

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 28TH DAY OF SEPTEMBER 2015/6TH ASWINA, 1937

CRL.A.No. 605 of 2004 ()

AGAINST THE JUDGMENT IN SC 287/1999 of ADDL. DISTRICT & SESSIONS
(ADHOC) COURT-I, KOLLAM, DATED 29-03-2004

APPELLANT(S)/ACCUSED::

SUKUMARAN NAIR, S/O. RAMAKRISHNAN NAIR,
PREETHABHAVANAM, VELUNTHARA, VALIYAPADAM MURI,
WEST KALLADA, KOLLAM DIST.

BY ADV. SRI.B.MOHAN LAL

RESPONDENT(S)/COMPLAINANT::

STATE OF KERALA,
REPRESENTED BY THE SUB INSPECTOR OF POLICE,
SASTHAMCOTTAH POLICE STATION, KOLLAM DISTRICT,
THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 28-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SS

K. RAMAKRISHNAN, J.

Crl. Appeal No.605 of 2004

Dated this the 28th day of September, 2015

JUDGMENT

Accused in S.C.No.287/1999 on the file of the Additional Sessions Court, (Ad hoc-I), Kollam, is the appellant herein. The appellant was charge-sheeted by the Assistant Sub Inspector of Police, Sasthamcottah police station in Crime No.337/1998 of that police station, under Section 55(a) of the Abkari Act (ought to have been under Section 8(1) of Abkari Act).

2. The case of the prosecution in nut shell was that, on 24.09.1998 at about 11.45 a.m., the accused was found to be in possession of 9 liters of arrack, in a black kannas of 10 liter capacity, 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) of

Abkari Act (this ought to have been under Section 8(1) of the Kerala Abkari Act).

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Sasthamcottah, and the case was taken on file as C.P.No.17/1999. Thereafter it was committed to the Sessions Court, Kollam, by the learned magistrate under Section 209 of the Code of Criminal Procedure. After committal, the case was taken on file as S.C.No.287/1999 by the Sessions Judge, Kollam, and originally made over to Principal Assistant Sessions Court, Kollam, for disposal. Later it was withdrawn by the Sessions Court and made over to Additional Sessions Court(Ad hoc-I), Kollam, for disposal.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 have been under Section 8(1) of the Abkari Act) 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 4 were examined and Exts.P1 to P5 and MO1 were marked on their side. After closure of the prosecution evidence, the accused was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the prosecution evidence and he had further stated that, he had not committed any offence and he has been falsely implicated in the case. Since the evidence in the case did not warrant an acquittal under Section 232 of the Code of Criminal Procedure, the Additional Sessions Judge directed the accused 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) of the Abkari Act (ought to have been under Section 8(1) read with Section 8(2) of the Abkari Act) and convicted him thereunder and sentenced him to undergo

rigorous imprisonment for five years and also to pay a fine of ₹1,00,000/-, in default to undergo simple imprisonment for one year more. Set off was allowed for the period of detention already undergone by him in this case. Aggrieved by the same, the present appeal has been preferred by the appellant/ accused before the court below.

5. Heard Smt.Preetha P.S., representing Adv.Sri.Mohanlal appearing for the appellant and Sri.Jibu P.Thomas, Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that though the alleged detection was made on 24.09.1998, the articles were produced before court only on 08.02.1999 and the delay has not been explained. Further the final report in this case was filed by PW2, the Assistant Sub Inspector of Police who is not an Abkari Officer and cognizance taken on that basis is not legal. The learned counsel has relied on the decision reported in **Ravi v. State of Kerala [2011(3) KHC 121 (DB)]** and also **Subhash v. State of Kerala**

(2008(2) KLT 1047) in support of their case. The counsel for the appellant also submitted that there is no proper identification as the accused was the person who ran away from the place. The accused was arrested only on 26.11.1998 in connection with another crime and it is thereafter that a report was filed incorporating this accused in the case. In Ext.P1, there was nothing mentioned about the identity of the accused as well. They have no case of prior acquaintance with the accused in Ext.P1 mahazar. So the identity of the accused has not been properly established.

7. On the other hand, learned Public Prosecutor submitted that, there was no question put to PW4 or PW2 regarding the delay in producing the article and investigation in this case was conducted by PW4 and the final report was filed by PW2. According to him 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 witness was as follows:

On 24.09.1998 at about 11.45 a.m., while PW4 the Sub Inspector of police, Sasthamcottah police station was doing patrol duty along with PW3 and others and when they reached near the place of occurrence, he got information that one person was selling arrack from the property of one Palamoottil George and immediately when they reached that place, they saw a person coming with cannas and on seeing the police party, he abandoned the cannas and ran away from the place. Though he chased him, they could not arrest him. Thereafter he reached the place where that person had abandoned the cannas and verified the contents of the cannas and they were satisfied that it was arrack and it was having a quantity of 9 liters. When they enquired about the person, it was revealed that the person ran away from the place was the present accused. Thereafter he had taken sample and sealed the same and labeled the same and

thereafter sealed and labeled the kannas also in the same fashion 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.P2 first information report as Crime No.337/1998 of Sasthamcottah police station against the appellant under Section 55(a) of the Abkari Act. He prepared Ext.P3 property list. He produced the article before court along with forwarding note with a request to send the sample for chemical analysis. The sample was sent from court to chemical examiner's laboratory and Ext.P4 chemical analysis report obtained, which shows that the liquid in the sample bottle is having the smell of arrack and it contained 31.07 % by volume of ethyl alcohol. The final report in this case was filed by PW2 after verifying the records.

