

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

FRIDAY, THE 16TH DAY OF OCTOBER 2015/24TH ASWINA, 1937

Crl.Rev.Pet.No. 4267 of 2006 (E)

JUDGMENT IN CRA 59/1999 of ADDITIONAL DISTRICT AND SESSIONS COURT-I (FAST
TRACK), TRIVANDRUM DATED 26-11-2005

JUDGMENT IN CC 413/1997 of J.M.F.C.-I, NEDUMANGAD DATED 23-01-1999

REVISION PETITIONER/APPELLANT/ACCUSED:

SUJATHA, D/O. SEETHA,
THAVUKKOTTUKONAM VIA, WARD NO. IX, POUDIKONAM,
ULIYAZHUTHARA VILLAGE, THIRUVANANTHAPURAM TALUK.

BY ADV. SRI. D. AJITHKUMAR

RESPONDENT(S)/STATE:

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

BY PUBLIC PROSECUTOR SMT. MADHUBEN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 16-10-
2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

RAJA VIJAYARAGHAVAN.V. J

Crl.R.P.4267 of 2006

Dated 16th October, 2015

ORDER

1.In this revision petition filed u/s 397 & S.401 of the Code of Criminal Procedure, the revision petitioner challenges the concurrent findings of guilt arrived at against her.

2.The facts in brief are as follows:

On 31.01.1996 at 2.p.m., the petitioner was allegedly found possessing a plastic can having a capacity of 10 litres at the Vattappara - Thiruvananthapuram public road near Pallimukku junction. PW1, the Preventive Officer of Excise Range, Nedumangad intercepted the accused and the search conducted in the presence of witnesses, revealed that the can contained illicit arrack. The

contraband articles were seized as per Ext.P1 mahazar. The accused, the contraband article and the seizure records were produced before the Excise Range office, Nedumangad before PW5, the Excise Inspector of Nedumangad Excise Range. Crime No.07/1996 was registered against the accused under S.58 of the Abkari Act. The contraband articles were later produced before the court along with the forwarding note for sending the sample for analysis to the Chemical Analysis Laboratory. The analysis report revealed that the sample contained 28.06% by volume of ethyl alcohol. On the strength of the analysis report, it was deduced that the offence was committed and the charge was laid before the jurisdictional Magistrate.

3.In order to prove the case of the prosecution, as many as 5 witnesses were examined as PWs 1 to 5.

Exts. P1 to P5 were marked. The seized can was produced as MO1. After the close of the prosecution evidence, the incriminating materials arising out of the prosecution evidence was put to the accused u/s 313(1)(b) of the Code of Criminal Procedure. The petitioner maintained that she was innocent. No evidence was adduced by the defence.

4.The learned Magistrate accepted the prosecution case and found the petitioner guilty u/s 58 of the Abkari Act and sentenced her to undergo imprisonment for six months and to pay a fine of Rs.5,000/- and in default to undergo simple imprisonment for six months. The above judgment, conviction and sentence was challenged by the petitioner in Crl.A.59 of 1999. As per judgment dated 26.11.2005, the learned Additional District and Sessions Judge, Fast Track Court-I,

Thiruvananthapuram, allowed the appeal in part and while maintaining the conviction and sentence of the petitioner u/s 58 of the Abkari Act, sentence was modified. The sentence was reduced to two months but the fine was enhanced to Rs.15,000/- and in default of fine, she was directed to undergo simple imprisonment for three months.

5.I have heard the learned counsel appearing for the petitioner as well as the learned Public Prosecutor.

6.The learned counsel appearing for the petitioner emphatically submitted that the conviction entered against the petitioner u/s 58 of the Act cannot be sustained under law. Placing reliance on a Division Bench judgment of this Court in **Josekutty v. State of Kerala (2014 (1) KLT, 434)**, it was submitted by the learned counsel that the prosecution had no allegation in the charge or

evidence that the possession of arrack by the petitioner was with the knowledge that the contraband article was unlawfully manufactured. It was pointed out placing reliance on Ext.P1 mahazar that a 10 litre can as such was seized and no sampling was conducted at the time of seizure. There is absolutely no evidence before Court as to how and when sampling was effected. It is pointed out that as per the prosecution records the 10 litre can was produced before the Court only on 1.3.1996 and the prosecution had failed to prove that the sample which was analyzed in the chemical analysis lab was the very sample which was drawn from the contraband article allegedly found in the possession of the accused. The learned counsel also relied on a Division Bench judgment of this Court in **Ravi v. State of Kerala (2011 (3) KLT 353)** to substantiate the above contention.

