

Bail Slip

The Appellant herein/Accused viz Arul, S/o.Sarangapani, was directed to be released on bail as per order of this court dated 08/05/2013 in Crl.R.C.No.659/2013.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.10.2018

Coram

THE HONOURABLE MR. JUSTICE M.V.MURALIDARAN

Crl.R.C.No.659 of 2013
and
M.P.No.2 of 2013

Arul ... Petitioner/Accused

vs

State by:

The Inspector of Police,
Cuddalore N.T. Police Station,
Cuddalore District.
(Crime No.568 of 2011)

... Respondent/Complainant

Prayer : Criminal Revision Petition filed under Sections 397 and 401 of Code of Criminal Procedure, to re-appreciate the evidence available on record and may be set aside the conviction given by the Principal Sessions Court, Cuddalore in Crl.A.No.7 of 2013 dated 25.04.2013 against the conviction and sentence passed by the learned Judicial Magistrate-II, Cuddalore in S.T.C.No.487 of 2011 dated 08.04.2013 and may be acquitted the accused and allow the revision petition.

For Petitioner : Mr.A.Arasu Ganesan

For Respondent : Mr.G.Ramar
Government Advocate (Crl.Side)

ORDER

This Criminal Revision Case is filed as against the order of conviction made in S.T.C.No.487 of 2011 dated 08.04.2013 on the file of the learned Judicial Magistrate-II, Cuddalore, which was modified by the order of the learned Principal District and Sessions Judge, Cuddalore in C.A.No.7 of 2013 dated 25.04.2013.

2.The case of prosecution is that on 10.10.2011 when PW-1 along with PW-2 to PW-5 were held in vehicle checking duty at Aalpettai Police check post, they seized 528 Brandy bottles from white colour ambassador car bearing registration No:TN-31-A-2610 which was driven by the accused namely Arul from Pondicharry to Cuddalore.

3.The accused has smuggled the above said Brandy bottles without having permit or license to carry the same. Immediately after the said seizure PW-1 informed the same to Amirthalingam, PW-6, Sub-Inspector of Police. Accordingly the accused and the seized articles and the ambassador car were produced and handed over by PW-1 to PW-6 at New Town Police Station, Cuddalore.

4.Consequently, F.I.R. was registered against the accused in Crime No.568 of 2011 for the offence under Section 4(1)(a)(a) of TNP Act and the case was taken up for investigation by PW-7, the Inspector of Police. After completion of investigation PW-7 filed final report charging the accused / revision petitioner for the offence under Section 4(1)(a)(a) of TNP Act and the case was taken up for trial in S.T.C.No.487 of 2011 by the Learned Judicial Magistrate II, Cuddalore.

5.The accused was questioned under Section 313 of Cr.P.C. and he denied the charges. On the side of the prosecution 7 witnesses were examined as PW-1 to PW-7 and marked Exhibit P-1 to P-3 and M.O.s-1 and 2 were marked. There was no oral and documentary evidence on the side of the accused.

6.Upon considering the oral and documentary evidence the Learned Magistrate, come to the conclusion that the accused was found guilty of the above offence and convicted and sentenced him to undergo Simple Imprisonment for 3 months and also to pay a fine of Rs -2000/-, in default to undergo Simple Imprisonment for 1 month.

7.Aggrrieved over the sentence, the accused filed the appeal in C.A.No.7 of 2013 before the learned Principal District and Sessions Judge, Cuddalore and the Learned District Judge modified the conviction imposed on the accused by reducing the sentence from 3 months to 1 month. The fine amount ordered by Trial Court was confirmed. Aggrrieved over the same, the present Criminal Revision is filed.

8.I heard Mr.A.Arasu Ganesan, learned counsel for the petitioner and Mr.G.Ramar, learned Government Advocate (Criminal Side) for the respondent and perused and entire materials available on record.

9.It is seen that according to the version of PW-1, SSI Gunasekaran, on the date of occurrence i.e., on 10.10.2011 at 7.00 P.M. when he was involved in vehicle checking at Aalpettai Police check post along with his police party, he seized 528 Brandy bottles from the accused in his white color ambassador car bearing Registration No.TN-31-A-2610 while he driven the car from Pondicherry to Cuddalore.

10.It is his further version that immediately after seizure he informed the same to PW-6, S.I. Amirthalingam and handed over the accused to the S.I. Amirthalingam at Police Station. However, contrarily it is found that in his cross examination, he deposed that PW-6, S.I Amirthalingam came to the place of occurrence at 7:30 P.M and Inspector Saravanadevendran, PW-7 also came to the spot at 7:30 P.M and obtained statement from PW-1.

