

A

JOSEPH KURIEN PHILIP JOSE

v.

STATE OF KERALA

OCTOBER 4, 1994

B

[M.M. PUNCHHI AND K. JAYACHANDRA REDDY, JJ.]

C

Indian Penal Code, 1860, S. 272—Adulteration of drink for sale—Appellant in control of depot which sold adulterated arrack causing death—Held, the offence stood committed on the very day appellant found in possession of adulterated arrack.

D

Kerala Abkari Act, SS, 55(a), (i) and 57—Illegal possession and sale of adulterated arrack—Appellant not licensee but in control of depot that sold adulterated arrack—Held, mere possession of liquor by the appellant sufficient to attract offence.

E

Indian Penal Code 1860, S. 328—Causing hurt by poison—Trial Court holding accused not aware that arrack being sold likely to cause death and ruling out offence under Ss. 302 and 304—Trial Court nevertheless convicting accused for causing hurt by poison—Held, in the absence of mens rea or evidence that accused administered poisoned liquor to the deceased offence not made out.

F

Indian Penal Code 1860, S.109—Abetment—Trial Court convicting and sentencing co-accused for substantive offence under Ss. 272 and 328 IPC—High Court acquitting co-accused of substantive offence but convicting and sentencing him for abetment—Held, when direct involvement not established, accused cannot without a formal charge be held guilty of abetment—Criminal trial.

G

Arising out of the Punalur Liquor Tragedy in Kerala in which certain persons died after consuming poisonous adulterated arrack, the first Appellant who was in control of the Punalur arrack depot and the second appellant who was its manager were convicted and sentenced by the Trial Court for offences under Ss. 272 and 328 IPC for adulteration and causing hurt by poison respectively. The Trial Court held that the appellants were

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not aware that the arrack they sold was likely to cause death and accord-

ingly ruled out the offence of causing death punishable under S.302 or even S.304 IPC. The appellants were also convicted and sentenced under the Kerala Abkari Act for possessing and selling adulterated liquor. A

The High Court confirmed the conviction and sentence of the first appellant but converted the conviction of the second appellant into one for abetment and sentenced him to two years' rigorous imprisonment although he was never charged with that offence in the first place. Hence this appeal. B

Allowing the appeal of the second Appellant and partly the appeal of the first appellant, this Court C

HELD : 1. The offence under S.272 IPC stood committed by the first appellant on the very day he was found in possession of adulterated arrack. The offence under S.272 was complete on introduction of the adulterant in the food or drink, provided it was meant for sale, actual or likely. D

[127A, 126-H]

2. The first appellant having been in possession of adulterated liquor, the offences under Ss.55(a) and (i) of the Kerala Abkari Act stood rightly proved against him. The scheme of the Abkari Act did not exclude the unlicensed possessor of liquor, in permitting him adulteration. E

[128-C, 128-B]

3.1 The first appellant had to be acquitted of the charge under S.328 IPC in the absence of positive evidence that he administered the poisoned liquor to the deceased directly or indirectly with the necessary mens rea. Important links in the prosecution case remained missing. [131-C, D] F

3.2 The finding of the trial court that the accused did not have guilty knowledge of causing death cannot stop in that slide and take within its arms hurt also. [131-B, C]

4. S.109 IPC could in no case be attracted and more so without a charge to that effect put to the second appellant. The roles of the perpetrator and abettor of the crime are different. When the direct involvement of the second appellant could not be established, he could not be taken to have answered the charge of abetment and convicted on that basis. There would be serious miscarriage of justice to the accused causing great prejudice to his defence. [132-D, G, F] G H

- A** **CRIMINAL APPELLATE JURISDICTION** : Criminal Appeal No. 472 of 1990 etc.

From the Judgment and Order dated. 9.4.90 of the Kerala High Court in Crl. A. No. 416 of 1985.

