

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 11TH DAY OF AUGUST 2015/20TH SRAVANA, 1937

Cr1.Rev.Pet.No. 2019 of 2006 ( )

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AGAINST THE JUDGMENT IN Cr1.APPEAL NO. 417/2003 of I ADL.SESIONS  
COURT, THIRUVANANTHAPURAM DATED 28-02-2006  
AGAINST THE JUDGMENT IN SC 633/2000 of ASSISTANT SESSIONS COURT,  
NEDUMANGAD DATED 28-08-2003

REVISION PETITIONER(S)/ACCUSED/APPELLANT:

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RAJAN S/O. PAULOSE,  
THOTTARIKATHU VEEDU, MUTHIYANKAVU, THOLIKKODE VILLAGE  
NEDUMANGAD TALUK.

BY ADVS.SRI.NAGARAJ NARAYANAN  
SRI.RAJAN VELLOTH  
SRI.SAIJO HASSAN  
SRI.A.S.SABU  
SRI.A.G.GIRISH KUMAR

RESPONDENT(S)/COMPLAINANT/STATE:

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

BY PUBLIC PROSECUTOR SMT. SAREENA GEORGE.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD  
ON 11-08-2015, THE COURT ON THE SAME DAY PASSED THE  
FOLLOWING:

acd

**P.D. RAJAN, J.**

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Crl. R.P. No.2019 of 2006  
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Dated this the 11<sup>th</sup> day of August, 2015

**ORDER**

The revision petitioner, who is the appellant in Crl.Appeal No.417/2003 of I Additional Sessions Court, Thiruvananthapuram, challenges the judgment of conviction u/s.58 of the Abkari Act. He was accused in S.C.633/2000 of Assistant Sessions Judge, Nedumangadu and convicted u/s.58 of the Abkari Act and sentenced to undergo rigorous imprisonment for two years and to pay a fine of ₹1 lakh, in default simple imprisonment for six months thereunder.

2. The prosecution case is that on 19.8.1999 at 5.45 p.m., the Sub Inspector of Police, Valiyamala was conducting patrol duty within his jurisdiction. When he reached at

Mariyankavu bridge, he got an information that the accused was conducting sale of arrack in the rubber plantation of one Kalam at Mannoorkonak-Muthiyankavu in Chittuveetu muri, Tholikkode Village and he arrived at the place of occurrence and seized four liters of arrack. Accused was arrested and the contraband articles were seized. He registered a case and after completing investigation, laid charge u/s.55(a) of the Abkari Act in the Judicial First Class Magistrate Court-I, Nedumangadu. Subsequently, the case was committed for trial.

3. During trial, prosecution examined PW1 to PW5 and marked Exts.P1 to P4 and admitted MO1 as material object. While cross examination of PW3, Ext.D1 was marked. The incriminating circumstances brought out in evidence were denied by the revision petitioner while questioning him. He was also heard u/s.232 Cr.P.C. He did

not adduce any defence evidence. The trial Court convicted the revision petitioner. Against that, he preferred the appeal, where the conviction passed by the trial Court was confirmed.

4. The learned counsel for the revision petitioner contended that there is delay of 11 days in producing the seized articles before Court and there was no explanation by the investigating officer about delay. The independent witnesses PW1 and PW2 did not support the prosecution case. The glass seized from the possession of the revision petitioner was not produced before Court. The prosecution failed to produce the document to show that the seized articles were sealed at the place of occurrence and proper sampling was done. The forwarding note prepared by the detecting officer was not produced before Court. There was no assurance that the seized

articles were produced before Court, which was sent to the Chemical Examiner's lab as alleged by the prosecution. Therefore, the legal infirmities highlighted were not approved by the courts below.

5. The revisional power of the High Court is as a supervisory power and it can be used for the purpose of satisfying the correctness, legality or propriety of the finding and sentence or order of the courts below. I have considered the evidence recorded by the court below to ascertain whether they have committed illegality or irregularity while disposing the above case. PW4 deposed that on 19.8.1999 at 5.45 p.m., he was conducting patrol duty within his jurisdiction, and on reaching at Mariyankavu bridge, he got an information that the revision petitioner was conducting sale of arrack in the rubber plantation of one Kalam at Mannoorkonak-Muthiyankavu in Chittuveetu

muri, Tholikkode Village and he arrived at the place of occurrence and seized four liters of arrack from the possession of the revision petitioner. He seized the arrack after preparing Ext.P1 seizure mahazar. He also seized one glass and ₹130/- from the possession of the revision petitioner. The seized articles were sealed at the place of occurrence, reaching at the Police Station, registered Ext.P2 F.I.R. Subsequently, on 20.8.1999, he conducted investigation, questioned the witnesses and prepared Ext.P3 report. The sample was forwarded to the Chemical Examiner's Lab and Ext.P4 is the chemical examination report. But, in cross examination, he admitted that he took sample of 180ml in a bottle and produced before Court. But, forwarding note for sending the sample to the chemical examiner's lab was not produced before Court, which was not marked in evidence.

