

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 13TH DAY OF OCTOBER 2015/21ST ASWINA, 1937

Crl.Rev.Pet.No. 3078 of 2004 (D)

AGAINST THE JUDGMENT IN CRL.APPEAL NO.236/2003 of SESSIONS
COURT,KOZHIKODE DATED 20-08-2004
AGAINST THE JUDGMENT IN SC 406/2001 of II ADDL.ASST. SESSIONS
COURT,KOZHIKODE DATED 07-04-2003

REVISION PETITIONER(S)/APPELLANT/ACCUSED::

VALSAN, S/O. APPUTTY,
RESIDING AT PANNIYANKARA AMSOM DESOM OF
KOZHIKODE TALUK.

BY ADVS.SRI.V.V.SURENDRAN
SRI.P.A.HARISH

RESPONDENT(S)/RESPONDENT/STATE:

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1. STATE OF KERALA, REP. BY THE PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.
 2. THE EXCISE RANGER OFFICER,
FEROKE.

R BY PUBLIC PROSECUTOR SRI.DHANESH MATHEW MANJOORAN.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 13-10-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

acd

P.D. RAJAN, J.

Crl.R.P.No. 3078 of 2004

Dated this the 13th day of October, 2015

ORDER

The revision petitioner, who is the appellant in Crl.Appeal No.236/2003 on the file of Sessions Court, Kozhikode, challenges the concurrent finding of conviction u/s.55(a) of the Abkari Act (hereinafter referred to as the 'Act'). He was the accused in S.C.No.406/2001 of II Additional Assistant Sessions Judge, Kozhikode for offence punishable u/s. 55(a) of the Act. He was convicted and sentenced to undergo simple imprisonment for three years and to pay a fine of ₹1,00,000/-, in default of payment of fine, simple imprisonment for six months.

2. The prosecution case is that on 3.9.2000 at 6.30

p.m., the Excise Inspector and party were conducting patrol duty within his jurisdiction, when they reached at Kundoor Narayanan Road near Panniyankara U.P. School, the accused was found carrying a black can. The Excise Inspector and his party intercepted him and interrogated and inspected the can, in which detected 2 litres of illicit arrack. They seized the contraband articles and arrested the accused. Thereafter, they registered a crime and occurrence report. After completing investigation, laid charge before Judicial First Class Magistrate-III, Kozhikode from there it was committed to Sessions Court.

3. To prove the offence, the prosecution examined PW1 to PW7 and admitted Exts.P1 to P6 as documentary evidence. The can was marked as MO1. The incriminating circumstances brought out in evidence were denied by the accused while questioning him. He did not adduce any defence evidence. In the circumstances, II Addl. Asst.

Sessions Judge, Kozhikode convicted the accused and sentenced thereunder. Against that, he preferred an appeal in the Sessions Court, where the conviction was confirmed and the sentence was modified. Being aggrieved by that, the accused preferred this revision.

4. When the revision came up for hearing, Adv. V.V. Surendran, the learned counsel appearing for the revision petitioner submitted that the revision petitioner expired on 5.5.2009. In the light of the above submission, this Court directed to obtain a report from the Excise Inspector, Excise Range Office, Feroke through the learned Public Prosecutor. Accordingly, the Excise Inspector, Excise Range Office, Feroke produced a copy of the Death Certificate of the revision petitioner, which shows that the revision petitioner died on 5.5.2009. The Death Certificate is marked as Ext.C1. In State of Kerala v. Narayani Amma Kamala Devi & others [AIR 1962 SC 1530], it

was held that there is no abatement in revision.

5. The learned counsel appearing for the revision petitioner submitted that there is no independent evidence to prove the alleged seizure. The evidence of PW2 and PW3 is not sufficient to prove the contents of seizure mahazar. There is no evidence to show that MO1 contained arrack as alleged by the prosecution. There was no proper custody of the seized articles.

6. The learned Public Prosecutor strongly opposed the argument and contended that the seizure of arrack was properly proved and chemical analysis report shows that the seized article contained 35.72% of ethyl alcohol and procedures were properly complied by the detecting officer. The independent witnesses PW3 and PW4 supported the seizure. No interference is necessary.

