IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

FRIDAY, THE 18TH DAY OF DECEMBER 2020 / 27TH AGRAHAYANA, 1942

Crl.Rev.Pet.No.2612 OF 2009

CRA 222/2006 OF ADDITIONAL SESSIONS COURT (ADHOC)-I, KASARAGOD

SC 44/2004 OF SESSIONS COURT, HOSDRUG

REVISION PETITIONER/S:

KUTTYKRISHNAN @ KALATHIL KRISHNAN
S/O.POKKAN, RESIDING AT THOTTUMPURAM,
NILESHWAR VILLAGE.

BY ADVS.
SRI.RAHUL SASI
SMT.NEETHU PREM

RESPONDENT/S:

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

R1 BY PUBLIC PROSECUTOR

OTHER PRESENT:

SR.PP.M.S.BREEZ

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 18.12.2020, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

O R D E R

The revision petitioner is the accused in SC No. 44 of 2004 on the file of the Assistant Sessions Court, Hosdurg and the appellant in Crl. Appeal No. 222 of 2006 on the file of the Additional Sessions Court (Adhoc)-I, Kasaragod. The offence alleged against the accused is punishable under Section 55(a) of the Abkari Act.

2. The prosecution case, in brief, is that on 22.02.2001 at 9 am at a place called Thottumpuram in Nileshwar Village, the accused was found in possession of 7 litres of arrack in a can having a capacity of 10 litres in contravention of the provisions under the Abkari Act and the Rules framed thereunder.

3. On the appearance of the accused, after having heard both sides, the trial court framed

charge against the accused for the offence punishable under Section 55(a) of the Abkari Act. The charge was read over, to which the accused pleaded not guilty.

4. During the trial, PWs 1 to 4 were examined and marked Exts.P1 to P8 and MO1 on prosecution side. On closing the evidence of the prosecution, the accused was questioned under Section 313(1)(b) of the Code of Criminal Procedure (hereinafter after referred to as, "the Cr.P.C."). He denied all the incriminating circumstances appearing in the evidence against him. When he was called upon to enter on his defence, no evidence was adduced.

5. On appreciation of the evidence, by its judgment dated 21.03.2006, the trial court convicted the accused under Section 55(a) of the Abkari Act and sentenced him to undergo simple imprisonment for one year and to pay a

fine of Rs.1,00,000/- and in default of payment fine to undergo simple imprisonment for there months more.

6. Challenging the conviction and sentence imposed by the trial court, the accused preferred Crl. Appeal No. 222 of 2006 and the appellate court, by its judgment dated 05.05.2009, dismissed the appeal confirming the judgment of conviction and sentence imposed by the trial court. Feeling aggrieved, the accused is before this Court in revision.

7. PW1, the Excise Inspector, Nileshwar Excise Range, arrested the accused in connection with the offence on 22.02.2001 at about 9 am by Ext.P1 arrest memo. He prepared Ext.P2 seizure mahazar, Ext.P3 crime and occurrence report, Ext.P4 property list, Ext.P5 forwarding note and Ext.P6 specimen impression of seal and forwarded to the court. The accused was produced before the court on 22.02.2001 along

with MO1 contraband article and other requisite documents. PW2, one of the officers accompanied PW1, supported the version of PW1 that the accused was arrested along with the contraband article on 22.02.2001 at about 9 am. At the time of arrest, Ext.P2 seizure mahazar was prepared by PW1. According to him, he took 300 ml of liquid from MO1 and sampled the same in accordance with the rules. Ext.P8 Chemical Analysis Report would indicate that the Chemical Examiner received one sealed bottle containing 300 ml of clear and colourless liquid alleged to be arrack involved in Crime No. 9 of 2001 of Nileshwar Excise Range for chemical analysis. In Ext.P8, the Chemical Examiner stated that the seals on the bottle were intact and found tallied with the sample seal provided. Ext.P6 is the sample seal produced by PW1 along with Exts.P1, P2, P3 and P4 on 22.02.2001. However, the sample

seal alleged to have been affixed on the sample is not seen affixed in Ext.P2 seizure mahazar. No explanation was offered by PW1 as to why no sample seal was affixed in Ext.P2 seizure mahazar to convince the court that he had affixed Ext.P6 sample seal on the sealed bottle containing 300 ml of contraband liquor for the examination of Chemical Examiner. Ext.P6 sample seal was affixed in a separate paper and produced before the court. In abkari cases, it is necessary to affix the sample seal in the seizure mahazar prepared by the detecting officer to ensure that the sample seal affixed by PW1 while taking the sample was one and the same, and to further convince the court that the specimen seal affixed on the samples had been produced before the court. In the case on hand, separate specimen sample seal was produced. It presupposes that the sample seal was prepared and affixed at a

later point of time. Had it been affixed in Ext.P2 seizure mahazar in the presence of witnesses, the genuineness of the sample seal would have been ensured. It is pertinent to note that the sealing of the sample is conspicuously absent in Ext.P2 seizure mahazar in this case.

8. The occurrence in this case was on 22.02.2001. The final report was submitted after investigation before the court on 14.03.2003. As per Section 50 of the Abkari Act, every investigation into an offence under the Abkari Act shall be completed without unnecessary delay and as soon as the investigation is completed, the Abkari Officer is obliged to forward a report in accordance with Sub section (2) of Section 173 of Cr.P.C. to a magistrate empowered to take cognizance of the offence on a police report. In the case on hand, there was inordinate delay in filing the

final report before the court, which has not been explained during the trial.

9. The learned counsel for the revision petitioner submitted that in connection with the crime, the accused was remanded by the court and he was in custody in connection with this case for a period of one month. In view of the fact the accused was an undertrial prisoner for 30 days, the investigating officer ought to have taken sufficient precaution to comply with the statutory provisions contemplated under Section 50 of the Abkari Act scrupulously. Having taken into consideration the delay in filing the final report and also in the absence of sample seal in Ext.P2 seizure mahazar, it is very difficult for this Court to arrive at a conclusion that the very same sample taken from the scene of occurrence was sent for chemical analysis. The benefit of doubt should

necessarily go to the accused.

10. Both the trial court and the appellate court failed to consider the above valid contentions in the right perspective and wrongly convicted and sentenced the accused for the offence under Section 55(a) of the Abkari Acct. No independent evidence was adduced to substantiate the case apart from the oral evidence of PWs 1 and 2. Further, there is no reliable evidence to come to the conclusion that the accused was in conscious possession of the contraband for an illegal import, export, transport or transit in contravention of Section 55(a) of the Abkari Act.

In the result, the criminal revision petition is allowed. The revision petitioner/accused is found not guilty of the offence punishable under Section 55(a) of the Abkari Act and he is acquitted thereunder. Cancelling his bail bond, this Court directs that he be set at

liberty. If any amount is deposited pursuant to an interim order passed by this Court, the same shall be released to the revision petitioner/accused in accordance with law. Pending applications, if any, stand disposed of.

Sd/-

N.ANIL KUMAR

JUDGE

Bka/18.12.2020