
(2012) 12 KL CK 0001
In the High Court Of Kerala
Case No : Criminal R.P. No. 1005 of 2003

Paul	Vs	APPELLANT
State of Kerala		RESPONDENT

Date of Decision : 14-12-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311
Evidence Act, 1872 — Section 106

Citation : (2013) 1 KLJ 469

Hon'ble Judges : N.K. Balakrishnan, J

Bench : Single Bench

Advocate : Philip T. Varghese and Thomas T. Varghese, for the Appellant; Roy Thomas (PP), for the Respondent

Judgement

N.K. Balakrishnan, J.—This revision is directed against the concurrent conviction and sentence passed against the petitioner for offence u/s 55(a) of Abkari Act. He was sentenced to simple imprisonment for one year and to pay Rs. 5,000/- as fine. Shorn of the details, the case of the Prosecution is that on 05.10.1996, PW9—the Sub Inspector of Police received a reliable information that in the godown of Akshaya Gas Agency, near Cheranalloor-Varappuzha Ferry, Indian Made Foreign Liquor was illegally stored and accordingly he and the Assistant Sub Inspector and other police officials went to that spot. After preparing the search memo and sending it to the Court, they proceeded to the godown. A1 was present there. The godown was got opened and examined. Altogether 475 cases of Indian Made Foreign Liquor were found in that building. Out of them, 179 cases contained 12 bottles each of 750 ml, 228 cases contained 24 Rum bottles each of 375 ml each and 68 cases contained 12 bottles each of Time Brandy of 750 ml. From each of the bottles samples were taken. It was sealed and labelled then and there.

2. Ext. P1-search list was prepared. It was signed by A1.A1 was arrested then and there. During investigation, the complicity of five other accused persons was also revealed. The 4th accused is the petitioner herein. According to the

prosecution the petitioner herein was the licensee of that godown and he was in possession of the liquor bottles mentioned above. The court below found that A1- the watchman of that godown and A2, A3, A5 and A6 were not proved to have kept or brought those liquor bottles in that godown and hence they were acquitted. Since the petitioner (A4) was proved to be the licensee or the person conducting Akshaya Gas Agency in that godown, he was convicted and sentenced.

3. The learned counsel for the revision petitioner submits that no document was produced by the prosecution to show that the petitioner was the lessee of that building or that he was the licensee or the person authorised to conduct the Gas Agency in that building at the relevant time. But the court below relied upon the evidence of PW11 and the evidence of CW1 to hold that the petitioner had obtained the said building on lease and that the said building was used as the godown of Akshaya Gas Agency. The learned counsel for the petitioner submits that in the absence of any other evidence, the oral testimony of PW11 and CW1 should not have been accepted by the court below. It is also argued that since the prosecution did not cite or examine the persons conducting the Gas Agency to prove that Akshaya Gas Agency was being run by the petitioner and another person, it cannot be said that the petitioner was in conscious possession of those articles.

4. The learned Public Prosecutor submits that the other witnesses, who were examined, deposed before court that they were aware of the fact that the said building, shown in Ext. P1-search list, was used as the godown of Akshaya Gas Agency. That was not challenged. PW11 has stated that the building mentioned in Ext. P1 was let out by her to the 4th accused (the petitioner herein) on rent and that the said building was used as the godown of Akshaya Gas Agency. That evidence cannot be simply ignored stating that the investigating agency did not seize the relevant document. The evidence given by PW11 is that the said building belonged to her and was leased out to the petitioner herein and it was used as a godown of Akshaya Gas Agency. That evidence does not suffer from any infirmity at all. Both the courts, after thorough examination, found the evidence given by PW 11 credible and acceptable. That apart, the contention raised by the accused before the trial court was that though there was a lease deed in the name of the petitioner herein, subsequently a document was executed to cancel the same. But PW11 denied having executed any such cancellation deed. It was also pointed out that the property was situated within the limits of the Sub Registrar's Office, Edapally whereas the document shown by, the petitioner to PW11 was the one allegedly registered in the Sub Registrar's Office, Ernakulam. Since PW11 has denied execution of any such cancellation deed, as mentioned above, the contention that as on 5.10.1996 the petitioner was not the lessee in possession of that building cannot be accepted.

