IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

THURSDAY, THE 30TH DAY OF APRIL 2020 / 10TH VAISAKHA, 1942

Crl.Rev.Pet.No.5 OF 2007(A)

AGAINST THE ORDER/JUDGMENT IN CRA 180/2004 OF ADDITIONAL DISTRICT COURT (ADHOC)III, PATHANAMTHITTA

AGAINST THE ORDER/JUDGMENT IN SC 45/2001 OF THE SSISTANT SESSIONS COURT, THIRUVALLA

REVISION PETITIONER/S:

C.V.RAJAPPAN
KANNAMPALLIL VEEDU, NIRANAM VILLAGE,, THIRUVALLA TALUK.

BY ADV. SRI.NIREESH MATHEW

RESPONDENT/S:

STATE OF KERALA
EXCISE INSPECTOR, EXCISE RNAGE OFFICE,, THIRUVALLA, PATHANAMTHITTA DISTRICT BY, PUBLIC PROSECUTOR, HIGH COURT OF KERALA,, ERNAKULAM.

R1 BY ADV. PUBLIC PROSECUTOR SRI.B.JAYASURYA

OTHER PRESENT:

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 14-02-2020, THE COURT ON 30-04-2020 PASSED THE FOLLOWING:

V.G.ARUN, J.

Crl.R.P.No.5 of 2007

Dated this the 30th day of April, 2020

JUDGMENT

The criminal revision petition is filed aggrieved by the conviction and sentence imposed on the petitioner by the Assistant Sessions Court, Thiruvalla in S.C. No. 45 of 2001, as affirmed by the Additional District and Sessions (Ad hoc Fast Track) Court-III Pathanamthitta in Crl. A. No. 180 of 2004. The trial Court Convicted the petitioner for the offence under Section 8(1), punishable under Section 8(2) of the Abkari Act and sentenced him to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs. 1 lakh with default sentence of simple imprisonment for a period of 6 months. The appellate court dismissed the appeal filed by the petitioner, but altered the conviction to one under Section 58 of the Abkari Act, instead of sections 8(1) and (2), while maintaining the sentence imposed by the trial Court. The prosecution allegation, based on which charge was framed and the petitioner prosecuted are as under;

While PW1 was doing patrol duty on 3.6.1999, he got reliable information that one Rajappan (the petitioner) was

indulging in sale of arrack from his house. Thereupon, the patrol party proceeded to the petitioner's house and on searching the house found 13 bottles hidden inside the kitchen, of which 11 bottles were of 1.5 ltrs and 2 bottles of 750 ml capacity. The contents of the bottle were examined by smelling and tasting and was identified to be arrack. The petitioner, who was present in the house was arrested and the contraband seized. From among the 13 bottles, sample was drawn from one bottle of 750 ML capacity. Thereafter the sample bottle as well as the 13 bottles containing the contraband were sealed in the presence of the petitioner and two independent witnesses. The requisite formalities like, filing of occurrence report, production of accused and seized articles along with sample before the jurisdictional Magistrate were complied without delay. Further investigation of the case was conducted by PW 5, who after completion of investigation filed charge sheet against the petitioner for commission of the offence under Section 8(1) of the Abkari Act.

2. In order to prove its case, the prosecution examined P Ws 1 to 6 and marked Exhibits P1 to P11, P11 a and P12 and MOs 1 to 13. During his questioning under Section 313 Cr.P.C, petitioner denied the incriminating circumstances brought out against him and further stated that he was falsely implicated in the case and was actually arrested from his shop.

3. The trial Court after appreciation of evidence found that the

prosecution had succeeded in proving the guilt of the petitioner. The contentions raised on behalf of the petitioner regarding there being no independent witness for the search and seizure since PWs 3 and 4, who were sought to be examined as witnesses to the search and seizure, did not support the prosecution case, were discarded. So also, the contention raised on the discrepancies in the oral testimony of PW 1, was found to be of no avail. The appellate Court, after consideration of the contentions urged on behalf of the petitioner, found them to be unsustainable and rejected the appeal. As far as the conviction under Section 8(1) and (2) of the Abkari Act is concerned, the appellate Court found that since, on analysis, the sample was found to be spirit, the conviction should have been under Section 58 of the Kerala Abkari Act and not under Sections 8(1) and (2), which are provision for charging and punishing for possession and sale of arrack. Consequently, while upholding the finding of guilt and the sentence imposed, the appellate Court altered the conviction to the offence under Section 58 of the Abkari Act.

