

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 20TH DAY OF JANUARY 2015/30TH POUSHA, 1936

Crl.Rev.Pet.No. 906 of 2008 ()

**AGAINST THE JUDGMENT IN CRL.A 466/2006 OF ADDITIONAL DISTRICT AND
SESSIONS COURT (ADHOC)-I, MANJERI DATED 16-01-2008**

**AGAINST THE JUDGMENT IN SC 179/2006 OF ASSISTANT SESSIONS COURT, MANJERI
DATED 30-11-2006**

REVISION PETITIONER/APPELLANT/ACCUSED:

**B.VASU,S/O. BANGLAN KEERAN
EDAKKATTUPARAMBA, VETILAPPARA AMSOM
VETILAPPARA DESOM, AREECODE, MALAPPURAM DISTRICT.**

**BY ADVS.SRI.P.VIJAYA BHANU
SRI.P.VENUGOPAL (1086/92)**

RESPONDENT/RESPONDENT/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. V.H. JASMINE

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
20-01-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

SHG/

K.RAMAKRISHNAN, J

CrI.R.P.No.906 OF 2008

Dated this the 20th day of January, 2015

ORDER

Accused in SC.No.179/2006 on the file of the Assistant Sessions Judge, Manjeri, is the revision petitioner herein.

2. The revision petitioner was charge sheeted by the Excise Inspector, Manjeri Excise Range in Crime No.11/2004 of that excise range under sections 55 (a) and 8 (1) of Abkari Act.

3. The case of the prosecution in nutshell was that on 08.05.2004, at about 10.15 a.m, the revision petitioner was found to be in possession of one litre of arrack in a white plastic can and transiting the same through Edakkattuparambu Kinaradappan Panchayat road in front of the house of one Thottiyal Chathu in violation of provision of Abkari Act and thereby he had committed the offence punishable under sections 55 (a) and 8 (1) of Abkari Act.

4. After investigation, final report was filed before the Judicial First Class Magistrate Court-I, Manjeri, where it was taken on file as CP.No.8/2006 and thereafter, it was committed to the Sessions Court, Manjeri where it was taken on file as SC.No.179/2006 and thereafter, it was made over to Assistant Sessions Court, Manjeri for disposal.

5. When the revision petitioner appeared before the court below, after hearing both sides, charge under sections 55 (a) and 8 (1) of 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 4 were examined and Exts.P1 to P7 and MO-1 were marked on their side. After closure of the prosecution's evidence, the revision petitioner was questioned under section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the prosecution's evidence. He had further stated that he had not committed any offence and he has been falsely implicated in the case. Since, the Assistant Sessions Judge found that it was not a fit case for acquittal under section 232 of the Code of Criminal Procedure, he was called upon and entered on his defence. But, no defence evidence was adduced on his side. After considering the evidence on record, the trial court found the revision petitioner guilty and convicted under section 55 (a) and 8(1) (2) of Abkari Act but sentenced him to undergo simple imprisonment for six months and to pay a fine of Rs.One lakh in default to undergo simple imprisonment for three months more under section 8 (1) and r/w section 8(2) of Abkari Act alone and no separate sentence was ordered under section 55(a) of Abkari

Act and both relates to same offence. Set off was allowed for the period of detention already undergone by him. Aggrieved by the same he filed Crl.Appeal No.466/2006 before the Sessions Court, Manjeri, which was made over to Additional Sessions Court, (Adhoc-I) Manjeri for disposal. The learned Additional Sessions Judge dismissed the appeal, confirming the order of conviction and sentence passed by the trial court. Aggrieved by the same, the present revision has been filed by the revision petitioner- accused before the court below.

6. Heard both sides.

7. The counsel for the revision petitioner submitted that there is discrepancy in the time of arrest in the mahazar and the arrest memo and that is material as far as this case is concerned especially when the independent witness to the seizure had turned hostile to the prosecution. Further, the incident said to have occurred on 08.05.2004 but the articles were produced before the court only on 12.05.2004 and there is no endorsement made in any of the documents that it was produced before the charge Magistrate and as directed by him, it was produced before the proper court on 12.05.2004. The explanation given by the excise officials for the delay cannot be accepted. So, the courts below had not properly appreciated these evidence on these aspects and the conviction entered by

the court below is not proper. He also submitted the sentence imposed is also harsh.

