

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.R.P.No. 1153 of 2004 (D)

Crl.A 124/2002 OF THE SESSIONS COURT,KOZHIKODE DATED 28-02-2004

CC 809/1996 of J.M.F.C.-IV,KOZHIKODE DATED 18-01-2002

REVISION PETITIONER(S)/APPELLANT/ACCUSED NO.1:

**POYIL THAZHATH VEETIL KARUNAN,
S/O. APPU, AGED 61 YEARS, PUTHIYANGADI AMSOM DESOM,
KOZHIKODE TALUK.**

BY ADV. SRI. P.V.KUNHIKRISHNAN

RESPONDENT(S)/RESPONDENT::

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

BY PUBLIC PROSECUTOR SMT. BINDHU GOPINATH

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

K. RAMAKRISHNAN, J.

Crl.R.P.No. 1153 of 2004

Dated this the 13th day of August, 2015

ORDER

1st accused in C.C. No. 809/96 on the file of Judicial Magistrate of First Class-IV, Kozhikode is the revision petitioner herein. The revision petitioner along with two others were charge sheeted by the Excise Inspector, Kozhikode Excise range in Cr. No. 108/95 under Section 55(a) of Abkari Act.

2. The case of the prosecution nutshell was that on 06.06.1995 at about 21:45 hrs, the 1st accused as entrusted by accused nos. 2 and 3 was found to be in possession of 9.8 litres of arrack in 98 packets in shop room with number 37/4 at Puthiyangadi amsom desom in violation of the provisions of Abkari Act and thereby all of them have committed the offence punishable under Section 55 (a) of Abkari Act.

3. After investigation, final report was filed and it was taken on file as C.C.No.809/96 on the file of the Judicial Magistrate of First Class-IV, Kozhikode.

4. When the accused appeared before the Court below, the particulars of offences were read over and explained to them and they pleaded not guilty. In order to prove the case of the prosecution, PWs. 1 to 5 were examined and Exts.P1 to P6 and MO.1 to MO.19 were marked on the side of the prosecution. After closure of the prosecution evidence, the accused were questioned under Section 313(1)(b) of Code of Criminal Procedure (hereinafter called the Code) and they denied all the incriminating circumstances brought against them in the prosecution evidence.

5. The 1st accused had stated that he had not committed any offence and he is innocent of the same. The accused nos. 2 and 3 also submitted that they have

not committed any offence and they have been falsely implicated in the case. No defence evidence was adduced on their side. After considering the evidence on record, the Court below found accused nos. 2 and 3 not guilty of the offence alleged and they were acquitted of the charge levelled against them giving them the benefit under Section 255(1) of the Code. But the trial Court found the revision petitioner guilty under Section 55(a) of Abkari Act and convicted him thereunder and sentenced him to undergo simple imprisonment for one year and also to pay fine of ₹1,000/- in default to undergo simple imprisonment for three months.

6. Aggrieved by the same, the revision petitioner filed Cr.Appeal 124/2002 before the Sessions Court, Kozhikode. The learned sessions judge found that the accused is not guilty under Section 55(a) of Abkari Act and but found him guilty under Section 58 of Abkari Act and

convicted him thereunder and sentenced him to undergo simple imprisonment for two months and also to pay fine of ₹1,000/- in default to undergo simple imprisonment for 15 days more. Aggrieved by the same the present revision has been filed by the revision petitioner, 1st accused before the Court below.

7. Heard Sri.Anoop who represented Sri.P.V. Kunhikrishnan, the learned Counsel for the revision petitioner and Smt. Bindhu Gopinath, the learned public prosecutor and peruse the records.

