

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 8TH DAY OF SEPTEMBER 2015/17TH BHADRA, 1937

CRL.A.No. 103 of 2003 ()

AGAINST THE JUDGMENT IN SC 358/1999 of ADDL.DISTRICT COURT (ADHOC-I),
ALAPPUZHA DATED 12-12-2002

APPELLANT/ACCUSED::

AJITH KUMAR, S/O. CHELLAPPAN,
KALIMKUMMOOTIL VEEDU FROM MALLIKKATTU KADAVIL,
PUTHIYAVILA MURI, KANDALL.

BY ADV. SRI.GEORGE VARGHESE (PERUMPALLIKUTTIYIL)

RESPONDENTS/STATE AND COMPLAINANT::

1. STATE OF KERALA REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

2. EXCISE RANGE INSPECTOR, KAYAMKULAM.

BY P.P.SRI.JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

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Crl.A.No.103 of 2003
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Dated this the 8th day of September, 2015.

JUDGMENT

The accused in SC.No.358/1999 on the file of the Additional Sessions Court (Adhoc-I) Alappuzha is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Kayamkulam excise range in Crime No.3/98 of that range under section 55(g) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 30.5.1998 at about 12 noon, the accused was found to be in possession 35 litres of wash, a material used for manufacture of arrack, in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under section 55 (g) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-I, Haripad where it was taken on file as C.P.No.46/1999. The learned Magistrate committed the case to Sessions Court under section 209 of the Criminal Procedure Code (hereinafter referred to as 'the Code') before the Sessions Court, Alappuzha. After committal the

case was taken on file as SC.No.358/1999 and thereafter it was originally made over to the Additional Sessions Court, Mavelikkara for disposal. Thereafter it was withdrawn and made over to Additional Sessions Court (Adhoc-I), Alappuzha for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under section 55(g) was framed and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, Pws 1 to 6 were examined and Exts.P1 to P8, P5(a), P6(a) and MO1 were marked on the side of the prosecution. After closure of the prosecution evidence, the accused was questioned under section 313 of the Code and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that he had not committed any offence and he is an invalid person and no article was seized from his possession and he was falsely implicated in the case. Since the evidence in this case did not warrant an acquittal under section 232 of the Code, the accused was directed to enter on his defence. But no defence evidence was adduced on his side.

After considering the evidence on record, the court below found the appellant guilty under section 55 (g) of the Abkari Act and convicted him there under and sentenced him to undergo rigorous imprisonment for two years and also to pay a fine of Rs. One lakh, in default to undergo rigorous imprisonment for six months. Set off was allowed for the period of detention already undergone by him. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

5. Heard Sri.A.R.Dilip counsel representing counsel for the appellant - Sri George Varghese Perumpallikuttiyl and Smt. Seena Ramakrishnan, the learned Public Prosecutor appearing for the State.

6. Counsel for the appellant submitted that there is no evidence adduced on the side of the prosecution to prove that the building from where the article was seized belongs to the accused and he was in exclusive possession of the same so as to come to a conclusion that he was in conscious possession of the contraband article. Further there is no specimen seal affixed either in the seizure mahazer or in the property list. The nature

of seal used was not mentioned in the seizure mahazer. Forwarding note was not sent and it was not marked also. So there is no evidence to show that there was any requisition from the Excise Inspector for forwarding the requisite sample for examination so as to link the chemical analysis report with the contraband article alleged to have been seized from the possession of the accused. So, according to him, these aspects were not properly considered by the court below and unless these things are proved by the prosecution beyond reasonable doubt, it cannot be said that the prosecution has proved beyond reasonable doubt that the accused had committed the offence and the conviction entered is not proper and he is entitled to get acquittal.

7. On the other hand, learned Public Prosecutor submitted that articles were produced before court on the same day and there was no question put to any of the witnesses regarding non production of the forwarding note etc. Further, the discrepancy if any in the forwarding note would only be a mistake as other documents would go to show that 600 ml sample taken in 750 ml bottle. Further the ownership of the

house is not material and what is required to be proved is whether he was in possession of the house at the relevant time and that has been proved by the evidence of prosecution witnesses. So according to the learned Public Prosecutor, the lower court was perfectly justified in convicting the appellant for the offences alleged and no interference is called for.

