

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 28TH DAY OF SEPTEMBER 2015/6TH ASWINA, 1937

CRL.A.No. 970 of 2003 ()

AGAINST THE JUDGMENT IN SC 1769/2002 of III ADDL.SESIONS COURT,
KOLLAM, DATED 19-05-2003

APPELLANT/ ACCUSED:

GOPAKUMA @ GOPAN,
S/O. KUTTAN PILLAI,
RESIDING AT SANTHA BHAVAN,
WESTERN SIDE OF SIVA TEMPLE,
MULAVANCHERY, MULAVANA VILLAGE,
KOLLAM.

BY ADVS. SRI.T.C.SURESH MENON
SRI.R. RAJA RAJA VARMA
SMT.M.R.VALSA
SRI.K.R.SREEKANTH

RESPONDENTS/ COMPLAINANT:

1. THE STATE OF KERALA, REPRESENTED
BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.
2. THE SUB INSPECTOR OF POLICE,
KUNDARA POLICE STATION,
KOLLAM.

BY PUBLIC PROSECUTOR SRI.JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 28-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

Crl. Appeal No.970 of 2003

Dated this the 28th day of September, 2015

JUDGMENT

Accused in S.C.No.1769/2002 on the file of the 3rd Additional Sessions Judge, Kollam, is the appellant herein. The appellant was charge-sheeted by the Assistant Sub Inspector of Police, Kundara in C.R. No.121/2000 of Kundara police station, under Section 8(1) & (2) of Abkari Act.

2. The case of the prosecution in nut shell was that, on 01.03.2000 at about 05.15 p.m., the accused was found to be in possession of 7 liters of arrack, in violation of the Provisions of Abkari Act and thereby he had committed the offence punishable under Section 8(1) read with Section 8(2) of the Kerala Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-I, Kollam, and the case was taken on file as C.P.No.79/2000,

thereafter it was committed to the Sessions Court, by the learned magistrate under Section 209 of the Code of Criminal Procedure. After committal, the case was taken on file as S.C.No.1769/2002 by the Sessions Judge and it was made over to the 3rd Additional Sessions Court, Kollam, for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 8(1) read with Section 8(2) 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, PWs 1 to 5 were examined and Exts.P1 to P3 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 of Criminal Procedure and he denied all the incriminating circumstances brought against him in the prosecution evidence and he had further stated that, he had not committed any offence 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 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 8(1) read with Section 8(2) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for two years and also to pay a fine of ₹1,00,000/-, in default to undergo simple imprisonment for six months. Set off was allowed for the period of detention already undergone by him in this case. Aggrieved by the same, the present appeal has been preferred by the appellant/ accused before the court below.

5. Heard Sri.P.S.Appu, counsel representing Adv. Sri.T.C.Suresh Menon, counsel appearing for the appellant and Sri.Jibu P. Thomas, learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that, investigation in this case was conducted by Assistant Sub

Inspector of police, who is not an Abkari Officer entitled to conduct investigation and filed final report under Section 50 of the Abkari Act and as such it is vitiated in view of the dictum laid down in the decision reported in **Subhash v. State of Kerala (2008(2) KLT 1047)**. He had also argued that, though the detention was on 01.03.2000, the article was produced before the court only on 17.04.2000 and there was no explanation forthcoming from the side of the prosecution for the delay in producing the article, so it cannot be said that the prosecution has proved the link between the contraband article and the accused and they also failed to prove the chemical analysis report represent the representative sample said to have been taken from the contraband article alleged to have been seized from the possession of the accused. He had relied on the decision reported in **Joseph v. State of Kerala (2009(4) KHC 537)** and **Ravi v. State of Kerala and another [2011(3) KHC 121 (DB)]** in support of his case. According to him, in view of the legal position, the conviction and sentence

passed by the court below are illegal and the same are liable to be set aside and the appellant is entitled to get acquittal.

7. On the other hand, the Public Prosecutor submitted that the evidence of PWs 3 and 4 will go to show that arrack was seized from the possession of the accused and the detection was made by competent officer. Further there was no delay in producing the article, as it will be seen from Form 151A and also the remand report that it was produced before the court on 02.03.2000 and it was observed by the court below on this aspect. So there is nothing to interfere the order passed by the court below.

8. The case of the prosecution as emerged from the prosecution witnesses was that, on 01.03.2000 at about 05.15 p.m., while PW4, the Sub Inspector of Police, Kundara police station was doing patrol duty along with PW3/ Head Constable and others, when they reached near the place of occurrence, they saw the accused coming with MO1 kannas in his hand and on seeing the police party, he got perplexed

and tried to move away from that place. PW4 stopped him and on verification, MO2 kannas was found with 7 liters of some liquid in it and on examination by smelling and tasting, he was satisfied that it was arrack. He had taken sample from the liquid and sealed the sample bottle and labeled the same with signatures of himself, accused and the witnesses. He had sealed and labeled MO1 kannas also in the same fashion and seized the same as per Ext.P1 mahazar in the presence of PW1 and 2. Thereafter he came to police station and registered Ext.P2 first information report as Crime No.121/2000 of Kundara police station against the accused under Section 8(1) and (2) of Abkari Act against the accused. As directed by the Sub Inspector of Police, investigation in this case was conducted by PW5, the Assistant Sub Inspector of Police. He produced the accused along with remand report, he prepared the property list and produced the same before court. As per his request the sample was sent from court for examination and Ext.P3 chemical analysis report was obtained. He questioned the

witnesses and recorded their statements. He completed the investigation and submitted final report.