9. PW1 is the independent witness and attestor to Ext.P1 mahazar. He denied having seen the seizure and even denied the signature in Ext.P1 and according to him he

did not know the accused as well. So his evidence is not helpful to prove the identity of the accused or the seizure of the article from the possession of the accused. Then the evidence is that of PWs 3 and 4. PW4 is the detecting officer. According to him, while they were doing patrol duty, he got information that one person was selling arrack and it was on that basis, they went to the spot and saw a person coming with MO1 kannas and on seeing the police party, he abandoned the kannas and ran away from the place. Thereafter he came back and collected sample and seized the article after completing the formalities. It was also seen from the evidence of PW4 that, he arrested the accused on 26.11.1998 in connection with another crime. According to him, he knew the accused earlier as he was accused in other cases as well and they could identify the accused as he was returning his face often while he was running away. But it was admitted by PW4 that there was nothing mentioned about the identity of the accused in

Ext.P1 mahazar. But in the First Information Statement it was mentioned that they got information that the accused was selling arrack, but there was no such indication mentioned in Ext.P1. Further, PW4 had no case that after he arrested the accused in connection with another crime, he was shown to witnesses as part of investigation so as to identify him as the person who ran away from the place. There is no description regarding the person ran away from the place also mentioned in Ext.P1 mahazar. So under the circumstances, the identification made by PWs 3 and 4, the accused from court is not sufficient to come to the conclusion that they were able to establish the identity of the accused as the person who ran away from the place after abandoning the contraband article. This aspect was not properly appreciated by the court below before coming to the conclusion that the prosecution has proved beyond reasonable doubt that the accused was found to be in possession of arrack so as to convict him for the offence

under Section 55(a) of Abkari Act.

10. There is a delay of more than 130 days in producing the article. It is seen from Ext.P1 mahazar that the detention was made on 24.09.1998, but it will be seen from Ext.P3 property list, it was produced before the court only on 08.02.1999. There is nothing in Ext.P3 to show that it was produced before the magistrate or before any court before it was received by the court on 08.02.1999. The observation made by the court below that there is practice of returning the contraband articles produced for want of space for keeping in the court room and delay in respect of the contraband article produced appears to be without any basis and not supported by the evidence as well. Even this is done by the magistrate or the presiding officer, it is not proper and at least instead of returning the property without entering the same in the property register the property should have been received and thereafter entrusted to the officials for safe custody, if there is no

space in the court. So under the circumstances, the observation made by the court below that the delay has been properly explained is not correct. Once it is proved by the accused that the articles were not produced before court in time and the delay has not been explained, it cannot be said that, the prosecution has proved that they have produced the same article before the court which was said to have been seized from the possession of the accused and the chemical analysis report relates to the representative sample that has been taken from the huge quantity of contraband article alleged to have been seized from the possession of the accused so as to convict him for the said offence. This was so held in the decision reported in Ravi v. State of Kerala and another (supra). So under the circumstances, it cannot be said that the prosecution has proved beyond reasonable doubt that the link between the accused and the contraband article seized and brought home the complicity of the accused in the commission of the

crime and the consequential conviction entered by the court below against the appellant is unsustainable in law and the same is liable to be set aside.

11. Further there is another lacuna in this case, the final report in this case has been filed by PW2 the Assistant Sub Inspector of police who is not an Abkari Officer competent to file final report, before court. This was so held in the decision reported in **Subhash v. State of Kerala (2008(2) KLT 1047)**.

12. In Subhash's case, this court has held that final report has been filed by an incompetent officer, on the basis of which cognizance was taken, then the cognizance is bad and the accused has to be discharged. But in this case this court has already found that the identity of the accused himself has not been properly established by the prosecution and on account of the delay, it cannot be said that the same article which has been seized from the possession of the accused had 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 and that benefit must be given to the accused and he is entitled to get acquittal on that ground, the accused need not be discharged as observed in Subash's case (supra). So under the circumstances, the finding of the court below that prosecution has proved the case beyond reasonable doubt, that the accused was found to be in possession of arrack and thereby he had committed the offence punishable under Section 55(a) of the Abkari Act and consequential conviction entered by the court below 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 giving him the benefit of doubt. In view of the finding that the appellant is entitled to get acquittal, the sentence imposed is also 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) of the Abkari Act (wrongly shown for Section 8(1) of Abkari Act) are hereby set aside and 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 will stand cancelled. The lower court is directed to refund the fine amount if any remitted by him to the appellant on making such an application before that court.

Office is directed to communicate this order to the concerned court, immediately.

Sd/-

K. Ramakrishnan, Judge

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P.A. to Judge

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