

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 2ND DAY OF NOVEMBER 2015/11TH KARTHIKA, 1937

CRL.A.No. 94 of 2004 (A)

SC 23/2000 of ADDL.DISTRICT COURT (ADHOC-I)KASARAGOD

APPELLANT(S)/ACCUSED::

**BABU @ POKLU
S/O.KARIYAN,
KAPPANAKKAL, PARIYA VILLAGE.**

**BY ADVS.SRI.M.THAMBAN
SMT.T.SUDHAMANI**

RESPONDENT(S)/COMPLAINANT & STATE::

- 1. THE STATION HOUSE OFFICER
BAKAL POLICE STATION.**
- 2. THE STATE OF KERALA REP. BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 02-11-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No.94 OF 2004

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Dated this the 2nd day of November, 2015

JUDGMENT

Accused in SC No.29/2000 on the file of the Additional Sessions Court (Adhoc-I) Kasaragod, is the appellant herein. The appellant was charge sheeted by the Sub Inspector of Police, Bekal Police Station in Crime No.252/1998 of Bekal Police Station under Section 55(g) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 24.8.1998, at about 3.45 pm the accused was found to be in possession of 15 litres of wash in a tin in his house compound in violation of the provisions of the Abkari Act and thereby he had committed the offence under Section 55(g) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-II, Hosdurg, wherein it was taken on file as CP No.61/1999 and it was committed to the Sessions Court, Kasaragod by the

learned Magistrate under Section 209 of the Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the Sessions Judge took cognizance of the case as SC 29/2000 and it was made over to Assistant Sessions Court Hosdurg for disposal. Later it was withdrawn by the Sessions Judge and this was made over to Additional Sessions Court (Adhoc-I) Kasaragod for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55 (g) of the Abkari Act was proved 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 3 were examined and Exts.P1 to P5 and MO1 were marked on their side. After closure of the prosecution evidence, accused were questioned under Section 313 of the Code and he denied all the incriminating circumstances brought out against him in the prosecution evidence. 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, he has been called upon 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 55 (g) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for three years and also to pay a fine of Rs.1,00,000/- in default to undergo rigorous imprisonment for six months. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

5. Heard Shri. Harilal Sasi, counsel for the appellant and Shri. Jibu P. Thomas learned Public Prosecutor appearing for the State.

6. Counsel for the appellant submitted that the court below had not properly appreciated the evidence adduced on the side of the defence that he has been

falsely implicated in the case.

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

On 24.8.1998, PW3 the Sub Inspector of Police Bekal was in the Police Station. At about 7 pm, on that date he got information that the accused was conducting illegal sale of arrack from his house compound and he along with police party went to the spot and he saw a person standing near a cashew tree and on seeing the police party, he abandoned the tin in his hand and ran away from the place. When it was enquired with his wife, it was revealed that the person who ran away from there was the present accused who is none other than her husband. He examined the contents of MO1 tin and found that it contained 15 litres of some liquid which on examination he found that it was wash, a material used for manufacture of arrack. He took sample from the liquid of 375 ml each in two 375 ml bottles from the liquid and sealed the same and destroyed the balance wash and

seized the same as per Ext.p1 mahazar in the presence of PW1 and another. Thereafter he came to the Police Station and registered Ext.P3 First Information Report as Crime No.252/1998 of Bekal Police Station against the present appellant. He produced the article before the court along with property list and he sent Ext.P4 forwarding note with a request to send one of the samples for analysis and it was sent from court and Ext.P5 chemical analysis report obtained which shows that sample contained 0.53% by volume of ethyl alcohol and it was having the smell of wash. He questioned the witnesses and recorded their statements and prepared Ext.P2 scene mahazar in the presence of PW2 and other. He completed the investigation and submitted final report.

8. PW1 is attestor to Ext.P1seizure mahazar. He had admitted that he had witnessed the seizure and also attested Ext.P1 mahazar. He had categorically stated that he knew the accused and he saw the accused ran away from the place on seeing the police party and he

abandoned the tin. He had admitted that he came there to his relatives house and he happened to see the incident when he was returning from the house. It was admitted by PW3 that it was night and there was no light in that place. He had not mentioned in Ext.P1 or in Ext.P3 First Information Report regarding the nature of light in which they could identify the person who ran away from that place. PW3 had admitted that he had no prior acquaintance with the accused. PW3 did not state about presence of light or how he could identify the accused as the person who ran away from the place as well. He is not a person from that area. He had also stated that he did not know the owner of the house as well. No documents were produced from the side of the prosecution to prove the relationship of the property with the accused as well. Though PW3 had a case that he came to know regarding the identity of the person as the accused from the wife of the accused, she was not cited as a witness as well. So under the circumstances, the

identity of the accused, as spoken to by witnesses appears to be doubtful and it is not safe to rely on their evidence to prove the identity of the accused as the person who ran away from the place to connect him with the contraband articles seized, especially when PW1 is not a person from that locality, but he is a chance witness and his presence at that place, at that time appears to be doubtful as well.

9. Even assuming that the prosecution was able to prove seizure, that alone is not sufficient to convict the accused unless it is established by the prosecution that the same articles which were said to have been seized had reached the court in a tamper free condition and the chemical analysis report relates to that sample taken from the article seized. In this case admittedly, the articles were produced before the court only on 30.9.1998 though the detection was on 24.8.1998 nearly more than one month of the alleged seizure. Though PW1 had stated that he was in possession of the same and due to the

work pressure he could not produce the same before court, he had not filed any report to that effect before the court regarding the delay. So it can only be inferred that he is now stating some reason for the delay as an afterthought.

10. 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 before the court alone is not sufficient to doubt the genuineness of the articles produced, if it is satisfactorily explained to the satisfaction of the court. But if the delay is not explained, then that benefit must be given to the accused. It cannot be said that the articles have reached the court in tamper free condition and chemical analysis report relates to the representative sample said to have been taken from the contraband articles alleged to have been seized from the possession of the accused. In this case also there was a delay of more than 30 days in producing the articles and the

delay has not been properly explained and the explanation given by PW3 cannot be accepted as well. So the court below was not justified in coming to the conclusion that prosecution has proved beyond reasonable doubt that the accused was found to be in possession of wash and consequential conviction entered by the court below against the appellant for offence under Section 55(g) of the Abkari Act are unsustainable in law and the same is liable to be set aside. The appellant is entitled to get acquittal of the charge levelled against him. So the court below found that he is entitled to be acquitted, the sentence imposed is also not proper, the same is also set aside.

In the result appellant succeeds and appeal is allowed. The order of conviction and sentence passed by the court below against the appellant under Section 55(g) of the Abkari Act are hereby set aside. The appellant is acquitted of the charge levelled against him giving him the benefit of doubt. He is set at liberty. The bail bond

executed by him stand cancelled. The lower court is directed to refund the fine amount if any remitted by the appellant to him on making necessary application for that purpose.

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

Sd/-

K.RAMAKRISHNAN, JUDGE

SKV