Joseph Vs. State of Kerala

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Court : Kerala

Decided On : Feb-23-2015

Judge : Honourable Mr. Justice K.Ramakrishnan

Appellant : Joseph

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN MONDAY,THE23D DAY OF FEBRUARY20154TH PHALGUNA, 1936 Crl.Rev.Pet.No. 2292 of 2003 (C) ---------- AGAINST THE

JUDGMENT
IN SC822000 of ADDL. ASSISTANT SESSIONS COURT, NORTH PARAVUR, DATED2908-2002 & AGAINST THE

JUDGMENT
IN CRL. APPEAL6432002 of ADDITIONAL SESSIONS COURT, NORTH PARAVUR, DATED2207-2003. REVISION PETITIONER(S): ---------- JOSEPH, S/O. DEVASSY, PALATHUSSERY VEEDU, PALLIPURAM KARA, KUZHUPPILLY VILLAGE. BY ADV. SRI.V.S.CHANDRASEKHARAN RESPONDENT(S): ---------- STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF

KERALA, ERNAKULAM, REPRESENTING THE EXCISE INSPECTOR NJARACKAL RANGE. BY PUBLIC PROSECUTOR SRI. RAJESH VIJAYAN THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON2302-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING: ss K. RAMAKRISHNAN, J.

---------- Crl.R.P.No.2292 of 2003 ---------- Dated this the 23rd day of February, 2015

ORDER

Accused in S.C.No.82/2000 on the file of the Additional Assistant Sessions Judge, North Paravur, is the revision petitioner herein. The revision petitioner was charge-sheeted by the Excise Inspector, Njarackal Range, in Crime No.2/1998 of Njarackal Excise Range, alleging offences under Section 55(a) and 64-A of Abkari Act.

2. The case of the prosecution in nut shell was that, on 27.08.1998, at about 05.00 p.m., the second accused was found to be in possession of 5.22 liters of coloured illicit liquor in 29 bottles of 180 m.l. each on the north-western side of the house compound with No.184-A of Ward No.IV of Pallipuram Panchayath, which belongs to him and that was handed over by the first accused to the second accused for the purpose of sale and thereby both of them have committed the offence punishable under Section 55(a) and 64-A of the Abkari Act. Crl.R.P.No.2292 of 2003 2 3. After investigation, final report was filed before the Judicial First Class Magistrate Court, North Paravur, which was committed to the Sessions Court, Ernakulam, by the learned magistrate under Section 209 of the Code of Criminal Procedure and the Sessions Judge, Ernakulam, had taken cognizance of the case as S.C.360/2000 and it was made over to Additional Sessions Court, North Paravur, for disposal.

4. When the revision petitioner along with other accused appeared before the court below, after hearing both sides, charge under Section 55(a) and 64-A of the Abkari Act was framed and the same was read over and explained to them and

they pleaded not guilty. In order to prove the case of the prosecution, PWs 1 to 6 were examined and Exts.P1 to P8 and MOs 1 and 2 series were marked on their side. After closure of the prosecution evidence, the revision petitioner and first accused were questioned under Section 313 of the Code of Criminal Crl.R.P.No.2292 of 2003 3 Procedure and they denied all the incriminating circumstances brought against them in the prosecution evidence. They have further stated that, they have not committed any offence and they have been falsely implicated in the case. After considering the evidence on record, the trial court found the first accused not guilty of the offences alleged and acquitted him of those charges under Section 235(1) of the Code of Criminal Procedure, but found the revision petitioner guilty under Section 55(a) and 64-A of the Abkari Act and convicted him thereunder and sentenced him to undergo simple imprisonment for two years and also to pay a fine of 1,00,000/-, in default to undergo simple imprisonment for one year under Section 55 (a) of Abkari Act and also to pay a fine of 25,000/-, in default to undergo simple imprisonment for one month under Section 64-A of Abkari Act. Aggrieved by the same, he filed Crl.Appeal 643/2002 before the Sessions Court, Ernakulam, which was made over to Additional Sessions Crl.R.P.No.2292 of 2003 4 Court, North Paravur, for disposal and the learned Additional Sessions Judge by the impugned judgment dismissed the appeal, confirming the order of conviction and sentence passed against the revision petitioner. Aggrieved by the same, the present revision has been filed by the revision petitioner/second accused before the court below.

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

6. The counsel for the revision petitioner submitted that, no incriminating articles were seized from the house of the revision petitioner, but it was found from the corner of the compound and it cannot be said that he was in conscious possession of the same. Further, sample was taken only from one of the bottles and it cannot be said that all the bottles contained liquor. Though there is a compound wall mentioned, neither in Ext.P2 seizure mahazar nor in Ext.P7 plan, the existence of any compound Crl.R.P.No.2292 of 2003 5 wall was mentioned and that creates doubt regarding the prosecution case. Further there was delay in sending the

forwarding note and so that also cast doubt on the prosecution case. Courts below have not properly appreciate these aspect and prayed for acquittal. The counsel further submitted that, no offence under Section 64-A is attracted, as even according to the prosecution, there is no question of permitting any other person to keep the article arises, if that be the case, he cannot be convicted under Section 55(a) of Abkari Act, alleging that he was in possession of the contraband article. So the conviction entered by the court below on that ground is not sustainable. He had further submitted that the sentence imposed is harsh.