11.According to the evidence of PW-2, SSI Venkatesan, during his cross, he stated that PW-1 did not inform PW-6 Amirthalingam, he further deposed that PW-7, Inspector of Police has not come to the place of occurrence. No passport was given to them to go to Aalpettai check post and they were orally informed by PW6, S.I. Amirthalingam that they should go to vehicle checking.

12.PW-3 Head Constable Selvam during his cross stated that on the date of occurrence he along with PW1 and PW2 were on duty at Aalpettai Police check post from morning 8:00 A.M onwards. It is further revealed from his evidence that PW6 S.I and PW7 Inspector have not come to the place of occurrence as alleged by PW1.

13.From the above reading of evidence of PW1-PW3, it is found that there are numerous contradiction and discrepancies among the evidence of PW1-PW3. However, the record disclose that the Learned Trial Judge convicted the accused, holding that though there are certain contradictions in the evidence of PW1-PW3 the same would not affect the case of prosecution.

14. But in my considered opinion the said finding on the learned trial Judge is not proper and in the Criminal Jurisprudence it is the duty of the prosecution to prove the case beyond reasonable doubt.

15. Further, according to PW5, SSI that he was sent to Aalpettai Police check post duty at 7.00 A.M on 10.10.2011, he further deposed that on the date of occurrence neither Sub-Inspector of Police nor Inspector of Police came to the place of occurrence. Therefore, PW5's evidence also not supported the version of PWs 1 to 3.

16. This court has carefully considered the crucial argument made by the learned counsel for the revision petitioner that after Seizure of MO.1, no sample was taken to prove as to whether the Seized article is illicit arrack or IMFL as contemplated under section 32(c) of the Tamilnadu Prohibition Act.

17. In this regard, this court has carefully analyzed the evidence of PW7, the Inspector of Police who conducted Investigation. According to him he has not taken sample of MO.1 Brandy bottle and the same has not been sent to chemical analysis. The non-sending MO.1 for chemical analysis is fatal to the case of the prosecution.

18. In this regard, it is useful to refer the Judgment of this court made in Criminal Appeal No.699 of 2006 dated 18.03.2011, in the case of Selvi Vs. State represented by Inspector of Police Rasipuram Police Station holding as following that:

"9. Now, coming to the occurrence on 27.09.2004, the prosecution relies on the evidences of P.W.8 and P.W.4. It is stated by both the witnesses that the accused was found in possession of illicit arrack in a plastic can as well as in two lorry tubes. As I have already narrated, it is their case that they were seized under mahazar in the presence of P.W.4 by P.W.8. But, the contraband namely, the illicit arrack said to have been seized from the appellant was not produced before the court. Instead, P.W.8 would state that he destroyed the same in the presence of P.W.4 at the place of occurrence after drawing sample in two bottles. The question is whether he has got power to do so. As per the third proviso to Section 32(c) of the

TNP Act, he has got power to do so, but, there are other provisions which are to be followed before doing so. At this juncture, it is worthwhile to reproduce the said provision viz., Section 32(c) of the TNP Act which reads as follows:-

"32. Arrest of offenders and seizure of contraband liquor and articles without warrant. - Any Prohibition Officer, any officer of the police or Land Revenue Departments, and any other person authorised in that behalf -

(a)

(b)

(c) may search any person, vessel, vehicle, animal package, receptacle or covering, upon whom or in or upon which, he may have reasonable cause to suspect any such liquor, drug or other article to be or to be concealed:

Provided that

Provided further that

Provided also that where any illicit arrack is seized under this section by any officer or person, such officer or person may, in the presence of a Prohibition Officer or any Police Officer not below the rank of Inspector, -

(i) take two samples of the illicit arrack or such quantity and in such manner as may be prescribed, and

(ii) destroy or cause to be destroyed the illicit arrack and send the pots or other receptacles in which the illicit arrack was kept together with the samples taken and a certificate from the Officer in whose presence the samples were taken and the illicit arrack was destroyed, as to the total quantity or illicit arrack seized, the total quantity taken as samples and the total quantity destroyed, to the Magistrate having jurisdiction to inquiry into the case. The Magistrate shall, upon the receipt of the samples, retain one in his court and send the other to such Officer as may be prescribed for chemical analysis."

