ITEM NO.103 COURT NO.7 SECTION IIB

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Criminal Appeal No(s). 347/2009

SURESH KUMAR & ANR. Appellant(s)

VERSUS

STATE OF KERALA Respondent(s)
(with office report)
WITH
Crl.A. No. 348/2009
[STATE OF KERALA V. SURESH KUMAR & ANR.]

SLP(Crl) No. 880/2009
[STATE OF KERALA V. MANOJ KUMAR]
(With Office Report)

Crl.A. No. 1180/2010
[AJITH KUMAR V. STATE OF KERALA]
(With Office Report)

Date : 03/11/2015 These matters were called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE FAKKIR MOHAMED IBRAHIM KALIFULLA
HON'BLE MR. JUSTICE S.A. BOBDE

For Appellant(s) Mr. Jayanth Muthraj, Adv.
Ms. Reena, Adv.
Ms. Seema Jain, Adv.
Mr. Roy Abraham, Adv.
Mr. Himinder Lal, A.O.R.

Mr. P. V. Dinesh, A.O.r.

Mr. Amer M.S., Adv.
Ms. Mukti Chowdhary, A.O.R.

For Respondent(s)

For State Mr. M.T. George, Adv.
Ms. M.G. Yogamaya, Adv.

Mr. P. V. Dinesh, A.O.R.(NP)

Mr. Anup Kumar, Adv.
Mr. Romy Chacko, A.O.R.

Ms. Bina Madhavan,Adv.

UPON hearing counsel the Court made the following

O R D E R

Criminal Appeal No. 347 of 2009 is allowed and Criminal Appeal No. 348 of 2009 is dismissed in terms of the signed order.

SLP(Crl) No. 880 of 2009 is dismissed.

Criminal Appeal No. 1180 of 2010 be listed on 4th November, 2015.*

[KALYANI GUPTA]
COURT MASTER

[SHARDA KAPOOR]
COURT MASTE

[SIGNED ORDER IN CRIMINAL APPEAL NOS. 347 and 348 OF 2009 IS PLACED ON THE FILE.]

*The matter was listed on 4th November, 2015 based on the reporting given to Listing Branch.]

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 347 OF 2009

SURESH KUMAR & ANR. ..... APPELLANTS

VERSUS

STATE OF KERALA ..... RESPONDENT

AND

CRIMINAL APPEAL NO. 348 OF 2009

STATE OF KERALA ..... APPELLANT

VERSUS

SURESH KUMAR & ANR. ..... RESPONDENTS

O R D E R

The appellants are A3 and A4 who were admittedly Salesmen and were working in the Ayurvedic Medicine Shop owned by A1 called Ajit Ayurvedic Shop at Kulasekarpuram Panchayat Kerala. On the alleged date of occurrence namely, 27th May, 2000, apart from A1, A3

and A4 two other persons were also arrayed as accused namely, A2 and A5. A2 was an Ayurvedic

Doctor/Technical Assistant in the said shop who is none other than the brother of A1. A5 was supplier of methyl alchohol.

According to the prosecution, on 27th May, 2000, number of persons consumed the substance called 'Arishtham' so called ayurvedic medicine in the shop of A1, Ajit Ayuurvedic Shop who complained dizziness, pain and thereafter some of them lost their vision due to the poison contained namely, methyl alchohol in the substance consumed by them namely, 'Aristham'. Two other persons Lawrence Crusino and Felix Rodrix @ Kunjuman died in the hospital. Lawrence died on 29 th May, 2000 at 7:20a.m. while Felix Rodrix @ Kunjuman died on 30th May, 2000, at 00:45 hours. Case against the appellants along with the other accused was registered in Crime No. 336 of 2000 at Karunagapally Police Station. A1 to A3 were arrested on 3 rd June, 2000, A4 was arrested on 8th June, 2000 and A5 was arrested on 11th June, 2000. After investigation, Final Report was filed by the Police alleging commission of offence against all the accused punishable under Sections 302, 307,325 and 201 read with 34 IPC as well as Section 55(a)(b)(d)(i), Section 57A(2) and 58A of Kerala Abkari Act and under Section 6 of the Poisons

Act.