5. Since the Investigating Officer did not seize the relevant document, the learned Magistrate rightly invoked the power under Sec. 311 of Cr.P.C. and summoned the officer of Indian Oil Corporation to produce the documents

relating to Akshaya Gas Agency CW1, who was so summoned, deposed before court that there was an establishment by name Akshaya Gas Agency. It was stated that as per the records of the Indian Oil Corporation, the licensees of Akshaya Gas Agency were TJ. Paul (the petitioner herein) and one C.S. Rani. It was further stated that as per the records of the Indian Oil Corporation, the Akshaya Gas Agency was being run in building no. 5/567(a), which is the building mentioned in Ext. P1-search list. It was stated that the owner of that building was PW11, mentioned earlier. It is also important to note that C.S. Rani-the other partner of Akshaya Gas Agency was examined as DW1. She has testified before court that the godown building, mentioned above, was of PW11 and that it was obtained on lease by herself and the petitioner herein. It was also stated by her that the said building was used as the godown of Akshaya Gas Agency. She did not specifically say that the lease deed executed in favour of PW11 was cancelled. To the suggestion put to CW1 by the defence it was stated by CW1 that the petitioner herein or DW1-(Rani) did not produce any document nor did they intimate them (IOC) that the lease was terminated nor did they have a case that they shifted their godown to any other building. That gas agency was there till 26-6-1998. The evidence given by DW1 would show that she was staying with her children at a far away place and that though she was a partner of Akshaya Gas Agency along with the petitioner the gas agency was being run by the petitioner. It could also be brought out that the Gas Agency (license) given to those two persons was cancelled only on 26-06-1998 i.e. nearly two years after the detection of the case. Therefore, in the light of the evidence given by PW11 and CW1, the contention raised by the accused that he was not the licensee or that the said building was not used as godown of Akshaya Gas Agency cannot be sustained.

6. In the light of the evidence given by PW11 and CW1 and the further fact that Akshaya Gas Agency was being conducted till 1998, the court below was perfectly justified in holding that the petitioner was the licensee of the godown referred to in Ext. P1-search list and that he was the lessee of that building. As such it can be found that the petitioner was in possession of 475 cases of Indian Made Foreign Liquor, mentioned in Ext. P1-search list.

7. The learned counsel for the revision petitioner submits that mere possession of Indian Made Foreign Liquor, mentioned above, cannot attract the offence u/s 55(a) of Abkari Act. The decision in Mohanan v. State of Kerala-2007 (1) KLT 845 : 2007 ICO 7044 has also been relied upon by the learned counsel for the petitioner in support of his submission that Sec. 55 (a) is applicable only when it is proved that a person has illegally imported or transported liquor or he is in illegal possession of liquor. The decision of the Single Bench in Raman and Another Vs. State of Kerala, : Raman and Another Vs. State of Kerala, has also been relied upon by the learned counsel for the petitioner to canvass for the position that unless possession of contraband liquor was incidental to or in connection with export, import, transport or transit of liquor, the offence under Sec. 55 (a) is not made out.

8. The learned Public Prosecutor takes strong exception to the contention placed by the accused based on the aforesaid decision and relies upon the decision in *Kelukutty C. Vs. State of Kerala*, , it was held:

When once possession of IMFL in excess of three litres (which is the maximum permissible quantity that a person can possess or transport as per orders issued by the Government under S. 10 and 13 of the Abkari Act) is proved by the prosecution, then, unless the accused satisfactorily accounts for his possession of the IMFL, the Court can, under S. 64 of the Act, presume that the accused committed an offence punishable under S. 55 of the Act.