8. The Counsel for the revision petitioner submitted that there was delay in producing the article after detection before the Excise Inspector and also delay in producing the article before the Court below. There is no explanation forthcoming from the side of the prosecution for the delay. Even the documents were produced before the Court only on 12.06.1995 though the detection was made on

06.06.1995. Since the delay has not been explained, it cannot be said that the chemical analysis report relates to the article alleged have been seized from the possession of the accused. Further, there are discrepancies in the place of occurrence in the search memo and the charge and there is no document produced on the side of the prosecution to prove that the revision petitioner was in possession of the shop from where the articles were seized. Further there is no evidence adduced on the side of the prosecution to prove that he was in possession of the arrack knowing that it is illegally manufactured so as to attract the offence under Section 58 of the Abkari Act. So according to him he is entitled to get acquittal.

9. On the other hand the learned public prosecutor submitted that there is concurrent finding of the Court below that the articles were seized from the possession of the revision petitioner and the chemical analysis report will

go to show that it is not a licit liquor but it is a illicit liquor. So the appellate court was perfectly justified in convicting the revision petitioner for offence under Section 58 of Abkari Act.

10. The case of the prosecution as emerging from the prosecution witnesses is as follows:

On 06.06.1995 while PW1, the Sub Inspector of Police, Elathur Police Station was in the Station, he got information from the Assistant Commissioner of Police that arrack was being illegally sold from the shop no. 37/4 of Mokavur. Immediately, he sent a search memorandum to Court and thereafter went to that place along with PW4 and found the revision petitioner in the shop and he conducted the search of the shop in the presence of Pws. 2 and 5 and found 98 packets of illicit arrack in MO.18 tray and also found that there were bucket, basin, soda bottle, drinking glass, empty bottles, kerosen stove, can of 20 litres and he had seized these articles which

were later identified as MO.1 to MO.19 after describing same in Ext.P1 search list. He arrested the revision petitioner and came to Police station and registered Ext.P2 First Information Report as Crime No.86/95 of Elathur Police Station under Section 55(a) of Abkari Act and thereafter released the accused on bail from there. He had produced the First Information Report along with the search list and articles seized before PW6, the Excise Inspector who alone was competent to register and conduct the investigation at that time of offence under the Abkari Act.

11. PW6 on the basis of documents produced registered Ext.P5 occurrence report. Ext.P2 First Information Report was registered on the basis of Ext.P3 report prepared by PW1 describing the detection made by him. PW6 had sent the articles along with the property list with Ext.P6 requisition for chemical analysis to Court and obtained Ext.P4 chemical analysis which will go to show

that the samples contained 29.22% and 31.49% of by volume of ethyl alcohol which is far less than 42.86% by volume to ethyl alcohol which is expected to be present in the arrack to be sold by the Government. Since it was revealed that accused nos. 2 and 3 were the persons who are contractors of the area during the relevant time, he had registered the crime against all the three persons including the present revision petitioner for the said offence. He completed the investigation and filed the final complaint before the Court.

12. The prosecution relies on the evidence of PWs. 1,2,4 and 5 to prove the seizure. PWs 2 and 5 were the independent witnesses of the seizure but they turned hostile though they admitted their signature in Ext.P1. So the only evidence available to prove the search and seizure was that of Pws. 1 and 4, the detecting officer and the Police officer who accompanied the detecting officer at that

time. Evidence of PW1 will go to show that he got information from his higher officials that the accused is selling unauthorised arrack from shop no. 37/4 of Mokavoor amsom and immediately after sending the search memorandum he along with PW4 and others went to the shop and found the revision petitioner in the shop. He found 98 packets of liquid in plastic covers and he examined one of the covers and found that it is arrack. Thereafter he took 100ml of liquid from two packets in two bottles of 180ml and sealed the same and labelled the same and thereafter seized the articles found there which were marked as Mos.1 to 19 as per Ext.P1 search list. Thereafter, he arrested the revision petitioner and came back to Police station and prepared Ext.P3 report on the basis of which Ext.P2 First Information Report was registered.

