

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 7TH DAY OF DECEMBER 2015/16TH AGRAHAYANA, 1937

CRL.A.No. 1367 of 2003 ()

SC 68/2002 of ADDL.DISTRICT COURT, FAST TRACK (ADHOC-II), ALAPPUZHA

APPELLANT/ACCUSED

VIJAYAN
S/O. KUNJU PILLAI,
SOWPARNIKA (CHERTHIDAPURAYIL)
KANNIMEL MURI, VELLIKUNNAM VILLAGE

BY ADVS.SRI.K.SHAJ
SRI.RENJIT GEORGE
SRI.R.REGHUNANDANAN

RESPONDENT/COMPLAINANT

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

R1 BY PUBLIC PROSECUTOR SHRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
07-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

'CR'

K.RAMAKRISHNAN, J.

=====

Crl. Appeal No.1367 OF 2003

=====

Dated this the 7th day of December, 2015

JUDGMENT

The accused in SC No.68/2002 on the file of Additional Sessions Court (Fast Track-II) Alappuzha is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Kayamkulam Excise Range in Crime No.18/1999 of that Excise Range under Section 55(a) of the Abkari Act (ought to be under Section 8(1) of the Abkari Act).

2. The case of the prosecution in nutshell was that on 26.4.1999, at about 5.45 pm, the accused was found to be in possession of 8 litres of arrack and found transitting the same along the road in front of Cycle shop of one Razak in Vallikkunnam Village, Kannimel Muri along the road leading to Changankulangara-Kambisserymukku in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under Section 55(a) of the Abkari Act (ought to be under Section 8(1) of the Abkari Act).

3. After investigation, final report was filed before the Judicial First Class Magistrate's Court, Kayamkulam, where it was taken on file as CP 66/2001. After complying with the formalities, the learned Magistrate committed the case to the Sessions Court, Alappuzha under Section 209 of the Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the case was taken on file by the Sessions Judge as SC 68/2002 and thereafter it was made over to Additional Sessions Court (Adhoc-II) Alappuzha 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) of the Abkri Act) and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of prosecution, PWs 1 to 5 were examined and Exts.P1 to P4 and MO1 were marked on their side. 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 no article was seized

from his possession and he was taken into custody from his stationary shop on 27.4.1999 and falsely implicated in the case. 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. DW1 was examined on his side to prove his case. 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 two years and also to pay fine of Rs.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 under Section 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

5. Since the appellant did not appear earlier, Advocate Shri.Ragunandhan was appointed as legal aid counsel. Thereafter, Advocate Shri.Shaj entered appearance and expressed his willingness to argue the case for the appellant. So the appointment of the legal aid counsel was terminated

and Advocate Shri. K. Shaj was permitted to argue the case.

6. The counsel for the appellant argued that the evidence of DW1 will go to show that there was no such place of occurrence as claimed by the prosecution from where the alleged seizure was effected. Further out of the two independent witnesses, only one witness was examined and other was not examined and he did not support the case of the prosecution. The court below was not justified in relying on the evidence of interested official witnesses alone to prove the case. Further the arrest memo or forwarding note were not marked. So there is nothing on record to show that they were either produced as well. So according to the learned counsel, the court below was not justified in convicting the appellant for the offence alleged. He is entitled to get acquittal.

7. On the other hand, learned Public Prosecutor submitted that the arrest memo as well as forwarding note etc. were produced before the court and there was no delay in producing the article and non-marking of the documents alone is not sufficient to disbelieve the case of the prosecution, especially when those aspects were spoken to by the witnesses

and it was not challenged in the cross examination as well.