4. Heard the learned Counsel for the revision petitioner and the learned Public Prosecutor.

5. Other than the contentions urged before the trial and appellate courts regarding discrepancy in the evidence tendered by the prosecution witnesses, lack of independent evidence regarding search and seizure and absence of evidence of the contraband and sample

being in safe custody till it reached the court, the learned Counsel for the petitioner articulated on the illegality of the conviction, whether it be under Section 8(2) or Section 58 of the Abkari Act. In elaboration of this contention, the learned Counsel submitted that, even according to the prosecution, the alleged contraband was stored in 13 bottles, of which eleven bottles were of 1.5 litre capacity and two of 750 Ml capacity, but the sample was taken only from one bottle of 750 Ml capacity. The contents of the rest of the bottles were found to be arrack by taste and smell alone, which cannot be the basis for a conviction, especially since on chemical analysis, the sample was found to be spirit and not arrack. It is hence contended that there is nothing to prove that the sample drawn and the sample tested were the same. The further contention is that having found the conviction under Section 8(2) to be bad, the appellate court could not have converted the conviction to one under Section 58 of the Abkari Act. In support of this proposition, reliance is placed on the decisions in ***Anilkumar v. State of Kerala [2016(4)KHC 827]*** and ***Vijayan @ Pattalam Vijayan and anr v. State of Kerala [2018 (2) KHC 814].***

6. The learned Public Prosecutor contended that the search and seizure was carried out in strict compliance of the provisions of the Abkari Act and the Code of Criminal Procedure and that the siezed articles were produced before the court without delay . Placing reliance on the decision in ***Aithappa Naik V. State of Kerala [2017 (2) KLT***

1137], the learned Public Prosecutor contended that just because the accused was convicted under a wrong section, in spite of their being clear evidence to prove the definite offence punishable under the penal law applicable to the facts, the conviction cannot be set aside.

7. There cannot be any quarrel to the proposition that whatever be the quantity of contraband seized, the person from whose possession the seizure was effected can be convicted only on the basis of convincing proof that the sample drawn and the sample analysed are the same (See ***Vengadan Narayanan@Achootty v. State of Kerala [2019(3)KLJ 862]*** and ***Sukumaran v. State of Kerala [ILR 2019(4)Kerala 70]***. In order to establish this fact every link in the chain of events starting from collection of sample in the presence of witnesses and accused, affixure of label and seal on the sample and the residue, production of sample and residue before court without delay, forwarding of sample for chemical analysis under forwarding note containing the sample seal, receipt of sample intact and comparison of seal on the sample bottle with the seal in the forwarding note has to be proved through cogent evidence. As far as the instant case is concerned, though in Exhibit P3 seizure mahazar, mention is made about affixure of seal on the sample bottle and the seized bottles no mention about the seal is made in Exhibit P4 property list. Further, PW6 who was the then Station House Officer stated that he could not recollect as to whether sample seal was provided to the

court. Therefore the prosecution had failed to convincingly establish that the sample that was analysed was the very same sample drawn from the liquid allegedly seized from the possession of the accused.

8. Added to this is the crucial fact that the sample was collected from only one among the 13 bottles. The definite case of the prosecution was that the contents of all the bottles were examined through taste and smell and was found to be arrack and hence the sample was collected from only one bottle. But as per Exhibit P6 Chemical analysis report, the liquid received for analysis was not 'arrack' but 'spirit, containing 92.56 percent by volume of ethyl alcohol. The sample having been found to be spirit, the failure to collect samples from 12 among the 13 bottles, on the premise that all the bottles contained arrack is definitely a fatal lacuna which vitiated the trial. In such circumstances the conviction based on alleged seizure of arrack cannot be sustained.

9. That being the case, it is not necessary to consider the question as to whether the conviction should have been under Section 8(2) or Section 58 of the Abkari Act and whether the appellate court could have convicted the petitioner for an offence, other than the one for which he stood convicted by the trial court.

In the result, the conviction and sentence imposed on the revision petitioner by the trial and appellate courts are set aside. The petitioner is found not guilty and is acquitted. The bail bond executed

by the petitioner will stand cancelled and he is set at liberty. The fine amount, if any, deposited by the petitioner will be refunded.

Sd/-

V.G.ARUN, JUDGE

vgs