

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 16TH DAY OF DECEMBER 2015/25TH AGRAHAYANA, 1937

CRL.A.No. 1002 of 2003 ()

AGAINST THE JUDGMENT IN SC 243/2001 of ADDITIONAL SESSIONS COURT
(FAST TRACK-I), PALAKKAD, DATED 21-06-2003.

APPELLANT(S) : ACCUSED:

1. PRAKASAN, S/O/ RAMANKUTTY,
KIZHAKKEKARA, PULIPARAMBIL,
THRIKKUNNAPUZHA, KARTHIKAPPALLY,
ALAPPUZHA.
2. DAYANANDAN, S/O. SUBRAMANYAN,
LOKAMALESWARAM, KALAPPURAKKAL VEEDU,
KODUNGALLUR.

BY ADV. SRI.NIREESH MATHEW

RESPONDENT/ COMPLAINANT:

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 16-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SS

K. RAMAKRISHNAN, J.

[C.R.]

Crl. Appeal No.1002 of 2003

Dated this the 16th day of December, 2015

JUDGMENT

Accused Nos. 1 and 2 in S.C.No.243/2001 on the file of the Additional Sessions Court (Fast Track-I), Palakkad, are the appellants herein. The appellants were charge-sheeted by the Excise Inspector, Alathoor Excise Range in Crime No.2/1998 of that Excise Range under Section 55(a) of Abkari Act.

2. The case of the prosecution in nut shell was that, on 09.04.1998 at about 12.15 p.m., near Swathi Threatre, Alathoor, along with National Highway, first accused being the driver and 2nd accused being the person travelled in the vehicle bearing No.KL-7/M-7713 transported 1150 liters of toddy without any proper documents and using a fake permit in violation of the provisions of Abkari Act and thereby they have 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, Alathoor, where it was taken on file as C.P.No.19/2000. After complying with the formalities, the learned magistrate committed the case to Sessions court, Palakkad, under Section 209 of the Code of Criminal Procedure (hereinafter called the Code) against the present appellants as 3rd accused in the case was absconding and case against him was split up and refiled as C.P.No.29/2001. After committal, the learned Sessions Judge, Palakkad took cognizance of the case as S.C.No.243/2001 against the present appellants and it was made over to Additional Sessions Court (Adhoc-I), Palakkad, 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 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 P10 and MOs 1 and 2 were marked on the side of the prosecution. After closure of the prosecution evidence, the accused were questioned under Section 313 of the Code of Criminal Procedure and they denied all the incriminating circumstances brought against them in the prosecution evidence. They have further stated that, they have not committed any offence and they were 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 accused were called upon to enter on their defence. But no defence evidence was adduced on their side. After considering the evidence on record, the court below found the appellants guilty under Section 55(a) of the Abkari Act and convicted them there under and sentenced them to undergo rigorous imprisonment for four years each and also to pay a fine of

₹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 by them in this case. Aggrieved by the same, the present appeal has been preferred by the appellants/ accused Nos. 1 and 2 before the court below.

5. Heard Sri.Nithish Mathew, counsel representing the senior counsel Sri. C.C.Thomas, appearing for the appellants and learned Public Prosecutor Sri. Jibu P.Thomas appearing for the State.

6. The counsel for the appellant submitted that, there was no evidence to show that Ext.P3 was a bogus permit as claimed by the prosecution. Unless it is proved by the prosecution that it is bogus permit, it cannot be said that the transit of toddy was illegal. Further there is no evidence adduced on the side of the prosecution to prove that first accused was the driver of the vehicle and no evidence adduced to connect the 2nd accused with the

articles transported in the vehicle. The driving license and registration certificate of the vehicle though said to have been seized were not produced before the court to connect the first accused with the commission of the crime. Further even assuming that first and 2nd accused were travelling in the vehicle and they transported toddy, unless it is proved that Ext.P3 is a bogus permit and knowing that it is a bogus permit, they were transporting the same, they cannot be held guilty for the said offence. Further the specimen seal impression of the seal said to have been used for sealing the sample was not produced. PWs 3 and 4 were not sure about the nature of seal used as well. The forwarding note was not produced and marked in the case. So under the circumstances, it cannot be said that prosecution has proved beyond reasonable doubt that the chemical analysis report relates to the representative sample said to have been taken from the contraband article alleged to have been seized from the possession of the accused. Further

the evidence adduced on the side of the prosecution is not sufficient to prove that Ext.P3 is a bogus document. Exts.P9 and P10 should not have been relied on by the court below as they were procured and produced long after filing of the final report without the permission of the court, without conducting further investigation. Further the person whose seal and signature have been forged was not examined. Further the documents relating to the issuance of Ext.P6 permit, which is said to be a real permit was not examined and produced before the court as well. None of the witnesses have categorically stated that the signature found in Ext.P3 is a forged signature of the then Assistant Commissioner, Manikyam. So under the circumstances, it cannot be said that prosecution has proved beyond reasonable doubt that the accused have committed the offence and they are entitled to get acquittal of the charge levelled against them. He had relied on the decision reported in **Krishnan .H v. State (2015(1) KLD 421)** in

support of his case.