- B** G. Ramaswamy, V.J. Francies, Thomas Mathew for the Appellant in Crl. A. No.545/90

E.M.S. Anam and C.C. Thomas for the Appellants in Crl. A. No. 472/90.

- C** M.T. George for the Respondent.

The Judgment of the Court was delivered by

- D** **PUNCHHI, J.** These are two criminal appeals arising out of the judgment and orders of the High Court of Kerala dated April 9, 1990 passed in Criminal Appeal No. 416 of 1985. The respective appellants herein are Joseph Kurian, A-4 and Philip Jose, A-1 described as such in the courts below.

- E** These appeals arise out of a phase of sporadic incidents referred to in Kerala as the "Punalur Liquor Tragedy" in which certain persons died and others received injuries due to consumption of poisonous adulterated arrack, Methyl alcohol adulterated with methyl alcohol. Pursuant to wide spread rumours of poisonous arrack sales, the Circle Inspector of Police, Punalur on 19-2- 1981 raided a few pan shops in the town and seized small
- F** polythene pouches containing arrack kept for unauthorised sale supplied by Punalur arrack depot. Two cases were registered on the basis of the said recovery. The following day on 20th February, 1981, the Sub-Inspector of Police, Punalur effected a search of the arrack depot at Punalur controlled and managed by A-1 and took samples of arrack in order to have them tested by chemical analysis. Case under section 272 I.P.C. and Section
- G** 57(a) of the Kerala Abkari Act was registered. Two days thereafter, i.e. on 22-2-1981, three persons, one Sreedharan Pillai and two others, were reported to have died allegedly due to consumption of adulterated arrack. Three cases were registered on account of the unnatural death of these persons. During the course of investigation of these cases conducted by the
- H** Circle Inspector of Police, Punalur, two more cases were registered.

Pursuant to the registration of these related cases 10 accused persons were arrested and the crimes investigated. Six cases were separately put up for trial before the Court of Session but they were ordered to be trial jointly. At the trial, the prosecution produced as many as 91 witnesses and 101 documents to establish its case. Finally the court of Session on October 29, 1985 found A-1 and A-4 guilty of offences punishable under sections 272 and 328 of I.P.C. as also for offences punishable under Sections 55(a) and 55(i) of the Kerala Abkari Act and imposed sentences of imprisonment on them thereunder. Accused nos. 2, 3, 6 and 7 were found guilty for offences punishable under the Abkari Act and were imposed nominal sentences of fine only. The remaining four accused nos. 5, 8, 9 and 10 were found not guilty and were thus acquitted. The High Court on appeal by A-2, A-3, A-6 and A-7 confirmed the conviction and sentence of A-3, A-6 and A-7 and dismissed the appeal of A-2 as abated on account of his death. We have nothing to do now with the afore-referred to eight accused. Fate of A-1 and A-4 alone remains to be dealt with.

The High Court confirmed the convictions and sentences of A-1 as imposed by the Court of Session. It however set aside the similar convictions and sentences of A-4 recorded by the Court of Session and instead convicted him under section 109 I.P.C. for having abetted the commission of offences punishable under sections 272 and 328 I.P.C. whereunder, without specificity, he was awarded rigorous imprisonment for a period of two years. It is in this form that these appeals are before us.

The prosecution was able to prove not only by its own evidence but also by admissions of A-1 in his statement under section 313 Cr. P.C. That he was the person incharge of the liquor business initially belonging to his father, which had been taken over by him in management. It has not been disputed that during the year 1980-81 A-1 had Abkari licences for vending arrack in more than one range and had also the licence for wholesale dealership in Indian made foreign liquor throughout the State. It is also not disputed any more that he was incharge and in control of the Punalur Depot, even though the licensee was A-2, wherefrom arrack samples had been taken by the investigation on 20th February, 1981. It also stand undisputed that these samples were found to be adulterated inasmuch as ethyl alcohol (arrack) was found to be adulterated with 2.64 per cent of methyl alcohol. Any procedural fault in the collection of the samples, in

A their despatch for analysis to the chemical examiner, in his analysis and the report thereon would now have to remain unchallenged because two courts below have trusted the seizure and have recorded the finding that the sampled arrack was adulterated with the poisonous substance known as methyl alcohol. We would now proceed on the footing that adulterated
 B arrack was found in the depot controlled and managed by A-1.

