IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 7TH DAY OF APRIL 2015/17TH CHAITHRA, 1937

Crl.Rev.Pet.No. 2676 of 2004 (D)

AGAINST THE JUDGMENT IN CRL.A 214/2002 of ADDITIONAL DISTRICT & SESSIONS COURT, THODUPUZHA DATED 22-07-2004

AGAINST THE JUDGMENT IN SC 120/2000 of ASSISTANT SESSIONS COURT,KATTAPPANA DATED 14-11-2002

REVISION PETITIONER/APPELLANT/ACCUSED::

KUMARAN, S/O. NARAYANAN,
ANIKKATTUKUDIYIL HOUSE, RAJAKUMARI KARA,
RAJAKUMARI VILLAGE,
UDUMPANCHOLA TALUK, IDUKKI DISTRICT.

BY ADVS.SRI.GEO PAUL
SRI.SANU MATHEW
SRI.C.R.PRAMOD
SRI.S.ASHOK KUMAR.
SRI.RADHIKA RAJASEKHARAN P.
SRI.JERRY VARGHESE

RESPONDENT/RESPONDENT/COMPLAINANT::

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

BY P.P. SMT. V.H. JASMINE

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 07-04-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. RAMAKRISHNAN, J.

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Crl.R.P.No.2676 of 2004

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Dated this the 7th day of April, 2015.

O R D E R

The accused in S.C.No.120/2000 on the file of the Assistant Sessions Court, Kattapana is the revision petitioner herein. The revision petitioner was charge sheeted by the Excise Inspector, Udumbanchola excise range in C.R.No.45/1997 of that range under section 55(i) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 3.7.1997 at about 5.30 p.m the accused was found to be in possession of 16 bottles of 750 ml each of wisky and 15 bottles of 500 ml each of brandy, which was intended to be sold at Karnataka only in the kitchen of the house with No.R.P.II/177 without any document, for the purpose of sale in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under section 55(i) of the Abkari Act.

3. After investigation, final report was filed and it was taken on file as C.P.No.16/1999 on the file of the Judicial First Class Magistrate Court, Adimali and the learned Magistrate had committed the case to the Sessions Court, Thodupuzha under section 209 of the Code of Criminal Procedure and it was

taken on file as S.C.No.120/2000 and the same was made over to the Assistant Sessions Court, Kattapana, for disposal.

4. When the revision petitioner appeared before the court below, after hearing both sides, charge under section 55(i) of the Abkari Act was framed and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, Pws 1 to 6 were examined and Exts.P1 to P5 and Mos 1 to 3 series 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 and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that he was not arrested from the house and he was residing in the hotel conducted by him and he was arrested from that place. Further, apart from himself, his wife and four major children were residing in the house and contraband articles were seized from his possession. Since the evidence in the case did not warrant acquittal under section 232 of the Code, the learned Assistant Sessions Judge directed the revision petitioner to enter on his defence. Dw1 was examined on the side of the revision petitioner and Exts.D1 was marked on his side. After

considering the evidence on record, the trial court found the revision petitioner guilty under section 55(i) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for three years and also to pay a fine of ₹1,00,000/-, in default to undergo rigorous imprisonment for another six months. Aggrieved by the same, he filed Crl.A.No.214/2002 before the Sessions Court, Thodupuzha, which was made over to the Additional Sessions Court, Thodupuzha for disposal and the learned Additional Sessions Judge allowed the appeal in part confirming the order of conviction, fine and default sentence but reduced the substantive sentence to one year rigorous imprisonment from three year rigorous imprisonment imposed by the court below. Aggrieved by the same, the present revision has been filed by the revision petitioner/accused before the court below.

5. Heard the learned counsel for the revision petitioner Sri. Geo Paul and Smt.V.H. Jasmine, learned Public Prosecutor appearing for the State.

6. The counsel for the revision petitioner submitted that though a search memo was said to have been prepared and sent, it has never reached the court and it was not marked as well.

Further, there is a delay of 102 days in producing the article and the evidence of PW4 that though he produced the contraband article before the court, it was returned with the direction to produce as and when required by the court was in fact not believable. But though the trial court had come to the conclusion that such an explanation is not believable, but later accepted that explanation on the ground that such things are happening in practice which is unsustainable in law. No endorsement has been made by the Magistrate while returning the articles to the Excise Inspector so as to produce them later. Further, the specimen impression of the seal affixed after seizing the article was not produced before court as well. So the delay in producing the article will go to show that the prosecution has not proved beyond reasonable doubt that the articles said to have been seized were the same articles produced before court and the chemical analysis report relates that article so as to convict the revision petitioner for the offence alleged. He had also argued that in the absence of any evidence adduced that the kitchen was in the exclusive possession of the revision petitioner from where the articles were seized, it cannot be said that he was in conscious possession of the same and on that

ground also, he is entitled to get acquittal.