At the instance of the prosecution, 49 witnesses were examined and Exhibits P1 to P68 were marked. On

the side of the accused, D.W. 1 to D.W. 3 were examined. Trial Court ultimately convicted all the accused under Section 304 Part II, 325 and 201 read with 34 IPC. They were imposed with a sentence of ten years rigorous imprisonment under Section 304 Part II, 7 years rigorous imprisonment for the offence under Section 325 and three years rigorous imprisonment for the offence under Section 201 read with 34. They were also convicted for the offence under Section 57A(ii) for which sentence of imprisonment for life was imposed. For the offence under Section 55(a), (b) and d(i) a sentence of three years rigorous imprisonment along with a fine of Rs. 1,00,000/- with default sentence of one year simple imprisonment was imposed. For the offence under Section 58A, three years rigorous imprisonment was imposed. For the offence under Section 6 of the Poisons Act, simple imprisonment of three months was imposed. As against the conviction and sentence imposed, the appellants preferred Criminal Appeal No. 434 of 2008 before the High Court. A2 and A5 also filed appeals in Criminal Appeal Nos. 309 and

367 of 2002.

By this impugned common judgment dated 31st March, 2008, the High Court while partly allowing the appeals filed by appellants in this appeal namely, A3 and A4 confirmed the conviction of the trial Court, with a modification as regards the conviction made under Section 57A wherein High Court convicted them under Section 57A(1) (ii). The sentence was altered from life imprisonment to seven years rigorous imprisonment along with a fine amount of Rs. 25,000/-. The

conviction under Section 55 was made under sub-clause (i) as against sub-clause (a), (b) and (i) as imposed by the trial Court. While convicting the appellants under Section 55(i), the sentence was again enhanced from three years to seven years rigorous imprisonment and the fine amount of Rs 1,00,000/- was imposed. For the offence under Section 55A, sentence as imposed by the trial Court namely three years rigorous imprisonment was confirmed and the fine amount of Rs.10,000/- was imposed with a default clause of three months rigorous imprisonment for each count of fine.

Mr. Jayanth Muthuraj, learned counsel for the appellant in his submissions, mainly confined to the conviction and sentence imposed by the High Court under

Section 57A(1)(ii) contending that the said conviction as maintained by the High Court under Section 57A(1)(ii) is not sustainable. According to learned counsel, in the first place, the charge as framed against the appellants was under Section 57A(2), whereas the trial Court convicted them under section 57A(ii). The learned counsel also pointed out that the High Court including the charge framed namely, 57A(ii) proceeded to impose the conviction under Section 57A(1)(ii) and for which no notice was issued to the appellants before altering the charge and when no appeal was filed at the instance of the State in order to enable the High Court to convict the appellants for a different charge for which they were neither charged nor fined.

On this aspect, when we heard Mr. M.T. George, learned counsel for the State, the learned counsel was not able to convincingly demonstrate before us that

there was any justification for the trial Court to have convicted the appellants for the offence under Section 57A(ii) or for the High Court to modify the said conviction under Section 57A(1)(ii). We ourselves verified the charge sheet which was framed against the appellants which discloses that the appellants were charged along with others insofar as Section 57A was

concerned for the offence under sub-Section (2) and under no other sub-clause or other sub-sections of the said Section. When we perused the judgment of the trial Court, we find that the trial Court even while referring to the charges on this particular aspect it has noted, the charge as one falling under Section 57A(ii) and ultimately the conviction was also made under Section 57A(ii).

Therefore, at the very outset the trial Court having misdirected itself in proceeding to consider the charge against the appellants under Section 57A(ii) instead of Section 57(A)(2) with any of the sub-clauses (i) or (ii). It must be held that there was total miscarriage of justice as against the appellants inasmuch as the entire evidence which would have been led under Section 57A(2) would have been far different from any specific offence under Section 57A(1)(ii) or under Section 57A(2)(i) or (ii). In the said circumstances, as the said flaw strikes at the very root of the conviction made by the trial Court, the said flaw must be held to be wholly incurable. The prosecution should have at the appropriate stage realized the flaw in the framing of the charge itself and should have taken steps to correct it. Having

failed in their responsibility in carrying out the said duty, the trial Court was wholly unjustified in having imposed a conviction under Section 57A(ii) for which the appellants were not charged and for which apparently no evidence was let in. Unfortunately, no appeal was filed by the State pointing out any defect either in the framing of the charge or on any other grounds for even the non-consideration of the charge which was actually framed against the appellants namely, 57A(2). The High Court unfortunately again had misdirected itself by ultimately convicting the appellants under Section 57A(1)(ii). In this context, when we refer to Section 57A(1) and (2), we find that they cover two different situations. The nature of the offence are entirely different. While under Section 57A(1), the ingredient is mixing or permitted to mix any noxious substance etc. under sub-Section (2) of Section 57A, it refers to the absence of any reasonable precautions or omission to prevent mixing or any noxious substances.