7. On the other hand learned Public prosecutor submitted that the accused persons were arrested from the spot and huge quantity of toddy was seized and they have no case that the articles seized was not toddy and the same articles was not produced before the court as well. So under the circumstances, court below was perfectly justified in convicting the appellants for the offence alleged and it does not call for any interference.

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

On 09.04.1998 at about noon, PW3 the Excise Circle Inspector of Excise Special Squad, Palakkad, was doing vehicle checking duty along with PW4 and others near Swathy Threatre, Alathoor, on the Palakkad-Thrissur National Highway. At that time they stopped the mini lorry with No.KL-7/M-7713, which was driven by the first accused and with the 2nd accused in the cabin and 3rd accused as the

registered owner and on examination he found that there were 11 cannss of which 7 cans each contained 165 liters of some liquid and other four cannases were found empty. He examined the contents of those cannases and found that it is toddy. When he asked the accused persons about the document as entrusted by the 2nd accused, first accused had produced Ext.P3 permit said to have been issued from the office of the Assistant Excise Commissioner, Palakkad Division, permitting to carry 2250 liters of toddy in favour of one Mohanan to be carried to the toddy Shop Nos.49-89/98-99 of Kanjirappally Excise Range drawn by tapping of 1500 coconut trees from the limit of toddy shop No.14/98-99 of Chittoor range to the above said toddy shop by road between 9.00 a.m and 4.00 p.m., daily once, via Alathoor, Mannuthy, Angamaly, Aroor and Alappuzha and the permit number was shown as 3/98-99/ID/THY dated 02.04.1998. On getting suspicion about the document as they were having Ext.P6 permit with the same date and number to be

issued to one Udayanan of Kayamkulam Excise Range and when they further questioned the accused persons, they did not disclose any fact, so he seized the vehicle and the articles and arrested accused Nos. 1 and 2 and prepared Ext.P4 series arrest memos. Thereafter he took 500 ml sample from one of the cannas and sealed and labeled the cannases and seized the same as per Ext.P1 mahazar in the presence of PWs 1 and 2. Thereafter he along with the articles and the accused came to the office and entrusted the range office and Ext.P5 crime and occurrence report was registered against the accused persons under Section 55(a) of Abkari Act. Further he had seized the driving license of the first accused and photocopy of the registration certificate of the vehicle and came to understand that 3rd accused is the owner of the vehicle. The articles were sent to court along with property list and sample was sent from court and Ext.P7 chemical analysis report obtained. This was done by PW5. He obtained Ext.P8

letter from the Assistant Excise Inspector, Palakkad, for ratifying the act of destroying the toddy without getting prior permission and that was ratified as per this letter. The investigation in this case was conducted by PW6. He questioned the witnesses and recorded their statements. He collected Ext.P7 chemical analysis report and filed final report. Ext.P9 and P10 were obtained by PW3 namely the specimen seal of the alleged seal used during the year 1998 at the office of Assistant Excise Commissioner, Palakkad Division and the specimen signature of the then Assistant Excise Commissioner, namely Manikyam while the case was in progress and the same were produced along with petition to receive the same as per Section 311 of the Code of Criminal Procedure.

9. PWs 1 and 2 are the alleged independent witnesses to the seizure and arrest of the accused persons. Though they admitted their signature in Ext.P1, they denied having seen the arrest or seizure. They have even admitted

their signatures in Ext.P2, the search list of the vehicle. They have further stated that, they did not know the accused as well. They have stated that they were working in a bar in that area and as requested by the excise officials, they put their signature. But PW2 had admitted that, he was made to sign Ext.P1 and P2 to prove the seizure of toddy from a mini lorry, but he had not seen the seizure as such. So it can be safely concluded that they were trying to help the accused and that was the reason why they were not supporting the case of the prosecution. So their evidence is not helpful to prove the seizure as such.

