

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 26TH DAY OF OCTOBER 2015/4TH KARTHIKA, 1937

CRL.A.No. 902 of 2003 (M)

AGAINST THE JUDGMENT IN SC 195/2000 of ADDL.SESIONS COURT (ADHOC-II)
KASARAGODE, DATED 23-05-2003.

APPELLANT/ACCUSED:

MANKU @ MALINKAN,
S/O.SUBBAYYA, AGED 35 YEARS,
CHEENAPPADY, ADOOR VILLAGE,
KASARAGOD.

BY ADV. SRI.E.C.BINEESH

RESPONDENT/COMPLAINANT:

STATION HOUSE OFFICER,
ADOOR POLICE STATION, KASARAGOD,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR, SMT. SEENA RAMAKRISHNAN.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SS

K. RAMAKRISHNAN, J.

Crl. Appeal No.902 of 2003

Dated this the 26th day of October, 2015

JUDGMENT

Accused in S.C.No.195/2000 on the file of the Additional Sessions Court(Ad hoc-II), Kasaragod, is the appellant herein. The appellant was charge-sheeted by the Sub Inspector of Police, Kasaragod, in Crime No.121/1998 Adhur police station under Section 55(a) of Abkari Act (ought to be under Section 8(1) and (2) of the Abkari Act).

2. The case of the prosecution in nut shell was that, on 02.09.1998, at about 05.00 p.m., at Cheenapadi in Adhur village, the accused was found to be in possession of 160 packets of arrack containing 100 m.l. each manufactured in Karnataka for the purpose of sale in violation of the Provisions of Abkari Act and thereby he had committed the offence punishable under Section 55(a) of the Kerala Abkari Act.

3. After investigation, final report was filed

before the Judicial First Class Magistrate Court, Kasaragod, and the case was taken on file as C.P.No.173/1998. Thereafter it was committed to the Sessions Court, Kasaragod by the learned magistrate under Section 209 of the Code of Criminal Procedure. After committal, the learned Sessions judge had taken cognizance of the case as S.C.No.195/2000 and it was made over to the Assistant Sessions Court, Kasaragod, for disposal. Later it was withdrawn by the Sessions Judge and made over to Additional Sessions Court (Ad hoc-II), Kasaragod for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55(a) of the Abkari Act was framed (ought to be under Section 8 (1) and (2) of Abkari Act) 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 3 were

examined and Exts.P1 to P6 and MOs 1 to 3 were marked on their side. After closure of the prosecution evidence, the accused was questioned under Section 313 of the Code of Criminal Procedure 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 no article was seized from his possession and he has been falsely implicated in the case. Since the evidence in the case did not warrant an acquittal under Section 232 of the Code of Criminal Procedure, the Additional Sessions Judge directed the accused 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(a) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for one year and also to pay a fine of ₹1,00,000/-, in default to undergo rigorous

imprisonment for three months under Section 55(a) of the Abkari Act and 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. E.C. Bineesh, counsel appearing for the appellant and Smt. Seena Ramakrishnan learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that there is no proper identification of the accused as the person who had abandoned the articles and ran away from the place. Further the detection was on 02.09.1998 whereas the property was produced before court on 18.09.1998 after 16 days. There is no explanation for the delay. He had relied on the decision reported in **Balakrishnan v. State of Kerala (2007 KHC 3666)** and **Mohanan v. State of Kerala (2014 KHC 55)** in support of his case. So

according to the learned counsel, the court below was not justified in convicting the appellant and he is entitled to get acquittal.

7. On the other hand, the learned Public Prosecutor submitted that PW1 had identified the accused as the person who ran away from the place. Further PW1 had stated that, he had entrusted the articles to the writer on 03.09.1998 and it was in his safe custody and there was no possibility of tampering before it was produced in court. So according to the learned Public Prosecutor, the lower court was perfectly justified in convicting the appellant for the offence alleged.

8. The case of the prosecution as emerged from the prosecution witnesses was that, on 02.09.1998 at about 05.00 p.m., while PW3, the Sub Inspector of Police, Adhur along with PW1 and P.C. 875 were doing patrol duty, they got information that one person named Manku had come

with arrack to a rented house taken by him. Immediately they went to that place and saw a person coming with a sack near that house and on seeing the police party, he abandoned the articles and ran away from the place. Though they chased him, they could not catch hold of him and so they came back and examined MO1 sack and it contained 160 packets of arrack made in Karnataka having 100 m.l each. He took six packets and opened the same and examined the contents and convinced that it was arrack. So he took the liquid in two bottles and sealed the same and seized MO1 series remaining packets, MO3 series empty packets after taking samples and MO2 sack as per Ext.P1 mahazar in the presence of PW1 and another police constable as there was no independent witnesses was available at that place. Thereafter he came to police station and registered Ext.P3 first information report as Crime No.121/1998 against the present appellant for the offence

under Section 55(a) of Abkari Act. He had undertaken the investigation of the case. He went to the place of occurrence and prepared Ext.P2 scene mahazar in the presence of PW2 and another. He prepared Ext.P4 property list and produced the articles before court. He prepared Ext.P5 forwarding note with request to send the sample for chemical analysis and the sample was sent from court and Ext.P6 chemical analysis report was obtained. He completed the investigation and submitted final report.

