IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

MONDAY, THE 31ST DAY OF AUGUST 2015/9TH BHADRA, 1937

Crl.Rev.Pet.No. 1082 of 2003 ( )

AGAINST THE JUDGMENT IN CRL.APPEAL NO. 313/1999 of ADDL.DISTRICT & SESSIONS COURT, FAST TRACK, (ADHOC)-II, KOZHIKODE DATED 14-08-2002

AGAINST THE JUDGMENT IN CC 580/1997 of J.M.F.C.-II,THAMARASSERY DATED 26-05-1999

REVISION PETITIONER(S)/ACCUSED:

ARACKAL JOSE, S/O. CHACKO,
KODENCHERY AMSOM, DESOM,
POORAMUNDA

BY ADVS.SRI.P.S.SREEDHARAN PILLAI
SRI.P.GOPINATH

RESPONDENT(S)/COMPLAINANT/STATE:

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

BY PUBLIC PROSECUTOR SRI. DHANESH MATHEW MANJOORAN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 31-08-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

acd

P.D. RAJAN, J.

Crl. R.P.No.1082 of 2003

Dated this the 31st day of August, 2015

ORDER

The revision petitioner, who is the appellant in Crl.Appeal No.313/1999 of Additional District and Sessions Judge Fast Track, Adhoc-II, Kozhikode, challenges the judgment of conviction u/s.55(a) of the Abkari Act. The revision petitioner was convicted in C.C.No.580/1997 of the Judicial First Class Magistrate Court-II, Thamarassery u/s.55(a) of the Abkari Act and sentenced to imprisonment for a period of six months and to pay a fine of ₹25,000/-, in default of payment of fine, simple imprisonment for two months.

2. The prosecution allegation was that on 9.7.1996 at

17.15 hours, the Sub Inspector of Police, Kodenchery amsom desom was conducting vehicle inspection at Ambattupady within his jurisdiction. When he inspected the vehicle KL-10C 506, he detected 18 bottles of Indian Made Foreign Liquor, each containing 375 ml. The revision petitioner was arrested and the contraband articles were seized. After completing investigation, he laid charge before Judicial First Class Magistrate Court, Thamarassery.

3. To prove the offence, the prosecution examined PWs 1 to 7 and marked Exts.P1 to P3 as documentary evidence and MO1 series and MO2 series were admitted as material objects in the trial Court. The incriminating circumstances brought out in evidence were denied by the revision petitioner, while questioning him. He did not adduce any defence evidence. The trial Court convicted

the revision petitioner, against that, he preferred the above appeal, in which conviction was confirmed and dismissed the appeal. Being aggrieved by that, he preferred this revision.

4. Heard the learned counsel appearing for the revision petitioner and the learned Additional Public Prosecutor. It is clear from Ext.P1 seizure mahazar that the Sub Inspector of Police seized 18 bottles of foreign liquor from the possession of the revision petitioner, while conducting vehicle inspection on 9.7.1996 at 17.15 hours. PW4 in his evidence deposed that he inspected the vehicle at Ambattupady, at that time, PW3 and other Police Constables were present there. The independent witnesses were also present there at the time of seizure of MO1 series and MO2 series from the jeep KL-10C 506. After that, he prepared Ext.P1 mahazar. He took two

bottles from the seized articles as sample and sealed at the place of occurrence, which was forwarded to the Chemical Examiner's Lab through Court. He registered Ext.P3 F.I.R. The investigation was completed by PW7. He arrived at the place of occurrence and prepared Ext.P2 scene mahazar. Ext.P4 is the forwarding note and Ext.P5 is the Chemical Examination result, which shows that ethyl alcohol was detected in the samples forwarded. The independent witness present there supported the prosecution case. He identified MO1 series and MO2 series and deposed that MO1 and MO2 were seized from the vehicle as alleged by PW4. The other independent witnesses, PW1 and PW5 did not support the case. The official witnesses, PW3 and PW4 also supported the alleged seizure. No reasons are stated by the revision petitioner to discard the oral testimony of official

witnesses. Therefore, analysing their evidence, it is found that MO1 and MO2 series were seized by PW4 as alleged.