8. The learned Public Prosecutor supported the concurrent findings of the court below.

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

On 08.05.2004, at about 10.00 a.m, while PW1 along with PW2 are doing petrol duty and when they reached the place of occurrence, they saw the revision petitioner coming with MO-1 cannas and on seeing the excise party, he tried to go away from that place. So, they stopped him and examined the contents of MO-1 and found that it contained one litre of liquor and on examination it was revealed that it was arrack. Thereafter, he took sample in a bottle and sealed the bottle and affixed label and also sealed the MO-1 cannas and affixed label containing the signatures of the witnesses and the detecting officer and seized the same as per Ext.P1 mahazar in the presence of PW3 and another. He arrested the revision petitioner and prepared Ext.P2 arrest memo and gave Ext.P3 arrest intimation to his relative. He came to the office along with the revision petitioner and the contraband articles and registered Ext.P4 occurrence report as Crime No.11/2004 of Manjeri Excise Range under section 55 (a) and 8(1) of Abkari Act against the revision

petitioner. He produced the revision petitioner before the court along with remand report and produced the articles before court along with Ext.P5 thondy list. The investigation in this case was conducted by PW4. He sent Ext.P6 forwarding note with a request prepared by PW1 to court and on that basis, the sample was sent for chemical analysis and Ext.P7 chemical analysis report was obtained, which shows that the sample contained 54.87% by volume of ethyl alcohol. He questioned the witnesses and completed the investigation and submitted the final report.

10. PW3 is an independent witness. Though he had admitted his signature in Ext.P1 mahazar and the label seen on MO-1, he denied having seen the seizure. So, he was declared hostile. It is also admitted by him that he knew the revision petitioner. So, the possibility of the witness did not support the prosecution in order to help the revision petitioner cannot be ruled out.

11. PWs 1 and 2 are the detecting officer and the excise official who accompanied with PW1 on that day. PW1 had categorically stated that on 08.05.2004 at about 10.00 a.m, he along with PW2 was conducting petrol duty at Vettilappara and when they reached the place of occurrence, they saw the revision petitioner coming with MO-1 cannas in his hand and on

seeing the excise party, he tried to go away from that place in a perplex condition and so they stopped him. On examination of MO-1 cannas, by him it was revealed that it contained one litre of arrack. He had arrested the revision petitioner and took sample from the contents of the cannas and sealed the sample bottle and MO-1 cannas and labelled the same and thereafter seized the same as per Ext.P1 mahazar in the presence of PW3 and another. He had prepared the arrest memo and gave arrest intimation to the relative of the revision petitioner and came to the office and registered the crime. The evidence of PW1 was corroborated by the evidence of PW2 the official witness accompanied with him. Though, they were cross-examined at length, nothing was brought out to discredit their evidence on this aspect. The fact that the revision petitioner was taken by the excise officials was admitted by PW3 independent witness also. According to him, he had signed the documents to prove that he was arrested by the excise officials. But he deposed that he did not see the actual seizure. It is settled law that merely because, the independent witness for seizure did not support the case of the prosecution is not a ground to disbelieve the prosecution case as such. Court can rely on the evidence of the official witnesses if their evidence is trustworthy. In this case, nothing was brought out to disbelieve the evidence of PWs

1 and 2, regarding the seizure and arrest of the revision petitioner. No enmity was suggested for PWs 1 and 2 for falsely implicating the revision petitioner in a case like this as well. So, under the circumstances, courts below were perfectly justified in relying on the evidence of PWs 1 and 2 for the purpose of proving the arrest and seizure of the contraband articles from the possession of the revision petitioner.