9. There were no independent witness to the seizure. The seizure was witnessed by police constable who accompanied PW3/ detecting officer at that time. PW3 had deposed that on 02.09.1998 at about 4.55. p.m., while they were doing patrol duty, he got information that one person by name Manku had come near his rented house at Cheenapadi with arrack in a sack. Immediately they went to the place and saw a person coming with MO2 sack and on

seeing the police party, he abandoned the articles from behind the house and ran away from the place. Though they chased him, they could not succeed in catching hold of him. Thereafter they came back and examined the contents of the sack and found it contained 160 packets of 100 m.l. each and on examination of six such packets, he was convinced that it was arrack. He took the liquid in three packets each in two bottles as sample and sealed the same and he seized the remaining MO1 series packets along with MO3 empty packets and MO2 sack as per Ext.P1 mahazar. He had admitted in the cross examination that he had no prior acquaintance with the accused. He had seen the accused for the first time after the incident from the court on the date of examination. He had no case that he had arrested him later as well during the course of investigation. So his identification regarding the accused as the person who ran away from the place cannot be relied on

to come to the conclusion that it was the accused who had run away from the place after abandoning the contraband articles.

10. Then the evidence is that of PW1/police constable. Though he had corroborated the evidence of PW3 regarding the seizure of the articles, he had also admitted that he had seen the accused 50 meters away and since he is the person engaged in sale of arrack and he knew him earlier and he had seen him turning back while he was running from the place and that was how he had identified him. But those aspects were not mentioned by him when he was questioned by the investigating officer. Further those things were not mentioned in Ext.P1 seizure mahazar as well. On going through Ext.P1 seizure mahazar, it will be seen that the abandoned 160 packets of liquid kept in MO2 sack were seized and samples were taken from those packets by taking of six packets and those bottles were

seized after sealing the same. So his evidence is not safe to rely on to prove the identity of the accused as the person who had abandoned the articles and run away from the place so as to connect him with the contraband article which were seized by the detecting officer. This aspect has not been considered by the court below before convicting the accused for the offence alleged and that benefit ought to have been given to the accused.

11. Further it is seen from the evidence that, though the detection was made on 02.09.1998 at about 5.00 p.m., the articles were seen produced before court only on 18.09.1998 after sixteen days of the alleged seizure. PW3 had deposed that he had prepared the property list and entrusted the same to the writer of the police station for the purpose of producing the same before court on 03.09.1998 and he had not given any explanation for the delay in producing the article. The writer to whom the articles

entrusted was not examined to show that he was in possession of the same and it was produced in the same condition in which it was entrusted to him before court so as to come to the conclusion that the articles alleged to have been seized from the accused had reached the court without any manipulation and the chemical analysis report relates to the representative sample taken from the contraband articles said to have been seized from the possession of the accused.

12. In the decision reported in **Balakrishnan v. State of Kerala (2007 KHC 3666)**, it has been held that, it is burden of the prosecution to prove that the sample drawn from the contraband substance said to have been seized from the accused and the same reached to the chemical examiner in tamper proof condition. If the delay has not been explained, then it cannot be said that prosecution has proved beyond reasonable doubt that the

same articles said to have been seized have reached the court and the sample relates to the contraband article seized. Further in the same view has been approved by the Division Bench of this court in **Ravi v. State of Kerala and Another (2011(3) KHC 121)**. There also the Division Bench has held that, mere delay in production of article before court is not sufficient to disbelieve the case of the prosecution, provided it was properly explained by the investigating agency to the satisfaction of the court. If the delay has not been explained, then that benefit must be given to the accused. In this case there is no explanation forthcoming from the detecting/ investigating officer regarding the delay in producing the article. So that benefit must be given to the accused. Further there is no specimen seal impression affixed in the seizure mahazar and the nature of seal used was not mentioned therein as well. Further it was admitted by PW3 that there was no specimen

seal impression provided in the forwarding note. According to him it may contain in the original forwarding note. It may be mentioned here that the forwarding note is prepared in triplicate by the investigating officer/ detecting officer and the two of them will be sent to the court and one will be retained by the investigating officer. Out of the two sets of forwarding note sent, one will be sent to chemical examiner's lab along with the request from the court. So all the three sets of forwarding notes must contain the specimen seal impression. So in the absence of specimen seal impression, it cannot be said that the article reached the court in a tamper free condition as well. These aspects were not considered by the court below before coming to the conclusion that the prosecution has proved the case against the accused beyond reasonable doubt. In this case, the delay in producing the article has not been explained and the identity of the accused has not been established as

well. So under the circumstances the finding of the court below that prosecution has proved beyond reasonable doubt that the accused had committed the offence punishable under Section 55(a) of the Abkari Act is 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. In view of the finding that the 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 and the order of conviction and sentence passed by the court below against the appellant under Section 55(a) of the Abkari Act (ought to be under Section 8 (1) and (2) of the Abkari Act) are hereby set aside and 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 will stand cancelled. Court below

is directed to refund the fine amount if any remitted by him on making necessary application 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

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