

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 6TH DAY OF FEBRUARY 2015/17TH MAGHA, 1936

Crl.Rev.Pet.No. 1777 of 2004 (B)

**AGAINST THE JUDGMENT IN CrI. APPEAL 267/2003 of ADDL. DISTRICT & SESSIONS
COURT (SPECIAL COURT FOR NDPS CASES), THODUPUZHA, DATED 13-04-2004**

&

AGAINST THE JUDGMENT IN CC 459/1998 of J.M.F.C., PEERMADE, DATED 17-09-2003

REVISION PETITIONER(S)/APPELLANT/ACCUSED::

**RAJESH @ VARGHESE, S/O. BHAGYANATHAN,
RBT DIVISION NO.1, NO.12TH LAYATHIL THAMASAM,
GRAMBY KARA, PERIYAR VILLAGE.**

**BY ADVS.SRI.C.M.TOMY
SRI.MATHEW SKARIA**

RESPONDENT(S)/RESPONDENT/COMPLAINANT::

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

BY PUBLIC PROSECUTOR SMT. V.H.JASMINE.

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
06-02-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

SS

K. RAMAKRISHNAN, J.

Crl.R.P.No.1777 of 2004

Dated this the 6th day of February, 2015

ORDER

Accused in C.C.No.459/1998 on the file of the Judicial First Class Magistrate Court, Peermade, is the revision petitioner herein. The revision petitioner was charge-sheeted by the Excise Inspector, Vandiperiyar, in Crime No.29/1996 of Vandiperiyar Excise Range, under Section 55(a) of Abkari Act.

2. The case of the prosecution in nut shell was that, on 12.07.1996 at about 02.15 p.m., the revision petitioner was found to be in possession of ten bottles of Indian Made Foreign Liquor, having a capacity of 375 m.l. each, meant for sale in Tamil Nadu only, found importing the same from Tamil Nadu to State of Kerala through the boarder check post in a big shopper bag, in violation of the Provisions of Abkari Act and thereby he had committed the offence punishable under Section 55(a) of the Kerala Abkari

Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Peermade, and the case was taken on file as C.C.No.459/1998. When the revision petitioner appeared before the court below, the particulars of offence were read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, PWs 1 to 3 were examined and Exts.P1 to P3, MO1 series and MO2 were marked on the side of the prosecution. After closure of the prosecution evidence, the revision petitioner was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the prosecution evidence and he had further stated that, he had not committed any offence. It was happened that, when he came from Tamil Nadu after a temporary employment, he was asked to sign as a witness in a case for which he had denied. On account of enmity he has been falsely implicated

in the case. No defence evidence was adduced on his side. After considering the evidence on record, the trial court found the revision petitioner guilty under Section 55(a) of Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for one year and also to pay a fine of ₹25,000/-, in default to undergo rigorous imprisonment for six months more. Aggrieved by the same, he filed Criminal Appeal 267/2003 before the Additional Sessions Court, Thodupuzha, and the learned Additional Sessions Judge by the impugned judgment dismissed the appeal, confirming the order of conviction and sentence passed by the court below. Aggrieved by the same, the present revision has been filed by the revision petitioner/accused before the court below.

4. Heard the counsel for the revision petitioner and learned Public Prosecutor.

5. The counsel for the revision petitioner submitted that, there was inordinate delay in producing the

article before the court and the delay has not been explained. Further there was no spot sample taken and it was not known from where the sample was taken and when it was sent to chemical analysis. There is no evidence adduced on that aspect. So under the circumstances, it cannot be said that, the sample relates to the contraband article seized and as such, it cannot be said that the prosecution has proved beyond reasonable doubt that the offence was committed by the revision petitioner. These aspects were not considered by the court below as well. So he prayed for acquittal.

