision petition is allowed and the petitioner is acquitted of the offence.

Sd/-
RAJA VIJAYARAGHAVAN.V.
Judge

MrCs

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P.S TO Judge