

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 9TH DAY OF OCTOBER 2015/17TH ASWINA, 1937

CRL.A.No. 1742 of 2003 ()

SC 96/2001 OF ADDL.SESIONS COURT (ADHOC)-II, ERNAKULAM

CP 9/1999 OF JUDICIAL FIRST CLASS MAGISTRATE COUR.-I MUVATUPUZHA

APPELLANT(S)/ACCUSED 1 AND 2:

1. **RADHAKRISHNAN NAIR, ALIAS VANDI BROKER THANKAPPAN NAIR,
S/O KRISHNAN NAIR, AGED 55 YEARS, MOLETH VEEDU,
NOW RESIDING AT HOTEL SRIKRISHNA AND MODERN LODGE
NEAR K.S.R.T.C BUS STAND, PERUMBAVOOR, ERNAKULAM.**
2. **VIDYADHARAN ALIAS KUNJUMON, S/O. RAMANKUTTY,
AGED 38 YEARS, PLANTHOTTATHIL VEETIL,
ODIYAPARA KARA, VANNAPURAM VILLAGE,
IDUKKI DISTRICT.**

BY ADV. SRI.JOHN JOSEPH(ROY)

RESPONDENT/COMPLAINANT:

**THE STATE OF KERALA REPRESENTED BY THE D.Y.S.P. ,
CRIME DEPARTMENT, ALUVA REPRESENTED THROUGH THE PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM**

BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09-10-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No.1742 OF 2003

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Dated this the 9th day of October, 2015

JUDGMENT

Accused Nos. 1 and 2 in SC No.96/2001 on the file of the Additional Sessions Court (Adhoc-II), Ernakulam are the appellants herein. The appellants were charge sheeted by the Deputy Superintendent of Police Crime Detachment, Aluva in Crime No.348/1997 of Muvattupuzha Police Station under Section 55(a) and (i) of the Abkari Act.

2. The case of the prosecution in nut shell was that on 9.7.1997, at about 7.15 pm, the appellants along with another person were found to be in possession of 3216 bottles of Super Star brandy in 112 boxes worth Rs.2,68,800/- unlawfully stored in Molath House with No.XV/40 of the Muvattupuzha Municipality owned by PW3 and possessed by the 1st accused for the purpose of distribution to other accused persons, in violation of the

provisions of the Abkari Act and thereby they have committed the offence punishable under Section 55(a) and (I) of the Abkari Act and Section 34 of Indian Penal Code (hereinafter referred to as the Code).

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-I, Muvattupuzha, where it was taken on file as CP No.9/1999. After complying with the formalities, the learned Magistrate committed the case to Sessions Court, Ernakulam under Section 209 of the Code. After committal, the case was taken on file as SC No.96/2001 on the file of the Sessions Court Ernakulam and thereafter, it was originally made over to Assistant Sessions Court Muvattupuzha, for trial. When the accused appeared before that court, after hearing both sides, charge under Section 55(a) and (i) of the Abkari Act was framed and the same was read over and explained to them and they pleaded not guilty (only accused Nos.1 and 2 appeared and the 3rd accused was absconding). Thereafter, the case was withdrawn by the

Sessions court and made over to Additional Sessions Court, Adhoc-II for disposal.

4. In order to prove the case of the prosecution, PWs 1 to 13 were examined and Exts.P1 to P13 and Mo1 Series, MO2 series and MO3 were marked on the side of the prosecution. After closure of the prosecution evidence, the accused were questioned under Section 313 of the Code, 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 are innocent of the same. 1st accused had further stated that he was residing with his family consists of wife and two female children at Kollam and he was asked to come to Muvattupuzha and when he came to the Deputy Superintendent of Police's office, he was informed that he was arrested in connection with the case and thereafter, he along with 2nd accused were produced before the court. He was falsely implicated in the case at the instance of CW3 his sister, as

there was some dispute regarding property after the death of parents. Since the evidence in this case did not warrant an acquittal under Section 232 of the Code, the accused were called upon to enter on their defence. The 1st accused was examined as DW1 and one witness was examined as DW2 and Ext.P1 was marked on his side. After considering the evidence on record, the court below found the appellants not guilty under Section 55(a) of abkari Act and acquitted them of the charge under Section 235 (I) of the Code. But the court below found the appellants guilty under Section 55(i) of Abkari Act and convicted them thereunder and sentenced them to undergo rigorous imprisonment for two ears and also to pay a fine of Rs.1,00,000/- each, in default to undergo simple imprisonment for two months more. Set off was allowed for the period of detention already undergone by them under Section 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellants/accused Nos.1 and 2 before the court below.