7. On the other hand, the learned Public Prosecutor submitted that the courts below have given cogent reason for the delay in producing the article and come to the conclusion that, that does not cause any prejudice to the revision petitioner and the concurrent findings on facts do not call for any interference.

8. The case of the prosecution as emerged from the prosecution witnesses was as follows:

On 3.7.1997 at about 5.30p.m, while Pws 1 and 2 along with other excise party were doing patrol duty, they got information that unauthorized sale of arrack is being done from the house of the revision petitioner. So immediately PW1 sent a search memorandum to court and went to the house in question and conducted search of the house in the presence of PW3 and another and found 16 bottles of wisky having a capacity of 750 ml each and 15 bottles of brandy with capacity of 500ml each with a label intended for sale in Karnataka only was found sacked in concealed position with the firewood in the kitchen and the same was seized as per Ext.P2 search list. Thereafter, three samples of 180 ml from each category were taken and

sealed the same and thereafter seized the same as per Ext.P1 mahazer in the presence of witnesses. He arrested the revision petitioner and came to excise office and entrusted the revision petitioner with the contraband articles and the document prepared to PW4, who registered Ext.P3 occurrence report against the revision petitioner as C.R.No.45/1997 of Udumbanchola excise range. He produced him before the Magistrate along with the remand report. According to him, the articles were also produced, but the same were returned to him with the direction to produce the same later when required by the court. Thereafter he had sent forwarding note and got Ext.P5 chemical analysis report. Further, investigation in this case was conducted by PW6, his successor in office. He collected Ext.P4 ownership certificate of the house issued by PW5 to prove that the revision petitioner is the owner of the house. On the basis of the request made by the investigating officer, samples were sent for chemical analysis from court and Ext.P5 chemical analysis report obtained, which goes to show that the samples contained 42.11, 41.15 and 41.83 percent by volume of ethyl alcohol. He completed the investigation and submitted final report.

9. The case of the accused was one of total denial. According to him, he was not residing in the house and he was residing in the hotel conducted by him and apart from him, four major persons including his wife were residing in the house and he was not aware of the contraband articles seized. In fact, he was arrested from the hotel where he was staying. In order to prove that fact, he produced Ext.D1 and also examined DW1. The evidence of DW1 will go to show that he is also conducting a shop near the shop of the revision petitioner and apart from the revision petitioner, his wife and three children were in the house and according to him, the revision petitioner was staying in the shop. But, in the cross examination he had admitted that he used to go home at 9 p.m after closing his shop and he did not know whether the revision petitioner used to go to his house or not. No attempt was made to prove through other witnesses that arrest of the revision petitioner was made from the hotel and not from the house. If really this witness was a neighbouring shop owner and he was aware of the activities of the revision petitioner, he could have known about the arrest of the revision petitioner as well, if it was done from the hotel. So the courts below were perfectly justified in not relying on

the evidence of this witness to prove that he was not residing in the house. The revision petitioner had no case that the house where the contraband articles seized was not belonged to him. Ext.D1 also will go to show that he is the owner of the house and he is residing in that along with his family consists of wife and three children. It is true that all the family members were majors at the time when the alleged detection was made. But the fact that he was arrested from the house where the contraband articles were seized will go to show that he is in conscious possession of the articles as well. So the submission made by the counsel for the revision petitioner that the prosecution has failed to prove that the revision petitioner was in conscious possession of the articles and he is entitled to get acquittal on that ground is liable to be rejected.

10. On going through the evidence of Pws 1 and 2, it will be seen that the revision petitioner was arrested and the contraband articles were seized from the house. It is also seen from the document that the revision petitioner was produced before the Magistrate on the next day itself along with the remand report and he was remanded to custody. He had no complaint about his arrest before the Magistrate as well. It is

true that the arrest memo has not been produced. But, when he was produced before court, he had no complaint about the arrest. It loses significance especially when DW1 had no case that he was arrested from the hotel and not from the house as he was examined to prove that the revision petitioner was not in the habit of going to the house and he was residing in the hotel itself. As regards the seizure is concerned, it is true that search memo has not been produced. But Abkari Act is a self contained Act. Section 36 of the Abkari Act only says that any case of seizure, as far as possible, the procedure provided under the Criminal Procedure Code has to be followed. It doesn't mean that any infraction made therein will affect the seizure as such. So from the evidence, it can be concluded that the Excise Officials have conducted search and seized the alleged contraband articles and arrested him from his house.