10. Then the evidence available is that of PWs 3 and 4, the Excise Circle Inspector and Excise Inspector attached to the Special Squad of Excise Department. According to them, they were doing vehicle inspection duty along the national highway at Alathoor near Swathy Theatre and at that time they examined the vehicle in dispute, which was driven by first accused as driver and 2nd accused was

seen sitting in the cabin. On examination of the vehicle, they found that there were 9 blue cannases of 200 liters capacity and two black cannas, both empty and out of the 9 blue cannases, 2 cannases were empty and 7 cannases contained 165 liters each capacity of some liquid, which when they examined, they were satisfied that it was toddy. When they asked about the document for carrying toddy, 2nd accused had taken Ext.P3 permit and handed over the same to the first accused who in turn handed over the same to PW3. He found some doubt regarding the genuineness of the permit as with the same No. and date, Ext.P6 permit was seen given to one Udayanan in respect of toddy shops at Kayamkulam Excise Range. When he asked about the same, the accused did not give any proper answer and they did not know about the same. So they arrested them and took sample and seized the articles as per Ext.P1 and P2 in the presence of PWs 1 and 2. Though they were cross examined at length, nothing was brought out to discredit

their evidence on this aspect. Merely because the driving license and registration certificate said to have been seized is not a ground to disbelieve the arrest of accused persons as contended by the counsel for the appellant. So under the circumstances, court below was perfectly justified in coming to the conclusion that the accused were arrested by PW3 along with 7 cannases said to be containing toddy said to be without any proper document.

11. Merely because seizure was effected alone is not sufficient to convict the accused for the offence alleged. It must be further proved by the prosecution that the articles seized had reached the court in tamper proof condition and the prosecution has to further prove that the chemical analysis report relates to the sample said to have been taken from the contraband article alleged to have been seized from the possession of the accused. In this case the specimen impression of the seal used for sealing the sample has not been produced. PW3 had stated that he had

used metal seal for sealing the sample and he did not remember the letters in that seal. Further he had no case that he had handed over specimen impression of the seal used for sealing the article to any one. He had further stated that he did not know what happened to the articles after he had entrusted the same to Alathoor Excise Range. According to DW4, PW3 had affixed the seal of the Circle Inspector and he did not know what was written in that seal. Further neither in the seizure mahazar nor in the search list, the nature of seal used was mentioned as well. Quite unfortunately forwarding note was not seen produced or marked in this case. Without forwarding note on file, it is not possible to ascertain as to whether the specimen seal impression of the seal used for sealing the sample has been provided to court or the chemical examiner to satisfy the genuineness of the sample produced. Further it will be seen from the property list produced, though not marked, that they were produced on 10.04.1998 before the magistrate

who was in charge of the jurisdictional magistrate and it was directed to be kept in the custody of the excise official with a direction to produce the same on 15.04.1998 before the concerned court. But it is seen from the property list that it was produced before the Judicial First Class Magistrate Court-I, Palakkad, as he was in charge of Judicial First Class Magistrate Court, Alathoor, on that day. It is seen from the property list 'not marked' that though there was a direction to produce the article on 15.04.1998, it was not seen produced on that day and the magistrate had issued a memo to the Excise Inspector to produce the same, by order dated 16.04.1998 and it is seen that on 17.04.1998 with a new property list, they produced same cannases not produced the entire articles in the same condition it was produced as per the earlier property list, at the time when it was produced on 17.04.1998, the cannases were empty. No permission was obtained from the court for destruction of the articles. But it is seen from Ext.P8 that he

had got ratification from the Assistant Excise Commissioner for destroying the toddy. Though it was done as per Rule 8 of the Kerala Abkari Disposal of Confiscation Articles Rule, 1996 and a reading of that Rule will go to show that, it will be applicable only in cases where confiscation has been ordered by the authority. So under the circumstances, it cannot be said that there was no possibility for tampering the articles before the same was produced in court, though the same was produced earlier on 10.04.1998 before the magistrate who was in charge of the jurisdictional magistrate at that time with the direction to produce the same on 15.04.1998, but it was not produced on that day. Later it was produced on getting a memo from the concerned court, that too after destroying the toddy said to have been seized from the vehicle without orders of the court. Further in the absence of specimen seal impression of the seal used for sealing the article having been produced in court and in the absence of producing and

marking the forwarding note which is expected to contain the specimen seal impression of the seal used for sealing the sample for the purpose of enabling the chemical examiner to verify and satisfy regarding the genuineness of the sample produced for examination, it cannot be said that the prosecution has proved beyond reasonable doubt that the articles were produced in court in the same condition in which it was seized and it reached the chemical examiner's lab in a tamper proof condition and the chemical analysis report relates to the representative sample said to have been taken from the large quantity of contraband article alleged to have been seized from the possession of the accused. If this was not proved to the satisfaction of the court, then it cannot be said that the prosecution had succeeded in bringing home the complexity of the accused in the commission of the crime and that benefit must be given to the accused. This was so held in the decision reported in **Sasidharan v. State of Kerala (2007(1) KLT**

720), Joseph v. State of Kerala (2009(4) KHC 537) and Majeedkutty v. The Excise Inspector, Kollam Range (2015(1) KLD 262). These aspects were not properly considered by the court below before coming to the conclusion that the prosecution has proved the case against the accused beyond reasonable doubt and consequential conviction entered is unsustainable in law and the same is liable to be set aside.

