

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

THURSDAY, THE 3RD DAY OF SEPTEMBER 2015/12TH BHADRA, 1937

Cr1.Rev.Pet.No. 2179 of 2004 (B)

AGAINST THE JUDGMENT IN Cr1.APPEAL 168/1999 of ADDITIONAL SESSIONS
JUDGE FAST TRACK COURT-1, PALAKKAD DATED 29-06-2004
AGAINST THE JUDGMENT IN CC 92/1997 of J.M.F.C.-II, PALAKKAD
DATED 18-09-1999

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

CHENTHAMARA, S/O. MUTHA,
VALIYAPARAMBU VEEDU, MUNDUR VILLAGE, PALAKKAD TALUK.

BY ADVS.SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENT(S)/RESPONDENT/COMPLAINANT:

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

R, BY PUBLIC PROSECUTOR SRI. N. SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 03-09-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

acd

P.D. RAJAN, J.

Crl.R.P.No.2179 of 2004

Dated this the 3rd day of September, 2015

ORDER

The revision petitioner, who is the appellant in Crl.Appeal No.168/1999 of Additional Sessions Judge, Fast Track Court-I, Palakkad, challenges the judgment of conviction u/s.55(a) of the Abkari Act. He was accused in C.C.No.92/1997 of Judicial First Class Magistrate Court-II, Palakkad and convicted and sentenced to undergo rigorous imprisonment for one year and to pay a fine of ₹25,000/-, in default of payment of fine, simple imprisonment for three months, which was confirmed in the above appeal. Being aggrieved by that judgment, he approached this Court.

2. The prosecution case is that on 30.9.1996 at 5 p.m.,

the Excise Inspector, Parali Excise Range found the revision petitioner carrying 5 litres of illicit arrack in a plastic kannas along the northern side of Puthur pond in Valiyaprambu desom, Mundoor amsom. On seeing the Excise party, the accused thrown away the kannas and flee from there. PW1, the Excise Inspector seized those articles and registered a case. After completing investigation, laid charge before Judicial First Class Magistrate Court-II, Palakkad.

3. To prove the offence, the prosecution examined PW1 to PW4 and marked Exts.P1 to P5 as documentary evidence. The kannas was marked as MO1. The incriminating circumstances brought out in evidence were denied by him while questioning him. The trial Court convicted the accused. Against that, he preferred the above appeal.

4. The learned counsel appearing for the revision

petitioner contended that there is no arrest in this case.

The detection of the offence was on 30.9.1996 at 5 p.m.

and the contraband articles were produced on 26.10.1996.

When there is no explanation for the delay, the petitioner is entitled to get the benefit of doubt. When PW2 has no previous acquaintance with the revision petitioner, the identity stated by PW2 is also not admissible. The independent witness, PW4 supported the prosecution, which is not a ground to cover the legal infirmity of inordinate delay for a conviction.

5. The learned Public Prosecutor admitted that there is delay in producing the article before Court, but the seized articles were kept in the custody of the Abkari Officer and no reason to disbelieve his version.

6. In this context, I have considered the merit of the contention. The prosecution case is that the appellant was holding of 5 liters of illicit arrack, in his hand, seeing

the Excise party, he abandoned the kannas by the side of the pond and flee from there. To prove that point, PW1 was examined in the trial Court. PW1 deposed that while he was conducting patrol duty, the revision petitioner was found carrying MO1, on seeing the Excise Party, he abandoned MO1 and ran away. PW1 seized MO1, after preparing Ext.P1 mahazar, reaching at the Excise office, registered an occurrence report and Ext.P2 is the occurrence report. The thondy article was forwarded to the Judicial First Class Magistrate-II, Palakkad. Ext.P3 is the forwarding note. Ext.P4 is the report of the chemical analyst, after examination. Ext.P5 is the property list. The oral evidence of PW1 was supported by PW4, who deposed that the revision petitioner abandoned MO1 by the side of the pond and ran away. Analysing the oral evidence of PW1 , PW2 and PW4, it is found that an abandoned kannas was seized from the side of the pond.

7. From the evidence of PW1, it is clear that he took sample of 180 ml in a bottle and sealed at the place of occurrence. MO1 cannabis was also sealed at the place of occurrence. Ext.P3 is the requisition and Ext.P4 is the chemical analysis result, which shows that 14.14% of ethyl alcohol was detected in the sample. The seal of packet was intact and found tallied with the sample seal provided. PW1 has not stated in his evidence that he forwarded the sample seal when the sample was forwarded to the chemical examination. The seizure of arrack was on 30.9.1996 at 5 p.m, which was produced before Court on 26.10.1996. The reasons for the delay was not explained by the Abkari Officer. While cross examination of PW1 also, no explanation was stated by him. He asserted that he kept the article in his custody. This Court in Ravi v. State of Kerala [2011 (3) KLT 353] held as follows:

