IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

TUESDAY, THE 15TH DAY OF DECEMBER 2020 / 24TH AGRAHAYANA, 1942

CRL.A.No.118 OF 2008

AGAINST THE JUDGMENT IN SC 275/2005 DATED 27-12-2007 OF THE ADDITIONAL DISTRICT & SESSIONS COURT, VADAKARA

PETITIONERS/ A1 & A2 :

1 CHANDRAN,
AGED 27 YEARS, S/O POKKAN,
VAYALIL, KUNNUKULAM, VANIMEL

2 BABU,
AGED 26 YEARS,
S/O KANARAN,KONNAPALAMKANDY,
KANNUKULAM, VANIMEL.

BY ADV. SRI.C.P.UDAYABHANU

RESPONDENT/ COMPLAINANT :

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

BY PUBLIC PROSECUTOR SMT.REKHA C.NAIR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15.12.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING :

JUDGMENT

Dated this the 15th day of December 2020

Appellants challenge the conviction and sentence imposed by judgment dated 27.12.2007 by the Additional Sessions Judge, Vadakara having found them guilty for the offence under Section 55(a) of the Kerala Abkari Act (for short, 'the Act'). They were sentenced to undergo rigorous imprisonment for two years each and to pay a fine of Rs.1,00,000/- each, in default to undergo rigorous imprisonment for six months.

2. The prosecution case is that on 30.03.2004 at 8.15 a.m., the first accused was driving an Autorikshaw bearing No.KL 11 G 8339 and A2 was travelling in it as a passenger. 65 litres of petrol and 48 bottles of Indian made foreign liquor were found being transported by the accused. On detecting the offence, PW1 registered the crime while PW6 conducted the investigation and filed a final report indicting the accused for offence under Section 55(a) of the Act as well as Section 6 of the Kerala Motor Spirit and High Speed Diesel Oil (Maintenance and Regulation of Supplies) Order, 1979 read with Section 3, 7(1)(a) of the Essential Commodities Act. Pursuant to

committal of the case to the Sessions Court, the prosecution examined PWs 1 to 8 and marked Exts.P1 to P9. MOs 1 to 4 were also marked.

3. After analysing the evidence adduced in the case, the learned Additional Sessions Judge found the accused not guilty for the offence under Section 6 of the Kerala Motor Spirit and High Speed Diesel Oil (Maintenance and Regulation of Supplies) Order, 1979 on the ground that the Detecting Officer was incompetent to file a final report under the Essential Commodities Act, but found the accused guilty of the offence under Section 55(a) of the Act. The accused have preferred this appeal challenging the conviction and sentence.

4. I have heard Adv.C.P.Udayabhanu, the learned counsel for the appellant as well as the learned Public Prosecutor Smt.Rekha C.Nair on behalf of the State.

5. It was argued on behalf of the appellant that there is nothing to connect the accused with the crime and the entire crime is based upon false and baseless allegations. It was submitted that the delay in producing the alleged contraband material before the court was also crucial and the same was not properly appreciated by the learned Sessions Judge and the judgment to the extent it is against the accused was liable to be set aside.

6. The learned Public Prosecutor, on the other hand

vehemently contended that the evidence adduced clearly proved the offence alleged against the accused. Referring to the evidence of PW1 that the contraband were found on the lap of the 2nd accused and by his side, clearly shows that the possession was with the accused and by virtue of Section 64 of the Act, they having not accounted for the same, the presumption will apply and the accused are not entitled for any benefit of doubt. It was also argued that the alleged delay in producing the contraband before court was only two days, since the offence was detected on 30.03.2004 and the contraband were produced before the court on 01.04.2004.

7. I have considered the rival contentions. The contraband was seized allegedly from accused 1 and 2 on 30.03.2004 at 8.15 a.m. It has come out in evidence that the same was produced before the court on 01.04.2004. PW1 was not questioned by the accused regarding the alleged delay. In the circumstances of the case, I do not find that the alleged delay of two days in producing the sample before the court has caused any material prejudice to the accused in the instant case. The contention regarding the delay in producing the sample is therefore rejected.

8. In this context, it may be appropriate to mention that the sample was forwarded for chemical analysis to the Forensic

Science Laboratory and the said forwarding note contains the sample seal also. In view of the proper sealing and proper forwarding of the sample for chemical analysis, the prosecution has convincingly established that the sample of contraband taken from the seizure effected on 30.03.2004 was the same sample that was sent for chemical analysis.

9. However, one crucial aspect pointed out by the learned counsel for the appellant was that there was nothing to connect either of the accused with the seizure effected and especially that of the first accused. In this context, the evidence of PW1 is significant. PW1 during his chief examination stated as follows :-

"ബാബുവിന്റെ മടിയിൽ ചാക്കുകെട്ടും താഴെയായി കാർഡ്ബോർഡ് പെട്ടിയും കണ്ടു."

10. The Detecting Officer clearly speaks about the seizure of contraband articles from the lap of the 2nd accused and from his side. It was also deposed that the 2nd accused was the owner of the Autorikshaw while the first accused was only an employer. Curiously no questions had been put to PW1 regarding his deposition on the seizure of the contraband articles from the lap of the 2nd accused.

11. In other words, the possession of the contraband from the lap of the 2nd accused stands proved and in the absence of any

explanation from the 2nd accused as to how he came in possession or dominion over the contraband articles, the presumption under Section 64 of the Act will arise that the said accused person has committed an offence. Not even an attempt was made, even during the stage of 313 statement, to explain or to account for the possession of the contraband articles from the lap of the 2nd accused. In such circumstances, I find that the finding of guilt of the 2nd accused stands proved and there is no reason to interfere with such a finding.

12. However, as far as the first accused is concerned, there is nothing to connect him with the crime other than he being the driver of the Autorikshaw in which the contraband was being transported. It is at this juncture that the position of the first accused as an employee of the 2nd accused as deposed by PW1 assumes significance. There is not even a whisper in the evidence of PW1 as to whether the investigation revealed knowledge of the first accused regarding the contents of the bag possessed by the 2nd accused. There is no evidence to connect the 1st accused with the crime. In the absence evidence, I find it difficult to uphold the conviction of the first accused. He is entitled to be given the benefit of doubt in the aforesaid circumstances.

13. In view of the above, I find the first accused entitled to

be given the benefit of doubt and accordingly his conviction and sentence is liable to be set aside. As far as the 2nd accused is concerned, his conviction is confirmed and he is found guilty of the offence under Section 55(a) of the Act.

14. In respect of the sentence to be already imposed upon the 2nd accused by the learned Sessions Judge, the learned counsel for the appellant beseech this Court that such a harsh punishment of rigorous imprisonment for two years ought not to be imposed upon him. The offence having taken place in 2004 and the 2nd accused being a young man of 26 years at that time, the learned counsel seeks a liberal application of sentencing laws.

15. Taking note of the aforesaid submissions and the young age of the 2nd accused at the time when the offence was committed, I deem it appropriate that the period of sentence already undergone by the accused would be a sufficient punishment apart from the sentence of fine already been imposed.

In the said circumstances, while acquitting the 1st accused in SC.No.275/2005 on the files of Additional Sessions Court, Vadakara, I confirm the conviction of the 2nd accused in the above case and sentence him to the period already undergone and to pay a fine of Rs.1,00,000/- in default of payment to undergo simple imprisonment

for three months for the offence under Section 55(a) of the Act.

Sentenced accordingly and the appeal is allowed in part.

Sd/-
BECHU KURIAN THOMAS, JUDGE

RKM