5. The counsel for the appellants submitted that the 1st appellant is no more, in view of the dictum laid down in the decision reported in **State of Andra Pradesh v Narasimha Kumar** [2006 (3) KLT 505], where the apex court has held that, if fine forms part of the sentence, death of the accused will not end in abatement of the appeal, in view of the proviso to Section 394 of the Code the appeal will abate on the death of the appellant as against him, so it was decided to hear the matter on merit as against him also.

6. Heard the counsel for the appellant Shri.John Joseph and Smt. Seena Ramakrishnan, learned Public Prosecutor appearing for the State.

7. The counsel for the appellants submitted that there is discrepancy regarding the time at which search was conducted in the evidence of officials who were said to have accompanied PW12, the detecting officer. Further there is no documents produced to prove that the 1st accused was residing in that house and he has got domain

over the house, so as to prove that he was in conscious possession of the contraband articles alleged to have been seized from that house. The evidence adduced on the side of the accused will go to show that his mother alone was residing in that house and that house belongs to CW3 his sister, which is evident from the prosecution evidence itself. Further, though the articles were alleged to have been seized on 9.7.1997, they were produced before the court only on 16.7.1997 and PW12 had a case that he produced it on 13.7.1997. There is no explanation forthcoming for the delay in producing the article. The nature of seal used was not mentioned in the search list or seizure mahazar. It was not affixed in the property list also. So when there is delay in producing the article, non-mentioning of the nature of seal used will have some impact on the genuineness of the articles produced. So according to the counsel for the appellant, the prosecution has failed to prove beyond reasonable doubt that the article seized were the same articles

produced before the court and Ext.P12 Chemical analysis report relates to the representative sample said to have been seized from the articles collected or seized from the possession of the accused and he is entitled to get the acquittal. He had also argued that the detection and major portion of the investigation was conducted by PW12 that caused prejudice to the accused. He is entitled to get acquittal.

8. On the other hand, the learned Public Prosecutor submitted that the search was proved through PW12 and also other witnesses accompanied him. PW1 had admitted his signature in Ext.P1 and also admitted that the contraband articles were transported to the police station in his vehicle. So the evidence will go to show that the search and arrest were proper and legal. The delay has not caused any prejudice as no question was put to them regarding the same. According to the learned Public Prosecutor, the court below was perfectly justified in convicting the appellants for the offence

alleged.

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

On 9.7.1997, at about 6 pm, while PW2 the Deputy Superintendent of Police, Muvattupuzha was in his office, he got reliable information that Indian made foreign liquor is being unauthorizedly kept in the house of the one Thankappan Nair, at Marady Village in Muvattupuzha Municipality and immediately he sent Ext.P9 search memorandum and informed PW3 the Excise Inspector and party and PW4 the Circle Inspector of Police Muvattupuzha and PW5 and all of them reached their house and on seeing the police party, three persons in the house ran towards the rear side of the house and they chased them and they could arrest the accused Nos.1 and 2 alone and 3rd person had run away from the place and they could not catch-hold of him. From the enquiry, it was revealed the person who run away from the place was one Babu who was arrested as third accused in the

case. Thereafter PW12 conducted the search of the house and found in the shed attached to the house some cardboard boxes and when he examined the same, he found that they contained some bottles and on examination, he was satisfied that they were Indian made foreign liquor. On examination, it was found that it contained 3216 bottles of Super Star brandy and the Kerala State Beverage Corporation's sticker was not seen on the bottles. He took two bottles from each category of 375 ml. and 180 ml. and examined the same and convinced that it was Indian Made Foreign Liquor. He had taken two samples each from the two categories of brandy found and sealed the same and seized these articles as per Ext.P1 search list in the presence of PWs1 and 2. Thereafter he came to the Police Station and registered Ext.P7 First Information Report as Crime No.348/1997 of Muvattupuzha Police Station against three persons including the appellants under Section 55(a) and (i) of the Abkari Act. He produced the accused before the

court along with Ext.P13 remand report on the next day itself. He prepared Ext.P10 property list and Ext.P11 forwarding note and produced the contraband articles before the court with request to send the sample for analysis and the samples were sent from court and Ext.P12 chemical analysis report obtained. It shows that the samples contained ethyl alcohol. He questioned the witnesses and recorded their statements. When it was revealed that the 1st accused was managing the house and he was paying the electricity charges and water charges through M/s Mithra Agencies of Muvattupuzha conducted by PW10, he went to the shop and seized the documents pertaining to the house in question as per Ext.P4 mahazar in the presence of PW8 and another. He gave a request to the Chief Judicial Magistrate to record the statement of CW3 the owner of the house under Section 164 of the Code, and as per the orders of the Chief Judicial Magistrate, PW6 the then Judicial First Class Magistrate Court-II, Muvattupuzha was authorised to

record the statement and accordingly, he recorded Ext.P3 statement of CW3 under Section 164 of the Code. Since the father's name of the first accused was given wrongly, PW12 gave Ext.P8 report showing the correct name and address of both the accused. Further investigation in this case was conducted by PW13, the Deputy Superintendent of Police Crime Detachment, Aluva. He verified the investigation conducted by PW12 and completed the investigation and submitted final report before the court below.