The allegation of the prosecution further is that when the seizure of samples was made on 20-2-1981, A-4 was then the manager of the Punalur Depot. There is pointed evidence that when samples taken, A-4 was present. A-4 is even proved to have signed search list Ex. P-9. The plea of
 C A-1, and correspondingly that of A-4, that the later was only an appointed representative of A-4 to settle some labour disputes of the management and not in any managerial capacity at the Punalur Depot, was negated by both the courts below and we find no reason to differ from that view that A-4 was so placed. We would therefore proceed on the footing that A-4
 D was then the Manager of the Punalur Depot.

Section 272 of the Indian Penal Code reads as follows :

E "272. ADULTERATION OF FOOD OR DRINK INTENDED FOR SALE - Whoever adulterates any article of food or drink so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or
 F with both."

In order to establish that an offence under section 272 I.P.C. has been committed, the prosecution has to prove that the article involved was food or drink meant to be consumed by live persons, that the accused adulterated it, that such adulteration rendered it noxious as food or drink, and
 G that the accused at the time of such adulteration intended to sell such article as food or drink, or knew it to be likely that such article would be sold as food or drink. Now noxious rendering is making it poisonous or harmful or both. As is plain the offence is complete on introduction of the adulterant in the food or drink, provided it is meant for the purposes of
 H sale, actual or likely. That A-1 in particular keeping apart A-4, for the

moment, was found to be in possession of adulterated arrack on 20th February, 1981 would lead to the conclusion that the offence under Section 272 I.P.C. stood committed on that day itself. Likewise offence under sections 55(a) and (i) of the Abkari Act can safely be concluded to have been committed on 20th of February, 1981 itself. These provisions as are relevant are reproduced below :

"55. FOR ILLEGAL IMPORT, ETC. - Whoever in contravention of this Act or of any rule or order made under this Act or any license of permit obtained under this Act.

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

(b) xxxxxxxxxxxx

(c) xxxxxxxxxxxx

(d) xxxxxxxxxxxx

(e) xxxxxxxxxxxx

(f) xxxxxxxxxxxx

(g) xxxxxxxxxxxx

(h) xxxxxxxxxxxx

(i) sells liquor or any intoxicating drug; shall, on conviction before a Magistrate, be punished --

(1) for any such offence, other than an offence falling under clause (d) or clause (e), with imprisonment for a term which may extend to two years and with fine which may extend to five thousand rupees:

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the court, -

(i) such imprisonment shall not be less than six months and fine shall not be less than one thousand rupees for a first offence; and

(ii) such imprisonment shall be rigorous and shall not be less than one year and fine shall not be less than two thousand rupees for a subsequent offence;

(2) For an offence falling under clause (d) or clause (e), with

A imprisonment for a term which may extend to one year, or with fine which may extend to two thousand rupees, or with both."

B Adulteration of liquor is prohibited under section 57 of the Abkari Act to a licensed vendor or manufacturer. Even so the scheme of the Abkari Act still does not exclude the unlicensed possessor of liquor, in permitting him adulteration. This has barely to be mentioned to counter the argument raised on behalf of A-1 that he was not the licensee of Punalur Depot, the finding being that A-2 was. He was undoubtedly found to be in possession of liquor. It is on the footing that A-1 is not a licensee of arrack that section 55(a) and (i) have been attracted to hold C him guilty for possession and sale of liquor to various outlets, licensed or unlicensed by the courts below. Thus these offences under section 272 I.P.C. and sections 55(a) and (i) of the Abkari Act stood rightly proved against A-1 and this aspect of this case need not detain us any longer.

