

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 3RD DAY OF NOVEMBER 2015/12TH KARTHIKA, 1937

CRL.A.No. 1834 of 2003 (D)

SC 454/2001 of ADDL.SESIONS COURT (ADHOC)-II, PATHANAMTHITTA

APPELLANT/ACCUSED

RAGHAVAN
S/O. SANKARAN,
KALLUM MUKKALIL VEEDU,
MARUTHIKKODU KARA,
KODUMON VILLAGE,
ADOOR TALUK

BY ADV. SRI.BIJU ABRAHAM

RESPONDENT/RESPONDENT

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

BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS
RLEGAL AID BY ADV. SRI.THOMAS M.JACOB (EKM)

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03-11-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No. 1834 OF 2003

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Dated this the 3rd day of November, 2015

JUDGMENT

Accused in SC No.454/2001 on the file of the Additional Sessions Court (Adhoc-II) Pathanamthitta is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Adoor Excise Range in CR No.3/1999 of Adoor Excise Range under Section 8(1) and (2) and Section 55(a) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 25.1.1999, at about 11.30 am, the accused was found to be in possession of about 5 litres of arrack and found transitting the same along the road in front of the rice mill of one Yohannan near Valluveli junction in Kodumon Maruthikodu Kara in violation of the provisions of the Abkari Act and thereby he had committed

offence punishable under Section.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Adoor, where it was taken on file as CP No.261/2000. After complying with the formalities, the learned Magistrate committed the case to Sessions Court Pathanamthitta 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 Court as SC No.454/2001 and thereafter it was made over to Additional Sessions Court (Ahoc-II) Pathanathitta for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 8(1) and 8(2) and 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 6 were examined and Exts.P1 to P6 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 he had not committed any offence. He was taken from his house to the Excise office and thereafter 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, the accused was called upon to enter on his defence but no defence evidence was adduced on his side. After considering his evidence on record, court below found the appellant guilty under Section 8(1) of the Abkari Act and convicted him thereunder and sentenced him to undergo simple

imprisonment for 2 years and also to pay a fine of Rs. 1,00,000/- and in default to undergo simple imprisonment for 6 months more. 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 accused/appellant before the court below.

5. Since the counsel who filed the appeal has reported no instruction, Shri. Thomas M. Jacob, Advocate, Ernakulam is appointed as legal aid counsel. Heard Shri. Thomas M. Jacob legal aid counsel and Shri. Jibu P. Thomas, learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that there is no description of the place of occurrence clearly mentioned in Ext.P2 mahazar. Further there is dispute regarding the actual place

of occurrence and there is contradictions in the evidence of PWs1 and 2 regarding the place where the actual incident occurred. That shows that the incident had not occurred as claimed by the prosecution. He had also argued that the independent witnesses to the seizure did not even admitted their signature and their evidence also will go to show that the seizure was not properly proved by the Excise officials. No sketch plan of the place of occurrence was prepared. Further the sample seal was not produced and there is discrepancy in the evidence of PW5 regarding the sample produced also. The learned counsel had also pointed out that the presence of wife at that time when Ext.P2 mahazar was prepared itself is also doubtful and that will go to show that the mahazar would not have been prepared as claimed by the prosecution at the place of occurrence. So

overall circumstances will go to show that the prosecution has failed to prove the case against the accused and he is entitled to get acquittal and the court below was not justified in convicting the appellant for the offence alleged.

7. On the other hand, learned Public Prosecutor submitted that it will be seen from the evidence that there exists a rice mill belonging to Yohannan on the side of road near Valluveli junction and it was near to that place that seizure was effected. So the existence of rice mill as claimed by the prosecution was proved by the evidence of defence witness itself. Further the articles were produced before the court on the same day and there is no complaint filed by the accused against his false implication before the Magistrate as well. So under the circumstances, according to the learned Public Prosecutor, the

court below was perfectly justified in convicting the appellant for the offence alleged.