6. A close scrutiny of the evidence of PW4 itself shows that he has not properly prepared the forwarding note and took sample at the time of seizure. The official witness, who accompanied PW4, supported the evidence of seizure. PW3 deposed that while he was working in the Police Station, Valiayamala, he accompanied PW4 and saw the detection of the offence. PW3 also has not stated about the method of taking sample. But, he admitted that the seized articles were sealed at the place of occurrence. PW1 and 2 are the independent witnesses, who were present at the time of seizure, did not support the evidence of PW3 and PW4. They admitted their signature in Ext.P1. But, they denied the contents in Ext.P1. PW5 also did not depose about the preparation of forwarding note for taking sample. He has no knowledge about the seized articles. The totality of the procedure followed by

PW4 shows that there were serious legal formalities in connection with the seizure of the articles.

7. It is clear that no request was made by the investigating officer to forward the sample to the Magistrate for sending it to the chemical examiner's lab.

This Court in Joseph v. State of Kerala [2009(4) KHC 537] discussed about such legal infirmities and held as follows:

"Yet another infirmity in the prosecution case is that there is no request or forwarding note either produced or marked to indicate that a request was made to the Magistrate to send the sample bottle to the chemical examiner to analysis. PW6 who conducted the investigation, has no case that he had made a request or had filed any forwarding note. Likewise, PW1 also has no case that he had made a request to the Magistrate to send the sample bottle to the chemical examiner. Ext.P4 certificate of chemical analysis dated 24/11/1997 is relied on by the prosecution to show that the sample bottle was duly despatched to the chemical examiner for analysis. In the absence of any forwarding note or requisition, it is not explained as to how the Magistrate forwarded a sample bottle to the chemical examiner as per his covering letter dated 19/08/1997 referred to in Ext.P4 certificate. Even the office copy of the covering

letter has not been produced. The thondi section clerk who was the custodian of the properties before the Magistrate, was not examined to prove matters such as the date of receipt of the property before the Magistrate, the condition in which those properties were received in Court including the fact whether a sample bottle was received and if so, whether the seals if any on such bottle were in tact, the date of despatch of the sample to the chemical examiner and the nature of the custody of the sample bottle until then. The prosecution can succeed in securing a conviction against the appellant only if it is shown that the sample which was subjected to chemical analysis as evidenced by Ext.P4 certificate was the very same sample which was drawn from the bulk quantity of contraband liquor allegedly held by the accused and which after change of hands, eventually reached the hands of the chemical examiner (See - State of Rajasthan v. Daulat Ram, AIR 1980 SC 1314, Valsala v. State of Kerala, 1993 (2) KLT 550 (SC) and Sasidharan v. State of Kerala, 2007 (1) KLT 720)"

Therefore, mere arrest of the accused itself is not sufficient to establish that the revision petitioner committed an offence u/s.58 of the Abkari Act. No evidenciary value can be given to Ext.P4 chemical analysis report in this backdrop.

8. Another pitfall highlighted by the revision petitioner is that the glass and the amount seized from the place of occurrence were not produced before Court. Absolutely, there is no evidence to convince the Court that PW4 seized the alleged articles stated by him. It is the responsibility of the prosecution to show that the seized articles were properly produced before Court and from there, it was forwarded to the chemical examiner's lab without any tampering. Unless and until such evidence is not found, it is difficult to approve the conviction passed by the trial Court. In Ravi v. State of Kerala and another [2011 (3) KHC 121], this Court held as follows:

"It is difficult for us to believe that PW4 had produced the properties on 25/08/1997 and the thondy Section Clerk refused to receive the properties on the ground that he was too busy. Even assuming that such a thing happened, we would have expected the prosecution to examine the Thondy Section Clerk to substantiate the above explanation. For reasons best known to the prosecution the Thondy Section Clerk was not

examined. If so, it cannot be assumed that the property was in the safe custody of W4 until their production before Court after 16 days. There is the possibility that the properties would have been tampered with. The prosecution, in a case of this nature can succeed only if it is shown that the contraband liquor which was allegedly seized from the accused ultimately reached the hands of the Chemical Examiner by change of hands in a tamper- proof condition."

In the result, the conviction and sentence passed by the Court below u/s.58 of the Abkari Act is set aside and the appellant is set at liberty.

**P.D. RAJAN, JUDGE.**

acd



