Joseph Vs State of Kerala

Court: High Court Of Kerala

Date of Decision: Aug. 12, 2013

Citation: (2014) 1 KHC 133 : (2014) 1 KLJ 315 : (2014) 1 KLT 35

Hon'ble Judges: K. Harilal, J

Bench: Single Bench

Advocate: P.T. Jose, for the Appellant; Liju V. Stephen, Public Prosecutor, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

K. Harilal, J.
The revision petitioner is the accused in S.C. No. 77/2000 on the files of the Additional Assistant Sessions Court, N. Parur.

He was charge sheeted for the offence punishable under S. 55(a) of the Abkari Act; but convicted for the offence punishable under S. 58 of the

said Act. After trial, the learned Judge found that though the revision petitioner was charge sheeted under S. 55(a), he is found guilty under S. 58

of the Abkari Act. He was sentenced to undergo simple imprisonment for one year and to pay a fine of Rs. 1 lakh and in default, to undergo simple

imprisonment for one year. Though the revision petitioner had preferred Crl. Appeal No. 731/2002 before the Additional Sessions Judge (Ad

Hoc-I), Ernakulam, after re-appreciating the evidence on records, the learned Sessions Judge also found the revision petitioner guilty of the

offence, not under S. 58, as found by the trial court, but, under S. 55(a) of the Abkari Act. Thus, the appellate court reversed and converted the

conviction from S. 58 to S. 55(a) of the Abkari Act and retained the sentence as such, without any interference. This Revision Petition is filed

challenging the divergent findings of conviction and sentence on various grounds. The case of the prosecution is that the accused had kept in

possession of illicit liquor contained in 9 plastic covers of 350 ml each while standing on the public road which is situated on the northern side of

Parankiyattu Kurisu-Kurumbathuruth Road of Puliyanthuruth for the purpose of sale and thereby committed the offence punishable under S. 55(a)

of the Abkari Act. The accused pleaded not guilty. But, no evidence, either oral or documentary, was produced in defence.

2. Though this Revision has been filed on various grounds challenging the conviction and sentence, the learned counsel for the revision petitioner

mainly focuses on a grave illegality committed by the Appellate Court. The learned counsel contends that, though the accused was charge sheeted

and he has faced trial for the offence punishable under S. 55(a), the learned Asst. Sessions Judge found that the offence under S. 55(a) was neither

attracted nor proved by the prosecution; whereas the offence under S. 58 stands proved by prosecution evidence. Hence, the revision petitioner

was convicted for the offence punishable under S. 58 of the Abkari Act and sentenced thereunder. According to the learned counsel, the alteration

of conviction from S. 55(a) to S. 58 by the trial court impliedly amounts to acquittal of the revision petitioner under S. 55(a) and no appeal had

been filed by the prosecution against the acquittal under S. 55(a). But, in the appeal challenging the conviction under S. 58, filed by the revision

petitioner, the learned Sessions Judge went wrong by altering the conviction from S. 58 to S. 55(a), for which the trial court had acquitted him. In

short, the appellate court has exercised jurisdiction which was not vested in it under S. 386 of the Cr.P.C. The learned counsel cited the decision

reported in Sely Vs. State of Kerala, .

3. The learned Public Prosecutor, per contra, advanced arguments to justify the impugned judgment and cited R. Janakiraman Vs. State

represented by Inspector of Police, CBI, SPE, Madras, and submitted that the alteration of conviction from S. 58 to S. 55(a) of the Abkari Act, in

appeal, is sustainable and not illegal.

4. In view of the rival contentions, the question that emerges for decision in this Revision Petition is whether the conviction of the accused under S.

58 of the Abkari Act can be reversed and altered to conviction under S. 55(a) of the Abkari Act in the appeal preferred by the accused against

conviction under S. 58, when the accused was tried for charge under S. 55(a) and convicted for the offence under S. 58 of the said Act by the trial

court. Put it commonly, the question of law is, whether conviction under one offence can be reversed and altered to another offence and convicted

thereunder in appeal, preferred against conviction, when the accused was charge sheeted, tried and acquitted of the latter and convicted under the

former.

5. Let us examine the powers of the Appellate Court provided under S. 386 of the Cr.P.C. For a better appreciation, the relevant S. 386(b) of the

Cr.P.C. is extracted below:

386. Powers of the Appellate Court.--

(a) .....

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction

subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

6. The question raised above would come under S. 386(b)(ii) of the Cr.P.C. Then the point is, whether the expression ""alter the finding"" employed

under S. 386(b)(ii) of the Cr.P.C. includes power to alter or modify the findings of acquittal to conviction? It is to be borne in mind that when an

accused is charge sheeted and tried for one offence and convicted for another offence, there is an implied acquittal of the former for which he was

charge sheeted and tried. Reversal of an acquittal is impermissible in an appeal against the conviction by the accused. The acquittal can be altered

to conviction in an appeal against the acquittal only. Similarly, enhancement of sentence is also impermissible in an appeal against the conviction. In

the above view of the matter, alter the finding can neither be nor would encompass alter the finding of acquittal to conviction. The Appellate Court

can alter the findings of conviction only. So, the expression ""alter the finding"" does not include the power to alter or modify the findings of acquittal

to conviction.

7. The above proposition is supported by The State of Andhra Pradesh Vs. Thadi Narayana, There, the Apex Court considered the scope and

extent of the power of the Appellate Court under S. 423(1)(b) of the Cr.P.C., 1898, which exactly corresponds to S. 386(b)(ii) of the Cr.P.C.,

1973. In the above decision, the Supreme Court while considering S. 423(1)(b) held as follows:-

If an appeal is preferred against an order of acquittal by the State and no appeal is filed by the convicted person against his conviction, it is only the

order of acquittal which falls to be considered by the Appellate Court and not the order of conviction. Similarly, if an order of conviction is

challenged by the convicted person but the order of acquittal is not challenged by the State, then it is only the order of conviction that falls to be

considered by the Appellate Court and not the order of acquittal. Therefore, the assumption that the whole case is before the High Court when it

entertains an appeal against conviction is not well-founded and as such it cannot be pressed into service in construing the expression ""alter the

finding.

In our opinion, therefore, the power conferred by S. 423(1)(b)(1) is intended to be exercised in cases falling under Ss. 236 to 238 of the Code.

We would accordingly hold that the power conferred by the expression ""alter the finding"" does not include the power to alter or modify the finding

of acquittal. The finding specified in the context means the finding as to conviction, and the power to alter the finding can be exercised in cases like

those which we have just indicated.

This Court also placed reliance on the above decision, in Sely Vs. State of Kerala, I have considered the decision in R. Janakiraman Vs. State

represented by Inspector of Police, CBI, SPE, Madras, cited by the learned Public Prosecutor. But, I find that the facts of that case are entirely

different. There, the finding regarding the extent of offence under the same conviction is altered which would come under alteration of the findings

only. Therefore, I find that the said decision will not render any assistance to justify the impugned order under challenge.

In the light of the above discussions, I find that the impugned judgment passed in appeal is illegal and unsustainable and the same is set aside. The

revision petitioner is acquitted of the offence alleged against him.

The Revision Petition is allowed.