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

On 25.1.1990, at about 11.30 am, PW1, the Preventive officer and PW2 the Excise guard along with others were conducting patrol duty and they were proceeding towards Valluveli junction from Sreekandapuram Temple and when they reached in front of the rice mill belonging to Yohannan, they saw the accused coming and carrying with MOI cannas in his hand and on seeing the Excise party, he tried to go away from the place. So PW1 stopped him and examined the cannas and found that it was having full of some liquid which when he examined by smelling and tasting, he was satisfied that it was arrack. He took the sample of 150 ml in a 180 ml bottle and sealed the bottle and

labelled the same containing the signatures of the accused, himself and witnesses and also sealed the cannas and labelled the same in the same fashion and seized the same as per Ext.P2 mahazar in the presence of PWs3 and 4. He arrested the accused and prepared Ext.P1 arrest memo and informed the same to the wife of the accused who came there. Thereafter he came to Excise office along with the accused and produced the accused and articles before PW5 Excise inspector, who registered Ext.P2 crime and occurrence report as CR No.3/1999 against the accused under Section 8(1) and 55(a) of the Abkari Act. He prepared Ext.P4 property list and produced the accused along with Ext.P5 remand report on the same day. He had produced the articles seized before the court along with Ext.P4 property list on the same day. On the basis of the

requisition given by him, sample was sent from court for chemical analysis and Ext.P6 chemical analysis report obtained, which shows that sample contained 26.85% by volume of ethyl alcohol. The investigation in this case was conducted by PW6. He questioned the witnesses and recorded their statements. He collected Ext.P6 chemical analysis report and produced the same before court and completed investigation and submitted the final report.

9. PWs3 and 4 are the independent witnesses to the seizure. Though they earlier denied their acquaintance with the accused by name Raghavan, they have admitted that they have seen the accused in Valluveli junction area. So it is clear from this that they knew the accused and they want pretend that they were not having acquaintance with the accused and that was the

reason why they had even denied their signature in Ext.P2 mahazar. It was also brought out in their evidence that there exists Yohannan's rice mill on the side of road not leading from Sreekandapuram temple towards Valluveli junction but towards the road leading to Angadikkadavu.

10. PW1 is the preventive officer who detected the crime. PW2 is the Excise guard who accompanied him. PW1 had categorically stated that they were being patrol duty on that day along the road leading to Valluveli junction from Sreekandapuram temple and when they reached near the rice mill of Yohannan, they saw the accused coming in the opposite direction by carrying MOI cannas. Since he was found perplexed and trying to go away from the place, they stopped him and examined the cannas and satisfied that it contained arrack. He took the

sample and sealed the same and labelled the same and thereafter sealed and labelled the kannas also in the same fashion and seized the same as per Ext.P2 mahazar. He arrested the accused and prepared Ext.P1 arrest memo and he gave intimation regarding the arrest to the wife of the accused who came there. The evidence of PW1 was corroborated by the evidence of PW2 on these aspects. Both of them also stated that after the arrest and seizure, they came to the excise office and produced the accused and contraband articles before the Excise inspector. It is true that there is some discrepancy regarding the direction in which they proceeded and the location of the rice mill of Yohannan.

11. But in Ext.P2 mahazar it was specifically mentioned that the place of occurrence was road in front of Yohannan's rice mill situated near the

Valluveli junction. The presence of Yohannan's rice mill at that place is not disputed even by the defence witnesses. Though some confusion was attempted to be made regarding its exact locations, it cannot be said that there was no specific description regarding the place of occurrence as claimed by the defence in the seizure mahazar. When a place can be identified by a particular land mark viz, rice mill, that could be the best location for the place of occurrence there could not be any confusion regarding the same as well, though witnesses may have some confusion regarding the direction of the road etc. Further it will be clear from the evidence that the incident occurred in the year 1999 and witnesses were examined in the year 2003. So the possibility of some confusion regarding the direction of the road is quite possible and that

cannot be taken as a ground for disbelieve the case of the prosecution and genuineness of the seizure as spoken to by PWs1 and 2.

12. It is also settled law that merely because independent witnesses to the seizure did not support the case of the prosecution is not a ground to disbelieve the case of the seizure and there is nothing wrong for the court to rely on the evidence of official witnesses to prove the seizure if it is satisfied with its trustworthiness. Except the suggestion given that he was taken from his house to Excise office and falsely implicated in the case, there is no motive suggested or established for the Excise officials for falsely implicating the accused in a case like this. PW1 had stated that they have given intimation of arrest to the wife of the accused who came there at that time. It was also brought out in the evidence of PW1 that seizure

mahazar was prepared after the accused was arrested. So the presence of the wife of the accused at the time of preparation of seizure mahazar in the circumstances of the case cannot be said to be doubtful as claimed by the legal aid counsel. 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 arrested by the Excise officials on 25.1.1999, at about 11.30 am, along with MO1 kannas which contained, according to the prosecution arrack.