10. Though PWs 1 and 2 have admitted their signature in Ext.P1 search list, they did not support the seizure as such or the presence of the accused in that house. PW1 had stated that he did not witness the search and he was the driver and he was asked to come to the place by the police officials. Accordingly he went there and it was in his vehicle that the contraband articles alleged to have been seized were transported to the police station. He had stated that he did not see any of

the accused persons in the house at the time he came there. PW2 though admitted his signature in Ext.P1, according to him, he came to understand that the police people had come to the house of Thankappan Nair. As requested by Jincy George, he along with Jincy George went there and saw police officials taking Indian Made Foreign Liquor from that house. But he did not see the accused persons there. Thereafter when they asked him to sign, he ran away from that place and thereafter police people took him to the police station and obtained his signature in Ext.P1. PW1 also stated that he signed the mahazar from the police station not from the place of occurrence. The evidence of PW1 is not helpful to prove either the seizure or the arrest of accused persons. The evidence of PW2 will go to show that the contraband articles were seized from the family house of the 1st accused and he had no acquaintance with the 2nd accused and he did not see any of the accused at the time when he went to that place.

11. PW3 is the Excise Inspector. He had stated that as requested by PW12 Deputy Superintendent of Police Muvattupuzha, he also reached that place with their party. According to him, at the time he reached there, he found only one of the accused and other accused was brought there later. He did not speak about the manner in which the search was conducted and the seizure was effected. He did not mention as to what was the nature of seal used or whether any seal has affixed at all on the sample or any other measures were taken to safe guard the contraband articles seized from the house. PW4 the Circle Inspector of Police also deposed in the same manner. According to him and PW5, the Police Constable who was in the squad of PW4, as instructed by PW12 the Deputy Superintendent of Police, they also accompanied him. When they reached the house three persons ran away from the place and they chased and they could catch-hold of the accused numbers 1 and 2 alone from that place. Thereafter according to them, on the back side

of the house in a shed attached to the house they found some Indian made foreign liquor stored in card board boxes and it was seized by PW12. There were some discrepancy regarding the time at which the seizure was effected, in the evidence of these witness PW12, the detecting officer. Though he had stated that Thankappan Nair and another person were caught hold of them when they ran away from the place, they did not identify them as accused persons when they were examined in the court. PW12 is the detecting officer cum investigating officer as well. According to him, while he was in the office at about 6 pm, he got information about the sale of Indian made foreign liquor from the house of one Thankappan Nair in Muvattupuzha Municipality. He sent Ext.P9 search memo before court and informed PW3, Excise inspector and PW4 Circle Inspector of Police and asked them to come to that place. Accordingly, they reached the place and when they entered the house there were three persons in the house and on seeing the police

party they ran away from the house through the backside and they could catch hold of the accused Nos. 1 and 2 alone. PW4 also identified accused Nos.1 and 2 as the persons who have catch-hold by him. He had further deposed that he conducted search and found 3216 bottles of Indian made foreign liquor and some of them are 375 ml. capacity and some of them are 180 ml. capacity. He took one bottle each from each category and opened the same and examined the contents and satisfied that it was Indian Made Foreign Liquor. He had also deposed that the sticker of Kerala State Beverages Corporation was not seen on the bottles. He had prepared Ext.P1 search list and seized the same in the presence of PWs 1 and 2 and arrested the accused and came to the Police Station and registered Ext.P7 First Information Report as Crime No.348/1997 of Muvattupuzha Police Station. According to PW12, he reached the place and started the search at 7.15 pm. But according to PWs3,4 and 5 it was between 5.30 and 6.00 pm. The discrepancy in the time is not

much relevant in this case as even the independent witness PW2 had stated that Police had seized some article from the family house of the 1st accused on that date. So the fact that search was conducted and some bottles said to be containing Indian Made Foreign Liquor in huge quantity was seized from that house was proved by the prosecution and search and seizure also legal.

12. As regards the arrest is concerned, PWs3,4 and 5 and also PW12 have deposed about the arrest of the accused persons. According to PWs4, 5 and 12 and when they reached the place, the accused persons ran away from the place and they chased them and caught hold of them and it was in their presence that the search was conducted.

13. It is true that PW3 had stated that at the time when he reached there, he could see only one of the accused and other person came later. But it is seen from the remand report that on the next day the accused persons were produced before the court and they have no

complaint of any false implication before the Magistrate.

