

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 30TH DAY OF SEPTEMBER 2015/8TH ASWINA, 1937

CRL.A.No. 721 of 2003 (E)

**AGAINST THE JUDGMENT IN SC 48/2000 of ADDITIONAL DISTRICT COURT (ADHOC),
MANJERI DATED 24-03-2003**

APPELLANT(S):

**BABU, S/O. KRISHNAN @ KUNHIPPU,
PULLUVALAPPIL HOUSE,
VETOM AMSOM, PADIYAM DESOM,
TIRUR.**

BY ADV. SRI.K.M.SATHYANATHA MENON

RESPONDENT(S):

- 1. THE SUB INSPECTOR OF POLICE,
TIRUR**
- 2. THE STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.**

BY PUBLIC PROSECUTOR, SRI. JIBY P. THOMAS

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30-09-2015,
ALONG WITH CRA. 632/2003, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

DST

K. RAMAKRISHNAN, J.

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Crl. Appeal No.721 of 2003

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Dated this the 30th day of September, 2015

J U D G M E N T

The second accused in S.C. No. 48 of 2000 on the file of the Additional Sessions Court (Adhoc-I) Manjeri is the appellant herein.

2. The appellant along with another accused were charge sheeted by the Sub-Inspector of Police, Tirur Police Station in Crime No. 430 of 1997 of that Station alleging offence under Sections 55(b) and (g) of the Abkari Act. After investigation, final report was filed before the Judicial First Class Magistrate, Tirur where it was taken on file as C.P. No. 3 of 2000. After complying with the formalities, the case was committed to the Sessions Court, Manjeri by the learned Magistrate under Section 209 of Code of Criminal Procedure(*hereinafter called 'the Code'*). After committal, the case was taken on file by the Sessions Judge as S.C. No. 48/2000 and thereafter, it was originally made over to Assistant Sessions Court, Tirur for disposal. After the

-: 2 :-

establishment of Adhoc Courts, the case was withdrawn by the Sessions Judge and made over to Additional Sessions Court, No- 1, Manjeri for disposal.

3. When the accused appeared before the court below after hearing both sides charge under Section 55(b) and (g) of the Abkari Act was framed and the same was read over and explained to them and they pleaded not guilty. In order to prove the case of the prosecution, PWs 1 to 6 were examined and Exts.P1 to P5 and MOsl to XV were marked on the side of the prosecution. After closure of the prosecution evidence, the accused were questioned under Section 313 of the Code and they denied all the incriminating circumstances brought against them in the prosecution evidence. The second accused has submitted that he had not committed any offence and no incriminating articles were seized from his possession and he has been falsely implicated in the case. Since the evidence in this case did not warrant an acquittal under Section 232 of the Code, the accused were called upon to tender upon their defence. Exts.D1 and D2 were marked on the side of the accused in defence. After considering the evidence on record, court below found both the accused guilty

-: 3 :-

under Section 55(b) and (g) of the Abkari Act and convicted them thereunder and sentenced them to undergo Rigorous Imprisonment for three years and also to pay a fine of Rs.1,00,000/-each. In default to undergo Simple Imprisonment for one year each set off was allowed for the period of detention already undergone under Section 428 of the Code.

4. Aggrieved by the Order of conviction and sentence passed by the court below, the present appellant who is the second accused in the court below filed the above appeal. It is seen from the records that the first accused also filed Criminal Appeal No. 632/2003 before this Court and this Court by judgment dated 19.10.2009 acquitted the appellant in that case.

5. Heard Mrs. Kaveri Thampi, counsel representing Sri. K.M. Sathyanatha Menon, counsel appearing for the appellant and Sri. Jibu P. Thomas, Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that this Court, while acquitting the first accused found that the identity of the accused was not established and also that the prosecution has failed to prove the reason for the delay in producing the article and they have failed to prove the link between the accused and

-: 4 :-

contraband articles seized and as such it cannot be said that they have proved the case as against the accused for the offences alleged. Since this Court has already found that the chemical analysis report does not relate to the representative sample alleged to have been taken from the contraband seized, the same benefit must be given to the present appellant also though he was said to be arrested from the same spot. The delay in producing the article has not been explained. The nature of seal used and the forwarding note etc. were not marked as well. So under the circumstances, the court below was not justified in convicting the appellant for the offence alleged and he is entitled to get acquittal.

7. On the other hand, the learned Public Prosecutor submitted that the circumstances under which the first accused was acquitted by this Court is different. As regards the present accused is concerned and he has red handedly caught by the Police along with the contraband articles. So the above decision is not applicable to the facts of this case. Since, huge quantity of contraband articles were seized, it took time for production of the same. So the delay cannot be said to be fatal in this case.

-: 5 :-

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

On 16.10.1997, at about 11.00 pm, while PW1, the Sub Inspector of Police, Tirur was doing patrol duty along with PWs3 and 4, he got information that the accused were engaged in distilling of arrack in an unoccupied house belonging to one 'Thappa'. Immediately they went to the spot and saw the accused persons engaged in the distillation of arrack from the eve of that house and on seeing the Police party, one person ran away from the place and they stopped the other person who is the appellant in this case and they found that huge quantity of wash was kept in a vessel on stove and distillation of arrack was being done. They conducted the search and seized the articles. The sample were taken from the wash and the arrack found in the vessels kept there. They have seized MOs I to XV and also the sample bottles as per Ext.P1 mahazar. PW3 arrested the second accused from the spot and came to Police Station along with the contraband articles and the second accused, prepared Ext.P2(a) report and registered Ext.P2 First Information Report against the two accused persons, including the appellant as Crime No.