6. On the other hand, the learned Public Prosecutor supported the concurrent findings of the court below on this aspect.

7. The case of the prosecution as emerged from the prosecution witness was that, on 12.07.1996 at about 12.15 p.m., PW1, the preventive officer who along with the excise party was doing patrol duty and when they were

standing near the Vandiperiyar check post, they found the revision petitioner coming with MO2 big shopper bag, getting down from a bus, coming from Tamil Nadu and on examination it was found that 10 bottles MO1 series foreign liquor bottles having 375 m.l. each capacity intended to be sold in Tamil Nadu alone were found in MO2 big shopper bag and on examination he was satisfied that it was Indian Made Foreign Liquor. He seized the same as per Ext.P1 mahazar in the presence of witnesses and arrested the revision petitioner and came to the office produced by the excise inspector, predecessor of PW3 who registered Ext.P2 crime and occurrence report. He released the revision petitioner on bail and thereafter the investigation was conducted by PW3. He had undertaken the investigation and submitted final report. The evidence of PW1 coupled with the evidence of PW2 shows that, some articles were seized from the possession of the petitioner. But the actual incident occurred on 12.07.1996 and it will be seen from

Ext.P1 mahazar that no spot sample was taken. But it is seen from Ext.P3 chemical analysis report that, sample of 180 m.l., was sent for analysis and Ext.P3 report obtained. There is no evidence adduced on the side of the prosecution, as to from where the sample was taken and sent. Further it is seen from the evidence that, though the articles were alleged to have been seized on 12.07.1996 and they were produced before court only on 28.05.1997. There was no evidence adduced on the side of the prosecution, as to who was in possession of that articles and the articles were produced in court in the same condition when it was seized and the sample mentioned in Ext.P3 was the representative sample, that was taken from the articles said to have been seized.

8. In the decision reported in **Sasidharan v. State of Kerala (2007(1) KLT 720)**, this court has held that, the link evidence of actual sampling by the concerned clerk of the court by drawing sample from the can and

sending the same in a sealed packet to the chemical examiner with a specimen seal sent separately for tamper proof despatch, the prosecution cannot be held to have brought him the offence against the appellant. The prosecution had a duty to prove that, it was the sample taken from the contraband liquor seized from the accused, which had reached the hands of the chemical examiner in a foolproof condition. In the same decision it has been observed that, the committing magistrate has to take care that contemporary proceedings evidencing the drawing of sample and sending the same to chemical analysis in a tamper proof condition are to be recorded in the proceedings before the court. Sessions Judge trying such cases also should ensure that, the concerned member or the staff who had drawn the sample and despatched the same to the chemical examiner, duly packed and sealed under the covering letter of the examiner before the court during trial. The Public Prosecutor in charge of the case, also had a duty

to file an additional witness list for examining the 'thondy section clerk' (property clerk) concerned, so as to establish the nexus between the contraband substance and the accused.

9. Further in the decision reported in **Ravi v. State of Kerala (2011(3) KLT 353)**, this court has held that, long delay in producing the articles will cast suspicion about the articles seized and unless the delay is satisfactorily explained, that benefit must be given to the accused. In the same decision, it has been observed that no conviction can be entered against the accused in a prosecution as in the present one, unless it is proved that the sample which was examined in the chemical examiners laboratory was of the very same sample drawn from the contraband liquor allegedly found in the possession of the accused. In this case, no spot sample was taken and there is no evidence as to from where the sample was taken also. There was inordinate delay in producing the article also,

which has not been explained. So under the circumstances, it cannot be said that, prosecution has proved beyond reasonable doubt, that the chemical analysis report relates to the representative sample that has been taken from the contraband article, alleged to have been seized from the possession of the revision petitioner and that benefit must be given to the revision petitioner. But these aspects were not properly considered by the courts below before coming to the conclusion that the prosecution has proved beyond reasonable doubt that the revision petitioner had committed the offence alleged. So the conviction entered by the court below without considering these facts is unsustainable in law and the same is liable to be set aside and the revision petitioner is entitled to get acquittal of the charge levelled against him, giving him the benefit of doubt. In view of the fact that, the revision petitioner is entitled to get acquittal, the sentence imposed is also not proper 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 revision petitioner under Section 55(a) of the Abkari Act and confirmed by the appellate court are hereby set aside and he 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. If any fine amount has been remitted by him, the lower court is directed to refund the same to the revision petitioner on making an application before that court for that purpose.

Office is directed to communicate this order to the concerned court, immediately.

Sd/-

K. RAMAKRISHNAN, JUDGE

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P.A. to Judge