8. The case of the prosecution as emerged from the prosecution witnesses was as follows:

On the fateful day, PW1 and PW4 were doing patrol duty and at that time when they reached the junction, they got information that accused was in possession of the articles required for manufacture of arrack and accordingly he had prepared Ext.P1 search memo and sent the same to court and thereafter went to the house of the accused and he was found in the house and he conducted search of the house in the presence of Pws 2 and 3 independent witnesses. He found MO1 kannas in the kitchen and on examination of the kannas, he found that it contained 35 litres of wash which he was convinced after examining the same by smelling and tasting. Thereafter he had taken the same in a bottle, sealed the same and affixed label

containing signatures of the accused, witnesses and himself and destroyed 10 litres of wash and thereafter seized MO1 cannas with the remaining wash and after sealing and labelling as mentioned above, seized the same as per Ext.P4 mahazer in the presence of Pws 2 and 3. Thereafter he arrested the accused evidenced by Ext.P2 arrest memo and gave Ext.P3 arrest intimation to his wife who was there in the house. Thereafter he came to the office and produced the accused and contraband article before PW5, the Excise Inspector, who registered Ext.P5 occurrence report as Crime No.3/1998 against the accused under section 55(g) of the Abkari Act. He prepared property list and produced the articles along with property list before court on the same day and he gave request to send sample for analysis. Further investigation was conducted by PW6 his successor, who questioned the witnesses and recorded their statement. He obtained Ext.P8 chemical analysis report and produced before court and he completed investigation and submitted final report.

9. Pws 2 and 3 are the independent witnesses to the search and seizure. Though they admitted their signature in

Ext.P4 mahzer, PW2 has admitted his signature in the label found on MO1 cannas but he had denied having seen the seizure. PW3 had admitted his signature in Ext.P4 alone and he denied the signature in other documents shown to him. He had further stated that they knew the accused. So it is clear from this that they are trying to help the accused and that was the reason why they are not supporting the prosecution case fully. Then the evidence available is that of Pws 1 and 4, the Preventive Officer and the Excise Official, who accompanied him. PW1 had categorically stated that while he was doing patrol duty, he got information that accused was engaged in distillation of arrack, and immediately, he sent Ext.P1 search memo and went to the house of the accused and conducted search in presence of the witnesses and he examined the house and he did not find any incriminating article in the hall or bedroom. But had found MO1 cannas kept beneath the platform of the kitchen which he examined and satisfied that it contained 35 litres of wash. Thereafter he took sample and seized the article after sealing and labelling as per Ext.P4 mahazer. He had admitted in his evidence that there was a

concrete house just adjacent to the shed like building which is made of wooden planks and thatched with cudjan leaves and it was supported by the wall of the house. There was no house number for the shed and according to him when he questioned the accused, it was revealed that he is the owner of the house and he has no ration card and no identity card was also produced. So he was satisfied that he was the owner of the house and he arrested him. The evidence of PW1 was corroborated by the evidence of PW4 on all materials aspects. So from the evidence it can be said that the search was conducted in a shed in which the accused was found which has no building number and MO1 kannas was seized from there.

10. But that alone is not sufficient to prove that the accused had committed the offence. Unless it is proved by the prosecution that he was in conscious possession of the article and also that the chemical analysis report relates to the representative sample alleged to have been taken from the bulk quantity of contraband article alleged to have been seized from the possession of the article, it cannot be said that the prosecution has proved the guilt of the offence beyond

reasonable doubt.

11. There is some force in the submission made by the counsel for the accused that merely because he was found in the house alone is not sufficient to prove that he was in conscious possession of the article as no article was seized from his hand or while he was handling the same. It was kept in the place where others were also having access. It was brought out in evidence that the accused is a handicapped person and his both hands were crippled and both the witnesses have stated that they do not know whether he is able to handle the kannas or lift the kannas. So under the such circumstances, the relevance of ownership and possession of the house from where the article was seized got importance. No attempt was made by PW1, 4 or 6, the investigating officers to find out who was the owner of the house as well. Further there is some discrepancy in the evidence of Pws 1 and 4 regarding the description of the house as well. According to PW1, the alleged shed from where the contraband article was seized is abutting a concrete house and supported by a wall of that house, whereas according to PW4, the house is

situated 10 metres away from the place where the contraband article was seized. So that discrepancy was lightly brushed aside by the court below and has come to a conclusion that it was not a material to disbelieve the case of the prosecution. If this portion is part of a bigger house and merely because accused was found there without handling the contraband liquor, then it cannot be said that he was in conscious possession of that article so as to connect him with the contraband article so as to come to a conclusion that he was in possession of the article so as to convict him for the offence for possession of such contraband article.

