

**Vasu vs the State of Kerala**

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**Court :** Kerala

**Decided On :** Dec-22-2023

**Judge :** Honourable Mrs. Justice Sophy Thomas

**Appeal No. :** Crl.Rev.Pet/1455/2008

**Appellant :** VASU

**Respondent :** The State of Kerala

**Judgement :**

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE SOPHY THOMAS  
FRIDAY, THE 22ND DAY OF DECEMBER 2023 / 1ST POUSHA, 1945  
CRL.REV.PET NO. 1455 OF 2008 AGAINST THE JUDGMENT DATED  
21.02.2008 IN CRL.APPEAL NO.363/2006 OF ADDITIONAL SESSIONS  
COURT FAST TRACK (ADHOC) III, MANJERI SC 467/2004 OF  
ASSISTANT SESSIONS COURT, TIRUR REVISION  
PETITIONER/APPELLANT/ACCUSED: VASU, S/O.UNNI, IYYATHODI  
HOUSE, CHELEMBRA, THIROORANGADI TALUK, MALAPPURAM  
DISTRICT. BY ADV SRI.BABU S. NAIR  
RESPONDENT/RESPONDENT/STATE: THE STATE OF KERALA,  
REPRESENTED BY THE EXCISE INSPECTOR, MALAPPURAM  
EXCISE RANGE - THROUGH THE PUBLIC PROSECUTOR, HIGH

SMT.NIMA JACOB, PUBLIC PROSECUTOR THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 22.12.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: Crl.R.P No.1455 of 2008 2

## **ORDER**

This revision is at the instance of the accused in

S.C.No.467 of 2004 on the file of Assistant Sessions Court, Tirur, assailing the judgment in Crl.Appeal No.363 of 2006 on the file of Additional Sessions Judge (Fast Track Court No.III-Adhoc), Manjeri, which upheld his conviction under Sections 8(1) and 8(2) of the Abkari Act, though the sentence was modified and reduced to certain extent.

2. Prosecution case is that on 16.09.2003 at 4.45 p.m., PW1, the preventive officer of Excise Enforcement and Anti-Narcotic Special Squad and party, while doing patrol

duty, received reliable information that, the revision petitioner was keeping arrack for sale in his house at Chakkiparambu. After sending search memo to court, they proceeded to that house, and conducted search. From the store room of that house, a ten litre can containing six litres of arrack was seized. The revision petitioner, who was present there, was arrested and the contraband was seized.

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After completing the legal formalities, the revision petitioner along with the contraband and the documents prepared were produced before the Excise Range Office, Malappuram, where crime was registered against him by PW5. PW6 investigated the case and laid charge-sheet against the revision petitioner under Sections 8(1) and 8(2) of the Abkari Act.

3. On appearance of the revision petitioner before the

trial court, charge was framed under Sections 8(1) and 8(2) of the Abkari Act, to which he pleaded not guilty and claimed to be tried. Thereupon, prosecution examined PWs 1 to 6, marked Exts.P1 to P11 and identified MO1 to prove its case. On closure of prosecution evidence, the revision petitioner was questioned under Section 313 of Cr.P.C., he denied all the incriminating circumstances brought on record. No defence evidence was adduced.

4. On analysing the facts and evidence and on hearing the rival contentions from either side, the trial court found the revision petitioner guilty under Sections 8(1) and 8(2) of CrI.R.P No.1455 of 2008 4

the Abkari Act, and he was convicted and sentenced to undergo rigorous imprisonment for a period of one year and fine of Rs.1,00,000/-, with a default sentence of rigorous imprisonment for a further period of three months.

5. Aggrieved by the conviction and sentence, the

revision petitioner preferred CrI. Appeal No.363 of 2006. The appellate court, on re-appreciation of the facts and evidence, found nothing to interfere with the conviction of the revision petitioner under Sections 8(1) and 8(2) of the Abkari Act. But the sentence was modified and reduced to rigorous imprisonment for six months, retaining the fine part and its default sentence, against which, he has preferred this revision.

6. When the revision petition was taken up for

consideration on 25.01.2018, learned counsel submitted that the revision petitioner is no more, and thereafter on 26.09.2023 sought time to implead the legal representatives of the deceased revision petitioner. But as he could not collect the whereabouts of legal representatives, on CrI.R.P No.1455 of 2008 5 instructions, learned Public Prosecutor obtained a report from the Excise Inspector of Excise Range Office, Malappuram, furnishing details of the legal representatives

of deceased revision petitioner. Since they were not interested to get themselves impleaded, to prosecute the revision, no steps were taken for impleading them. Since the sentence includes fine amount also, that will not get abated on the death

of the revision petitioner. So, learned counsel for the revision petitioner sought permission to argue the matter on merit and that was allowed.