As pointed out by us earlier, the offences under Sub-Clauses (1) and (2) of Section 57A being distinct and different applicable to different situations vis-a-vis the offender, unless appropriate charge had

been framed and necessary evidence in support of the said charge had been led, the conviction made by the trial Court and the modified conviction as imposed by the High Court under Section 57A(1)(ii) thereby by

modifying the sentence from life to seven years as has been rightly contended by the learned counsel for the respondent was wholly unjustified. Therefore, the said conviction and sentence imposed under Section 57A(1)(ii) is liable to be set aside.

Once we set aside the said conviction and sentence imposed, the presumption clause under Section 57A(5) would also automatically cease to apply and thereby the rebuttal of the presumption to be established by the appellants for the offence falling under the relevant Section under 57A will also fall to the ground. As a sequel to it, the conviction under Section 304 Part II as well as other Sections 325 and 201 read with 34 IPC cannot also be sustained. Consequently, the appeal preferred by the State as against that part of the judgment in having set aside the conviction under the above provisions under the IPC cannot also be entertained. The State Appeal is, therefore, liable to be dismissed.

Insofar as the conviction under Section 55(i) by

the High Court and imposition of sentence of seven years along with a fine of Rs 1,00,000/- is concerned, here again, we find that the contention of the learned counsel for the respondent is forceful. We do not find any mention in the judgment impugned as to any opportunity extended to the appellants for modifying the conviction and enhancing the punishment as against the appellants. The trial Court based on the evidence led before it convicted the appellants for the offence under Sections 55(a), (b) and (i) which pertains to the role of the appellants as salesmen in having sold

liquor having any 'intoxicating drug'. It is true that the appellants were charged of the offence under Section 55(a),(b), (d) and (i) for which the trial Court ordered conviction under Section 55(a), (b) and (i) and imposed a sentence of three years apart from a fine amount of Rs 1,00,000/- with a default clause. However, the High Court, if it were to enhance the sentence from three years to seven years under Section 55(i) as rightly pointed out by learned counsel for the appellants, there should have been either an appeal as against the lesser sentence imposed by the trail Court at the instance of the State or there should have been an opportunity given to the appellants as to why the sentence should not have been enhanced. The High Court

did neither. The State, as a matter of fact, did not file any appeal for the enhancing of the sentence nor was any opportunity given by the High Court for enhancing the sentence as was done by it. In the circumstances, the appellants are bound to succeed to the extent to which the High Court enhanced the sentence from three years to seven years for the offence under Section 55(i). The appellant is not keen to challenge the conviction as made by the trial Court under Section 55(i) and 58A. In fact, while, convicting the appellants for the offence under Section 55(a), (b) and (i) as well as Section 58A, the sentence imposed was three years on each count and the sentences were to run concurrently.

In such circumstances, while allowing the appeal filed by the accused, we set aside the modified conviction imposed by the High Court for the offence under Section 57A(1)(ii). The conviction imposed by the

trial Court under Section 57A(ii) and the conviction made by the trial Court under Section 55(I) and the sentence of three years rigorous imprisonment along with a fine of Rs.1,00,000/- with default clause stands restored, as well as the conviction under Section 58A and the imposition of sentence of three

years with RS.10,000/- fine with a default clause also stands restored. The modified sentence made by the High Court under Section 55(i) from three years to seven years stands set aside. The appeal filed by the State as against setting aside the conviction under Section Section 55 (a), (b) of the Abkari Act and also conviction under Sections 304 Part II, 325 and 201 of IPC is dismissed.

.....J
[FAKKIR MOHAMED IBRAHIM KALIFULLA]

.....J
[S.A. BOBDE]

NEW DELHI
NOVEMBER 03, 2015.