12. It is true that the time of preparation of mahazar, was shown as 10.15 a.m on 08.05.2004. But in the arrest memo and the occurrence report the time of arrest was shown as 10.00 a.m. Ext.P1 is the contemporaneous record which has been prepared by the excise officials, when the mahazar was prepared. Further, it was brought out in evidence that they spotted the revision petitioner at 10.00 a.m. So, the possibility of putting the time as 10.00 a.m by mistake on the basis of the fact that he was cited first at 10.00 a.m.c cannot be ruled out. So, under the circumstances, courts below were perfectly justified in coming to the conclusion that time of arrest mentioned as 10.00 a.m in Ext.P1 and Ext.P4 occurrence report, could only be a mistake for 10.15 a.m as deposed by PWs 1 and 2 and that is not fatal to disbelieve the case of the prosecution.

13. It is true that it will be seen from Ext.P5 thondy list,

that the articles produced before the Judicial First Class Magistrate Court-I, Manjeri, only on 12.05.2004. But PW1 had categorically stated that the articles were produced before Judicial First Class Magistrate (Forest Offences), Manjeri, who was in charge of Judicial First Class Magistrate Court-I, Manjeri on 08.05.2004 itself and as orally directed by him that he can produce the articles before the concerned court after despatch of the documents from that court and it was on that basis the articles were produced before the court on 12.05.2004 and PW1 had categorically stated that he was in possession of that articles till that day. Further, a perusal of the judgment of the courts below will go to show that though it was not mentioned in the documents such a oral direction was given, it is seen from the covering letter received from the Judicial First Class Magistrate (Forest Offences), Manjeri that it was sent from that court only on 11.05.2004 and it was received in that court. Further, it is settled law that merely because, there was some delay in producing the articles is not sufficient to disbelieve the seizure or the genuineness of the articles produced. Further, the seal was in tact and in the label the signature of PW3 was admitted. Further, PW1 had categorically stated that he was in possession of the articles till they were produced before court and it was produced without any tampering. So, under the

circumstances, there is nothing wrong to rely on the evidence of PW1, on the genuineness of the articles seized and produced in court especially when the custody of the articles has been proved by him and there is nothing to doubt that the articles were produced without tamper proof. Further, the documents produced will go to show that the contemporaneous documents were produced before the Magistrate in charge on 08.05.2004 at 3.15 p.m namely, the date of arrest and seizure itself. So, under the circumstances, the delay in producing the articles has been explained by the excise officials and there is nothing to doubt the genuineness of the same as well. So, under the circumstances, delay is not fatal in this case, which has been properly explained and accepted by the courts below on appreciation of the evidence.

14. The chemical analysis report shows that it contains 54.87% by volume of ethyl alcohol. There is no case for the revision petitioner that it is not arrack as well. Only case was that it was not seized from his possession. So, under the circumstances, courts below were perfectly justified in coming to the conclusion that the prosecution has proved beyond reasonable doubt that the revision petitioner was found to be in possession of one litre of arrack, which is an offence under section 8(1) r/w section 8(2) of the Abkari Act and rightly

convicted him for the said offence. The concurrent findings of the court below on this aspect do not call for any interference.

15. As regards the sentence is concerned, the trial court had sentenced him to undergo simple imprisonment for six months and also to pay a fine of Rs.One lakh in default to undergo simple imprisonment for three months under section 8 (1) r/w section 8(2) of Abkari Act and no separate sentence was awarded for the offence under section 55(a) of Abkari Act. This was confirmed by the appellate court. It is true that possession of arrack after it was prohibited has to be viewed seriously and persons who are committing such offence are doing the same knowing that what they were doing is an offence. But at the same time, considering the quantity involved, this court feels that some leniency can be shown in the substantive sentence and default sentence as minimum fine of Rs.One lakh has already been imposed by the court below. So, considering the circumstances, this court feels that sentencing him to undergo simple imprisonment for two months and also imposing a default sentence of one month will be sufficient and that will meet the ends of justice. So, the sentence imposed is modified as follows:-

The revision petitioner is sentenced to undergo simple imprisonment for two months and also to pay a fine of Rs.One

lakh in default to undergo simple imprisonment for one month more under section 8(1) r/w section 8(2) of Abkari Act. The set off is allowed for the period of detention already undergone by him under section 428 of the Code of Criminal Procedure.

With the above modification of the sentence alone, the revision petition is allowed in part and disposed of accordingly. Office is directed to communicate this order to the concerned court immediately.

Sd/-
K.RAMAKRISHNAN, JUDGE

R.AV

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PA to Judge