7. On the other hand, the learned Public Prosecutor submitted that, courts below have concurrently found that he was in possession of the contraband article and it is not illicit liquor. So, once possession of illicit liquor Crl.R.P.No.2292 of 2003 6 is proved, presumption under Section 64 is attracted and as such, the courts below were perfectly justified in convicting the revision petitioner for the offence alleged.

8. The case of the prosecution was that, on 27.08.1998, at about 05.00 p.m., PW1 along with PW2 and party were doing patrol duty, they got information that, second accused was engaged in sale of illicit liquor from his house and immediately he prepared a search memorandum and sent the same to the court and thereafter they went to the house of the second accused and conducted search of the house and there were no incriminating article found and Ext.P1 search list was prepared. Thereafter, when he examined the compound, he found MO1 bag and on examination there were 29 bottles of 180 ml. each. He examined one of the bottles and found that it was illicit liquor. There was no label or sticker found in the bottle. So he was convinced that it is illegally coloured liquor, not licit liquor. When he questioned him, it was revealed that, it was Crl.R.P.No.2292 of 2003 7 entrusted to him by first accused for sale. Accordingly, they went to the tea shop of first accused and thereafter arrested him and prepared Ext.P1 and P1(a) arrest memo and gave intimation regarding arrest and thereafter came to the house of the second accused, sealed the articles and seized the same as per Ext.P2 mahazar, in the presence of PWs 5 and 6. Thereafter he came to excise office and registered Ext.P6 crime and occurrence report against both the accused as Crime No.2/98 of Njarackal police station under Section 55(a) and 64-A of Abkari Act and he produced the accused along with the contraband articles before court on the

next day itself along with property list. Thereafter the investigation was conducted by PW4. On the basis of his request, PW7 prepared Ext.P7 sketch plan of the place of occurrence and issued Ext.P8 possession certificate showing that the property from where the contraband article was seized belongs to second accused. He questioned the witnesses and recorded their statements and Crl.R.P.No.2292 of 2003 8 completed the investigation and submitted final report.

9. It is true that PWs 5 and 6 independent witnesses though admitted their signature in Ext.P2 seizure cum scene mahazar, they did not support the case of the prosecution regarding the seizure of the article. It was brought out in evidence that, they knew the second accused. So the possibility of these witnesses supporting the second accused cannot be ruled out.

10. PW1 is the detecting officer. He had deposed that, on the fateful day when he was doing patrol duty along with PW2 and others, they got information that illicit liquor was being sold from the house of the second accused. Immediately he prepared a search memorandum and sent to court and went there and conducted search and found no incriminating article and he prepared Ext.P2 search list. Thereafter when he examined the compound, he found on the north-western corner, a plastic bag and on examination it was found that, it contained 29 bottles of 180 ml. coloured Crl.R.P.No.2292 of 2003 9 liquor and on examination it was revealed that, it is illicit coloured liquor, as there was no label or sticker found in the bottle. Thereafter he examined one of the bottles and satisfied that, it was illicit coloured liquor and he sealed the bottles, labeled the same and seized the same, after describing the same in Ext.P2 mahazar. Thereafter he came to the office and registered the case. He had categorically stated that, these articles were kept in the office under his lock and key. It was he who produced the same before court on the next day. This was supported by the evidence of PW2. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect. Though the revision petitioner had a case that, he was falsely implicated, there is no acceptable evidence adduced on the side of the revision petitioner to prove this fact. The fact that, the property belongs to the second accused from where the contraband articles were seized is proved by the evidence of PW3, the Village officer coupled with Ext.P8 Crl.R.P.No.2292 of 2003

10 possession certificate given by him. The fact that, he was arrested from the property was also proved through the evidence of PWs 1 and 2.

11. It is true that there was some delay in sending the forwarding note, but the articles were produced in court without delay. Once the contraband articles were produced before court without delay, then it cannot be said that there was a possibility of tampering the article and the article reached the chemical examiner is not the same article which has been seized from the possession of the accused. So mere delay in sending the forwarding note is not sufficient to come to the conclusion that, there was any prejudice caused to him. So the courts below were perfectly justified in coming to the conclusion that the delay in sending the forwarding note is not fatal in this case.

