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E.Joy vs the State of Kerala

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Court : Kerala

Decided On : Oct-28-2021

Judge : Honourable Dr. Justice Kauser Edappagath

Appeal No. : Crl.Rev.Pet/3673/2007

Appellant : E.JOY

Respondent : The State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH THURSDAY, THE 28TH DAY OF OCTOBER 2021 / 6TH KARTHIKA, 1943 CRL.REV.PET NO. 3673 OF 2007 AGAINST THE JUDGMENT IN CRL.A NO.73/2002 OF ADDITIONAL SESSIONS COURT (ADHOC I), THALASSERY, KANNUR CC 504/1997 OF JUDICIAL MAGISTRATE OF FIRST CLASS, MATTANNUR, KANNUR REVISION PETITIONER/APPELLANT/ACCUSED: E.JOY, S/O.DEVASSYA, AGRICULTURIST, RESIDING AT KANDAPPANATH,, KOTTIYOOR AMSOM, DESOM, THALASSERY TALUK, P.O.KOTTIYOOR, KANNUR DISTRICT. BY ADV SRI.P.U.SHAILAJAN

RESPONDENT/RESPONENT/COMPLAINANT: THE STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. SMT PUSHPALATHA M.K.,PP THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 28.10.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: CRL.REV.PET NO. 3673 OF 2007 2

ORDER

Dated this the 28th October, 2021 This revision petition has been filed against the judgment in Crl.A No.73/2002 dated 9.4.2007 on the file of the Additional Sessions Court (Adhoc-I), Thalassery (for short 'the appellate court') as well as the

judgment in C.C.No.504/1997 dated 8.1.2002 on the file of the Judicial

First Class Magistrate Court, Mattannur (for short 'the trial court')

2. The accused before the courts below is the revision petitioner. He faced trial for an offence punishable under Section 55(a) of the Abkari Act.

3. The prosecution case in short is that on 6.6.1996 at 11.35

am., the accused was found transporting 100 packets of Karnataka made arrack of 100 ml each in a bus bearing registration No.KL 15- 2106 and thereby committed the offence.

4. PW5, the Excise Inspector at Koottupuzha Check Post, is the detecting officer. The evidence would show that on the date and CRL.REV.PET NO. 3673 OF 2007 3

time of the incident, he checked the bus mentioned above, in which the accused was travelling. The accused was found sitting on the back seat of the bus with a gunny bag and on inspection it was found that it

contained 100 packets of 100 ml each arrack. The accused was arrested and the contraband articles were seized. One packet was opened and the sample was drawn from it. It was properly sealed and packed. Ext.P1 is the mahazar. Thereafter, PW5 went along with the accused and the seized contraband articles and handed over to the Excise Range Office, Mattannur. PW4 at 4.45 pm received the accused and seized the contraband articles from PW5 and registered crime against the accused. Ext.P2 is the occurrence report. He produced the contraband articles at the court. The sample was sent for chemical analysis during investigation and the report was received, which was

marked as Ext.P3. The report shows that it contained 35.15% by volume of ethyl alcohol. After completion of the investigation, final report was filed before the learned Magistrate. The trial court after completing the statutory formalities committed the case to the Court of Sessions. CRL.REV.PET NO. 3673 OF 2007 4

5. On receipt of summons, the accused appeared at the trial

court. After hearing both sides, charge was framed against the accused under Section 55(a) of the Abkari Act. The charge was read over and explained to the accused who pleaded not guilty.