"There is no statutory mandate under the above

provision to "forthwith" produce the properties before the Court. What is insisted on is that the seizure of the property should be forthwith reported to the Court. But that does not mean that the detecting or Investigating Officer can produce the property leisurely, particularly when the nature and contents of the property can be convincingly established only through expert opinion obtained either in the form of chemical analysis or the report of a forensic or other expert for which the property should reach the court without unreasonable delay. Delayed production before court of the seized property (wherever it is practicable) is likely to be frowned upon by Courts because of the possible misuse or tampering with of such property while in the custody of the officer concerned. There is also the chance of such property getting misplaced. Under sub-s.(3) of S.40 it is provided that every person arrested and every article seized shall be forwarded without unnecessary delay to the officer in charge of the nearest Police Station or to the officer empowered under S.5A of the Abkari Act or to the Abkari Inspector. Here also there is no statutory mandate to "produce" the property before the Court "forthwith". But the very fact that the statute insists on production of the property before an officer of a particular designation or rank is to ensure that there is no misuse of the property. Likewise, unless the property is before Court, there cannot be a proper ascertainment of the nature and content of the property by questioning the service of an expert through the instrumentality of the Court. Hence, production of the property before Court without unreasonable delay is also a necessary requirement of law. Delay in producing the property before Court, by itself, cannot be fatal

to the prosecution if the delay can be satisfactorily explained. It is not necessary to produce the article seized under S.34 of the Abkari Act before the Magistrate "forthwith" either by virtue of S/103(2) Cr.P.C. or by virtue of any of the provisions of the Abkari Act or the Abkari Manual. What is enjoined by the statute is only that the seizure of the property should be reported forthwith to the Court. But we hasten to add that the production of the property before Court (wherever it is practicable) should also take place without unnecessary delay. There should be explanation for the delay when there is delayed production of the property. (paras 5,6 & 8)

In this case, there is no explanation for the delay, which will create a doubt in the credibility of the alleged seizure. Moreover, there is no arrest of the revision petitioner after the incident.

8. PW2 stated that he is familiar with the revision petitioner, but the circumstance under which he has acquaintance with the revision petitioner, was not disclosed. In paragraph 5 of Ravi 's case (supra), it was held as follows:

"In Dominic v. State of Kerala (1989 (1) KLT 601) a learned Single Judge of the Court

referring to the provisions in the Excise Manual Volume II read with S.36 of the Abkari Act, took the view that if those provisions are read together it is clear that seizure of property should be reported to the Court "forthwith" and request for sending a sample for analysis to be made expeditiously. Paragraphs 17, 26, 34, 49 and 77 of the Excise Manual were relied on in this connection. The above view was reiterated by another Single Judge of this Court in Alex v. State of Kerala (2003 (1) KLT SN 9 (C.No.12)). In Kunhikannan v. State of Kerala (2006 (4) KLT 469) also yet another Judge of this Court held that the delay of 14 days in producing the seized articles before the Court was fatal to the prosecution. In Vikraman v. State of Kerala (2007 (1) KLT 1010) which was overruled on another point in Subash v. State of Kerala (2008 (2) KLT 1047 (D.B.)), it was observed that even though under S.102(3) Cr.P.C. the property seized should be forwarded to the Court "forthwith", the said provision does not contain the consequence of non compliance and therefore, if proper explanation for the delay is offered, such delay by itself is not fatal to the prosecution.

Section 102(3) Cr.P.C. reads as follows:

"Every police officer acting under Ssub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be, conveniently transported to the Court or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in the Police custody may not be considered necessary for the purpose of investigation, he may give custody thereof to

any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same."

There is no statutory mandate under the above provision to "forthwith" produce the properties before the Court. What is insisted on is that the seizure of the property should be forthwith reported to the Court. But that does not mean that the detecting or Investigating Officer can produce the property leisurely, particularly when the nature and contents of the property can be convincingly established only through expert opinion obtained either in the form of chemical analysis or the report of a forensic or other expert for which the property should reach the court without unreasonable delay. Delayed production before court of the seized property (wherever it is practicable) is likely to be frowned upon by Courts because of the possible misuse or tampering with of such property while in the custody of the officer concerned. There is also the chance of such property getting misplaced.

9. A close scrutiny of the evidence shows that there is no explanation for 26 days' delay in producing the seized article and the sample before Court. In such a situation, there is no guarantee that the sample forwarded to the chemical examination lab was the very same sample

drawn from the contraband arrack alleged to have been found by the side of the pond. There is no convincing link of evidence to show that the revision petitioner was in possession of the above arrack as alleged by the prosecution. The Courts below failed to appreciate that position. Therefore, the conviction and sentence passed by the Courts below ignoring the vital aspect are liable to be set aside. In the result, conviction and sentence u/s.55 (a) of the Abkari Act are set aside and the revision petitioner is acquitted thereunder.

The Criminal Revision Petition is allowed.

P.D. RAJAN, JUDGE.

acd