[Emphasis supplied]

10. A close reading of the above third proviso to Section 32(c) of the Tamil Nadu Prohibition Act would make it abundantly clear that the officer who has seized the illicit arrack can draw samples only in the presence of a prohibition officer or any police officer not below the rank of an Inspector of Police and then

he can destroy the remaining contraband. In respect of the destruction, the said prohibition officer or police officer, in whose presence the destruction is done, should give a certificate in respect of the total quantity seized, the total quantity taken as samples and total quantity destroyed and such certificate should be forwarded to the Magistrate having jurisdiction. But, in this case, drawing of samples as well as the destruction were not made in the presence of either a prohibition officer or any police officer not below the rank of an Inspector of Police. It may be true that P.W.8 himself is an Inspector of Police but that by itself will not satisfy the requirements of the above provision. Here, we have to look into the object behind the said proviso. In a case where the officer, who seizes illicit arrack, decides to destroy the same after drawing samples, in order to ensure that samples were really taken from the illicit arrack seized and that the rest of the illicit arrack was destroyed, the presence of yet another responsible officer namely, a prohibition officer or any police officer not below the rank of Inspector is insisted upon. This procedure, in my considered opinion, is mandatory as the object behind the same is to ensure that there is no manipulation at the hands of the officer who seizes the illicit arrack. In this regard, I may refer to a judgement of a Division Bench of this Court in Jeganathan v. State of Tamil Nadu reported in Manu/TN/8992/2006 wherein while dealing with a Habeas Corpus Petition challenging the order of detention passed under Tamil Nadu Act 14 of 1982, the Division Bench, while noticing Section 32 of the Tamil Nadu Prohibition Act and after referring to various orders passed on the earlier occasions, has held in paragraphs 3 and 4 as follows:-

"3. At the foremost, the learned counsel for the petitioner by drawing our attention to the reference made in paragraph 3 of the grounds of detention viz., the remaining I.D arrack and fermented wash were destroyed at the spot a "certificate was prepared to that effect, submitted that no such certificate was prepared as per Section 32 of the Tamil Nadu Prohibition Act, 1937 and the only document available is destruction mahazar. According to him, in the absence of the certificate as stated in paragraph 3 of the detention order, it is presumed that the detaining authority has not applied his mind while passing the detention order. He has also heavily relied on the decision of this Court dated 25.09.2003 in HCP No.2580 of 2002, which was followed by this Court in HCP No.140

of 2006 by an order dated 13.06.2006. In that case, before the Division Bench, a similar contention was raised. A perusal of the details mentioned in the said decision shows that in that case also the destruction mahazar alone was prepared and a copy was supplied to the detenu. However, as in the present case, the detaining authority therein referred to the said document as a certificate prepared under Section 32 of The Tamil Nadu Prohibition Act, 1937. The Division Bench after finding that the document available in the paper book does not amount to certificate in terms of Section 32 of The Tamil Nadu Prohibition Act, 1937 and after holding that the detaining authority has not applied his mind, quashed the detention order.

4. On going through the factual details in our case, particularly the reference made in para 3 as well as the document, we are of the view that the decision relied on by the learned counsel for the petitioner is directly applicable to the case on hand. Inasmuch as the detaining authority has referred the destruction mahazar as a certificate in terms of Section 32 of The Tamil Nadu Prohibition Act, 1937, we are satisfied that the detaining authority has not properly applied his mind and on this ground the impugned detention order is liable to be quashed and accordingly, the same is quashed."

The said view taken by the Division Bench of this Court clearly fortifies the view expressed by me herein above.

11. In the instant case, since the said provision has not been followed, in my considered opinion, the evidences of P.W.8 and P.W.4 that illicit arrack was seized, samples were drawn and the rest of the illicit arrack was destroyed cannot be believed."

19. Thus the Principle of Law enunciated from the above Judgment abundantly makes clear that as per section 32(c) of the Tamilnadu Prohibition Act. The officer, who seized the illicit arrack shall take samples in the presence of any Police Officer not below the rank of Inspector of Police and send the same for chemical analysis.

20. In the present case on hand, admittedly no such exercise was carried out by PW7, Inspector of Police which is fatal to the case of the Prosecution. Thus this Court finds that the Law settled in the above decision would also apply on the revision petitioner's case. In view of the above, I have no hesitation to allow the Criminal Revision case.

21. Accordingly the accused therein was acquitted from charges on account of want of compliance with mandatory procedures. Consequently Criminal Jurisprudence of rendering the benefit of doubt over the projected prosecution story, the accused was acquitted from all charges.

22. In the result:

(a) The criminal revision is allowed and the conviction and sentence imposed on the petitioner by the trial court which was modified by the appellate court are set aside;

(b) The petitioner is acquitted of all the charges. Fine amount if any, paid by the petitioner shall be refunded to the petitioner. The bail bond executed by the petitioner shall stand discharged. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS IX)

//True Copy//

Sub Assistant Registrar

To

1. The Principal Sessions Court, Cuddalore.

2. The Judicial Magistrate-II, Cuddalore.

3. The Chief Judicial Magistrate,
Cuddalore.

4. The Public Prosecutor,
High Court, Madras.

5. The Inspector of Police,
Cuddalore N.T. Police Station,
Cuddalore District.

+1cc to Mr. A. Arasu Ganesan, Advocate sr.no. 69251

Cr1.R.C.No.659 of 2013
and
M.P.No.2 of 2013

rji(co)
nr 15/10/2018