7. The allegation against the revision petitioner was that on 3.9.2000 at 6.30 p.m. while PW1 was conducting

patrol duty, seized two liters of arrack from the possession of the revision petitioner. PW1 tasted the content and identified as arrack. He took 180ml sample at the place of occurrence and sealed it in the presence of the accused and independent witnesses. Ext.P2 is the seizure mahazar. The accused was arrested from the spot itself. Ext.P1 is the arrest memo, reaching at the Excise office, he registered Ext.P3 crime and occurrence report. He also prepared Ext.P4 sketch. The seized articles were forwarded to the chemical examiner's lab through the Court. Ext.P5 is the forwarding note. On 4.9.2000, the Court received the sample of contraband articles. It is specifically mentioned in the forwarding note. Ext.P6 is the chemical analysis report, which shows that the sample contained 35.72% of ethyl alcohol. During cross examination of PW1, he admitted that MO1 can was broken down at the time of examination of PW1.

8. PW2 supported the evidence of PW1. He saw the seizure of arrack from the possession of the accused and PW1 arrested him with MO1 can and arrack.

9. PW3 admitted the signature in Ext.P2 seizure mahazar. PW4 also admitted the attestation of Ext.P2 mahazar, but these two witnesses did not see the seizure. Even though PW3 and PW4 attested Ext.P2, they never saw the seizure of arrack from the possession of the accused. PW5 is the Excise Guard, Excise Range Office, Feroke and PW6 is the Village Assistant, who had prepared the sketch. PW7 is the Excise Inspector, who conducted the investigation in this case. On 4.9.2000, he registered Ext.P3 crime and occurrence report, subsequently, the accused and the contraband articles were produced before Court. He identified the seal and signature in the forwarding note. On a perusal of the above evidence, it is clear that they arrested the accused from the place of

occurrence and no reasons are stated by the revision petitioner to discard the evidence of official witnesses.

10. In this context, I have verified whether any offence u/s.55(a) of the Act has been committed. Section 8 of the Abkari Act deals with prohibition of manufacture, import, export, transport, transit, possession, storage, sales of arrack. Instead of convicting u/s.8(2) of the Abkari Act, the revision petitioner was convicted u/s.55(a) of the Act and thereby imposed sentence . This Court in Gopan v. State of Kerala [2007(3) KLT 443] held that the mere possession of arrack in any form without any authority would only attract Section 8 and not Section 58 of the Abkari Act. In Jose v. State of Kerala [2007(2) KLT 202] held that arrack is liquor, the possession of which incidental to transportation will squarely attract S.55(a) of the Abkari Act. S. 58 of the Act seeks to punish a person for possession of illicit liquor. Further it was observed

that except for the ingredient of "knowledge" mentioned in S.8 which is a conscious mental state, there does not appear to be much difference or distinction between S.8, S.55(a) and S.58 of the Abkari Act, so far as the transport of arrack is concerned. The possession of arrack only an offence punishable u/s.8(1) and (2) of the Abkari Act. Section 8(1) and (2) of the Act reads as follows:

"8(1): Prohibition of manufacture, import, export, transport, transit, possession, storage, sales etc., of arrack.- No person shall manufacture, import, export without permit transit possess, store, distribute, bottle or sell arrack in any form.

(2) If any person contravenes any provisions of subsection (1), he shall be punishable with imprisonment for a term which may extend to ten years and with fine which shall not be less than one lakh."

In this case, revision petitioner challenged Ext.P7 chemical analysis report and contended that 35.72% of ethyl alcohol detected, which is not a criteria provided for arrack. The arrack is defined u/s.6A of the Act, where such specific

percentage is not mentioned. Hence, in the absence of such evidence to attract the offence punishable u/s.55(a) of the Act, trial Court convicted the revision petitioner u/s.55(a) of the Act. Therefore, the conviction passed by the trial Court, which was upheld by the Sessions Court u/s.55(a) of the Act is to be set aside. On the other hand, prosecution proved a case alleging offence punishable u/s.8(1) and (2) of the Act alone. Now, the accused is no more and a conviction u/s.8(1) and (2) of the Act is also not possible, hence the case is closed as abated.

P.D. RAJAN, JUDGE.

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