9. Though PWs1 and 2 admitted the signature in Ext.P1 mahazar, they denied having seen the seizure. They have stated that, they knew the accused. So it is clear from the evidence that, they are now trying to help the accused and that was the reason why they are trying to support the accused. Then the evidence of PWs 3 and 4, the officer accompanied the detecting officer were also there to prove the seizure and arrest of the accused. PW4 had categorically stated that on that day while he was doing patrol duty and they reached the place of occurrence, they saw the accused coming with MO1 kannas and on seeing the police party, he tried to go away from that place and he was also seen perplexed. So they stopped him and on examination of the kannas they were satisfied that it contained 7 liters of arrack. He took sample sealed and labeled the sample bottle and kannas and seized the same as per Ext.P1 mahazar. Thereafter he arrested him and

came to police station registered Ext.P2 first information report against him. The evidence of PW4 on this aspect was corroborated by PW3, Head Constable who accompanied him. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect. So merely because the independent witnesses to the seizure did not support the case of the prosecution alone is not sufficient to disbelieve the prosecution case. If the court is satisfied with the evidence of official witnesses, then court can rely on their evidence for that purpose. The evidence of PWs 3 and 4 is believable as nothing was brought out to discredit their evidence regarding the arrest and seizure of the article from the accused. So the lower court was perfectly justified in coming to the conclusion that accused was arrested by PW4 along with MO1 kannas alleged to have contained arrack.

10. Mere seizure of some liquor with kannas alone is not sufficient to come to the conclusion that the prosecution has proved their case. The prosecution has

further prove that the articles alleged to have been seized from the possession of the accused reached the court in tamper proof condition and they were able to establish the link between the contraband article and the accused and further prove that chemical analysis report relates to the sample said to have been taken from the alleged contraband article said to have been seized from the possession of the accused. In this case though PW5 had stated that the material objects were produced before court on 02.03.2000, there is nothing on record to show that it was produced on that day. Court had relied on the remand report, which was not marked in which a mention has been made that first information report, seizure mahazar and property list were produced. There is no endorsement seen in Form 151A, namely the property list that it was produced before the magistrate on 02.03.2000 along with accused and the remand report. But it is seen from the property list though not marked admitted by PW5 in its evidence, that it was received in court only on 17.04.2000. PW5 had no

explanation as to how such an endorsement has come in the property list. If that be the case, it can only be presumed that the material objects were produced before court only on 17.04.2000 and not on 2.03.2000 as observed by the court below.

11. In the decision reported in **Joseph v. State of Kerala 2009(4) KHC 537**), it has been observed that if there is no explanation as to the inordinate delay in producing the property before the court, and even if the properties including the sample bottle reached the court with a seal intact, it cannot be said that prosecution had proved the case beyond reasonable doubt and the accused is entitled to get acquittal. Further the question of delay and the word forthwith occurring in Section 36 of the Abkari Act were considered by the Division Bench of this court in **Ravi v. State of Kerala and another (2011 (3) KHC 121)** and observed that it is not always necessary that mere delay in producing the article is fatal to the prosecution case. If the delay has been explained by the

prosecution, then the court can ignore the delay and accept the explanation. If the delay is not explained, then court can come to the conclusion that prosecution has failed to prove that the articles produced before the court are the same articles which were said to have been seized from the possession of the accused and the chemical analysis report relates to the representative sample alleged to have been taken from the contraband article said to have been seized from the possession of the accused and that benefit must be given to the accused.

12. In this case, though the seizure was said to have been effected on 1.03.2000 and the property list was seen prepared on 02.03.2000, it reached the court only on 17.04.2000, there is a delay of nearly 46 days in producing the article. There is no explanation forthcoming from the detecting officer or the investigating officer for the delay in producing the article. There is no evidence to show who was in possession of these articles till it was produced before the court as well. So under the circumstances, the

finding of the court below that there is no delay in producing the article and the accused is not entitled to get acquittal is unsustainable in law, in view of the dictum laid down in the decision cited(supra). Once the prosecution has failed to explain the delay then the accused is entitled to get the benefit and he is entitled to get acquittal of the charge leveled against him on that ground.

13. It is also seen from the evidence of PW5 that investigation in this case was conducted by Assistant Sub Inspector of Police, who is not an Abkari officer and investigation conducted by such officer is nonest in law and court cannot rely on the investigation conducted by such officer. This was so held in the decision reported in **Subhash v. State of Kerala (2008(2) KLT 1047)**. Though in that case it was observed that accused has to be discharged the cognizance taken on a final report taken by the Assistant Sub Inspector of Police is not valid in law. But in view of the fact that this court has already been found that prosecution has failed to prove that the articles

produced before the court were the same articles and the delay has not been properly explained and he is entitled to get acquittal, this court feels that there is no necessity to discharge the accused on the ground of illegality in conducting the investigation and filing of final report. So the finding of the court below that the accused had committed the offence punishable under Section 8(1) read with Section 8(2) of the Abkari Act is unsustainable in law and the same is liable to be set aside and the appellant is entitled to get acquittal of the charge leveled against him giving him the benefit of doubt. In view of the finding that appellant is entitled to get acquittal, the sentence imposed is also liable to be set aside 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 8(1) read with Section 8(2) of the Abkari Act are hereby set aside. The appellant is acquitted of the charge leveled against him giving him the benefit of doubt. He is

set at liberty. The bail bond executed by him will stand cancelled. The lower court is directed to refund the fine amount if any remitted by him on making necessary application for that purpose before that court.

Office is directed to communicate this judgment to the concerned court, immediately.

Sd/-

K. Ramakrishnan, Judge

//True Copy//

P.A. to Judge

SS