12. Further forwarding note was not produced and marked in this case. None of the witnesses have spoken about the same as well. Even in Ext.P4 mahazer, there is nothing mentioned about the nature of seal used and PW1 also did not mention in his evidence regarding the nature of seal used as well. Further none of the document produced in court carried specimen seal of the seal used for sealing the article which is a material evidence for the court to come to a conclusion that it was produced in court without any tampering by verifying the

same. But that was not done in this case.

13. In the decision reported in ***Balakrishnan v. State of Kerala*** (2007 KHC 3666) this Court has held that burden is on the prosecution to prove that the sample drawn from the contraband substance is said to have been seized from the accused and the same reached the examiner in a tamper proof condition. Further in the decision reported in ***Joseph v. State of Kerala*** (2009 (4) KHC 537), this Court has held that every abkari officer filing charge sheet will have to be treated as a police officer and confession made to them are inadmissible in evidence. So except the evidence of Pws 1 and 4 before whom it was alleged to have been confessed by the accused that he is the owner of the house and it was he who had placed the contraband article in the kitchen, there is no other acceptable evidence adduced on the side of the prosecution to prove this fact. If this evidence is eschewed, then there is no other evidence to show that the accused was the owner of the house and he was in conscious possession of the article alleged to have seized as well. Further in the same decision it has been noted in paragraph 18 that the requisition made by the investigating

officer to send articles for examination was not produced and marked as well. So under such circumstances it cannot be said that the chemical analysis report relates to the article alleged to have been seized from the possession of the accused and that benefit was given and the accused was acquitted, relying on several decisions of the apex court and also this Court in this regard. The same view has been reiterated in the decisions reported in ***Gopalan v. State of Kerala*** (2012 KHC 812), ***Rajamma v. State of Kerala*** (2014 KHC 2548), ***Sambasivan v. State of Kerala, A.S.I of Police*** (2007 (1) KHC 462) and ***Krishnan H. v. State*** (2015 (1)KHC 822). In all these cases the specimen seal impression of the seal used for sealing the article has not been sent to court along with the property list or with the forwarding note. In this case also there was no specimen seal impression of the seal used for sealing the article was produced. Further the nature of seal used was also not mentioned in Ext.P4 mahazer. Under such circumstances though the article was produced before court on the same day, the possibility of tampering the article after seizure before producing the article cannot be ruled out and that benefit must

be given to the accused.

14. If it is not proved by the prosecution that the article was produced before court in a tamper proof condition and chemical analysis report relates to the representative sample alleged to have been taken from the bulk quantity of article seized from the possession of the accused, then it cannot be said that the prosecution has proved link between the contraband article and the accused so as to convict him for the offence of possession of that article and that benefit must be given to the accused. These aspects were not considered by the court below while appreciating the evidence and the finding made by the court below that the prosecution has proved beyond reasonable doubt that the accused was found to be in possession of wash and thereby he had committed the offence punishable under section 55(g) of the Abkari Act are unsustainable in law and the same is liable to be set aside. The appellant is entitled to get acquittal of the charge levelled against him giving him the benefit of doubt. Since the conviction was set aside by this Court, the sentence imposed is also not proper and the same is also set aside.

In the result, the appellant succeeds and the appeal is allowed. The order of conviction and sentence passed by the court below against the appellant under section 55 (g) of the Abkari Act are hereby set aside. The appellant is acquitted of the charge levelled against him giving him the benefit of doubt. He is set at liberty. The bail bond executed by him stands cancelled. The fine amount, if any, remitted by the appellant is directed to be refunded to him by the court below on making necessary application for that purpose.

Office is directed to communicate a copy of this judgment to the concerned court immediately.

Sd/-

K. RAMAKRISHNAN, JUDGE.

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/true copy/

P.S to Judge

K. RAMAKRISHNAN, J.

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Crl.A.No.103 of 2003

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8th September, 2015.

JUDGMENT