

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

FRIDAY, THE 4TH DAY OF SEPTEMBER 2015/13RD BHADRA, 1937

Crl.Rev.Pet.No. 3279 of 2003 ()

AGAINST THE JUDGMENT IN CRL.APPEAL NO. 5/2002 of ADDL.SESIONS
COURT,ALAPPUZHA. DATED 12-11-2003
AGAINST THE JUDGMENT IN SC 337/2000 of PRINCIPAL ASST.SESIONS
COURT,ALAPPUZHA DATED 18-12-2001

REVISION PETITIONER(S) /APPELLANT/ACCUSED:

VIJAYAN, S/O. MADHAVAN, VINOD BHAVAN, PALLANA MURI,
THRIKKUNNAPPUZHA VILLAGE, ALAPPUZHA DISTRICT.

BY ADV. SRI.S.SHANAVAS KHAN

RESPONDENT(S) /RESPONDENT/COMPLAINANT:

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

R1 BY PUBLIC PROSECUTOR SRI. N. SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 04-09-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

acd

P.D. RAJAN, J.

Crl.R.P.No.3279 of 2003

Dated this the 4th day of September, 2015

ORDER

The revision petitioner, who is the appellant in Crl.Appeal No.5/2002 on the file of Additional Sessions Court, Alappuzha, challenges the concurrent finding of conviction u/s.8(1) and (2) of the Abkari Act. The revision petitioner was sentenced to undergo rigorous imprisonment for one year and to pay fine of ₹1akh, in default of payment of fine, simple imprisonment for three months. No separate sentence was imposed u/s.55(a) of the Abkari Act. Being aggrieved by that, the accused approached this Court.

2. The facts considered for the indictment were that on 18.11.1998 the Excise Circle Inspector, Anti Narcotic

Special Squad was conducting patrol duty within his jurisdiction at about 5.30 p.m., when he reached at Thrikkunnappuzha Village in Karthikapally Taluk, he got an information that the revision petitioner was in possession of arrack. He prepared search memorandum and sent it to the Court and arrived at the place of occurrence, seized 5 litres of arrack from the house bearing No.550 in Ward No.VIII of Thrikkunnappuzha Panchayat. The revision petitioner was arrested. After completing investigation, Circle Inspector, Haripad Excise Range laid charge before Judicial First Class Magistrate's Court, Haripad from there the case was committed to Sessions Court for trial.

3. To prove the offence, the prosecution examined PW1 to PW6 and marked Exts.P1 to P9 and admitted MO1 in evidence. The incriminating circumstances brought out in evidence were denied by the accused, while questioning

him. He was also heard u/s.232 Cr.P.C. He did not adduce any defence evidence. The trial Court convicted him. Aggrieved by that, he preferred an appeal before Additional Sessions Court, where the conviction was confirmed. Being aggrieved by that, accused preferred this revision petition.

4. The learned counsel appearing for the revision petitioner contended that there is no authenticity with regard to the keeping of the seized article in safe custody. The prosecution has no explanation as to under whose custody the contraband articles and the sample were kept, immediately after the seizure. When the Excise Official keeping silence about the safe custody, there is every possibility of tampering. Moreover, at the time of seizure, there was no crack on MO1. Subsequently, when it was taken for trial, it was cracked and partially destroyed.

In the light of the aforesaid legal infirmities, the revision petitioner is entitled to get the benefit of doubt. The learned counsel for the revision petitioner relied the decision of this Court in Narayani v. Excise Inspector [2002 (3) KLT 725]. The revision petitioner contended that as per Section 36 of the Abkari Act, presence of two independent witnesses is necessary at the time of conducting search. In this case, only one witness supported and the other witness denied his presence, which shows that non-compliance of the provisions of the Abkari Act.

5. The learned Public Prosecutor contended that there is no delay in forwarding the seized article before Court. On the next day, the sample was produced before Judicial First Class Magistrate Court, Haripad. The official witnesses categorically narrated the seizure of the

arrack. The independent witnesses admitted their signature in the mahazar and no reason to deny the alleged detection. The possession of the house from where the arrack was seized was also proved. Hence, he prays to dismiss the appeal.

6. According to Section 36 of Abkari Act, all searches under the provisions of this Act shall be made in accordance with the provisions of Code of Criminal Procedure, 1973, provided that the person called upon to attend and witness such searches shall include at least two persons neither of whom is an Abkari police or Village Officer. Section 100(4) of Cr.PC requires that before making a search, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such

inhabitants of the said locality is available or is willing to be a witness to attend and witness the search, and may issue an order in writing to them or any of them so to do.

