

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 21ST DAY OF DECEMBER 2015/30TH AGRAHAYANA, 1937

CRL.A.No.99 of 2006 ()

AGAINST THE JUDGMENT IN SC 717/2004 of ADDITIONAL SESSIONS COURT
(ADHOC-I), THODUPUZHA, DATED 20-12-2005.

&

AGAINST THE ORDER/JUDGMENT IN CP 105/2002 of J.M.F.C.,
KATTAPPANA.

APPELLANT/ ACCUSED:

JOBY, S/O. UPENDRAN,
KOLATHOONGIYIL HOUSE, AYYAPPANCOVIL VILLAGE,
MATTUKATTA KARA.

BY ADVS.SRI.T.J.MICHAEL
SRI.P.NOOR SEMIR

RESPONDENT/ COMPLAINANT:

STATE OF KERALA
REPRESENTED BY S.I. OF POLICE, UPPUTHARA.

BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SS

K. RAMAKRISHNAN, J.

Crl. Appeal No.99 of 2006

Dated this the 21st day of December, 2015

JUDGMENT

Accused in S.C.No.717/2004 on the file of the Additional Sessions Court (Adhoc-I), Thodupuzha, is the appellant herein. The appellant was charge-sheeted by the Sub Inspector of Police, Upputhara police station in Crime No.24/2002 of that police station under Section 55 (a) and 8(1) & (2) of the Abkari Act (hereinafter called the Act).

2. The case of the prosecution in nut shell was that on 18.02.2002 at about 4.30 p.m., the accused was found to be in possession of 750 ml of arrack in a 1^{1/2} liter bottle near Chappathu for the purpose of sale in violation of the provisions of Abkari Act and thereby he had committed the offence punishable under Section 55 (a) and 8(1) & (2) of Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court,

Kattappana, where it was taken on file as C.P.No.105/2002. After complying with the formalities, the learned magistrate committed the case to Sessions Court, Thodupuzha, under Section 209 of the Code of Criminal Procedure(hereinafter called the Code). After committal, the case was taken on file as S.C.No.717/2004 on the file of the Sessions Court, Thodupuzha and thereafter it was made over the Additional Sessions Court(Adhoc-I), Thodupuzha, for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55(a) and 8(1)&(2) of 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, PWs 1 to 3 were examined and Exts.P1 to P4 and MOs 1 and 2 were marked on their side. After closure of the prosecution evidence, the accused was questioned under Section 313 of the Code of Criminal Procedure (hereinafter called 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 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, the accused was 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(a) and 8(1)&(2) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for six months and also to pay a fine of ₹1,00,000/-, in default to undergo simple imprisonment for one month. Set off was allowed for the period of detention already undergone by him under Section 428 of the Code. Aggrieved by the same, the above appeal has been preferred by the appellant/ accused before the court below.

5. Heard the Public Prosecutor Smt.Seena Ramakrishnan and perused the records.

6. It is seen from the judgment of the court below that the accused defended the case on the ground that independent witnesses to the seizure did not support the case of the prosecution and there was delay in producing the article which has not been properly considered by the court below.

7. On the other hand, the learned Public Prosecution submitted that, PW3 had categorically stated that the articles were in the custody of the Sub Inspector, till it was produced in court and there was no possibility of tampering. According to the learned Public Prosecutor the court below was perfectly justified in convicting the appellant.

8. The case of the prosecution in nut shell was that, on 18.02.2002 at about 4.30 p.m., while PW3 the Sub

Inspector of police, Upputhara police station was doing patrol duty. When he reached the place of occurrence, he saw the accused with MO1 bottle in his hand and on seeing the police party, he tried to go away from the place. So he stopped him and on examination of MO1 bottle, he found that it contained 750 ml., of some liquid which on further examination, he was satisfied that it was arrack. He arrested the accused and took sample from liquid in the bottle and sealed the sample bottle as well as MO1 bottle and labeled both and seized the same as per Ext.P1 mahazar in the presence of PWs 1 and 2. Thereafter he came to police station along with the accused and prepared Ext.P2(a) suo moto report and registered Ext.P2 first information report as Crime No.24/2002 of Upputhara police station under Section 55(a) and 8(1)&(2) of Abkari Act. He produced the accused along with the remand report before court and he was remanded to custody. He

produced the articles before court along with Ext.P3 property list. On the basis of his request, the sample was sent from court for chemical examination and Ext.P4 chemical Analysis report obtained. He completed the investigation and submitted final report against the accused.