12. Further it is seen from the evidence that the prosecution relies on Ext.P6 said to be the copy of the permit issued with same number as seen in Ext.P3 permit said to have been produced by the accused when demanded by the excise officials so as to come to the conclusion that Ext.P3 is not a genuine permit. Though PWs 3 and 4 have stated that according to them, there is some difference in signature of Assistant Commissioner and the seal of the office, but in the cross examination, they have stated that they cannot say as to whether the signature and the seal

were forged. They have also stated that they were not having acquaintance with the signature and the seal of the officer and the office concerned as well. They have also stated that they did not make any enquiry regarding the genuineness of Ext.P3 permit as well. Merely because in the chief examination, they have stated that according to them, there is some difference in the signature and seal as found in Ext.P3 and P6 so as to infer that Ext.P3 is not a genuine document as observed by the court below alone is not sufficient to come to the conclusion that Ext.P3 is not a genuine document. The person whose signature is said to be forged was not examined as a witness to prove that signature seen in Ext.P3 was not his signature and the seal seen on Ext.P3 was not the seal of his office and that document was not issued from that office. None from that office was also examined to prove this fact. Further PW5 had deposed that he cannot say as to whether the signature in Ext.P3 was a forged signature. He had only stated that to

his knowledge, no application had been received from the person by name Mohanan for getting a permit in their office, but he had also stated that he did not verify the records and the investigating officer had not seized any document from their office to prove this fact. They were only relying on the practice that if a permit has been issued by the Assistant Excise Commissioner, Palakkad Division, a copy of the same will be sent to their office and also to the Special Squad. They have not produced the register showing such receipt of copies of such permits as well. Further the investigating officer also stated that he did not make any enquiry or investigation regarding the genuineness of Ext.P3 and he did not make any investigation as to whether any such license as mentioned in Ext.P3 was available or not as well. It is a serious lapse on the part of the investigating agency in conducting the investigation in a case like this, especially when they have got a case that, huge quantity of toddy has been

transported by using a forged document. It was so lightly taken by the officials of the department and no proper investigation has been conducted to establish before the court that Ext.P3 is a fake document and no such document has been issued from the concerned office. Further PW3 had in an attempt to prove this fact after his retirement and also after final report has been filed without permission of the court, obtained the alleged signatures said to have been put by the then Assistant Commissioner Sri.Manikyam and produced the same along with seal said to have been used during the relevant time and marked as Ext.P8 and P9 during the course of the trial. Even at that time no attempt was made to file an additional witness list, showing the said Manikyam as an additional witness to prove that the signature seen Ext.P3 was not his signature.

13. So under the circumstances, without legal evidence adduced on the side of the prosecution, it is not safe to come to a conclusion that the prosecution was able

to establish beyond reasonable doubt that Ext.P3 is not a genuine document and with that knowledge the accused persons had transported toddy in the vehicle on the relevant date. Suspicion however strong is not a substitute for legal evidence to prove such fact especially when harsh punishment has been provided for such offence. When punishment is harsh, burden must be more on the prosecution to prove the case against the accused beyond reasonable doubt. Though the prosecution relies on the suspicion on the genuineness of Ext.P3 permit on the basis of Ext.P6, they did not take any steps to prove this fact by adducing legal evidence at least by examining the person whose signature has been alleged to be forged. So court below was not justified in coming to the conclusion that the prosecution has proved beyond reasonable doubt that Ext.P3 was proved to be a fake document so as to convict the accused for the offence of transporting toddy without proper document as well, in view of the dictum laid down in

the above decision and also the discussions made by this court regarding this aspect. In view of the finding of the court below that the prosecution has proved the case against the accused beyond reasonable doubt and consequential conviction entered by the court below against the appellants for the offence alleged is unsustainable in law and the same is liable to be set aside. The appellants are entitled to get acquittal of the charge levelled against them giving them the benefit of doubt. Since it was found that the appellants are entitled to get acquittal, the sentence imposed is also not proper and the same is also set aside.

In the result the appellants succeed and the appeal is allowed. The order of conviction and sentence passed by the court below against the appellants under Section 55(a) of the Abkari Act is hereby set aside. The appellants are acquitted of the charge levelled against them giving them the benefit of doubt. They are set at liberty.

The bail bond executed by them will stand cancelled. The fine, if any remitted by the appellants is directed to be refunded to the appellants by the court below on making necessary application for that purpose before that court.

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

Sd/-
K. Ramakrishnan, Judge

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P.A. to Judge