13. It is seen from the evidence that articles and accused were produced before the court on the same day of incident itself. Further it is seen from Ext.P4 property list that MO1 kannas as well as the sample bottle produced were sealed and labelled. Since it was produced before the court on

the same day with a description that it was sealed and labelled will go to show that there was no possibility of tampering of the articles before it was produced in court so as to doubt the genuineness of the articles seized or produced before the court. Further though PW5 had stated that PW1 had not produced the sample before him and it was at his request that sample was taken from the court, that appears to be not correct from the property list produced and it could only be a mistake as it was admitted by PW5 that it was PW5 who prepared Ext.P4 property list and it was produced before the court by him which shows that sample bottle along with kannas was produced before court. So court below was perfectly justified in coming to the conclusion that the evidence given by PW5 on this aspect could only be a mistake and it is against the record produced in court.

14. Since the articles were produced before the court with out delay and it was also having description that it was sealed and labelled and mere non production of the specimen seal impression of the seal used alone is not sufficient to disbelieve the case of the prosecution. Further it will be seen from Ext.P6 chemical analysis report that the seal on the bottle was in-tact and found tallied with the sample seal provided along with the forwarding note which was sent from court and that contains a specimen seal impression of the seal used for sealing the articles which was produced before court without delay.

15. Further it is true that PWs1 and 2 have stated that the writings in the label were not clear. But they have categorically stated that there is a label on the MO1 kannas. The damage caused to the label could be due to lapse of time as evidence

was taken in this case after nearly 4 years of the seizure and production of MOs before the court. So under the circumstances, court below was perfectly justified in coming to the conclusion that the prosecution has proved beyond reasonable doubt that the accused was found to be in possession of arrack which is an offence punishable under Section 8(1) read with 8(2) of the Abkari Act and rightly convicted the accused for the said offence and the finding does not call for any interference.

16. The legal aid counsel for the appellant submitted that the sentence imposed is harsh. Court below had sentenced the accused to undergo simple imprisonment for 2 years and also to pay a fine of Rs.1,00,000/- and in default to undergo simple imprisonment for 6 months.

17. The persons who are committing the

offence under Abkari Act are committing the same knowing that it is an offence and ignoring the consequence of their act on the people consuming some illegally manufactured arrack. Showing undue leniency in such cases will only give a wrong signal to the society and cause loss of confidence to the people in the criminal justice delivery system. But at the same time, while considering the question of sentence court can consider the antecedent of the accused, his family background and also possibility of reform etc. and that can be taken as a mitigating circumstance to show leniency in imposing the sentence.

18. In this case prosecution had no case that accused had got any criminal background of committing any offence. He was aged 49 years at the time when the detection was made. Further it cannot be said that there is no possibility of

reformation as well. Considering the quantity and also the background of the accused, this court feels that some leniency can be shown in imposing the sentence and reducing the substantive sentence to 6 months simple imprisonment and default sentence to 3 months simple imprisonment and retaining the fine of Rs.1,00,000/- will be sufficient and that will meet the ends of justice. So substantive sentence and default sentence imposed by the court below are set aside while confirming the sentence of fine and the same is modified as follows:

The appellant is sentenced to undergo simple imprisonment for 6 months and also to pay a fine of Rs.1,00,000/- and in default to undergo simple imprisonment of 3 months. Set off is allowed for the period of detention already undergone under Section 428 of the Code.

In the result the appeal is allowed in part. The order of conviction passed by the court below against the appellant under Section 8(1) read with Section 8(2) of the Abkari Act and fine of Rs.1,00,000/- imposed are hereby confirmed but the substantive sentence of 2 years simple imprisonment and default sentence of 6 months imprisonment is set aside and the same is modified as follows:

The appellant is sentenced to undergo simple imprisonment for 6 months and also to pay a fine of Rs.1,00,000/- and in default to undergo simple imprisonment of 3 months. Set off is allowed for the period of detention already undergone under Section 428 of the Code.

I place my appreciation of record, the manner in which the legal aid counsel Shri. Thomas M. Jacob argued the case for the appellant.

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

K.RAMAKRISHNAN, JUDGE

SKV