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

On 26.4.1999 at about 5.45 pm, PW1 the preventive officer attached to Mavelikkara Excise Range was doing patrol duty along with PW2 Excise Guard and when they reached near the Cycle Shop of one Razak, he found the accused coming with MO1 kannas in his hand. On seeing the excise party, he tried to go away from there. So they stopped him and on verification of the kannas, they found that it contained eight litres of some liquid which on further examination, they were satisfied that it was arrack. He took sample from the arrack and sealed and labelled the same containing the signatures of himself and witnesses and the accused and sealed and labelled the kannas also in the same fashion and seized the same as per Ext.P1 mahazar in the presence of PW3 and another. He arrested the accused and gave arrest intimation to his relative and thereafter he came to excise office and produced the accused along with the contraband articles and documents prepared before PW4, the Assistant Excise Inspector who was

in charge of the Excise office at that time.

9. On the basis of documents produced, PW4 registered Ext.P2 crime and occurrence report as Crime No.18/1999 of Kayamkulam Excise Range under Section 55(a) of the Abkari Act. He prepared Ext.P3 thondi list and produced the articles seized before Court along with thondi list. He produced the accused along with remand report. He sent forwarding note with request to send the sample for analysis and sample was sent from court and Ext.P4 chemical analysis report obtained. The investigation in this case was conducted by PW5, the Excise inspector who questioned the witnesses and recorded their statements. He collected Ext.P4 chemical analysis report and produced the same before court. He completed the investigation and submitted final report.

10. PW3 is the independent witness to seizure. But he did not support the case of the prosecution. He had admitted that he knew the accused from his childhood. So it is clear from this that he was trying to help the accused and that was the reason why he was not supporting the case of the prosecution. Then the evidence available is that of PW1 the

detecting Officer and PW2 the Excise guard who accompanied him to prove the arrest of the accused and seizure of contraband articles from the possession of the accused. PW1 had categorically stated that on that day while he was doing patrol duty along with PW2 and others and when they reached near the Cycle Shop of one Razak, they saw the accused coming with MO1 cannas in his hand and on seeing them, he tried to go away from that place. So they stopped him. He verified the contents of MO1 cannas and he was satisfied that it contained eight litres of arrack. He took sample from the liquid, sealed and labelled the sample bottle and sealed and labelled the cannas also in the same fashion and seized the same as per Ext.P1 mahazar in the presence of PW3 and another. He arrested the accused and came to Excise Office and produced the accused along with the contraband articles and documents prepared before PW4, the Assistant Excise Inspector who was in charge of Excise Inspector at the relevant time. The evidence of PW1 on this aspect was corroborated by the evidence of PW2, the Excise guard who accompanied him on that date. Though PWs 1 and 2 were

cross examined at length, nothing was brought out to discredit their evidence on the question of arrest of the accused and seizing MO1 kannas with liquid said to be arrack from his possession.

11. It is true that DW1 was examined on the side of the accused to prove his case. Though DW1 has deposed that there was no cycle shop belonging to one Razak in the area and the accused was taken from his stationary shop on 27.4.1999 at 8 am, he had admitted in his evidence that he did not know as to whether any arrack was seized from the possession of the accused. He did not know as to whether any complaint has been filed against the excise officials for wrongfully taking the accused from his stationary shop. He had also admitted that he knew the accused since long time. So it is clear from his evidence that he had no knowledge about the seizure or arrest of the accused but he was giving evidence as requested by the accused in order to help him to get exonerated from the crime in respect of which he has been arrested. So court below was perfectly justified in rejecting the evidence of DW1 on this aspect and rightly believed the

evidence of PWs1 and 2 and came to the conclusion that the accused was arrested by PW1 along with MO1 kannas said to be containing arrack.

12. PW4 had deposed that he was working as Assistant Excise Inspector at the relevant time and he was in charge of the Excise Inspector when the accused was produced before him. He registered the crime and produced the articles before court along with Ext.P3 property list. It will be seen from Ext.P3 property list that the description mentioned in Ext.P1 has been reiterated in the property list also. Further it is seen from Ext.P3 that the property list was produced on 27.4.1999 itself. Though arrest memo was not marked, it was seen produced along with remand report and certain questions were put to PW1 regarding this aspect as well. So non-marking of arrest memo is not fatal in this case especially when questions were put to PW1 regarding the arrest memo when he was examined in court.

