

10 MAR 2023

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THE HIGH COURT OF KERALA

Ernakulam-682031
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DI-3/142883/2022

Date: 08-03-2023

OFFICIAL MEMORANDUM

Sub: Framing of charge – various directions - reg.

Ref: Judgment of this Court dated 28-10-2022 in CrI. A. No.79/2016.

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A copy of the judgment referred above is forwarded herewith for information and compliance.

(By Order)

Encl: As above

Suneera
Suneera P. M.
Joint Registrar

To,

All The District and Sessions Judges in the State
The District and Sessions Judge, Kavaratti
(They shall communicate a copy to all the criminal courts in their respective judicial district)

Copy to :

The Director, Kerala Judicial Academy, Athani
Advocate G. Unnikrishnan, Secretary, Rule Committee, GTWRA 1,
Ganapathy Temple Road, Edappally- 682 024.
Administrative Records Section.
The stock file.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE MARY JOSEPH

FRIDAY, THE 28TH DAY OF OCTOBER 2022 / 6TH KARTHIKA, 1944

CRL.A NO. 79 OF 2016

AGAINST THE JUDGMENT IN SC 518/2010 OF ADDITIONAL DISTRICT

COURT & SESSIONS COURT - III, PATHANAMTHITTA / III

ADDITIONAL MACT DATED 23.12.2015

APPELLANTS/ACCUSED:

- 1 ARUN KUMAR
AGED 36 YEARS
S/O. SIVAN, KOZHIMALA VEETIL, KOZHIMALA MURI &
THIRUVALLA TALUK, PATHANAMTHITTA DISTRICT.

- 2 P.G.MATHEW
AGED 54 YEARS
S/O. GEORGE, PANDISSERIL VEEDU, OTHARA WEST,
ERAVIPEROOR, THIRUVALLA.

BY ADVS.SRI.V.SETHUNATH
SRI.V.R.MANORANJAN MUVATTUPUZHA

RESPONDENT/COMPLAINANT/STATE:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT
OF KERALA, ERNAKULAM-682 031.

OTHER PRESENT:

PP SMT. MAYA M.N

**THIS CRIMINAL APPEAL HAVING COME UP FOR HEARING ON
28.10.2022, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

JUDGMENT

Dated this the 28th day of October, 2022

This appeal is filed challenging the judgment passed on 23.12.2015 in S.C.No.518/2010 by Additional Sessions Judge-III, Pathanamthitta. Appellants are accused Nos.1 and 2 in the aforesaid case.

2. The case of the prosecution was that on 24.04.2009 at 11.30 a.m., the accused were found transporting 20 litres of Indian Made Foreign Liquor in a motorcycle bearing registration No.KL-03/J-7020 through Kallisseri - Eraviperoor Public Road near to the shop of Thomas Chacko at East Othara in Eraviperoor Village. Alleging that the accused have committed offences punishable under Sections 55(i) and 67B of the Kerala Abkari Act,1077 (for short 'the Act'), a crime and occurrence report was filed against them.

3. After investigation, a final report was laid before Judicial First Class Magistrate Court, Thiruvalla. In view of the incorporation of an offence triable by the Court of Sessions in the

chargesheet, the case was committed to the Court of Sessions, after complying with all legal formalities. On entering appearance of the accused, after hearing the learned Public Prosecutor and the counsel appearing for the accused elaborately, charge was framed for an offence punishable under Section 55(i) of the Act. Charge was read over and explained to each of the accused in Malayalam. They pleaded not guilty and faced trial.

4. On the side of the prosecution, PWs 1 to 3 were examined and Exts.P1 to P9 were marked. On closure of the prosecution evidence, each of the accused was questioned under Section 313(1)(b) of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') Each of them denied the incriminating evidence on record put to them and had taken a stand of innocence and false implication. Grounds to record an order of acquittal of the accused having not been made out, the accused were asked to enter on their defence. None adduced any evidence.

5. The trial court after appreciating the evidence adduced by the prosecution arrived at a finding that each of the accused was guilty for an offence punishable under Section 55(i) of the

Act. Each of them was convicted and sentenced to undergo imprisonment for one year and to pay fine of Rs.1,00,000/-. Each of them was also directed to undergo simple imprisonment for three months in case of default in payment of fine. Set off was also allowed under Section 428 Cr.P.C. The material objects were directed to be destroyed after expiry of the appeal period. The accused were aggrieved by the judgment of conviction and sentence and therefore approached this Court in the appeal on hand.

6. It is contended by the learned counsel that clear and proper independent evidence is lacking in the case on hand to take a view on commission of the offence charged against the accused. According to him, the accused were convicted based on evidence of official witnesses who were examined as PW1 and PW3. It is pointed out by the learned counsel that PW2 examined by the prosecution was an independent witness, but he denied to have witnessed the detection of the contraband, its seizure and other formalities performed by PW1 at the spot. According to the learned counsel, the independent witness has admitted affixture of signatures in various documents prepared at the spot and

identified those as his own. The learned counsel has also pointed out that the versions of the official witnesses examined as PW1 and PW3 are discrepant in various material aspects. For the reasons, it was canvassed by the learned counsel that the prosecution has thoroughly failed to establish guilt against the accused and the impugned judgment is liable to be reversed.