13. All these things happened on 06.06.1995 at

22:45 hrs. Later he had stated that though the information received was Mokavoor but when they went to the shop, they came to understand that it is in Puthiyangadi amsom desom and it is thereafter the search was conducted and accused was arrested along with the contraband articles. The amsom in which the shop is situated is not much relevant in this case because the accused was arrested from the building along with the contraband articles and as per evidence from Pws. 1 and 4, there were no other person found in the shop at that time. So under the circumstances though PWs. 2 and 5 the independent witnesses turned hostile, the evidence of PW.1 and PW.4 will go to show that the accused was arrested along with some plastic packets alleged to be containing arrack and that evidence is sufficient to come to the conclusion that he was arrested along with the alleged contraband articles.

14. It will be seen from the evidence of PW6, the

Excise Inspector that the articles and the documents were produced before him on 07.06.1995 at 8:00 pm. He had further stated that the articles were produced before him by a Police constable and he had further stated that he did not know the reason for the delay for producing the article before him and he did not know who was in possession of the articles till that time. He had further stated that he had produced that article before Court on 12.06.1995. He did not mention in his evidence as to who was in possession of that article till that time. Further it is seen from his evidence that he had put his seal in the sample bottle along with the seal of the Police seal already put on the same. But he had stated that he did not put any label on the other thondy articles. He had further stated that he had not verified the thondy articles as well when it was produced before him.

15. It is settled law that unless the prosecution is

able to prove that the chemical analysis report relates to the representatives samples said to have been taken from the contraband articles, alleged to have been seized from the possession of the accused, it cannot be said that prosecution has proved the case against the accused beyond reasonable doubt. This was so held in the dictum reported in ***Ravi v. State of Kerala [2011(3) KHC 121]***. In this case there is a delay of six days in producing the article before the Court after it was seized. Further there is a delay of one day in producing the article before the Excise Inspector by the Police officer as well. There is no explanation forth coming for such delay. Further there is nothing on record to show that the label contained the signatures of the witnesses as well. In Ext.P3 report it was only mentioned that label was affixed. So under the circumstances in the absence of any evidence regarding the delay in producing the article before the Court, it

cannot be said that the same articles which were seized from the possession of the accused were produced before the Court in tamper proof condition so as to come to a conclusion that the chemical analysis report obtained relates to the representative samples taken from the articles alleged to have been seized from the accused. These aspects were not considered by the Court below, while coming to the conclusion the prosecution has proved beyond reasonable doubt that the revision petitioner was found to be in possession of illicit arrack so as to convict the accused for the offence under Section 58 of Abkari Act and that benefit must be given to the accused.

16. Further, in order to attract Section 58 of the Abkari Act it must be alleged and proved by the prosecution that the accused was in possession of the same knowing that it is illegally manufactured arrack for which no revenue has been paid. In the absence of such

allegations and evidence adduced the accused cannot be convicted for the offence under Section 58 of the Abkari Act as the articles were seized at the time when there was no prohibition for possession of arrack. This was so held in the decision reported in ***Josekutty v. State of Kerala [2013(1) KHC 241 (DB)]***. So under the circumstances, the finding of the Appellate Court that the revision petitioner was found to be in possession of illicit arrack and thereby he had committed the offence punishable under Section 58 of Abkari Act is unsustainable in law, the same is liable to be set aside. The revision petitioner is entitled to get acquittal of the charge levelled against him giving him the benefit of doubt. Since the revision petitioner was found not guilty, the sentence imposed by the Court below is also illegal and the same is also 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 appellant under Section 55(a) of Abkari Act which was modified by the Appellate Court under Section 58 of Abkari Act are hereby set aside and the revision petitioner is acquitted of the charge levelled against him, giving him the benefit of doubt. He is set at liberty. The bail bond executed by him will stand cancelled. The fine amount if any remitted by him is directed to be returned to the revision petitioner on making an application for this purpose before the Court below. Office is directed to communicate the concerned Court immediately.

Sd/-
K. RAMAKRISHNAN
JUDGE