

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 1ST DAY OF OCTOBER 2015/9TH ASWINA, 1937

CRL.A.No. 903 of 2003 ()

SC 163/2001 OF ADDITIONAL DISTRICT COURT (ADHOC-1), THODUPUZHA

APPELLANT/ACCUSED:

**KUMARAN, AGED 35 YEARS,
S/O. KUNJAPPAN, PUNNATTUPARAMBIL HOUSE,
POOPPARA.**

BY ADV. SRI.M.T.SURESHKUMAR

RESPONDENT(S):

**STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM**

BY PUBLIC PROSECUTOR SRI JIBU P. THOMAS

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01-10-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No.903 OF 2003

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Dated this the 1st day of October, 2015

JUDGMENT

The accused in SC No.163/2001 on the file of the Additional Sessions Court (Adhoc-1), Thodupuzha is the appellant herein. The appellant was charge sheeted by the Sub Inspector of Police, Santhanpara Police Station in Crime 158/1999 of Santhanpara Police Station under Section 55 (a) of the Abkari Act.

2. The case of the prosecution in nut shell was that on 23.7.1999, at about 6.20 pm, the accused was found to be in possession of 31 bottles of 150 ml. New Master Brandy and 5 bottles of 375 ml. each Honey blend pure brandy in a provision shop at Puppara estate in violation of the provisions of the Abkari Act for the purpose of sale in violation of the provisions of the Abkari Act and thereby

he had committed offence punishable under Section 55(a) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Nedumkandam, where it was taken on file as CP No.101/2000. After complying with the formalities, the case was committed to Sessions Court, Thodupuzha by the learned Magistrate under Section 209 of the Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the case was taken on file as SC No.163/2001 and made over to Assistant Sessions Court, Kattappana for disposal by the Sessions Judge. Thereafter it was withdrawn from that court and made over to Additional Sessions Court (Adhoc-1) Thodupuzha for disposal by the Sessions Judge.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55 (a) of the Abkari Act 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, PWs1 to 5 were examined and Exts.P1 to P4 and MO1 series and MO2 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, he is innocent of the same and no contraband articles were seized from his possession. Since the evidence in this case did not warrant an acquittal under Section 232 of the Code, the accused was called upon 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 three months and also to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment for one month more. Aggrieved by the

same, the present appeal has been preferred by the appellant/accused before the court below.

5. Heard Sri.Manu Thampi, learned counsel representing M.T.Suresh Kumar, counsel appearing for the appellant and Smt. Seena Ramakrishnan, learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that mere possession of foreign liquor is not sufficient to attract the offence under Section 55(a) of the Abkari Act. Further there was delay in producing the article which has not been explained and so the court below was not justified in convicting the appellant for the offence alleged. He had also argued that no document has been produced to prove the possession of the building with the accused as well. So he prayed for acquittal of the accused.

7. On the other hand, learned Public Prosecutor submitted that the evidence adduced on the side of the prosecution proved the guilt of the accused beyond

reasonable doubt and he was arrested red handedly with the contraband articles. The delay has been properly explained by PW5 the Sub Inspector of Police. Though the investigation was conducted by the Assistant Sub Inspector of Police, the final report was filed by the competent officer. So according to the learned Public Prosecutor, the order of the court below did not call for any interference.

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

On 23.7.1998 while PW5, the Sub Inspector of Police Santhanpara Police Station was doing Patrol duty along with police party, he got information that the accused was engaged in sale of liquor from his shop and immediately he prepared Ext.P2 search memo and sent the same to court, thereafter he went to the shop and saw it was closed from inside. So he opened the shop and found the accused inside. When he conducted the search by opening the iron table kept there, after taking MO2 key

from the accused, he found MO1 series liquor bottles 36 number were kept in a plastic sack. He had taken one sample each from 370 ml bottle and 180 ml. bottle and sealed all the bottles and seized the same as per Ext.P1 mahazar in the presence of PW1 and others. Thereafter he arrested the accused and came to Police Station and registered Ext.P3 First Information Report as Crime No.158/1999 of Santhanpara Police Station under Section 55(a) of Abkari Act. He sent the articles to the court along with forwarding note with a request to send the sample for analysis. Accordingly the sample was sent from court and Ext.P4 chemical analysis report obtained. The investigation in this case was conducted by PW4, the Assistant Sub Inspector of Police, which was verified PW4 Sub Inspector of Police and he submitted the final report.