The revision petitioner contended that independent witnesses had not participated at the time of conducting search of the house of the revision petitioner. But, I have gone through the oral evidence of PW4 in which he admitted that while conducting patrol duty, he got information that the revision petitioner was in possession of arrack, he proceeded to the place of occurrence after preparing Ext.P2 search memorandum. Thereafter, he obtained two witnesses and conducted a search and detected five litres of arrack in a white jerry can in the kitchen. PW1 and PW2 are the witnesses present at the time of seizure of arrack. The jerry can was marked as MO1. PW1 admitted his signature in the seizure mahazar.

The seizure mahazar was marked as Ext.P1. PW2 also admitted his signature in Ext.P1. The specific case of PW1 was that he never saw the seizure of arrack from the house of revision petitioner. But he signed in a white paper. PW2 also admitted his signature. He also gave a similar version. The Excise Officials seized the arrack after preparing a search memorandum, during the search independent witnesses participated in the search, but one of the witnesses declined to support the prosecution case before Court. In this situation there is no reason to discard the evidence of the detecting officer.

7. Apex Court in Sahib Singh v. State of Punjab (1997 SCC Crl 315) held that presence of independent and respectable witnesses at the time of search will not always affect the probative value of search. When the police officer enjoined to call independent and respectable

witness of the locality to participate in the search, if the police officers have done this, the persons are not supporting to participate, the presence of independent witness at the time of search would not itself be a ground to discard the search illegal or irregular." Like so, if the mahazar witnesses who participate in the search and subsequently deny their participation and admits their signature, what is the impact of the result of the seizure. Since no enmity is alleged against the excise officials in this case, and the mahazar witnesses admit their signatures and denied the search, the evidence of the excise official has to be scrutinized more rigorously. On such examination, if the procedure followed by the Excise Inspector and team inspires confidence that evidence is admissible.

8. In normal case, the presence of independent

witness is insisted in order to ensure fairness in the search. The requirement of independent witness provided under Section 100(4) Cr.P.C are the witnesses independent and respectable, if after making them participate as provided under Section 36, they withdrew and speak against the prosecution case, that itself is not a ground to discard the veracity of the seized article and the oral testimony of the official witnesses who conducted search. Therefore, even though PW1 and PW2 denied their presence, the oral testimony of PW4 itself is sufficient to show that his evidence is admissible. I find no illegality in the said procedure.

9. The detecting officer deposed that the seized articles were produced before Excise Range Office, Haripad from there registered Ext.P5 occurrence report. Ext.P3 is the search list and Ext.P4 is the arrest memo.

PW3 was present with PW4, supported the search and seizure. He also deposed about the presence of PW1 and PW2 at the time of search and seizure. The panchayat Secretary deposed that house No.550 in ward No.VIII of Thrikunnapuzha panchayat was possessed by the revision petitioner and he is the owner of that house. PW5 issued Ext.P6 ownership certificate. Ext.P8 is the crime and occurrence report and Ext.P9 is the chemical examination result which shows ethyl alcohol at 36.18 %. Analysing this evidence, it is found that search and seizure of arrack was proved by the prosecution. PW6 completed the investigation and laid charge. Learned counsel appearing for the revision petitioner contended that forwarding note was not produced in this case. On a perusal of the records it is found that forwarding note was prepared which was not marked in the trial court. The sample seal was

provided. There is no illegality or irregularity committed by the Court below to invoke the revisional jurisdiction. Therefore the conviction of the revision petitioner under Section 8(1) & (2) of the Abkari Act is only to be confirmed.

10. Learned counsel submitted that the sentence imposed by the trial court is too harsh and needs interference. The sentence is purely discretion of the trial court. After analysing the nature of the offence and the character of the offender, the trial court imposed a sentence of one year imprisonment and fine of Rs.1,00,000/-. No previous criminal antecedents of similar nature is reported against the revision petitioner. In the circumstance, the sentence is modified as follows. The revision petitioner is sentenced to imprisonment for one month and fine of Rs.1,00,000/- and in default of payment

of fine, imprisonment for one month. Relied **Sasikumar V. State of Kerala** (2012(4) KLT 867).

The revision petition is allowed in part.

P.D. RAJAN, JUDGE.

acd/lgk