7. Two official witnesses were examined before the trial court as PW1 and PW3. PW1 is none other than the Excise Circle Inspector who had detected the alleged offence. He deposed to the effect that on 24.04.2009 while he was on patrol duty alongwith some officials through Kallisseri-Eraviperoor Public Road, a motorcycle bearing registration No.KL-03/J-7020 with two persons on it was found proceeding towards them. When the motorcycle was intercepted and examined, a sack was found kept in the space between the two person sitting on it. On watching the Excise Officials, the passengers in the motorcycle attempted to escape, but was restrained by PW1 and other officers. The sack kept in between the accused was examined in the presence of the independent witness available there. 20 liters of Rum in 20 bottles each having capacity of 1 litre with label Hatric XXX Rum,

were found kept inside the sack. The contents of the bottle was examined by the officials in the presence of witnesses by tasting and smelling. They got those also examined and identified as liquor by the witnesses present. The appellants were also questioned and they told that, the contraband was purchased from the outlet of the Kerala State Beverages Corporation at Chengannur and meant to be sold in retail. It was also told that the pillion rider in the motorcycle was the helper of the rider in the business of sale. Both the accused were arrested from the spot after preparing arrest memo and arrest notice.

8. The sack and the motorcycle used for transporting the liquor were taken into custody. From each of the 10 bottles, 200 ml were taken as samples in bottles having capacity of 375ml. Bottles with remanants were closed and sealed with the personal seal of PW1. The Engine number and Chassis number of the motorcycle were also recorded. Labels were prepared and affixed on the bottles. Signature of himself, the accused and other witnesses present were also procured on the labels and were affixed on each bottle. Properties were seized and alongwith the accused were produced at the office of the Excise

at Thiruvalla. Crime was registered against the accused for an offence punishable under Section 55(i) of the Act. The accused were remanded to judicial custody and the properties were taken into custody by the Court. Samples prepared were forwarded to the Chemical Examiner's Laboratory for conducting chemical analysis. Certificate was obtained from the Chemical Laboratory after analysis. Concluding the investigation, a final report was laid before Judicial First Class Magistrate Court, Thiruvalla. Since the offence incorporate in the Final Report was triable by Court of Sessions, the case was committed to that court for trial.

9. PW3 was an official witness who accompanied PW1 to the spot and witnessed the seizure. His version corroborates with that spoken by PW1. But, there is absolutely no evidence on record to establish that the contraband was transported intending it to be sold. PW2 is none other than the independent witness cited and examined by the prosecution. He denied to have witnessed the detection, seizure and compliance of other formalities at the spot by PW1. But, had admitted affixture of signatures in various documents prepared at the spot. It is based on the above oral evidence and also the certificate of

chemical analysis marked in evidence as Ext.P8 that the trial court arrived at, a finding that the contraband transported in the motorcycle and seized therefrom was Indian Made Foreign Liquor.

10. It is noticed by this Court on going through the final report laid by the police as well as the charge framed by the court that the offence for which the accused faced trial is one punishable under Section 55(i) of the Act. The specific allegation of the prosecution was that the accused were found transporting the contraband in the vehicle for the purpose of sale. But while framing charge, the court omitted to incorporate the ingredients of the offence punishable under Section 55(i) of the Act in it. The only allegation raised against the accused by the court in the charge framed by it was that the accused were transporting liquor. Therefore, charge ought to have been framed under Section 55(a) of the Act instead of Section 55(i). The offence for which the accused faced trial is Section 55(i) of the Act, but the allegations raised would only indicate commission of an offence under Section 55(a) of the Act. There is no whisper of an allegation raised against the accused in the charge framed by the court that they were transporting the contraband liquor for sale.

Therefore, it is unlikely that an offence under Section 55(i) is attracted. Charge was framed for an offence under Section 55(i) but, the ingredients of that offence having not been incorporated therein, the trial conducted against the accused cannot be said to be a proper and valid one. The trial can be said to be vitiated for the reasons.

11. In the above circumstances, though corroborative oral evidence of PWs 1 and 3 were available for the prosecution, in the absence of a charge framed incorporating the ingredients of an offence punishable under Section 55(i) of the Act, the accused cannot be said to have faced a valid trial for that offence. For failure to frame a charge for an offence under Section 55(i) of the Act, the accused cannot be found guilty for that and convicted and sentenced.

12. It is noticed that trial courts while framing charge are not applying its mind to the materials furnished by the prosecution and the allegation contained therein. It is found that the charges were framed even without hearing the learned Public Prosecutor and the counsel for the accused based on materials furnished by the prosecution. Section 228 Cr.P.C mandates a

trial court to frame a charge based on the materials of prosecution and after hearing the Public Prosecutor and the counsel for the accused.

13. The appeal succeeds for the said reasons and is allowed. The impugned judgment is set aside and the appellants are set at liberty.

This Court has noticed from the charge framed by the trial court in the case on hand that ingredients of the offence are not stated properly and that is against mandate of Cr.P.C. The trial court shall bear in mind the various directions under Sections 211 and 228 while framing charges in a criminal case. The trial court shall also bear in mind that it is on the basis of the charge framed that the trial have to proceed. If the charge is improperly framed, the trial conducted cannot be said to be a valid one. Therefore, it is fundamental for the trial court to frame a charge strictly in tune with the directions contained in Section 211 Cr.P.C. Registry is directed to circulate this among the officers of Subordinate Judiciary for compliance strictly.

Sd/-
MARY JOSEPH
JUDGE