

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

MONDAY, THE 10TH DAY OF AUGUST 2015/19TH SRAVANA, 1937

Crl.Rev.Pet.No. 3239 of 2004 ()

**AGAINST THE JUDGMENT IN CRL.A.NO.353/1997 of ADDL.SESIONS COURT (AD HOC-II),
THALASSERY DATED 30-03-2004**

**AGAINST THE JUDGMENT IN C.C.NO.394/1996 of JUDICIAL FIRST CLASS MAGISTRATE
COURT, KUTHUPARAMBA**

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

**A.NARAYANAN, S/O. KRISHNAN,
AYILACHI HOUSE, VEKKALAM AMSOM, PERAVOOR.**

BY ADV. SRI.GRASHIOUS KURIAKOSE

RESPONDENT(S)/RESPONDENT/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT.M.G.LISHA

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 10-08-
2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

Bb

RAJA VIJAYARAGHAVAN V, J.

Crl.R.P.No.3239 of 2004

Dated this the 10th day of August, 2015

O R D E R

The revision petitioner was convicted under section 55 (a) of the Abkari Act and sentenced to undergo rigorous imprisonment for 6 months and to pay a fine of Rs.25,000/- and in default to undergo rigorous imprisonment for 6 months by the Judicial First Class Magistrate, Kuthuparamba in C.C.No.394/1996.

2. The allegation is that, on 16.11.1995, at 6.30 p.m., the petitioner was found in possession of 5 litres of illicit arrack in a black can in front of Vekkalam U.P.School near the property belonging to Karoth Ravunni Nair when he was intercepted by PW3, the Excise Preventive Officer and his party.

3. Though, against the aforesaid conviction and sentence passed by the learned magistrate,

Crl.A.No.353/1997 was preferred by the petitioner herein, the same was dismissed. The revision petition is filed challenging the legality and propriety of the conviction and sentence.

4. I have heard the learned senior counsel Adv.Shri.Grashious Kuriakose for and on behalf of the petitioner and the learned Public Prosecutor.

5. It is seen that on 16.11.1995 at 6.30 p.m., while PW3 and his party was on patrol duty in Thalassery Taluk Vekkalam amsom desom, the Excise party saw the accused at a distance of 30 metres in front of U.P.School, Vekkalam situated near the property belonging to one Ravunni Nair. The accused appeared perplexed on seeing the Excise Party and he attempted to flee. He was apprehended and on examination, he was found carrying 5 litres of illicit arrack. PW3 prepared the mahazar in respect of the occurrence and the contraband articles were seized. He also arrested the petitioner. The investigation was conducted and after completing the same,

charge was laid against the petitioner before the Judicial First Class Magistrate Court, Kuthuparamba.

6. In order to prove the case of the prosecution, PWs 1 to 4 were examined and Exts.P1 to P5 were marked. MO1 was also produced and identified.

7. The independent witnesses who were examined as PWs 1 & 2 turned hostile. PW3 who was the Preventive Officer attached to Peravoor Excise Range gave evidence as regard to the detection and seizure and the evidence was considered reliable enough by the learned magistrate. Based on which, the findings and conviction was entered into.

8. Even though several contentions were raised by the learned senior counsel, the main argument advanced is that the contraband article seized by the officer on 16.11.1995 as per Ext.P1 mahazar was not forwarded to the court forthwith. According to the learned senior counsel, the inordinate delay in

production of properties before the court and the want of proper explanation by PW3 in respect of the same will prove fatal to the prosecution.

9. As per Ext.P3 Occurrence report dated 17.11.1995, it is seen recorded that the accused was found possessing illicit arrack on 16.11.1995 at 6.30 p.m. As is evident from Ext.P3, a black plastic can having a capacity of 5 litres containing illicit arrack was seized and at the time of seizure itself, sample was taken in a bottle having a capacity of 180 ml. The lower court records would reveal that the thondy articles seized by the detecting officer was produced before the Judicial First Class Magistrate Court, Kuthuparamba in O.R.No.85/1995 of Peravoor Range only on 21.03.1996. Ext.P4 is the requisition letter issued by the Excise Inspector to the Chemical Examiner to Government, Chemical Examiners Laboratory, Kozhikode requesting for subjecting the sample for chemical analysis and to report whether they contained ethyl alcohol as alleged. Ext.P4 requisition letter is dated 27.03.1996 which also would

reveal that the requisition was issued only after production of the thondy articles before the learned magistrate on 21.03.1996. There is absolutely no explanation from PW3 as to where the seized articles were retained till its date of production before the learned magistrate. All that was mentioned by PW3 in his evidence is that the seized materials were handed over to PW4 - the Excise Inspector. There is an inordinate delay of more than 4 months in producing the seized items as well as the sample before court. No explanation was also offered by PW3 as to where the items were retained during this period. In this case, it is also brought out in evidence that the labels of the seized articles were missing when the same was produced before court. It cannot be said for certain that the items which were seized by PW3 on 16.11.1995 were infact the items which were produced before court on 21.03.1996. According to me, absence of proper explanation will prove fatal to the prosecution.

10. In **Ravi Vs. State of Kerala [2011 (3) KLT 353]**,

while answering a reference as to whether it is necessary that article seized under section 34 of the Abkari Act should be produced before court forthwith either by virtue of section 103 (2) of the Code or any other provisions of Abkari Act or Abkari Manual. A Division Bench of this Court had answered the reference as follows:

"1. 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."

11. It has been held by this Court that the production of property which is seized as per section 103(2) of the Code of Criminal Procedure or by virtue of any of the provisions of the Abkari Act or Abkari Manual should take place without unnecessary delay. It has also been held that there should be explanation for the delay when there is delayed production of the property. This aspect was considered in **Ramankutty V Excise Inspector, Chelannur Range [2013 (3) KHC 308]**

as well.

12. I have gone through the judgment passed by the learned magistrate as well as the learned Sessions Judge in appeal. It does not appear that these aspects have been considered by the courts below.

13. As stated above the allegation is that the petitioner was found in possession of 5 litres of illicit arrack in a black can in front of Vekkalam U.P.School when he was intercepted by PW3, the Excise Preventive Officer and his party. It is on the said allegation that he was proceeded against and convicted under section 55 (a) of the Abkari Act. The ingredients of an offence under section 55(a) is the import, export, transport, transit or possess liquor or any intoxicating drug, in contravention of the Act or any rule or order made under the Act. The allegation as against the petitioner is limited to possession of arrack in contravention of the Act or rule or order made under the Act. It has been held in **Surendran Vs.**

Excise Inspector [2004 (1) KLT 404], Rajeevan V Excise Inspector [1995 (1) KLT 38], Purushan V State of Kerala [2002 (2) KLT 661] and Sabu V State of Kerala [2003 (2) KLT 173] that only possession of liquor in connection with or in the course of import, export or movement from one state to another or territories of this state is made penal under section 55 (a) of the Abkari Act. There is no case for the prosecution that the accused was transporting illicit arrack or that he has illegally imported the arrack or was in the course of export or transit. If that be the case offence under section 55 (a) is not made out as against him.

In the light of the above and in view of the settled precedents, I am of the considered view that the conviction entered and the sentence passed by the court below overlooking the above vital aspects on the matter cannot therefore be sustained and are accordingly dislodged. The petitioner is found not guilty of the offence punishable under section 55(a) of the Abkari Act and he is acquitted thereunder.

Crl.R.P.No.3239 of 2004 : 9 :

He is set at liberty.

In the result, this Crl.R.P. is allowed as above.

Sd/-
**RAJA VIJAYARAGHAVAN V,
JUDGE.**

Bb

[True copy]

P.A to Judge