D Section 328 of the Indian Penal Code reads as follows :

E "328. CAUSING HURT BY MEANS OF POISON ETC. WITH INTENT TO COMMIT AN OFFENCE - Whoever administers to or causes to be taken by any person any poison or any stupefying intoxicating or unwholesome drug, or other thing which intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years and shall be liable to fine"

F In order to prove offence under section 328 the prosecution is required to prove that the substance in question was a poison, or any stupefying, intoxicating or unwholesome drug etc, that the accused administered the substance to the complainant or caused the complainant to G take such substance, that he did so with intent to cause hurt or knowing it to be likely that he would thereby cause hurt, or with the intention to commit or facilitate the commission of an offence. It is, therefore, essential for the prosecution to prove that the accused was directly responsible for administering poison etc. or causing it to be taken by any person, through H another. In other words, the accused may accomplish the act by himself or

by means of another. In either situation direct, reliable and cogent evidence is necessary. Now on that basis it has to be whether A-1 had any role to play in directly administering to or causing to be taken the poisonous liquor by Sreedharan Pillai deceased, who had purchased and consumed liquor from a retail ship, with intent to cause hurt to him or knowing it to be likely that it would cause hurt to him. This has to be solved remaining cognizant that sections 272 and 328 are separate offences described in the Indian Penal Code. On this aspect that trial Court in para 152 of its judgment has observed as follows :

"The accused have been charged with the offence punishable under section 302 I.P.C. on the allegation that by adulterating arrack with a deadly poisonous substance viz. methyl alcohol, the accused committed an act, so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death; and by such act death was actually caused. I have found that Sreedharan Pillai mentioned earlier died as a result of consumption of poisonous arrack from Avaneeswaram shop owned by the contractors. Although Ramachandran Pillai and Sasidhanarn Pillai also have been proved to have died of methyl alcohol poisoning, the evidence methyl alcohol from one of the outlets owned by the accused - contractors. The contractors who are in the field of sale of arrack have to be fixed with knowledge of the toxicity of methyl alcohol. *Nonetheless it cannot be said that the accused or any of them knew that arrack mixed with small quantity of methyl alcohol was likely to cause death or serious bodily injury that is likely to cause death. The circumstances brought out in the evidence in this case is low that a very large number of persons might have consumed poisonous arrack supplied from Punalur depot, but only relatively a small number of persons has suffered its ill effects noticeably. Therefore, I do not think that the evidence is sufficient to find that the accused, even accused 1 and 4 whom I have found to be responsible for adulterating arrack, can be found guilty of having committed an act which comes within the purview of section '300 Fourthly' of I.P.C. It follows that none of the accused can be found guilty of the offence punishable under section 302 I.P.C. or even the one punishable under section 304 I.P.C. (emphasis supplied)*"

A The High Court on this aspect has barely observed at para 22 in its judgment as follows :

B "22. Accused 1 and 4 were found, guilty of offence punishable under sections 272 and 328 IPC and sections 55(a) and 55(i) of the Abkari Act. It is proved beyond reasonable doubt that the 1st accused was the licensee and that he had been managing all affairs relating to the vending of arrack in Pathanapuram and Chadayamanagalam ranges. The prosecution has adduced satisfactory evidence to show that there was a depot at Punalur wherein arrack was stored in large quantity and the same was being distributed to various licensed and unlicensed shops of 1st accused. C The 1st accused when questioned under section 313 Cr.P.C. was specifically asked regarding this aspect. In answer to questions 82, 84 and 85 the 1st accused admitted that he had been maintaining a depot at Punalur and the entire business was carried on by him. D The 1st accused owned all responsibility relating to the distribution of arrack in Pathanapuram and Chadayamanglam ranges. At the time of examination of various witnesses, the defence specifically suggested that the polythene bags containing arrack were being distributed from other ranges but there is no direct evidence to E that effect. However, it is proved beyond all reasonable doubt that to the arrack shop maintained by the 1st accused near Avaneeswaram Railway Station, arrack from the Punalur depot was supplied. It is also proved that this arrack was poisoned with methyl alcohol. It is proved that the 1st accused was instrumental in F adulterating the alcohol supplied from the Punalur depot. It is also proved that the 1st accused was responsible in distributing this arrack to the arrack shop near Aveeswaram Railway Station and thereby caused poisoned arrack to be taken by the consumers and in that way Sreedharan Pillai, who consumed alcohol, died as a G result of the poisoning. Therefore, the 1st accused has been rightly found guilty of offence punishable under sections 272, 328 IPC and sections 55(a) and 55(i) of the Abkari Act."