12. The dictum laid down by this court that, mere possession of a licit liquor will not attract an offence under Section 55(a) is not applicable to the facts of this Crl.R.P.No.2292 of 2003 11 case, as according to the prosecution, it is not licit liquor and it is illicit coloured liquor. Once it is proved that, it is illicit coloured liquor, then the presumption under Section 64 of the Abkari Act will be attracted and the burden is on the accused to prove that it is licit liquor and he is entitled to posses the same and he has to account for his possession as well. No such evidence has been adduced on the side of the accused. Further it is also settled law that, merely because the seizure (independent) witnesses turned hostile, is not a ground to disbelieve the case of the prosecution and if the court is satisfied the evidence adduced by the official witnesses regarding the same, it can be relied on to base conviction.

13. Further the evidence of PW3 will go to show that merely because the presence of compound wall was not mentioned in the plan, it does not mean that there was no compound wall. So that alone is not sufficient to come to the conclusion that there was no compound wall. Further the Crl.R.P.No.2292 of 2003 12 evidence of PWs 1 and 2 will go to show that it was seized from the property and from the description of the property coupled with Ext.P8, it will be seen that, it was in the possession of the second accused. So once a contraband article has been seized from the property in the possession of the accused, unless the contrary is proved,

it can only be presumed that he was in conscious possession of the article. Further since, it is an illicit coloured liquor, even assuming that other bottles were not sent for chemical analysis is not going to help the accused anyway as it is not licit liquor and only if it is licit liquor, non-examination of other bottles will have some impact to come to the conclusion that the quality is within the permitted limit of licit liquor or not. So under the circumstances, courts below were perfectly justified in coming to the conclusion that, the revision petitioner had committed the offence punishable under Section 55(a) of Abkari Act and the concurrent findings of the court below on this aspect do not call for any interference. Crl.R.P.No.2292 of 2003 13 14. As far as the offence under Section 64-A is concerned, we will have to analyse the Section first. Section 64-A of Abkari Act, which reads as follows:

64. . Penalty for allowing land, building, room etc. for manufacture, sale or storing for sale of liquor or intoxicating drug.- Notwithstanding anything contained in this Act, or in any other law for the time being in force, any owner or occupier or person having control of, any land, building, room, space or enclosure, permits any person to use such land, building room, space or enclosure for manufacture sale or storing for sale of liquor or intoxicating drug in contravention of this Act or of any rule or order made thereunder or of any licence or permit obtained under this Act shall be punishable with fine which shall not less than twenty-five thousand rupees unless he proves to the satisfaction of the court that all due and reasonable precautions were taken by him to prevent such use.

15. In order to attract that offence, it must be proved by the prosecution that, the owner of the property had permitted any other person to keep a contraband article with his consent in the property. In this case, the case of the prosecution was that, the second accused himself was in possession of the article and that was intended for sale, but entrusted by first accused for sale, that does not mean, he permitted any other person to keep Crl.R.P.No.2292 of 2003 14 the article in the compound so as to attract offence under Section 64-A of Abkari Act and the findings of the court below on that aspect in view of the discussions made above is unsustainable in law and the same is liable to be set aside and he is entitled to get acquittal of that charge as the ingredient of offence has not been made out. In view of the fact that, this court has found that the revision petitioner is not liable to be convicted for

the offence under Section 64-A of Abkari Act, the sentence imposed by the court below on that aspect is also unsustainable in law and the same is liable to be set aside.

16. As regards the sentence in respect of 55(a) of the Abkari Act is concerned, the court below had sentenced him to undergo simple imprisonment for two years and also to pay a fine of 1,00,000/-, in default to undergo simple imprisonment for one year. This was confirmed by the appellate court. But considering the contraband article and the quantity involved, this court feels that the sentence Crl.R.P.No.2292 of 2003 15 imposed is to be little harsh, especially when minimum sentence of fine of 1,00,000/- has been imposed with default sentence as part of the sentence. So considering the circumstances, this court feels that sentencing him to undergo simple imprisonment for three months and also providing default sentence of three months for the non- payment of fine will be sufficient and that will meet the ends of justice. So the revision is allowed in part. The concurrent findings of the court below that the revision petitioner had committed the offence punishable under Section 64-A of Abkari Act and conviction and sentence thereon are set aside and he is acquitted of that charge giving him the benefit of doubt. But the conviction entered by the courts below against the revision petitioner under Section 55(a) of Abkari Act is hereby confirmed, but the sentence imposed by the court below and confirmed by the appellate court is set aside and the same is modified as follows: Crl.R.P.No.2292 of 2003 16 The revision petitioner is sentenced to undergo simple imprisonment for three months and also to pay a fine of 1,00,000/-, in default to undergo simple imprisonment for three months more under Section 55(a) of Abkari Act. The sentence if any undergone by him as an under trial prisoner in this case is given set off under Section 428 of the Code of Criminal Procedure. With the above modification of the conviction and sentence passed by the court below, the revision is allowed in part and disposed of accordingly. Office is directed to communicate this order to the concerned court, immediately. Sd/- K. RAMAKRISHNAN, JUDGE // True Copy// P.A. to Judge ss