9. The learned Public Prosecutor submits that the petitioner has no case that he is a licensed manufacture or vendor of liquor. He did not account for possession of the same. He did not contend before the Courts below that large quantities of liquor bottles were kept by him having been obtained legally or that it was intended to be used for any marriage function or anything of that sort as has been mentioned. Therefore, the learned Public Prosecutor submits that the decision of the Division Bench in *Mohanani v. State of Kerala* (supra) has to be distinguished. There was no case for the accused as to how and why different varieties of Indian Made Foreign Liquor bottles were kept in the godown of Akshaya Gas Agencies. The very fact that these liquor bottles were seen kept in the godown of gas agency itself will show the intention or culpability of the petitioner, the learned Public Prosecutor submits. In this connection, the learned Public Prosecutor has also relied upon the decision of the Supreme Court *P.K. Arjunan Vs. State of Kerala*, . It was held:

11. Section 55 provides for a penal provision. The words "transport, transit or possession" have been introduced in the said section by Section 4 of Act 10 of 1955. The reason of the said amendment the lacuna which existed in the statute thus was sought to be remedied. Even otherwise, all the clauses specified in Section 55 of the Act if read in their entirety, would give rise to a construction that the act of possession involved in each one of the activities mentioned in the clauses specified therein.

12. A penal statute although is required to be construed strictly and a potential offence would be presumed to be non-existing the rule of purposive construction in a case of this nature and in particular in the matter of possession of the articles which have expressly been prohibited, came up for consideration before this Court in *Indian Handicrafts Emporium and Others Vs. Union of India (UOI) and Others*, wherein it was categorically held that when the statutory provisions are clear and unambiguous the same should be given its due effect without taking recourse to any technical plea. The same principle was reiterated in *Balram Kumawat Vs. Union of India (UOI) and Others*, stating:

26. The courts will, therefore, reject that construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used. (See *Salmon v. Duncombe-1886* (11) AC 627). Reducing the

legislation to futility shall be avoided and in a case where the intention of the legislature cannot be given effect to, the courts would accept the bolder construction for the purpose of bringing about an effective result. The courts when Rule of purposive construction is gaining momentum should be very reluctant to hold that Parliament has achieved nothing by the language it used when it is tolerably plain that it seeks to achieve. (See-BBC Enterprises v. Hi-Tech Extra vision Ltd. (1990 (2) All ER 118).

It was also held by the Supreme Court that the decision in Ram Rattan Vs. State of Punjab, is inapplicable since in that decision it was held that in the Opium Act there was no similar provision like Sec. 64 of the Abkari Act. Relying on Sec. 64 of the Abkari Act, it was held:

The decision of this Court in Ram Rattan (supra) was to the same effect as, in that case, the prosecution failed to establish that the appellant was in conscious possession of the opium recovered from his house. We do not mind that, in the Opium Act, there exists any *pari materia* provision like Section 64 of the Abkari Act, where the burden of proof was upon the accused to establish the foundation of the charge. Indisputably, thus, it was for the accused to prove the same. Section 106 of the Evidence Act also is a clear pointer to show that whoever, has any special knowledge of fact, onus of proof in respect thereof would be on him.

Relying on the aforesaid decision, the learned Public Prosecutor submits that there was no case for the accused that as to how he happened to store and keep possession of such a large quantity of IMFL that too of different variety. That was a fact which was within the special knowledge of the accused. He was bound to explain the same. Therefore, in the light of the Supreme Court decision in P.K. Arjunan (Supra) the contention that the prosecution could not prove the charge against the petitioner under Sec. 55 (a) of Abkari Act also is unsustainable. Therefore, I hold that the courts below have rightly convicted the petitioner for offences under Sec. 55 (a) of Abkari Act.

Since the offence was detected prior to the amendment which came into force on 3-6-1997, as the law then stood the punishment prescribed for the offence is imprisonment which may extend to two years and a fine which shall not be less than Rs. 25,000/-. Considering all the aspects, I find the sentence is to be modified. In the result, this Crl. R.P. is disposed of as stated below:

The conviction is confirmed. In supersession of the sentence awarded by the court below the petitioner is sentenced to S.I. for one month and to pay Rs. 25,000/- (Rupees twenty five thousand only) as fine, in default whereof he will undergo S.I. for six months.