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**Court : Kerala**

**Decided On : Mar-23-2012**

**Judge : P.S. Gopinathan**

**Appeal No. : Crl.MC.No. 418 of 2012**

**Appellant : Rajappan and Another**

**Respondent : State of Kerala Rep.by Excise Inspector,excise Range Office Devikulam Idukki District Represented by Public Prosecutor**

**Judgement :**

1. Petitioners in this petition under Section 482 of the Code of Criminal Procedure are accused 1 and 2 in C.P. 6 of 2012 on the file of the Judicial Magistrate of the First Class, Devikulam. The Excise Inspector, Excise Range Office, Devikulam, filed Annexure F Final Report before the Judicial Magistrate of the First Class, Devikulam, alleging offences under Sections 56(b) and 57(a) of the Abkari Act with an allegation that on 14.7.2010, the Excise Inspector took two sets of samples (samples A and B) of coconut toddy under Rule 8 of the Kerala Abkari shops Disposal Rules 2002 (hereinafter referred to as "Rules 2002") from the toddy shop run by the petitioners and sample 'A' was forwarded to the Chemical Examiner. By Annexure A, the Chemical Examiner to Government of Kerala, reported that the sample A contained 8.35% by volume of ethyl alcohol. Rule 9 (2) of the Rules

prescribes that the maximum percentage of ethyl alcohol at 8.1%. Since the percentage of alcohol exceeded the limit prescribed as per Rule 9(2) of the Rules, a case was registered for which Annexure E crime and occurrence report was filed. As mandated by Rule 8(3), the crime and occurrence report was submitted before the trial court along with sample B. The petitioners thereafter applied, though not under any of the rules but on the decision of the Apex Court, for sending sample B for chemical examination. After chemical examination, Annexure B report was obtained. In Annexure B it is certified by the Assistant Chemical Examiner that the sample contained only 7.39 % by volume of ethyl alcohol. Admittedly it is within the prescribed limit. However, the Excise Inspector proceeded with the investigation and filed the final report accusing the above offence. According to the petitioners, in the light of Annexure B report of the Assistant Chemical Examiner on sample B, the prosecution would not lie as the percentage of ethyl alcohol in the sample toddy is within the prescribed limit. Therefore, they would seek an order to quash Annexure F final report.

2. Learned Government Pleader would oppose this petition mainly by stating that Annexure B report cannot be looked into at this stage and that is a matter to be brought in evidence and that by examining the Chemical Examiner the prosecution could establish that there is every likelihood of chemical change during the course of time so that the percentage of alcohol would come down and therefore, according to the learned Government Pleader, final report is not liable to be quashed, but the petitioners are liable to be prosecuted and they have to undergo the ordeal of the trial and that this Court shall not interfere under Section 482 of the Code of Criminal Procedure.

3. Per contra, the learned senior counsel appearing for the petitioners would submit that had the consequence of the prosecution be only of penal nature, they would have readily waited for the disposal of the case on merits. But according to the learned counsel, unless the prosecution is not interfered under Section 482 Cr.P.C., they would be disqualified to apply for renewal of their licence and it would deprive their livelihood by denying them to do the business that now they are doing and therefore, this is a case where right to life is even in dispute.

4. In the decision reported in *Sudhakaran v. State of Kerala* (2011 (1) KLT 799) this Court declined to interfere with the investigation in an identical issue during the crime stage. The learned senior counsel for the petitioners relied upon the decision in *Joshy George v. State of Kerala* (2011(4) KHC 818) and would submit that in that case, on the identical set of facts, this Court interfered under Section 482 of the Code of Criminal Procedure and all further proceedings were quashed. It is submitted that as against the decision in *Sudhakaran's* case (*supra*), a Special Leave Petition is pending before the Apex Court and the operation of the judgment is stayed. As against the decision in *Joshy George's* case, so far no Special Leave Petition is preferred; but it is submitted that the file is sent for preferring a Special Leave Petition. The learned Government Pleader, canvassing my attention to sub-clause (2) of Section 293 Cr.P.C would submit that the court may, if it thinks fit, summon and examine the expert who issued Annexures A and B reports and therefore, according to him, Annexure A report could be substantiated and B report could be impeached. The argument of the learned senior counsel for the petitioner is that in Annexure F final report, there is no mention about Annexure B report and none of the witnesses scheduled therein are cited to prove or disprove Annexure A or B report. According to the learned counsel, therefore, there is no merit in the submission of the learned Government Pleader.

5. In *Sudhakaran's* case (*supra*) the learned Judge declined to interfere for the reason that the prosecution can examine the witness to support the first report or impeach the second respondent. In *Joshy George's* case (*supra*) the learned Judge, while allowing the petition, had come to a conclusion that the first report cannot be given credibility under Section 293 Cr.P.C. Whereas the second report is admissible in evidence under Section 293 of the Code even without examining the Chemical Examiner or the Assistant Chemical Examiner, as the case may be. I find that it would be appropriate to have a reading of Section 293 of the Code for a correct appraisal of the case. Section 293 reads as follows:

293. Reports of certain Government scientific experts.--

(1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly

submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4). This section applies to the following Government scientific experts, namely:--

(a) any Chemical Examiner or Assistant Chemical Examiner to Government;

(b) the Chief Controller of Explosives;

(c) the Director of the Finger Print Bureau;

(d) the Director, Haffkeine Institute, Bombay;

(e) the Director [Deputy Director or Assistant Director] of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government.

(g) any other Government Scientific Expert specified, by notification, by the Central Government for this purpose.

On carefully going through the above provision, I find that sample A was sent for analysis and obtained Annexure A report not in the course of any proceedings under the Code of Criminal Procedure. At the same time, Annexure B report was obtained by forwarding sample B in the course of the proceedings. So, Annexure B report has the support of Section 293 of the Code of Criminal Procedure. Annexure A report wouldn't get such a support as sample A was not sent for

examination in the course of proceedings under the Criminal Procedure Code. In this view of the matter, I find that the principle followed in Joshy George's case (supra) is in tune with the statutory provisions. In Sudhakaran's case that legal aspect was not considered.

6. Adding to the above, when there are two conflicting reports in one case, the one which in favour of the accused is to be relied upon so long as the prosecution has no good explanation for impeaching the report in favour of the accused. In this case, as mentioned earlier, in the final report there is nothing to assail Annexure B report. Therefore, the prosecution cannot now turn round and say that the prosecution could adduce evidence to impeach Annexure B report or to support Annexure A report. Therefore, I find no reason to arrive at a divergent conclusion than the one arrived at by this Court in Joshy George's case (supra). Applying the same principle, I find that I have to interfere with the final report under Section 482 of the Code. In the result, this petition is allowed. All further proceedings in pursuance to Annexure F final report would stand quashed.

Before leaving the matter, I would like to point out a lacuna in the Rules. Though the Rules prescribe for taking two samples (A and B) and B sample is to be forwarded to the court after registering the case when it is found on analysis/chemical examination of A sample that it is adulterated, there is no provision for sending sample B for analysis. There is no purpose served in taking two samples, without provision for sending B sample for analysis/chemical examination. In this case, report of the Chemical Examiner on A sample is disputed and B sample was forwarded for examination to the same laboratory and examined by the Assistant Chemical Examiner. There is no prudence in sending the second sample to same laboratory and obtaining report from another examiner. In my opinion, there would be apex laboratory with more experienced high ranking and expert Examiners where the examination/analysis can be done more scrupulously so that the 2nd report would get more credibility and would supersede the first report. Therefore, it is high time for amending the Rules and to have provision for sending the second sample to a higher laboratory.

I hope the State would look into the matter.