7. Now this Court is called upon to verify the legality, propriety and correctness of the impugned judgment.

8. Heard learned counsel for the revision petitioner and learned Public Prosecutor.

9. Learned counsel for the revision petitioner is

assailing the conviction and sentence mainly on the ground that PW5, who registered the crime was not competent to register the crime, as the occurrence was on 16.09.2003. According to him, an Assistant Excise Inspector was CrI.R.P No.1455 of 2008 6 empowered to exercise all the powers and to perform all the duties of the Excise Inspectors, subsequent to the

notification-SRO No.361 of 2009 dated 08.05.2009. Since the occurrence in this case and the registration of the crime was on 16.09.2003, i.e., prior to SRO No.361 of 2009, he was not having authority to register the crime. But on going through Ext.P6 crime and occurrence report, it could be seen that PW5-the Assistant Excise Inspector registered that crime as he was in charge of the Excise Inspector.

10. As per Clause 26 in Chapter XXV of Kerala Excise

Manual Volume-II, Abkari cases shall be registered by Excise Inspectors or by Assistant Excise Inspectors holding charge of the Excise Inspector. Clause 26 in Chapter XXV of Kerala Excise Manual Volume-II reads as follows: Chapter XXV - Crime-Detection, Investigation, Trials and Prevention

26. Registration of Abkari Cases:-Abkari cases

shall be registered in Form OR.1 by the Excise Inspector of the concerned range from which the case was detected. The specific charge alleged to be committed by the accused persons shall be described in the Crime and Occurrence Report. The CrI.R.P No.1455 of 2008 7

Excise Inspector shall affix his dated signature in the Crime and Occurrence Report. Asst. Excise Inspectors who hold charge of the Excise Inspector can also register the crimes at range office. The Excise Inspector of the range office shall peruse the documents produced before him and conduct an enquiry with available documents and materials before registering the crime.

Since PW5 was holding the charge of the Excise Inspector, Malappuram, he was competent to register the crime, and so the argument put forward by learned counsel for the revision petitioner is liable to be rejected.

11. Now coming to the detection, seizure, etc.,

PW1-the detecting officer deposed that, on 16.09.2003 before conducting search, he sent Ext.P1 search memo to court, by post. Ext.P1 search memo was seen received before court on 18.09.2003. Since it was sent by post, the receipt on 18.09.2003 cannot be treated as a delay. Ext.P7 property list shows that the seized articles along with the sample bottle reached court on 17.09.2003, i.e., on the very next day of its seizure. Ext.P3 mahazar shows the specimen impression of the seal and Ext.P8 forwarding note also

Crl.R.P No.1455 of 2008 8 shows the very same seal affixed on it. The investigation was completed and the final report was filed on 16.09.2004, and there also, we cannot say that there occurred delay in investigation and filing the final report.

12. On going through Ext.P11 chemical report it could be seen that the sample bottle was forwarded from JFCM, Parappanangadi to the Chemical Examiners Laboratory on

17.09.2003. But that sample reached the Laboratory only on 23rd day of October, 2003, with a delay of 36 days. Prosecution failed to offer any explanation for that delay. The Excise Guard, who received the sample from the court for taking it to the Chemical Examiners Laboratory, was not examined to explain the delay of 36 days in producing the sample bottle before the Laboratory, after it was being

received from court by him. That delay is fatal and it speaks against the veracity of the prosecution case.

13. Prosecution was duty bound to prove the link evidence starting from the point of seizure till the point of analysis before the Laboratory. Prosecution can succeed only Crl.R.P No.1455 of 2008 9

if it is shown that, the liquid, which was examined by the Chemical Examiner, was the very same sample drawn from the liquid seized. Unless there is evidence to show tamper proof despatch of the sample, we cannot say that the link evidence was established. In the case on hand, the delay of 36 days in reaching the sample bottle before the Chemical Examiners Laboratory, after it was forwarded from court, casts serious doubt regarding tamper proof despatch of the sample, and so it has to be held that the prosecution failed to prove the link evidence. For that reason alone, the prosecution fails in establishing the fact that the sample taken from the contraband allegedly seized from the revision petitioner, was the sample analysed before the Laboratory. The inordinate delay of 36 days in reaching the sample before the Chemical Examiners Laboratory, after it was being forwarded from court, is a ground to doubt the genuineness of the sample, analysed by the Examiner. The revision petitioner is entitled to get the benefit of that doubt. Prosecution has not even attempted to explain that delay.

Crl.R.P No.1455 of 2008 10 The conviction and sentence of the revision petitioner by the courts below without noticing this vital defect, is liable to be set aside. In the result, the conviction and sentence of the

revision petitioner under Sections 8(1) and 8(2) of the Abkari Act by the courts below are hereby set aside. The revision petitioner is found not guilty of the offences punishable under Sections 8(1) and 8(2) of the Abkari Act, and he is acquitted thereunder. His bail bond is cancelled and he is set at liberty forthwith.

The revision petition accordingly stands allowed. Sd/- SOPHY THOMAS, JUDGE DSV/-

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