5. The first contention taken by the defence counsel was that all the samples were not forwarded to the Chemical Examiner's Lab for identifying as foreign liquor. This Court in **Kelukutty C** v. **State of Kerala** [2009(4) KHC 110] held that, when similarly labelled and sealed bottles purported to contain the same type of article are seized, the law does not require that samples should be drawn from each and every bottle. It will be sufficient if sample is drawn from one or certain number of bottles selected at random and sent for chemical examination. Therefore, when the sealed bottles of Indian Made Foreign Liquor were seized by an Abkari Officer, he need not take sample from the entire bottles. If the seal of the same type of bottles are found intact and sealed any one or two bottles

from the total and sent it for chemical examination, it is sufficient to prove the content of the entire bottles.

6. This position was was considered by the Apex Court in the **State of Gujarat** v. **Chinubhai Gopaldas** [AIR 1968 SC 1275] held as follows:

> "(6) The short question therefore is whether it can be said that in respect of the 1500 and odd bottles, an offence punishable under the Prohibition Act had been committed. It is no doubt true that the person who was charged with committing an offence was found not guilty but the question is not whether the accused has been successfully brought to book, but whether the offence in respect of the property has been committed or not. There is distinction between the two. An offence may be demonstrated to be committed although the accused who committed it may not be successfully prosecuted. We may give an example. Suppose in a house a vast quantity of contraband opium is found. The householder may get off because the opium was found from a place which was open and had access to strangers. He may get the benefit of doubt and be acquitted, but it is clear that in so far as the opium is concerned, an offence must be deemed to have been committed, and if it is proved that the contraband article was opium, it would be remarkable that the order should be that the opium be returned to the

> householder. In these circumstances, on proof that the contraband article in respect of which an offence has been committed is proved to exist, the obvious course would be to confiscate it to the State. In the present case, the two bottles which were sent to the Chemical Examiner were said to contain alcohol although there was some doubt in the mind of the Magistrate as to whether there was no chance of any malpractice. Be that as it may, there are the other bottles intact. There is some evidence to shoe that they were in the original packing and were a proprietary product. The manufacturer came as a witness and deposed that the liquids were bottled by him as a proprietary manufacture. In these circumstances, it would be fair to assume that all of them were of the same kind as the ones which were sent for chemical examination. However, an examination of random samples can be made and if they satisfy the court that the bottles contain contraband stuff the bottles can be confiscated. The order of the High Court is thus set aside, but instead of restoring the order of confiscation we order that a few bottles at random should be analysed and if contraband stuff against the prohibition Act is found the whole stock shall be confiscated."

Here, the sampling was made by the Police Officer. If it is sealed and found intact without any tampering of the seal, the detecting officer has liberty to take one or two

bottles sample from the total and send it for chemical examination through Court. I do not find any illegality in the above procedure. In this case, there is delay of 10 days in forwarding the seized article before Court. PW4 admitted that it was in the custody of the station writer, since no prejudice was caused to the revision petitioner, which was not highlighted. As the seized article was Indian Made Foreign Liquor, there is no possibility of tampering. Since the evidence of PW5 is admissible, the above delay will not affect the credibility of the prosecution case. According to PW4, the revision petitioner was found in possession of Indian Made Foreign Liquor, which is excess quantity than the permissible limit. This Court in **Sabu** v. **State of Kerala** [2003 (2) KLT 173] held that if the liquor was purchased from the Kerala State Beverages Corporation, for own consumption, there is no question of

illegal import or transport of illicit liquor within the contemplation of Section 55(a) of the Abkari Act, which was followed in **Mohanan** v. **State of Kerala** [2007(1) KLT 845]. The maximum quantity of Indian Made Foreign Liquor in possession of a person at a term has been fixed as 4 ½ litres by the Government of Kerala as per notification S.R.O.No.89/69 issued under G.O.(P) 82/69/RD dt.19-2-69. The revision petitioner was in possession of 6.750 litres of liquor and it seems that he is in possession of excess quantity. Applying the provisions of the Act, it is found that the offence will fall within the purview of the Section 63 of the Abkari Act instead of offence u/s.55(a) of the Abkari Act. Therefore, the conviction of the revision petitioner u/s.55(a) of the Abkari Act is to be modified u/s.63 of the Abkari Act as follows:

7. In the result, the conviction u/s.55 (a) of the Abkari Act is set aside and the revision petitioner is convicted u/s.63 of the Abkari Act and sentenced to pay fine of ₹2,000/-, in default of payment of fine, imprisonment for three months.

This revision petition is partly allowed.

P.D. RAJAN, JUDGE.

acd