

(1980) 07 KL CK 0005
In the High Court Of Kerala
Case No : Criminal R.C. No. 5 of 1979

Sreedharan

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 25-07-1980

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 354, 360, 386, 387, 401
Kerala Abkari Act, 1077 — Section 55
Probation of Offenders Act, 1958 — Section 3, 4, 4(1), 6

Citation : (1980) 07 KL CK 0005

Hon'ble Judges : S.K. Kader, J

Bench : Single Bench

Advocate : G. Janardhana Kurup, for the Appellant; K. Thankappan, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Kader, J.—This Revision Case came up before this Court in pursuance of an order passed in Calendar Revision issuing notice to the parties to show cause why an order purport to be a judgment passed in CrI. Appeal No. 67/77 by the Court of Session, Trichur, should not be set aside.

2. The short facts necessary for the disposal of this Revision can now be stated. The accused in the case was tried by the Sub Divisional Magistrate, Kunnamkulam for an offence punishable u/s 55(b) of the Abkari Act on the allegation that at about 5.30 p.m. on May 3, 1976, while the accused was engaged in the act of distilling arrack inside his house at Ullisseri desom P.Ws. 1 and 2, Excise Officials who were moving about on patrol duty, on receiving information rushed to the house of the accused where he was caught red-handed in the act of distilling illicit arrack. The wash, arrack and the implements used for distillation were recovered under mahazar Ext. P-1 prepared on the spot and attested by witnesses. The accused was thereafter arrested. As per Ext. P-4, report of the Chemical Examiner, the arrack contained 18-30 per cent and wash

contained 1008 per cent by volume of ethyl alcohol.

3. The accused pleaded not guilty to the charge framed against him and examined D.W. 1 to show that the accused was residing about 4 houses away from the house from which the contraband articles were seized.

4. The learned Magistrate placing reliance on the evidence of P.Ws. 1 and 2 and rejecting the evidence of D.W. 1 and that of P.W. 3 who turned hostile to the prosecution, convicted the accused u/s 55(b) of the Abkari Act and sentenced him to suffer simple imprisonment for three months and to pay a fine of Rs. 500 or in default to suffer simple imprisonment for two months.

5. Challenging this judgment convicting and sentencing him, the accused filed Crl. Appeal No. 67/77 before the Court of Session, Trichur, and the learned Sessions Judge curiously and surprisingly instead of writing a judgment according to law contended himself by disposing of the appeal by the following two lines purported to be the judgment in the appeal;

Report accepted. Appellant "released on probation on his executing bond for Rs. 1000 with two sureties for a like amount to be of good behaviour for a period of one year.

6. Both the learned Public Prosecutor and the learned advocate appearing for the accused submitted that they cannot support this order which by no stretch of imagination can be characterised as a judgment in accordance with law. But the learned advocate appearing for the accused submitted that in view of the fact that more than 3 years have elapsed after the accused has been convicted and the Judge, who disposed of the appeal is no longer in service and also the great hardships and harassment that the accused may be subjected to in case the appeal is remanded to the court below, this Court may be pleased to dispose of the case here itself on merits after a reappraisal of the evidence. The Counsel further submitted that this is a fit case for applying the provisions of Section 4 of the Probation of Offenders Act. The learned Public Prosecutor also submitted that considering the fact that the concerned learned Sessions Judge has retired and left service and more than 3 years have passed after the conviction of the accused, it is not necessary that this case should be sent back for rehearing and in the circumstances, this can be finally disposed of on merits by this Court.

7. It is deeply distressing that a Sessions Judge has to be reminded of the mandatory provisions of Section 354 Code of Criminal Procedure and to be told how to write a judgment in a criminal appeal. There is really no judgment in this Criminal Appeal and the "judgment" said to have been pronounced in the appeal is one in flagrant violation of the mandatory provisions in Section 354 Code of Criminal Procedure. By virtue of the provisions in Section 387 Code of Criminal Procedure the rules contained in Chapter XXVII as to the judgment of a Criminal Court of original jurisdiction apply to the judgment in appeal of a Court of Session or the Chief Judicial Magistrate. The object of the relevant provisions in these Sections is to ensure that the court, whether it is a trial court or an