H As it appears both the findings of the Trial Judge as also by the High Court are somewhat vague and confusing. The Trial Court observed, as is

evident from the emphasised portion, that it cannot be said that the accused or any of them knew that arrack mixed with small quantity of methyl alcohol (2.64% as found by the chemical analyst) was likely to cause death or serious bodily injury that is likely to cause death. On this finding applicability of Section 302 or even that of Section 304 I.P.C. has been ruled out. This finding on the fact situation is open to doubt. If the finding be correct that the accused did not have guilty knowledge of causing death or of likelihood of causing death or of serious bodily injury likely to cause death, how could the guilty knowledge stop in that slide or grading not coming down to take within its arms hurt also. The act of the accused in adulterating liquor *per se*, as the law then stood sans amendments, would not attract the provision of section 328 of I.P.C. unless there is positive evidence that A-1 administered the poisoned liquor directly or by Sreedharan, deceased indirectly caused it to be taken by Sreedharan indirectly with the necessary intent and *mens rea*. This view of the learned Trial Judge as confirmed by the High Court does not appear to us to be sound in the back drop of the death actually occurring. But since it has taken that view it cannot stop short of hurt and so must slip down to a fall downright. Important links in the prosecution case on this particular remain otherwise missing. A-1 would thus have to be acquitted of the charge under section 328 IPC in carrying out the findings of the High Court to their logical end.

We would digress a little and shift over to the case of A-4. The High Court in paragraph 24 of its judgment has arrived at the conclusion to convict A-4 for the offence under section 109 by the following reasoning:

"24. The 4th accused has been found guilty of offence punishable under sections 272, 328 IPC and sections 55(a) and 55(i) of the Abkari Act. Even according to the prosecution, the 4th accused is an employee of the 1st accused. *There is no direct evidence to show that 4th accused mixed ethyl alcohol with methyl alcohol. If at all he had done such thing it would have been pursuant to the direction of the 1st accused. In the absence of direct evidence regarding the involvement of 4th accused, his conviction for the offence punishable under sections 272 and 328 IPC is not sustainable. However, there is overwhelming evidence to the effect that he was an abettor and he*

- A *was mainly responsible for mixing ethyl alcohol with methyl alcohol. Hence, he can be convicted for the offence punishable under section 109 IPC. Therefore, the 4th accused is found guilty of offence for having abetted the commission of offence punishable under section 272 and 328 IPC. It is not proved whether he was in fact personally*
- B *present at the time of the action of mixing ethyl alcohol with methyl alcohol. However, it is clear that he was also responsible for committing this act. Therefore, the conviction of the 4th accused for the offence punishable under sections 272 and 328 IPC and sections 55(a) and 55(i) of the Abkari Act is set aside and he is*
- C *found guilty of offence punishable under section 109 IPC for having abetted the commission of offence punishable under sections 272 and 328 IPC."*

(emphasis supplied).