14. The 1st accused had a case that he was in his house at Kollam and he came to Muvattupuzha Police Station as informed over phone and when he reached there he was falsely implicated in the case. It is true that he had gone to the witness box and gave evidence to DW1 and DW2 was examined to prove that he was doing some agricultural work in the family property of the 1st accused and it was being managed by the mother of the 1st accused. It will be seen from the prosecution witness that the father and mother of the accused were residing in that house and after the death of the parents it was being managed by the 1st accused. During the life time of parents of 1st accused, they were entrusting the electricity charges and water charges for the purpose of remitting the same to PW10 and he was doing the same for them and after the death of the mother, which occurred two or three months prior to the date of search in this case, there was arrears and that was remitted by

Thankappan Nair, the accused in this case. Though all the witnesses have stated that the name of the 1st accused Thankappan Nair his real name is Radhakrishnan Nair and this fact was not disputed by the 1st accused also. He had produced Ext.D1 ration card of the house to show that the mother alone was residing in the house, but the incident occurred after the death of the mother. So mere production of Ext.D1 will not be sufficient to prove that 1st accused was not residing in the house. It was brought out in the evidence that CW3 the sister of the 1st accused, was not residing at that time. So it can only be presumed that in the absence of sister through she was the owner of the house, it could only be managed by Thankappan Nair who was in station and it was brought out in the evidence of prosecution witnesses though hostile that they used to see Thankappan Nair in that house occasionally. So after the death of the mother it cannot be said that Thankappan Nair had no control or right in the house. None of the witnesses have stated

that sister was residing in the house even with the mother. When the arrest of the accused persons were made from the house, after they ran away from the place, non proving of ownership of the house is not much relevant. So under the circumstances, the court below was perfectly justified in coming to the conclusion that the appellants were arrested from the spot.

15. But that alone is not sufficient to convict the accused persons for possession of the contraband articles. It is for the prosecution to prove that the contraband articles reached the court in time without delay in tamper free condition and the chemical analysis report relates to the representative sample of the sample taken from the contraband article so as to convict the accused for the offence alleged. According to PW12 he had produced the articles with property list before the court on 13.7.1997. But it can be seen from Ext.P10 property list though it was prepared on 10.7.1997, it reached the court only on 16.7.1997 and it is seen from the

endorsement made by the Magistrate also that it was directed to be verified and received and except the sample bottles and other bottles were directed to be kept in the custody of the police. There is no explanation forthcoming for the side of the PW12 for not producing the articles before the court without any delay. Further in Ext.P7 search list, the nature of seal used was not mentioned. Further in the property list, the specimen seal and the seal used for sealing of the articles was not provided. Further neither PW12 nor other witnesses had a case that all the contraband articles seized were sealed properly, so as to avoid tampering of the same before they were produced before the court. Except the sample bottles no other bottles were sealed by the detecting officer so as to ensure that it could be produced in court in a tamper free condition and that was not done in this case as well. So under the circumstances it cannot be said that prosecution has proved beyond reasonable doubt that the same articles alleged to have been seized

from the possession of the accused have reached the court in tamper free condition and Ext.P12 chemical analysis report relates to the representative sample said to have been taken from the bulk of contraband articles seized from the possession of the accused as well.

16. In the decision reported in **Ravi v State of Kerala and Another** [2011 (3) KHC 121], the Division Bench of this court has held that mere delay in producing the article is not sufficient to disbelieve the case of the prosecution, if it is properly explained. If the delay is explained, then court can ignore the delay and accept the article as article that has been seized and rely on the same. But if the delay is inordinate and no explanation forthcoming from the side of the prosecution for the delay in producing the same, then that benefit must be given to the accused as that will break the link between the accused and the contraband article so as to come to the conclusion that the prosecution has proved beyond reasonable doubt that the accused were found to be in

possession of the contraband articles as claimed by the prosecution and they are entitled to get acquittal of that charge under that ground.

17. In this case also there is no explanation forthcoming from the side of the prosecution for the delay in producing the article and no report has been produced to explain the the delay in producing the article. There was no mention about the nature of seal used for sealing the sample bottles either in Ext.P1 search list or in Ext.P10 property list. Merely because the seal was impressed in the forwarding note alone in the absence of mention about the nature of seal used in Ext.P1 search list is not sufficient to come to the conclusion that articles reached the courts in tamper free condition. So under the circumstances, it cannot be said that the prosecution has proved beyond reasonable doubt that the articles produced before the court are the same articles which were said to have been seized from the house of the accused and Ext.P12 chemical analysis report relates to

the sample taken from such article so as to convict the accused for the offence alleged. The court below had not considered these aspects and without considering the same, coming to the conclusion that prosecution has proved beyond reasonable doubt that the accused had committed the offence and consequential conviction entered are 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.

18. In view of the findings that 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) and (i) of the Abkari Act are hereby set aside and the appellants are acquitted of the charge levelled against them giving them the benefit of doubt and they are set at

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

Office is directed to communicate this judgment to the concerned court at the earliest.

Sd/-
K.RAMAKRISHNAN, JUDGE

SKV