6. The prosecution examined PWs 1 to 5 and marked Exts.P1 to P3. MOs 1 to 4 were identified. He denied all the incriminating

circumstances brought against him during evidence. He submitted that he is innocent. No defence evidence was adduced. Considering the evidence on record, the trial court found the accused guilty under Section 55(a) of the Abkari Act and the accused was convicted for the said offence. The trial court sentenced the accused to undergo simple imprisonment for a period of six months and to pay a fine of Rs.25,000/-, in default to suffer simple imprisonment for a period of

three months. The accused challenged the said conviction and sentence at the appellate court in Crl.A No.73/2002. The appellate court as per the judgment dated 9.4.2007 confirmed the conviction but modified the sentence to imprisonment for three weeks and to pay a fine of Rs.25,000/-, in default to suffer simple

imprisonment for 15 CRL.REV.PET NO. 3673 OF 2007 5 days. The revision petitioner challenges the conviction and sentence passed by both the courts below in this revision petition.

7. I have heard Sri.Nidheesh T.P, the learned counsel for the revision petitioner and Smt.M.K.Pushpathala, the learned Public Prosecutor.

8. The learned counsel for the revision petitioner submitted that the courts below committed illegality and irregularity in convicting the accused based on the interested testimony of the

official witnesses alone. The prosecution failed to produce the forwarding note, property list or arrest memo. In the absence of these evidences, the courts below ought not to have found the accused guilty, argued the counsel.

9. The learned Public Prosecutor, on the other hand,

supported the findings and verdict of the court below and argued that necessary ingredients of Section 55(a) of the Abkari Act had been established and the prosecution has succeeded in proving the case beyond reasonable doubt. CRL.REV.PET NO. 3673 OF 2007 6

10. PW5 is the detecting officer, who detected the offence.

PW2 is the Excise Guard, who accompanied PW5. They deposed about the arrest of the accused and seizure of the contraband articles and its sampling. The accused did not cross examine those witnesses. The court below proceeded on the premise that in the absence of challenge

to their evidence, the prosecution case stands proved. But it is pertinent to note that the prosecution did not produce the arrest memo to prove the arrest of the accused, the property list to prove when exactly the seized contraband articles and sample drawn from it were produced at the court and also the forwarding note to prove that the very same sample taken at the spot of occurrence had reached Chemical Examiner for analysis in a tamper proof condition.

11. A mere production of the laboratory report that the sample

tested was contraband substance is not sufficient unless and until the forwarding note also is produced. In Gireesh @ Manoj v. State of Kerala [2019 KHC 655] this Court held that in the absence of forwarding note marked in evidence, it cannot be found that the prosecution has proved beyond reasonable doubt that the very same sample taken at the spot of occurrence had reached the chemical

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examiner for analysis in a tamper proof condition. The forwarding note is the link evidence to show that it was the same sample which was drawn from the contraband seized from the accused had eventually reached the chemical analysis laboratory by change of hands in a tamper proof condition. Hence, I am of the view that non production of the forwarding note is fatal to the prosecution. Similarly, the arrest memo is an important document to prove the arrest of the accused. It has also not been produced. The detecting officer is expected to produce the seized article as well as the sample drawn from it without delay at the court. The property list has not

been produced. Therefore, there is no material to show that when exactly the seized article produced at the court. PW2 or PW5 did not

depose when the contraband article was produced at the court.

cannot be said that the prosecution has established its case.

12. The revisional power of the High Court under Section 401 r/w 397 Cr.P.C is wide though need to be sparingly exercised in a fit case. The powers are inherent in nature to correct the judgments and CRL.REV.PET NO. 3673 OF 2007 8

orders of the courts below which suffer from gross illegality or jurisdictional error. The above mentioned vital aspects which cut roots of the prosecution case were not taken into consideration by the courts below while convicting the accused. I am of the view that in the absence of basic evidence to connect the accused with the crime, the courts below ought not to have convicted the accused. No doubt, the

courts below have committed the gross illegality. Hence, the conviction and sentence passed by the courts below cannot be sustained. In the result, the Criminal Revision Petition is allowed. The conviction and sentence passed by the courts below vide impugned judgments are set aside. The revision petitioner is found not guilty of the offences charges against him and accordingly he is acquitted. His bail bond is cancelled. Sd/- DR. KAUSER EDAPPAGATH JUDGE ab

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