9. PWs 1 and 2 are the independent witnesses to the seizure. Though they admitted the signature in Ext.P1, they denied having seen the arrest or seizure of any contraband articles from the possession of the accused. But they have admitted that they know the accused. So it is clear from that they were trying to help the accused and that was the reason why they were not supporting the case of the prosecution.

10. Then the available evidence is that of PW3, the detecting cum investigating officer. According to him, on that day while he was doing patrol duty along with police

officials, he saw the accused with MO1 bottle in his hand and on seeing the police party, he tried to go away from the place. So he stopped him and examined MO1 bottle and found that it contained 750 ml., of arrack. He took sample and sealed and labeled the same and also sealed and labeled MO1 bottle and seized the same as per Ext.P1 mahazar and thereafter he registered the crime. Though he was cross examined at length, nothing was brought out to discredit his evidence on this aspect.

11. It is true that apart from PW3, no police official who accompanied him were examined in this case. But that alone is not sufficient to disbelieve the case of the prosecution. So under the circumstances, court below was perfectly justified in relying on the evidence of PW3 and coming to the conclusion that he arrested the accused along with MO1 bottle said to be containing arrack.

12. Mere seizure of a bottle which alleged to be

contained arrack alone is not sufficient to convict the accused. But it must be proved by the prosecution that the articles reached the court in a tamper proof condition and 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. Unless these aspects were proved by the prosecution, it cannot be presumed that the prosecution has succeeded in bringing home the complicity of the accused in the commission of the crime and the link between the accused and the contraband article has been established.

13. It is true that Ext.P4 chemical analysis report shows that it contained 34.40 % by volume of ethyl alcohol. It is only mentioned that the seals seen on the packet were in tact and found tallied with the sample seal provided. The forwarding note was not seen produced and marked in this case. It is not known as to whether the specimen seal

impression of the seal used for sealing the sample was produced along with the property list or affixed in the forwarding note. Further it was brought out in the evidence of PW3 that, the detention was on 18.02.2002 and the articles along with Ext.P3 property list were produced before the court only on 25.03.2002, after more than one month. According to him, he was in custody of the articles till it was produced in court, but that is not sufficient, as the law contemplates the articles must be produced before court forthwith. The question as to whether what is the effect of producing the articles with delay has been considered by the Division Bench of this court in **Ravi v. State of Kerala (2011(3) KHC 121)**, where it was observed that mere delay in producing the article alone is not sufficient to acquit the accused, if the delay has been properly explained to the satisfaction of the court. If the delay has not been explained, then that benefit must be

given to the accused. It is also mentioned in the decision that the word 'forthwith' mentioned in the Section does not mean that, it should be produced immediately. Under such circumstances, the court below has considered the impact, of the delay in producing the article and how the delay has to be considered by the court in deciding the cases.

14. In this case there is no endorsement in Ext.P4 that any attempt was made to produce the same earlier and it was as directed by the court that PW3 was in custody of the same. He had also mentioned in the evidence that there is no obstacle for him to produce the articles before court, when he produced the accused as well, along with the remand report. There is no report filed by PW3 stating the reason for the delay in producing the article as well. Further in the absence of forwarding note available before the court for examination and it was not mentioned in the chemical analysis report that the specimen seal

impression seen on the bottle tallied with the specimen seal impression provided, it cannot be said that the chemical examiner has got an opportunity to verify the genuineness of the sample that has been produced. 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 by the court below against the appellant for the offence alleged is 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 giving him the benefit of doubt. In view of the finding that the appellant is entitled to get acquittal, the sentence imposed is not proper and the same is also set aside.

In the result, the appellant succeeds and the appeal is allowed. The order of conviction and sentence passed by the court below against the appellant under

Section 55(a) and (i) read with Section 8(1)&(2) of the Abkari Act are hereby set aside. He is set at liberty and the bail bond executed by him will stand canceled. The lower court is directed to refund the fine amount if any remitted by the appellant to him, on making necessary application for this purpose.

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

Sd/-
K. Ramakrishnan, Judge

// True Copy//

P.A. to Judge