-: 6 :-

430/1997 of Tirur Police Station under Section 55(b) and (g) of the Abkari Act. He produced the second accused before court below along with the remand report. The investigation in this case was conducted by the Head Constable. He went to the place of occurrence and prepared Ext.P5 scene mahazar. He questioned the witnesses. The property list was prepared and sent to court by PW3. Subsequent investigation in the case was conducted by PW4 who obtained Ext.P4 chemical analysis report and completed the investigation and submitted final report. PW6 is the person, who on the basis of Ext.P2 report given by PW3, registered Ext.P2 First Information Report.

9. There is no independent witness for seizure in this case as the seizure was effected during the midnight. Further, PW1 is the Police Constable, who accompanied PW3, the Detecting Officer, who detected the crime. According to them, they got information that two persons were engaged in distillation of arrack from the unoccupied house belonging to one Thappa. Immediately, they went to that place and saw two persons engaged in the distillation of arrack and on seeing the police party one person ran away from the place and they stopped the

-: 7 :-

other person engaged in the process. They seized MOs I to XV and took samples from the liquids seen in the vessels, including the vessel kept on the stove from which arrack was distilled and also collected sample from the illegally manufactured arrack collected in the vessel. It is seen from the evidence of PW3 that they knew that they are going to conduct search of a house. He had categorically stated he did not prepare any search memorandum and send the same to the court. Further under Section 36 of the Abkari Act, if search has to be conducted in respect of a building, then as far as possible the procedure under the Code has to be followed and it must be done in the presence of two independent witnesses other than the Police officials and excise officials. In this case, no such thing was done. Further, there is no evidence adduced on the side of the Detecting Officer that there were no houses nearby and no independent witnesses will be available at that time and that was the reason for not conducting the search in the presence of independent witnesses.

10. Further, the nature of seal used was not mentioned in Ext.P1 mahazar as well. No search list was prepared after conducting the search as well. Further, it was brought out in

-: 8 :-

evidence that the earlier part of the investigation was conducted by the Head Constable, who is not an Abkari Officer authorised to conduct investigation in this case. Further, it is seen from Ext.P3 property list that the articles reached the court only on 24.10.1997 though, the alleged seizure was effected on the early morning of 17.10.1997. There is no explanation forthcoming from the side of either PW3, the Detecting Officer or PW6, the Sub-Inspector who registered the crime and PW4 the Investigating Officer, who submitted the final report for the delay in producing the article before court. Further, it is seen from Ext.D1 Remand Report that the samples were already sent for chemical analysis. There is no forwarding note produced and marked as well. So even assuming that the prosecution has proved that the present appellant was arrested from the spot and certain articles were seized said to be implements, articles and materials used for distillation of arrack, that alone is not sufficient to convict the accused for the offence alleged unless it is proved by the prosecution that the same articles reached the court in a tamper free condition and also reached the chemical examiner's lab in a full proof condition so as to come to a conclusion that the

-: 9 :-

chemical analysis report relates to the representative samples said to have been taken from the contraband articles alleged to have been seized from the possession of the accused. Unless, this is proved by the prosecution, it cannot be said that the link between the accused and the contraband articles has been established so as to convict him for the offences alleged.

11. This Court while disposing the appeal filed by the first accused in Criminal Appeal No. 632/2003, came to a definite conclusion that the prosecution has failed to prove the link between the contraband article and the accused and the Chemical Analysis Report relates to the representative samples said to have been taken from the possession of the accused and given that benefit and acquitted the accused relying on the decisions reported in ***State of Rajasthan v. Douloth Rao***[AIR 1980 SC 1314], ***Valsala v. State of Kerala***[1994(2) KLT 515] and ***Sasidharan v. State of Kerala*** [2007(1)KLT 720]. Further, in the decision reported in ***Ravi v. State of Kerala and Anr.*** [2011(3) KLT 121]this Court has held that though mere delay in production of articles before court is not fatal always, if the delay is explained. But if the delay is not explained, that benefit must

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be given to the accused. In this case, though the articles were said to be seized on the early morning of 17.10.1997, they were produced before the court only on 24.10.1997 after seven days of the alleged seizure and none of the witnesses has deposed the reason for the delay and as to who was in possession of the article and it was produced before court in the same condition in which it was seized as well. So that benefit must be given to the accused. So in view of the above discussion, the court below was not justified in coming to the conclusion that the prosecution has proved the case against the appellant beyond reasonable doubt and consequential conviction entered into by the court below against the appellant under Section 55(b) and (g) of the Abkari Act are unsustainable in law and the same are liable to be set aside and appellant is entitled to get acquittal of the charge levelled against him giving him the benefit of doubt. Since this Court has found that appellant is entitled to get acquittal, 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

-: 11 :-

court below against the appellant under Section 55(b) and (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. If the appellant had remitted any fine amount before the court below, then the court below is directed to refund the same to him on making necessary application before that court for that purpose. Office is directed to communicate this Order to the concerned court immediately.

Sd/-

**K. RAMAKRISHNAN,
JUDGE**

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P.A. To Judge