11. Merely because some articles were seized, which is said to be liquor alone, is not sufficient to convict the accused unless it is proved by the prosecution that the articles seized have reached court in the same condition in which it was seized and proved to the conscious of the court that it was produced in court in tamper proof condition. In this case, it is seen from the

evidence that though the alleged seizure was effected on 3.7.1997 at 6 p.m, the articles reached the court only on 16.12.1997, which was admitted by Pws 4 and 6. It was admitted by PW6 that it was he who produced the articles through the excise guard, who has not been examined in this case to prove this fact. According to PW4, though he had produced the articles on the next day itself before the Magistrate court, it was returned with the direction to produce later as and when required by the court and thereafter, till 9.9.1997 it was in the lock and key of himself and thereafter he had submitted that he did not know the condition though it was entrusted to PW6 by him. But even after that it was produced only on 16.12.1997. Further, the learned Assistant Sessions Judge in paragraphs 22 and 23 of the judgment had observed that he is not believing the evidence of PW4 on that aspect but he cannot rule out the possibility as such things are happening in some courts. It may be mentioned here that such an observation made by the court appears to be shocking. When the contraband article has been produced before court, there is a duty cast on the thondi clerk to enter the same in thondi register and, if they want to entrust the articles for safe custody,

orders to that effect have to be obtained from the Magistrate and only after getting orders, it can be returned to the excise officials for keeping the same in safe custody with a direction to produce the same as and when required in the same condition. So in the absence of any such endorsement, the explanation given by PW4, which was not accepted by the trial court as a reason for the delay has to be viewed seriously and it cannot be accepted as a plausible and acceptable reason for not producing the article which is required in such cases immediately under section 36 of the Abkari Act. So, the courts below were not justified in accepting the explanation given by the excise officials in not producing the article immediately and producing the same after 102 days of the alleged seizure on the ground that that does not cause any prejudice to the accused. In fact, articles are expected to be produced before court immediately so as to avoid tampering of articles said to have been seized from the possession of the accused so as to reach the court immediately so that court can infer that articles reached the court are the same articles which were said to have been seized from the possession of the accused. Further, in this case though it was mentioned in the seizure mahazer that seal

was affixed, the nature of the seal used was not mentioned. The specimen impression of the seal which has been used for sealing the articles was not put in the seizure mahazer or in the search list and the specimen impression of such seal used was not sent to court as well. The forwarding note was not seen marked so as to ascertain as to whether it contained specimen seal used for seizing the article. In the decision reported in **Joseph v. State of Kerala** (2009 (4) KHC 537), it has been observed that if the thondi was produced before court with inordinate delay and no plausible explanation has been given and no materials produced to show that the article reached the court with the seal in tact, it cannot be said that the prosecution has proved beyond reasonable doubt that the articles reached the court in tamper proof condition and that benefit must be given to the accused. The same view has been reiterated in the decision reported in **Ravi v. State of Kerala** (2011 (3) KLT 353) where it has been observed that the prosecution has got a duty to prove that the sample taken from the contraband liquor seized from the possession of the accused which reached the hands of the chemical examiner in full proof condition and in the absence of such evidence, no conviction can be entered against the revision

petitioner. The same view has been reiterated in the decisions reported in **Appukuttan v. State of Kerala** (2013 (2) KLT SN 109 C.No.138) and **Rajan v. State of Kerala** (2013 (3) KLT 654). So under the circumstances, the courts below were not justified in coming to the conclusion that the prosecution has proved beyond reasonable doubt that Ext.P5 chemical analysis report relates to the samples said to have been taken from the contraband article said to have been seized from the possession of the revision petitioner and in the absence of such evidence, it cannot be said that the prosecution has proved beyond reasonable doubt that the accused had committed the offence punishable under section 55(i) of the Abkari Act (in fact there was no proof of sale adduced but it can only be said that he was found to be in possession of the contraband article, which is punishable under section 55(a) of the Act) and the conviction entered by the courts below in view of the discussions made above 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 was acquitted, the sentence imposed is also not proper and the same is liable to

be set aside.

12. In the result, the revision petition succeeds and the same is allowed and the order of conviction and sentence passed by the court below and confirmed by the appellate court with modification of the sentence under section 55 (i) of the Abkari Act are 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 stands cancelled. If he had remitted any amount as a condition for suspending the sentence, then the lower court is directed to refund the same to the petitioner on making necessary application for that purpose.

Office is directed to communicate a copy of this order to the concerned court immediately.

Sd/-
K. RAMAKRISHNAN, JUDGE.

/true copy/

P.S to Judge

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