9. PWs 1 to 3 were the independent witnesses to the seizure. PW1 though admitted the signature in Ext.P1, denied having seen the search or seizure or arrest of the accused. PWs 1 to 3 have admitted that they

know the accused. But they have denied having seen the seizure or arrest. So it is clear from this that they are now trying to help the accused and that was the reason why they are not supporting the case of the prosecution. Then the evidence of PW5 the detecting officer alone is there to prove the search, seizure and arrest. He had categorically stated that he got information and immediately, he sent Ext.P1 search memo and went to the shop and found it was closed. Thereafter he opened the same and found the accused sitting inside the shop and when he examined the shop by opening the table by using the key produced by the accused, he found a sack containing 31 bottles of 180 ml. brandy and 5 bottles of 370 ml.each of brandy of different brand. Thereafter he took two samples from each category and sealed the same and he had sealed the other bottles also and seized the same as per Ext.P1 mahazar. Though he was cross examined at length, nothing was brought out to discredit his evidence on this aspect. It is true that no document

has been produced by the prosecution to prove that the accused was in possession of that building from where the alleged articles were seized. But however, when he was red handedly caught from the shop and arrested from the shop along with the alleged contraband articles non-proving of the ownership of the building is not material. So it can be safely concluded that the prosecution has proved that sack with MO1 series of bottles alleged to be containing foreign liquor was seized from the possession of the accused.

10. It is settled law that mere seizure of some bottles said to be contained foreign liquor is not sufficient to prove the offence against the accused. It must be proved by the prosecution that the link between the accused and contraband articles seized and the chemical analysis report relates to the sample that has been taken from the alleged contraband articles said to have been seized from the possession of the accused. It is also settled law that mere delay in producing the article is not

fatal always, if it is properly explained, but if it is not explained then that benefit must be given to the accused. This was so held in the decision reported in **Ravi v State of Kerala and Another** [2011 (3) KHC 121].

11. In this case it is seen from the property list, Ext.P4 that it reached the court only on 5.8.1999 though the seizure was on 23.7.1999. Though PW5 had stated that he was in possession of the same, but he had no explanation as to why it was not produced along with the accused. He had also stated that he did not remember when the articles were produced before the court as well. So under the circumstances, it cannot be said that the delay in producing the articles has been properly explained by the prosecution and that benefit must be given to the accused. Once the prosecution has failed to explain the delay in producing the article then it cannot be said that the same articles alleged to have been seized from the possession of the accused had reached the court in a tamper free condition and the chemical analysis

report relates to that article and that benefit must be given to the accused.

12. Further the investigation has been conducted by the Assistant Sub Inspector of Police who is not an Abkari Officer, though the final report has been filed by PW5, the Abkari Officer, the investigation conducted by such officer is nonest in law and that benefit must be given to the accused. 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 and the consequential conviction entered by the court below is unsustainable in law and the same is liable to be set aside. The appellant is entitled to get acquittal under the charge levelled against him giving him the benefit of doubt.

13. 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 appellant succeeds and the appeal is

allowed. The order of conviction and sentence passed by the court below against the appellant under Section 55(a) 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 court below is directed to refund the fine amount if any remitted by the appellant to him on making necessary application for that purpose.

Office is directed to communicate this order to the concerned court immediately.

Sd/-

K.RAMAKRISHNAN, JUDGE

SKV