- D The emphasised findings show that the High Court in the same breath has irreconcilably been inconsistent with regard to the participation of A-4 in the mixing of ethyl alcohol with methyl alcohol. Going by the High Court findings, section 109 IPC could in no case be attracted and more so without a charge to that effect put to A-4 to plead at the trial.
- E Section 109 IPC is by itself an offence though punishable in the context of other offences. A-4 suffered a trial for substantive offences under the Indian Penal Code and Abkari Act. When his direct involvement in these crimes could not be established, it is difficult to uphold the view of the High Court that he could lopsidedly be taken to have answered the charge
- F of abetment and convicted on that basis. There would, as is plain, be serious miscarriage of justice to the accused in causing great prejudice to his defence. The roles of the perpetrator and abettor of the crime are distinct, standing apart from each other. The High Court was thus in error in employing section 109 IPC to hold A-4 guilty. We thus set aside the conviction of A-4 and order his acquittal on all charges.
- G

- H Reverting back to the case of A-1, it needs additionally to be said that he was in possession of adulterated liquor, which liquor was not in the condition as released to licensee A-2 by the sanctioned breweries. In spite of adulteration, the liquor remained as liquor. Section 2 (10) of Abkari Act defines 'liquor' to include sprits of wine, methylated spirits, spirits, wine,

toddy, beer, and all liquid consisting of or containing alcohol. Methyl alcohol answers at least the description of being a liquid consisting of or containing alcohol. As an adulterant when it went to join ethyl alcohol, the compounded substance would remain liquor as such and its sale to be sale of liquor, coming within the mischief of section 55(a) & (i) of the Abkari Act. A-1 admits to be in the control of Punalur Depot, wherefrom the adulterated samples were taken. He could not thus have escaped the liability for having committed the aforesaid offences because it has been found as a fact that various authorised and unauthorised dealers had sold poisonous pouches of arrack which were supplied for sale from the Punalur Depot, and hence by A-1. Thus his conviction under section 55(a) and (i) of the Abkari Act was rightly maintained by the High Court.

In the absence of any material on the record, sentences of A-1 under section 55 of the Abkari Act would have to be governed by sub-clause (i) of Clause 1 thereof, whereunder imprisonment of either description is imposable being not less than six months together with a fine not less than one thousand rupees. When the main charge against A-1 under section 328 IPC has failed, we do not see any reason to maintain the sentence of A-1 for the aforesaid two offences more than the minimum prescribed. We, therefore, alter the sentences under the Abkari Act to be six months simple imprisonment and payment of Rs. 1000 fine, in default further simple imprisonment for one month, under each count. With regard to the sentence under section 272 IPC, some impression has been created that the courts below had wrongly awarded two years' rigorous imprisonment to A-1 whereas the maximum provided thereunder is six months imprisonment of either description. The impression is misfounded. The Trial Court had indeed imposed rigorous imprisonment for six months. The High Court has not been specific on this score. Thus for conviction under section 272 IPC also, we convert the imprisonment to be simple in nature. All the three sentences of simple imprisonment of six months shall run concurrently. We leave it open to A-1 to move the State Government for relief under sub-clause (d) of Section 433 of the Code of Criminal Procedure for commutation and conversion to fine. It will be for the State Government to consider granting relief to A-1 or not. We on our part would go by the letter of law.

By the foregoing reasons, Criminal Appeal No. 472 of 1990 of Joseph

- A** Kurian A-4 is allowed. He is acquitted of all the charges. Criminal Appeal No.545 of 1990 preferred by Philip Jose, A-1 is allowed in part inasmuch as conviction and sentence under section 328 IPC is set aside, his conviction under section 272 IPC is maintained whereunder he is substitutely awarded six months simple imprisonment, his convictions under section 55(a) and (i) of the Abkari Act are maintained whereunder, he is substitutely awarded six months simple imprisonment and a fine of Rs. 1000, in default of payment further simple imprisonment of one month, under each count; and sentences under all counts are to run concurrently.
- B**

In this manner these two appeals are disposed of.

- C** S.M. Appeal allowed.