

CASE NO.:
Appeal (crl.) 1114 of 2000

PETITIONER:
P.K. Arjunan

RESPONDENT:
State of Kerala

DATE OF JUDGMENT: 14/03/2007

BENCH:
S.B. SINHA & MARKANDEY KATJU

JUDGMENT:
JUDGMENT

S.B. Sinha, J.

1. The appellant along with one T.V. Raghavan Pillai (since deceased) and Ismail (absconding accused), were found to be in possession of 7985 litres of spirit in 42 barrels by the Circle Inspector of Police, Hosdurg.

2. Seizure of the said excise article was made on the basis of the information recieved by the said officer from DYSP, kanhangad to the effect that spirit for the purpose of manufacturing arrack was stored in a house in koolingal, without any permit. Admittedly, all the three accused were found to be in possession of the said excise article.

3. They were prosecuted under Section 55 of the Kerala Abkari Act ("the Act", for short) and were found guilty therefore.

4. The contention of the appellant before us was that he was an employee of the said Ismail. The said defence has not been accepted. It appears that in the body of the judgment of the learned Sessions Judge, provision of Section 55 of the Act had not been correctly reproduced in so far as the words "transports, transits or possesses" after the words "import, export" and before the words "liquor or any intoxicating drug" were missing. Presumably, only on that premises, notice was issued and leave was granted.

5. Section 55 of the Act reads as under:

"55. For illegal import, etc.- Whoever in contravention of this Act or of any rule or order made under this Act-

(a) imports, exports, transports, transits or possesses liquor or any intoxicating drug; or

(b) Manufacture liquor or any intoxicating drug;

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(d) taps or causes to be tapped any toddy-producing tree, or

(e) draws or causes to be drawn toddy from any tree; or

(f) constructs or works any distillery, brewery. winery or other manufactory in which liquor is manufacture; or

(g) uses, keeps, or has in his possession any material, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing liquor other than toddy or any intoxicating drug; or

(h) bottles any liquor for purposes of sale; or

(i) sells or stores for sale liquor or any intoxicating drug;
shall be punishable.-

(1) for any offence, other than an offence falling under clause (d) or clause (e), with imprisonment for a term which may extend to ten years and with fine which shall not be less than rupees one lakh and

(2) for an offence falling under clause (d) or clause (e), with imprisonment for a term which may extend to one year or with fine which may extend to ten thousand rupees or with both."

6. We may also notice the provisions of Section 58A of the Act which reads:

"For sale of certain preparations:- Whoever sells any preparation which he knows or has reason to believe is intended to serve as a substitute for alcohol or intoxicating drug shall, on conviction before a competent court. be punished with imprisonment which may extend to five years. or with a fine which may extend to fifty thousand rupees, or with both.

Provided that nothing contained in this section shall apply to the sale of any medicinal preparation for bona fide treatment. mitigation or prevention of disease in human beings or animals."

7. Section 64 of the Act raises a presumption in regard to commission of offence in certain cases.

8. If, therefore, a person is found to be in possession of excise articles it is for him to adduce sufficient and cogent evidence to rebut the said presumption.

9. Learned counsel appearing on behalf of the appellant before us would raise two contentions. Firstly, it was submitted that the High Court having found that the appellant was not the employee of the said Ismail, it was for the prosecution to show that he was in conscious possession of the liquor or any intoxicating liquor punishable under Section 55 (c) of the Act. Secondly, it was contended that, in any event, it was obligatory on the part of the prosecution to establish existence of mens rea on his part. In support of the aforesaid contention. reliance has been placed on *Inder Sain v. State of Punjab*, [1973] 2 SCC 372 and *Ram Rattan v. State of Punjab*, (1979) CrL. L.J. 791.

10. The Act was enacted by the Maharaja of Cochin. After the formation of the State of Kerala, the said Act was adopted by the State. Provisions of the said Act having regard to the subject matter dealt with thereby should, in our opinion, be read in the context of Article 47 of the Constitution of India. Dealing in liquor is considered to be "Res Extra Commercio". The Act prohibits dealing with the said commodity except by way of a licence on the terms and conditions mentioned therein. Illegal manufacture, possession, transport, export etc. have been brought within the purview of the penal provision contained in Section 55 of the Act. Various new provision have been introduced by way of amendment carried out in the said Act from time to time to bring within the purview of the statute the offences which were then unknown.

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. By 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 is 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 & Ors. v. Union of India & Ors.* [2003] 7 SCC 589, 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 *Balaram Kumawat v. Union of India & Ors.*, [2003] 7 SCC 628:

"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 legislature's utility 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 what it seeks to achieve. [See *BBC Enterprises v. Hi-Tech Xtravision Ltd. Ltd.* [1990] 2 All ER 118]."

13. Indisputably, where possession of a forbidden article constitutes an offence, the prosecution is duty bound to prove the ingredients thereof. Existence of *mens rea*, however, would be a question which has to be determined having regard to the provision of the statute.

14. In *Inder Sain (supra)*, whereupon the learned counsel placed strong reliance, the appellant therein received a consignment of a parcel of apples from one Uchana Das of Solan and he never had any occasion to know that therein some opium was kept. Existence of opium in the said parcel of apples was established only upon chemical examination. It was in the aforementioned premises, this Court held that as the expression "possess" was not crystal clear in the provisions of the Opium Act, it was necessary for the prosecution to show that the accused had the article which turned out to be opium, stating:

"In other words, the prosecution must prove that the accused was knowingly in control of something in circumstances which showed that he was assenting to being in control of it."

15. What was emphasised was that conscious possession of the accused was necessary for the purpose of establishing the guilt.

16. 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 find 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.

17. Learned counsel would submit that the offence having been committed in the year 1989 and the same being compoundable in nature at the relevant point of time, leniency may be shown by this Court in the matter of quantum of sentence. We are not inclined to do so.

18. This appeal is, therefore, dismissed.