appellate court duly considers all the relevant facts in the case before it in all its bearings. In this appeal, the learned Sessions Judge has abdicated his functions as an appellate Judge and failed to discharge his duty in this regard. It is only elementary that the provisions in Section 3 or 4 of the Probation of Offenders Act or Section 360 Code of Criminal Procedure can be applied only after the accused has been found guilty and convicted of an offence. The appellate court has not confirmed the conviction entered against the accused. Without finding the accused guilty and convicting him, neither the trial court nor the appellate court can apply the provisions of the Probation of Offenders Act or Section 360 Code of Criminal Procedure. The sentence passed against the accused has not been set aside and the order does not state whether it was u/s 360 Code of Criminal Procedure or Section 4 of the Probation of Offenders Act that the accused was released. The order also does not show or indicate whether the appellate court considered the circumstances of the case and the character and antecedents of the accused. It is also not clear whether the report mentioned is that of a Probation Officer or any other Officer. The provisions in Sections 4 and 6 of the Probation of Offenders Act only say that the report of the Probation Officer, if any, shall be taken into consideration. There is no question of rejecting or accepting the report as such. The judgment does not even state at least in brief, what is the case against the accused. On a reading of the so-called judgment, it is impossible to know the offence or offences said to have been committed by the accused or the sentence passed against him or the charge on which he was put on trial and found guilty by the trial court. The learned Sessions Judge has overlooked many of the mandatory and relevant provisions of the Code of Criminal Procedure. The learned Judge has neither discussed nor considered the evidence in support of the prosecution case against the accused and found whether the accused is guilty or not. In order to find out that there was legal appreciation of evidence, the judgment should be such as to indicate that the court has applied its mind. An appellate court is a final court on facts. The Sessions Judge hearing a criminal appeal has the power and duty to carefully study the entire evidence on record, judicially consider and weigh the same properly and come to his own independent conclusions. If, after a proper reappraisal of the evidence, it is found that there is no legal or reliable evidence or that the prosecution evidence falls short of the required standard of proof to sustain the charge or is not satisfactory and sufficient to support the charge against the accused, it is the duty of the appellate court to acquit the accused, irrespective of the fact whether the Counsel appearing for him argued the appeal on merits or not. In a criminal appeal, unlike in a civil appeal, it is the duty of the appellate court, whether the appeal was argued or not or whether all the points were pressed or not, to examine the correctness of all findings entered against the accused and to satisfy itself after a proper reappraisal of the evidence, that the legal evidence on record establishes the guilt of the accused person beyond reasonable doubt. If, after such a proper reappraisal of the evidence, the appellate court finds that the case against the accused has been proved beyond reasonable doubt, it should uphold the conviction. None of these things has been

done in this case.

8. It follows from the above that the order purported to be the judgment of the appellate court is manifestly illegal and cannot be sustained. The further question that arises for consideration is whether the case should be sent back to the appellate court for rehearing or whether it should be disposed of finally here itself. In the normal course, after setting aside the judgment, the records should have been sent back directing the learned Sessions Judge to restore the appeal on file and dispose of the same in accordance with law after writing a proper judgment; but considering the submissions made on either side in this regard and the peculiar facts and circumstances of the case, I feel that it would be a waste of time to remand the case for a rehearing and leave the way open for another revision. The balance of convenience is also in favour of adopting the present course. It is also advantageous to the accused that the High Court hears the appeal in the place of the subordinate court. The High Court's powers in this respect are undoubted. u/s 401 Code of Criminal Procedure, the High Court may, in its discretion exercise any of the powers conferred on a court of appeal u/s 386 Code of Criminal Procedure. In other words, by virtue of the provisions in Section 401 Code of Criminal Procedure, the High Court, if it so desires in the interests of justice, can itself hear the appeal, instead of remanding the case to the lower appellate court and dispose of the same. The case was therefore heard on merits.

9. On receiving information, when P.Ws. 1 and 2 suddenly rushed to the house of the accused, they found the accused in the actual act of distilling illicit arrack. In the course of the search that followed, the implements for distilling arrack, wash and freshly distilled arrack were recovered under a mahazar Ext. P-1 prepared on the spot and attested by P.W. 3 and others. P.W. 3 turned hostile to the prosecution. He admitted the signature in Ext. P-1, but he did not speak to the contents therein. A reading of his evidence, as a whole, shows that he is not desirous of speaking the truth with a view to help the accused. His evidence cannot be relied on for any purpose. P.Ws. 1 and 2 have sworn to the entire incident in necessary details and their evidence is also corroborated by Exts. P-1 to P-4. There is no adequate ground to disbelieve the evidence of P.Ws. 1 and 2. The evidence of D.W. 1 is thoroughly unsatisfactory and has been rightly rejected by the trial court. The prosecution has proved the case against the accused beyond any reasonable doubt. The conviction of the accused is therefore only to be upheld.

10. Regarding sentence, the learned Public Prosecutor submitted that in view of the report of the Probation Officer the accused can be released u/s 4 of the Probation of Offenders Act. It is not disputed that the accused is a first offender with good character and antecedents.

In the result, while confirming the conviction of the accused, taking into consideration the character and antecedents of the accused, the circumstances of the case and also the report of the Probation Officer, the sentence passed against

him is set aside and instead of sentencing him at once to any punishment, he is released u/s 4(1) of the Probation of Offenders Act on his executing a bond for Rs. 1,000 with two solvent sureties each in the like sum to the satisfaction of the trial court, to appear and receive sentence when called upon during a period of one year and in the meantime to keep the peace and be of good behaviour. If the accused had already executed bonds on these terms, no further bonds need be executed.