

(2023) 05 KL CK 0134

In the High Court Of Kerala

Case No : Criminal Miscellaneous Petition No. 9316 Of 2019

Jose Francis

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 23-05-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 232, 313(1)(b), 482
Kerala Abkari Act, 1967 — Section 55(a)

Citation : (2023) 05 KL CK 0134

Hon'ble Judges : Mary Joseph, J

Bench : Single Bench

Advocate : Nireesh Mathew, N.P.Prajeesh, Aravind V. Mathew

Final Decision : Dismissed

Judgement

Mary Joseph, J

1. The petition on hand is filed under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') seeking to quash the proceedings initiated by Judicial First Class Magistrate Court, Mannarkkad as CP No.124/2011 which originates from Crime No.77/2005 of Sholayur Police Station, Palakkad as against the petitioner herein, who is accused No.2.

2. The case of the prosecution was that on 09.10.2005 at about 13.30 hours two persons were found in possession of 10 litres of arrack in a tyre tube for the purpose of sale in the public road at Kozhikoodam, thereby alleged to have committed an offence punishable under Section 55(a) of the Abkari Act (for short 'the Act'). Following the seizure of the arrack, Crime No.77/2005 was registered at Sholayur Police Station, Palakkad District. The investigation in the case was conducted and a Final Report was filed before Judicial First Class Magistrate Court, Mannarkkad, certified copy of which is produced as Annexure A in the petition on hand.

3. 1st accused alone appeared before the court below responding to the

summons issued therefrom. Charge was framed for the offence, he pleaded not guilty and faced trial.

4. The prosecution examined PWs 1 to 6 and marked Exts.P1 to P9 and MO1 in evidence. The incriminating circumstances brought on record by the prosecution were put to him during examination under Section 313(1)(b) Cr.P.C and he denied all those.

5. Prosecutor representing the State and counsel representing the accused were heard under Section 232 Cr.P.C. Grounds having not been made out to record an order of acquittal, the accused was asked to enter on his defence. He did not adduce any evidence. Both the learned Public Prosecutor and the learned counsel were heard. Evidence on record were appreciated. The court below arrived at a finding that the 1st accused was not properly identified by the witnesses during trial and that the certificate of chemical examination of the contraband was not made available for it to take a view that the contraband seized was nothing but arrack.

6. The petitioner herein who is the 2nd accused in the case and the petitioner in CP No.124/2011 pending before Judicial First Class Magistrate Court, Mannarkkad, was out of station at the time when the trial was commenced against the 1st accused. He has come up before this Court by filing the petition on hand seeking to quash the proceedings pending against him for the reason that the 1st accused who faced trial was acquitted by judgment dated 11.08.2014 in SC No.54/20912, for want of proper identification and want of evidence to establish that the contraband seized from him was arrack. The certified copy of the judgment abovementioned is appended to the petition on hand as Annexure B. According to the petitioner, he being the co-accused of the 1st accused and the witnesses of the prosecution being the same, the benefit of Annexure B shall also be extended to him and thereby quash the proceedings pending against him as CP No.124/2011 on the files of Judicial First Class Magistrate Court, Mannarkkad.

7. The learned Public Prosecutor has opposed the application stating that the petitioner has to face the trial to test his luck. According to him, for the reason that the witnesses failed to identify accused No.1, it cannot be said that they would not identify accused No.2 during the conduct of the trial against him. A further contention was also advanced by the learned Public prosecutor that there is no case for the petitioner that the contraband after its seizure was not sent for chemical analysis to ascertain its nature. True that the certificate of chemical analysis was not available for the trial court at the relevant time when trial was held against accused No.1. It is not found from the impugned judgment that the court below had taken any steps to procure the certificate of chemical examination of the contraband at the Laboratory. Since it was not available during trial, that was also taken as a reason by the court below for arriving at a finding that he is not guilty of the offence and entering into an order of acquittal of the 1st accused.

8. It is revealed from the case set up by the prosecution that the 1st accused though found by the detecting officer with the contraband at the spot, he was not apprehended then and there. According to the investigating officer, the 1st accused rushed out from the spot of detection on watching the officials proceeding to the spot. The petitioner herein alone was arrested from the spot. Witnesses have a claim that the 1st accused was known to them. The witnesses have also not spoken when their statements were recorded by the investigating officer that they have prior acquaintance with accused No.1 and therefore is identifiable. It was during examination that they had the chance to see accused No.1 first in point of time and they identified him as the person who had rushed from the spot of detection of the offence. In the above context, the trial court held that the identification of the 1st accused by the witnesses before the court first in point of time without a test identification parade being conducted during investigation, is improper and the identification lost its validity.

9. Case of the petitioner stands contrary to the 1st accused for the reason mainly that he was arrested from the spot of detection itself. Therefore, the witnesses had the chance to see him and to have the features of his identity maintained in their memory. Therefore, without the trial being conducted against him, it cannot be said whether the witnesses would identify him or not. The non-conduct of test identification parade will not have much bearing on the identification of the petitioner by the witnesses in the court for the reason that they had the occasion to see him from the spot at the time of his arrest.

10. Non-availability of the certificate of chemical analysis during trial of the 1st accused cannot be taken as a reason for quashing the case against the petitioner, in the absence of a claim for him that the contraband after seizure was not sent to the chemical examiner's laboratory for analysis. At present, the certificate of chemical analysis might have been obtained by the court below or else it could have been procured by the learned Public Prosecutor for production before the court for the purpose of the proposed trial against the petitioner by taking appropriate steps.

11. In the above circumstances, this Court is convinced that Annexure B has no bearing on the proceedings pending against the petitioner as CP No.124/2011 and also on the trial proposed to be held based on that. The petitioner in the above context has to face the trial. For the purpose he is directed to appear before the court below in the proceedings abovementioned to facilitate the trial.

Crl.M.C. fails for the reasons and is dismissed.