

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

MONDAY, THE 17TH DAY OF JANUARY 2022 / 27TH POUSHA, 1943

CRL.MC NO. 880 OF 2021

AGAINST CC 288/2020 OF JUDICIAL MAGISTRATE OF FIRST CLASS,
ADIMALY, IDUKKI

PETITIONER/ACCUSED:

ABHIJITH, AGED 25 YEARS
S/O. SAJI, MOOSHARIPARAMBIL HOUSE, KONNATHADY P.O,
KONNATHADY, IDUKKI, KERALA.

BY ADVS.
K.R.VINOD
SMT.M.S.LETHA
KUM.K.S.SREEREKHA
SHRI.ARUN SEBASTIAN

RESPONDENT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, KOCHI - 682031.

BY ADV ADDL.DIRECTOR GENERAL OF PROSECUTION
SRI.C.K.SURESH

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 17.01.2022, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

O R D E R

Dated this the 17th day of January, 2022

This Cr1.M.C. has been filed to quash Annexure A1 final report in CC No.288/2020 on the file of the Judicial First Class Magistrate Court, Adimaly, Idukki invoking S.482 of Cr.P.C.

2. The petitioner is the accused. The offence alleged against him are u/s 6 r/w S.24 of the Cigarettes and Other Tobacco Products Act, 2003 (for short COTPA Act), u/s 77 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short, the JJ Act) and S/118(i) of Kerala Police Act, 2011 (for short, the KP Act.)

3. The prosecution case in short is that, on 23/2/2020, the accused without any valid licence or documents, was found in possession of prohibited tobacco products of GANESH and HANS of total 2770 packets which were kept at his residence with intention to sell the same to the children.

4. I have heard Sri.K.R.Vinod, the learned counsel for the

petitioner and Sri.C.K.Suresh, the learned Additional Director General of Prosecution.

5. The learned counsel for the petitioner/accused submitted that even if the entire allegations in the FI statement or final report together with all the materials collected during the investigation are taken together at their face value, they do not constitute the offences alleged.

6. S.6 of the COTPA Act prohibits sale of cigarettes and other tobacco products to a person below the age of 18 years and in an area within a radius of 100 yards of any educational institution. It reads as follows:

“6. Prohibition on sale of cigarettes or other tobacco products to a person below the age of eighteen years and in particular area- No person shall sell, offer for sale or permit sale of, cigarettes or any other tobacco product-
a) to any person who is under eighteen years of age, and
b) In an area within a radius of one hundred yards of any educational institution.”

7. The section takes into two offences; both are distinct and separate. The first part provides that irrespective of the place of sale, if the cigarette or any other tobacco product are sold to a

person who is under eighteen years of age, then it would be an offence. The second part provides that irrespective of the age of the customer, if any such tobacco product is sold in an area within a radius of 100 yards of any educational institution, then also it will attract the offence. The first part of the section makes it an offence focussing on the age of the purchaser irrespective of the place of sale, the second part of the section make sale in that prohibited area an offence irrespective of the age of that person [***Shajahan v. State of Kerala*** (2012 (4) KLT 838)]. In either case, there should be actual sale, offer for sale or permission for sale. The word "sale" has been defined u/s 3(m) of the COTPA Act as follows:

"(m) "sale", with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another, whether for cash or on credit, or by way of exchange, and whether wholesale or retail, and includes an agreement for sale, and offer for sale and exposure for sale."

8. The above provisions make it crystal clear that to attract S.6, one must actually sell or offer to sell or expose to sell or permit the sale of cigarette or tobacco product to a person below the age of 18 years or in an area within a radius of 100

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yards of any educational institution. Mere keeping of the tobacco products at the residence of the accused will not in any way attract the offence. The prosecution has no case that the petitioner sold or offered for sale or permitted sale of the cigarette or tobacco products. The only case of the prosecution is that the petitioner kept the tobacco products at his home with intention to sell. That apart, there is no case for the prosecution that any educational institution is situated within a radius of 100 yards of the petitioner's house so as to attract the second part of S.6. For these reasons, I hold that S.6 of the COTPA Act is not attracted.

9. S.77 of the JJ Act says that whoever gives, or causes to be given, to any child any intoxicating liquor or any narcotic drug or tobacco products or psychotropic substance, except on the order of a duly qualified medical practitioner, shall be punishable with rigorous imprisonment for a term which may extend to seven years and shall also be liable to a fine which may extend up to ₹1,00,000/-. A reading of S.77 of the JJ Act makes it clear that in order to attract the offence u/s 77, the accused should

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give or causes to be given, to any child any intoxicating liquor or any narcotic drug or tobacco products or psychotropic substance. Mere storing or keeping the tobacco products at the house of the accused would not constitute the offence. Here, there is no case for the prosecution that the petitioner had given or causes to be given tobacco products to any minor child. The only allegation is that the petitioner had kept the tobacco products at his house and it was presumed by police that they were kept for sale to minors. Hence, the ingredients of S.77 of the JJ Act are not attracted.

10. What remains is S.118(i) of the KP Act. It provides that any person who gives or sells to those who are below 18 years of age any intoxicating substance or any articles or substance to children which are harmful for their physical and mental health or procure the same near school premises for that purpose, shall be punishable. It creates three sets of offences; first one holding any person who gives or sells those who are below eighteen years any intoxicating substance guilty. It pertains to any intoxicating substance. The second part concerns sale of any

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articles or substances which are harmful for the physical and mental health of the children below eighteen years. It would include tobacco products as well. The third one concerns procuring an article or substance or intoxicating substance near school premises for sale. As stated already, there is no case for the prosecution that the petitioner gave or sold any intoxicating substance or tobacco products to any person below eighteen years of age. The prosecution has also no case that the house of the petitioner is situated near school premises. Hence, the ingredients of the S.118(i) of the KP Act are also not attracted. In short, a person simply procured and kept tobacco products at his/her residence cannot be prosecuted u/s 24 of COTPA Act or S.77 of the JJ Act. Nor can he/she be prosecuted u/s 118(i) of the KP Act unless his/her residence is situated near school premises.

11. It is trite that jurisdiction u/s 482 of Cr.P.C can be exercised to secure ends of justice and to prevent abuse of process of court. Since basic ingredients of the offence u/s 6 r/w S.24 of the COTPA Act, S.77 of the JJ Act and S.118(i) of the KP Act are altogether absent, proceeding with trial of Annexure 1

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will be abuse of process of the Court. Hence, I am of the view that it is a fit case where extra ordinary jurisdiction vested with this court u/s 482 could be invoked.

For the reasons stated above, the Crl.M.C. is allowed. The entire proceedings in connection with CC No.288/2020 on the file of the Judicial First Class Magistrate Court, Adimaly, Idukki stands quashed.

sd/-

DR. KAUSER EDAPPAGATH

JUDGE

Rp

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APPENDIX OF CRL.MC 880/2021

PETITIONER ANNEXURES

ANNEXURE A1 THE CERTIFIED COPY OF THE FINAL REPORT
IN CC 288 OF 2020 OF JUDICIAL FIRST
CLASS MAGISTRATE COURT, ADIMALY, IDUKKI.