7. In the instant case, the seizure was effected on 31.1.1996. At this juncture, it has to be noted that it was by Act 4 of 1996, which came into force on 27.3.1996 that after clause 6 of S.3, clause 6A was inserted defining arrack. S.8 was also inserted providing prohibition of manufacture, import, export, transport, transit, possession, storage and sale of arrack. U/s 8, no person shall manufacture import, export, transport, transit, possess, storage, distribute bottle or sell arrack in any form. Therefore, by virtue of S.8 there is a prohibition for possessing arrack in any form which came into force w.e.f 27.3.1996. It was only by amendment Act 16 of 1997 which came into effect on 3.6.1997 that sub-section (2) of S.8 was inserted after re-numbering original s.8 as sub-section (1) of S.8 providing punishment for contravention of sub-section (1) of S.8. Therefore, before 3.6.1997, no

specific punishment was provided for contravention of the provisions of S.8 as it then stood. It is in the light of the above that the contention raised by the learned counsel has to be appreciated.

8. Insofar as the 1st contention raised by the petitioner is concerned, as regards the applicability of S.58 of the Act, it is by now settled in view of the judgment of this Court in **Josekutty** (supra) that in order to attract S.58 of the Act, there should be specific allegation that the petitioner without lawful authority was in possession of any quantity of liquor or any intoxicating drug knowing the same to have been unlawfully imported, transported or manufactured or knowing the duty tax or rental payable not have been paid thereof. I have gone through the specific allegations against the petitioner as borne out from the charge and also the evidence of PW1, 2 and 5. There is no case for

the prosecution that the petitioner was in possession of the contraband article without lawful authority, knowing the same to have been unlawfully imported, transported or manufactured or knowing that the tax duty or rental payable under the Act has not been paid. As is clear from the section, mere possession of any quantity of liquor or intoxicating drug by itself is not sufficient to convict a person for the offence under S.58. The possession must be first without lawful authority and secondly with the knowledge that it has been either unlawfully imported or unlawfully transported or unlawfully manufactured. Therefore, absence of specific averment in the complaint will be fatal to the prosecution case.

9. Insofar as the 2nd contention raised by the learned counsel is concerned, Ext.P1 is the mahazar prepared by the detecting Officer on 31.1.1996. In Ext.P1 mahazar it has been specifically noted that

a 10 litre can has been seized by the detecting Officer. The seizure was reported immediately before the Court as is evident from Ext.P1. But at the same time, Ext.P2 requisition would reveal that a sealed bottle containing 150 ml illicit arrack was forwarded to the Chemical analysis lab. Ext.P2 is prepared and signed by the Excise Inspector, Nedumangadu Range. This Officer could be none other than PW5. When PW5 was in the box, to a specific question put by the learned counsel appearing for the accused, he had stated that he had submitted the requisition letter along with the charge. He also stated in cross examination that since the can was sealed, he did not open the same and take out the sample. In other words, he had produced the can before Court. Ext.P4 is the report submitted by the Excise Inspector, Excise Range Office, Nedumangadu, along with the requisition letter. It is numbered as T44/06 and it is seen dated

1.3.2006. As per Ext.P4, what has been produced is a ten litre black plastic can containing 10 litres of arrack. There is a total absence of evidence as to how sample was drawn from the sealed can. None of the witnesses examined by the prosecution have stated about the fact that sampling was conducted. The endorsement in Ext.P4 would reveal that 10 litre plastic can reached the Court only on 1.3.1996. The prosecution has not explained where the contraband articles were kept till 1.3.1996 and whether the same was stored in a tamper proof condition. It is for the prosecution to prove that the sample was taken for the purpose of analysis from the can allegedly seized from the possession of the petitioner and it was the same sample that had reached the Chemical Analysis Lab resulting in Ext.P5 Chemical Analysis report. In **Ravi** (supra), the Division Bench has held that the prosecution has to prove the safe custody of the

contraband article till its production before Court. In the instant case, there is no such evidence. As held by this Court in a catena of decisions, prosecution in a case of this nature, can succeed only if it is shown that the contraband article which was allegedly seized from the accused ultimately reached the hands of the Chemical Examiner in a tamper proof condition. No conviction can be entered against the accused in a prosecution under the Abkari Act unless it is proved that the sample which was analyzed in the Chemical Analysis Lab was the very sample drawn from the contraband liquor allegedly found in the possession of the accused. (See **Sathi v. State of Kerala (2007 (1) KLT SN 57 [C.No.82])** and **Sasidharan v. State of Kerala (2007 (1) KHC 275).**

10. In view of the above, I am of the considered view

that Ext.P5 Chemical Analysis report cannot be relied on to find the petitioner guilty of the offense alleged. The conviction recorded and the sentence passed against the petitioner, overlooking the above facts cannot be sustained. The petitioner is therefore found not guilty of the offence punishable u/s 58 and is acquitted. The petitioner is set at liberty forthwith.

The Revision petition is allowed as above.

Sd/-
RAJA VIJAYARAGHAVAN.V.
Judge

MrCs

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P.S. To Judge