13. Further though the forwarding note was not marked, it is seen produced and it contained the specimen seal impression of the seal used for sealing the sample. Further,

Ext.P5 chemical analysis report shows that the seal on the bottle tallies with the specimen seal provided. Further PW1 stated that he had provided the specimen seal impression before the Assistant Excise Inspector when he produced the articles. This aspect was not challenged in cross examination as well. So the dictum laid down in the decisions reported in [2009 (4) KHC 537], **Sasidharan v State of Kerala** [2007 (1) KLT 720] and **Krishnan v State of Kerala** [2015 (1) KLT 822] are not applicable to the facts of this case. So under the circumstances, court below was perfectly justified in coming to the conclusion that prosecution has proved beyond reasonable doubt that the accused was found to be in possession of the arrack and rightly convicted him for the offence of keeping possession of arrack which is punishable under Section 8(1) of the Abkari Act after amendment, though convicted by the court below under Section 55(a) of the Abkari Act and the finding does not call for any interference.

14. The Counsel for the appellant submitted that the sentence imposed is harsh. Court below sentenced the accused to undergo rigorous imprisonment for two years and also to

pay fine of Rs.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 under Section 428 of the Code.

15. Persons who are committing offence under the Abkari Act are doing the same knowing that it is an offence and ignoring the consequence of their act on innocent persons who are consuming the same. Showing undue leniency in such cases will only give a wrong signal to the society and that will cause loss of confidence to public in the criminal justice delivery system itself. However, court can consider the family background and the possibility of reformation etc. of the accused as mitigating circumstances for showing leniency in awarding sentence. The prosecutor has no case that appellant had involved in any similar crime earlier. Further they also have no case prior to or after the incident, that he had involved in any such crime as well. He was aged 43 at the time when the offence was committed. He must be more than 60 years now. Considering these aspects as mitigating circumstances, this Court feels that some leniency can be

shown in imposing sentence and sentencing the accused to undergo Simple Imprisonment for six months and also to pay fine of Rs.1,00,000/- in default to undergo simple imprisonment for three months will be sufficient that will meet the ends of justice. So the substantive sentence and default sentence imposed by the court below are set aside and the same is modified as follows:-

The appellant is sentenced to undergo simple imprisonment for six months and also to pay fine of Rs.1,00,000/- in default simple imprisonment for three months more.

So the appeal is allowed in part. The order of conviction passed by the court below though under Section 55(a) of the Abkari Act which ought to be under Section 8(1) of the Abkari Act and sentence of fine of Rs.1,00,000/-imposed by the court below are hereby confirmed. But the substantive sentence of two years rigorous imprisonment and default sentence of six months simple imprisonment imposed by the court below are set aside and the same is modified as follows:

The appellant is sentenced to undergo simple

imprisonment for six months and also to pay fine of Rs.1,00,000/- and in default to undergo simple imprisonment for three months more.

Before parting, this Court wants to make mention of the manner in which the trial of abkari cases were conducted in the trial court. It is seen in many cases that though the arrest memo, property list and forwarding notes were produced, no efforts were seen taken by the Public Prosecutor and the courts in marking these documents through the witnesses and this is being projected as serious lacuna and in some cases it leads to unmeritted acquittal as well. Further if the specimen seal impression of the seal used for sealing the sample was not produced, and its impression is not provided in the copies of forwarding note produced which alone will be marked at the time of trial, it is the duty of the concerned thondi clerk to bring it to the notice of the Magistrate to see that it is also produced and affixed in the copies of the forwarding notes provided, so that the court can verify the same and satisfy itself as to whether the contraband articles seized have reached the court in tact in a tamper proof condition, so that

properly conducted investigation will yield its required result in cases of this nature and acquittal on such technical grounds can be reduced.

Office is directed to communicate this judgment to the concerned court immediately. Office is also directed to communicate the order terminating the appointment of legal aid counsel Shri. Ragunandhan, to High Court Legal Service Committee as well, because the counsel engaged by the appellant in the case himself had argued the case.

K.RAMAKRISHNAN, JUDGE

SKV